

EMPLOYMENT LAW

The Law on Workplace Romances

BY RAY E. GALLO

Today many workers increasingly define themselves by what they do, and they are spending more and more time at the office. Couple that with the advent of email, cell phones, BlackBerrys, and pagers, and it seems that many of today's workers are practically never "off the clock."

Workplace romances have thus emerged as a hot issue in privacy law, and the courts are increasingly being called on to determine the extent to which employers can regulate the private sexual lives of their employees. The question is complex, and with relationships and careers on the line, the stakes are often high.

LOVE AND THE LAW

On one hand, employers have some legitimate reasons for regulating sexual relationships among employees. Sexual harassment is a prime concern, as is the potential for conflicts of interest when the relationship is between a supervisor and a subordinate. Additionally, many employers simply want to avoid the friction that can arise when workplace relationships turn sour. Employees involved in a bad breakup may feel that they can no longer work together, and employers don't want to lose the investment they have made in hiring and training workers.

On the other hand, when employees live their lives at the office, sexual relationships inevitably will develop among them. Contemporary social mores favor the position that employers should not have the right to forbid workplace romances that do not affect the professional performance of the employees involved.

The controversy is whether an employer has the legal right to force employees to choose between love and a job when a workplace romance occurs. While the law clearly is moving toward protecting an employee's right to choose a romantic partner, it has not yet offered hard and fast answers to the questions involved.

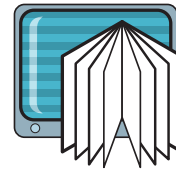
CALIFORNIA'S STATUTORY SCHEME

California statutes seem at first blush to provide broad protection to employees. California Labor

Code sections 96(k) and 98.6, when read together, appear to prohibit an employer from discharging or discriminating against an employee based on "lawful conduct occurring during nonworking hours away from the employer's premises." However, these statutes have been narrowly interpreted and now are effectively procedural in nature. They provide no substantive rights and create no independent public policies. To prevail on an invasion of privacy claim, a plaintiff must prove that adverse action was taken in violation of a recognized constitutional right. (*Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72 (2004).)

PRIVACY RIGHTS

The U.S. Supreme Court's recent decision in *Lawrence v. Texas* (539 U.S. 558 (2003)) reflects society's changing attitudes toward the "right to be let alone." That case struck down a Texas law banning private, consensual homosexual activity. Justice Anthony Kennedy, writing for the majority, forcefully declared that the right of intimate association includes a right of consenting adults to engage in private sexual activity. This right, he noted, is among the essential liberties protected by the Due Process Clause of the Fourteenth Amendment. In its conclusion, the Court found the Texas statute unconstitutional because it furthered no legitimate state interest sufficient to justify its intrusion into the personal and private lives of the individuals.



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The decision in *Lawrence* ultimately could give powerful legal protection to workplace romances. If an employee has a constitutionally protected right to engage in private sexual activity, then a relationship with a coworker involving such private activity would be similarly protected. An employer could not take adverse action based on the relationship without violating the employee's constitutional rights. Indeed, in *Barbee v. Household Automotive Finance Corp.* (113 Cal. App. 4th 525 (2003)), a California court of appeal relied in part on *Lawrence* in assuming that employees may have a legally protected right to pursue an intimate or sexual relationship at work.

In most states, the protections of *Lawrence* would be available only to government employees because constitutional claims are generally allowed only in cases in which there is state action. But the California Supreme Court has construed the state constitution to protect the state's residents against privacy invasions by both public and private entities. (*Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994).) So, in California, though private actors are sometimes held to a lower standard of review, the principles of constitutional privacy apply to both private employers and the government.

OBSTACLES IN EMPLOYEE LAWSUITS

Employees continue to face many obstacles to enforcing their constitutional privacy rights against their employers.

Burden of proof. To establish a constitutional invasion of privacy claim in California, a plaintiff must prove there is:

- a legally protected privacy interest;
- a reasonable expectation of privacy under the circumstances; and
- conduct constituting a serious invasion of privacy.

Courts have so far assumed that the right to participate in a workplace romance is a legally protected privacy interest under the principles set forth in *Lawrence*. Thus they have assumed that the first element—a legally protected interest—has existed. Similarly, the

third element—that the invasion of privacy be serious—is typically not difficult for a plaintiff to establish in employee privacy cases. Whenever an employee is forced to choose between keeping a job or ending a relationship, the invasion is serious. (*Ortiz v. Los Angeles Police Relief Ass'n*, 98 Cal. App. 4th 1288 (2002).) In contrast, a requirement that an employee simply make a supervisor aware of any workplace romance would likely be held to constitute a minimal invasion of privacy.

The problem for the employee is proving that he or she had a reasonable expectation of privacy under the circumstances. Courts appropriately recognize that “customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.” (*Hill*, 7 Cal. 4th at 36–37.)

Thus, in the *Barbee* case mentioned above, in which the employee-supervisor was terminated, the court focused on what it termed a conflict between the company's and employee's interests, created by the relationship between the plaintiff supervisor and his subordinate. The court, finding no reasonable expectation of privacy, held that widely accepted community norms did not support romantic involvement between a supervisor and the employee he or she supervises.

Alternative reasoning. Some decisions have largely ignored the concept of “broadly based and widely accepted community norms,” instead collapsing the inquiry into a question of whether the employee was on notice that the employer did not condone the conduct in question. For example, in *Tavani v. Levi Strauss & Co.* (2002 Cal. App. Unpub. LEXIS 10794), the court held that the plaintiff had no reasonable expectation of privacy primarily because he had received a warning letter from his employer that the conduct in which he was engaging was prohibited. *Barbee* placed some emphasis on the fact that

the plaintiff's employer had told him that “intercompany dating was a bad idea.”

