

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic behind the company name. The name is written in a clean, sans-serif font, with 'astrachan' in lowercase, 'gunst' in lowercase, and 'thomas' in lowercase.

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a professional corporation
attorneys at law
baltimore . washington, d.c.
www.agtlawyers.com

A Modern Day Proposal: "Honey, Will You Contract With Me?"

By: Julie R. Rubin, Esq.

It has been called a kiss on the lips from the ocean. A quivering, saline, chilly kiss. An oyster. An aphrodisiac? Well, I'm not sure, but who needs an excuse to make kissy face with this delicious creature? I certainly don't, but with all that's wrong in the world, I decided to throw a party for Valentine's Day, and oysters top my must-have list. Some red construction paper hearts, chocolates, champagne, and, of course, oysters. And maybe even some caviar and blinis if I'm feeling rich. A little kitsch. A lot delish. (It had to be done.) As I sat down to write out a menu for my party, the telephone rang.

"Julie, boy am I glad you answered. I got a letter from a lawyer about an employee who quit three weeks ago. She's threatening to file a discrimination claim." It was Hank Thomas. Hank is the head of human resources for a marketing research firm with about thirty-five employees. I met Hank when he attended a talk I gave a few years ago about workplace discrimination. He called me afterwards to revise the company's personnel manual and to do some in-house training. I hadn't done much work for the company since then, but in law, silence from a client often means all is well, and that is good (for the client anyway).

When I asked about the circumstances under which the employee quit, Hank explained that the situation was rather unremarkable. The employee hadn't really given a reason why she was quitting, and, when Hank inquired, she was rather circumspect. Hank had assumed she was simply being private. I asked Hank to email me the letter and told him I would call him after reviewing it.

The lawyer's letter stated that Catherine Liner, the former employee, had been "compelled to terminate her employment due to egregious discriminatory conditions in the workplace." The letter went on to say that Catherine's supervisor, Nigel Finerty, was known to have had love affairs with two other employees in as many years. That alone may sound more salacious than illegal. Many people have romantic relationships with co-workers. It may not be well advised, but it's not necessarily unlawful. But the letter went on to say: "each of the female employees with whom Mr. Finerty was romantically engaged was his subordinate, as was Ms. Liner, and each was promoted to a position for which my client had applied and was better qualified." And there you have it. In short, Catherine Liner was accusing the company, by virtue of the supervisor's conduct, of conditioning promotions on sex. True or not, it had plaintiff appeal.

After getting settlement authority from my client, I negotiated an inexpensive settlement fairly quickly, so there was no lawsuit. I'd like to say it was my savvy, searing legal skills that shut the case down, but the truth is that a background check on Ms. Liner led me to discover that she had lied on her resume about her educational and professional background. And not little exaggerations either. Big whoppers. No lawsuit, happy client.

But this whole situation got me thinking. Office romances are common as dishwater. When employees spend the majority of their waking hours with the same people day in and day out, it's bound to happen. (Have I mentioned that I met my husband at work?) As often as a spark ignites, however, one is snuffed. And we all know what can happen when office romance fizzles. At best, it's awkward. At worst, there's spite and anger, and that can be toxic for the workplace.

The riskiest romances are those between a subordinate and a supervisor. When those relationships fail, the subordinate often feels (or is) marginalized or overlooked for projects and promotions as a result of awkward tension or deliberate action. Often, after the relationship ends, the subordinate quits (either of her own volition or succumbing to strong encouragement). Or – equally likely – other employees feel they have been passed over for promotions in favor of the employee having an affair with the boss. As a result, office romances can and do lead to sex harassment claims. The employee involved in the affair claims she was pushed out because she wouldn't continue having sex with the boss; the co-workers claim they were pushed out because they weren't having sex with the boss. Either way, office romances – particularly those between a supervisor and a subordinate – expose the company to potential liability.

I suppose this potential liability is one reason why many employers forbid workplace romances. Such policies are completely unrealistic, although I do understand why employers do it. Few things are less romantic than a lawsuit. Except maybe a contract. How about a love contract? And I don't mean marriage. Some employers – perhaps in recognition that a no-fraternization policy is of little significance to most – impose quite a different policy. This policy requires that employees disclose workplace romances in which they become involved and that they sign what is known as a "love contract." By signing a love contract, the lovebird employees state that the relationship is consensual and agree that, should the relationship fail, they will not engage in retribution or any other ugly, childish behavior. These contracts also set forth the employer's sex discrimination policy. The theory behind love contracts is that such a contract insulates the employer from a sex harassment claim by one of the lovebirds if and when the relationship goes south.

These types of policies can take several forms. Some employers ban relationships between supervisors and subordinates on threat of termination and use the love contracts only for relationships between workplace equals. Other employers who implement love contracts don't explicitly ban any relationships, but make it known that a hidden workplace relationship is cause for termination.

Love contract policies have two chief weaknesses. First, they depend upon employee disclosure. Closeted homosexuals, employees committing infidelity, and anyone hell bent on maintaining some semblance of a personal life will not disclose a workplace romance. Second, as Catherine Liner demonstrates, a love contract will not protect an employer from claims that a

romance between two employees (particularly between a manager and a subordinate) has disadvantaged other employees in the workplace, or that advancement or good treatment is conditioned on sexual favors. But if all is fair in love and war, and no-fraternization policies don't work, a love contract can be an effective way to protect your business from a significant source of potential sex harassment claims. True, a love contract won't prevent all sex harassment claims, but in law, as it is in love, there are no guarantees.