Under such an approach, an employer could seek to avoid all privacy claims against it simply by adopting and strictly enforcing a rigid antifraternalization policy. This could prevent an employee from entertaining the notion that employee dating was permitted or legally protected.

However, many of these strict antifraternalization policies might be challenged for overbreadth and for encroaching on employees' constitutionally protected rights of association. For example, particularly for large companies with disparate operations, functions, and locations, there presumably are instances in which the employer has no legitimate reason to object to romances between certain employees.

Some argue that the proper inquiry is not whether the employee was on notice that the employer prohibited the conduct in question. The defendants in *Lawrence*, for example, were on advance notice that the homosexual conduct in which they were engaging was prohibited under Texas law. This had no effect on the analysis of whether the state was permitted to prohibit that conduct in the first place.

At least one California decision has questioned the legitimacy of the advance-notice theory in the context of an employee's right to engage in a private romantic relationship. In *Ortiz* the court noted that the U.S. Supreme Court's decision in *Loving v. Virginia* (388 U.S. 1 (1967))—which invalidated Virginia's antimiscegenation statute on grounds that it violated the defendants' fundamental right to marry—was similarly unaffected by the fact that the defendants had advance notice that they were breaking the law. Nonetheless, the *Ortiz* court's ruling that the plaintiff had a reasonable expectation of privacy was based largely on the fact that the defendant employer did not routinely question employees about their personal lives.

The standard of review. In one sense, *Lawrence* was an easy case. Once

the court determined that the right to privacy included a right to engage in private sexual conduct, it was able to find a privacy violation merely by holding by implication that the state's proffered justification for the law—the promotion of traditional sexual values—was not legitimate. But an employer often has legitimate interests in preventing romantic relationships in the workplace: Sexual harassment, conflicts of interest, and appearances of favoritism all can have negative effects on office productivity.

The California Supreme Court has expressly declined to define the precise level of scrutiny applicable in invasion of privacy cases—that is, whether a strict-scrutiny compelling-interest test would apply (in which case the privacy invasion could withstand constitutional attack only if it is necessary to further a compelling employer or government interest), or whether the privacy invasion need only be rationally related to a legitimate concern.

The court has stated: “The particular context, *i.e.*, the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, *e.g.*, freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a ‘compelling interest’ must be present to overcome the vital privacy interest. If in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.” (*Hill*, 7 Cal. 4th at 34.)

In addition, the *Hill* court noted, “[T]he pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions of private persons. . . . An individual generally has greater choice and alternatives in dealing with private actors” and usually has “a range of choice among

landlords, employers, vendors and others with whom they deal.”

Accordingly, one appellate court has applied a relaxed standard of review to employee privacy cases in the private sector, using the rhetoric of a rational-basis test. In *Ortiz*, decided a year before *Lawrence*, a company that administered employment benefits for undercover police officers fired the plaintiff after she told her employer that she intended to marry a convicted felon.

The court recognized that the employer had a legitimate interest in preventing the improper disclosure of confidential information about undercover police officers to criminals. It analyzed the plaintiff's invasion of privacy claim in the context of her fundamental

fundamental right to marry. Those cases held that firing individuals because of whom they date or marry does not prevent them from dating or marrying that person, and so the termination involves a less-serious invasion of the employee's constitutional rights.

In *Ortiz* the legitimate employer interest was protecting the lives of undercover police officers—a very serious concern. But in the antinepotism cases, the employer's legitimate interest was merely maintaining employee morale and avoiding conflicts of interest and appearances of favoritism—concerns that will be present in any employee dating situation.

Thus, even an employee who can establish a reasonable expectation of privacy still faces serious legal obstacles to recovery under invasion of privacy claims. Such an employee could argue that *Lawrence* has altered the effects of *Ortiz* and the antinepotism cases. The right to privacy—that is, the right to be let alone, which after *Lawrence* includes the right to engage in private sexual relationships—is very different from the right to marry. The right to marry isn't violated until a person is prevented from marrying; the right to be let alone is violated as soon as an employer takes adverse action based on conduct that is constitutionally protected.

A LOOK AHEAD

The U.S. Supreme Court has recognized a broad right of all citizens to engage in private intimate relationships. But the liberal policies outlined in cases such as *Lawrence v. Texas* have not yet been broadly applied in the context of private employment. For now, employers can, with relative confidence, continue to regulate office dating and to enforce anti-fraternization policies that have some reasonably direct relationship to their business goals. And employees should think carefully before becoming intimate with a coworker. **61**

“ If an employee has a constitutionally protected right to engage in private sexual activity, then such a relationship with a coworker would be similarly protected. ”

“right to marry” on the grounds that her discharge was a rational means of pursuing the employer's legitimate interests. It then ruled against the plaintiff. In doing so, the court noted that the intrusion into the plaintiff's privacy was less than in other cases (such as *Lawrence*) because the plaintiff “was able to choose freely among competing public or private entities in obtaining access to a job opportunity.”

The *Ortiz* case involved rather extreme facts, and the court could easily have found that the privacy invasion satisfied a compelling-interest standard. But the court clearly did not. Its decision relied heavily on a series of cases upholding government employers' antinepotism policies against challenges that they violated the employees'