

Cupid can interfere with school business

By the New York State Association of School Attorneys

February, we are told, is the month for love. As Cupid shoots his pesky little arrows, you may discover love blooming everywhere, including in your schools. This leads to the question of when, if ever, it is appropriate for a school district to insert itself in a romantic relationship between employees.

This article addresses the potential and actual pitfalls of romance in the workplace and offers ways to manage them from a legal and "best practices" standpoint.

Can't Help Falling in Love

Two employees have found love. Isn't life grand? But sometimes relationships become a source of distraction or discomfort to others and therefore interfere with school operations.

For instance, we recently received an inquiry from a school district about an employee who had an extramarital relationship with co-worker and actually informed his spouse of his paramour's identity. Shortly thereafter, the spouse showed up at a middle school to confront the paramour.

Interoffice relationships can interfere with school business in other ways. For example, personal phone calls, text messages, e-mails and the like exchanged during working hours can negatively impact on the delivery of services. More serious are unwanted forms of attention that violate federal and state law.

Having an anti-harassment policy benefits both employees and the employer. This policy should describe the steps employees should take if they believe they are being harassed or discriminated against. Employees should be given a copy of the policy when they are first hired. Most school districts wisely redistribute these policies on an annual basis and confirm receipt by their employees.

How should an administrator respond if he or she believes two employees are in a "more than just friends" relationship? Different responses are appropriate depending on the situation and level of concern. One option is to do nothing. A second option is to issue a general reminder in a communication, meeting or training event about whatever behavior the school district wants to discourage, such as excessively long lunch hours or having personal phone calls that distract co-workers. A third option is to take a more "hands on" approach by communicating directly with the employees. This could include meeting with them to verify the existence of the relationship, confirming that it is consensual and advising them to keep their romance out of their workplace.

If the purpose of the meeting is to investigate whether the employees have permitted their relationship to interfere with work, administrators should keep in mind that the employees may have the right, pursuant to Civil Service Law Section 209-a.1(g), to have a union representative present at the meeting. Since this right arises only in certain circumstances, check with your school attorney before proceeding in the absence of a representative.

If a meeting takes place, the employees should be given a copy of the school district's anti-harassment policy. It is recommended that the supervisor conducting this meeting maintain a record of what was discussed in case recollections differ down the road.

While the district can't prevent or foresee situations like the spouse of an employee showing up to confront her husband's lover, it can ensure that management enforces policies concerning access to school



property and Workplace Anti-Violence Prevention (see Labor Law Section 27-b for a description of the required contents of a Workplace Violation Prevention Program).

Some Kinda Love

What if the relationship is between a supervisor and a subordinate? There are two special risks in this situation. First, another employee may allege favoritism, e.g., he or she was wrongfully passed over for a promotion in favor of the subordinate who is having a romantic relationship with the supervisor. This could lead to (among other things) a contract grievance. Second, the subordinate could claim that the supervisor engaged in sexual harassment during the course of the relationship or after it ended.

A school board or its designee (usually the superintendent) may limit the authority of an employee in light of a personal relationship with a co-worker. For instance, if two employees are having a romantic relationship and one is a supervisor, the district could prohibit the supervisor from being involved in decisions affecting the subordinate's terms and conditions of employment, evaluations, promotional opportunities and discipline. When a supervisor is detached from employment decisions involving his or her love interest, the school district's chances of being implicated in a lawsuit alleging wrongful, adverse employment action significantly decrease.

School policies may help prevent these types of situations and minimize the district's exposure to liability. Two such policies are:

- **An anti-fraternization policy.** This prohibits employees from maintaining certain kinds of relationships with one another.
- **An anti-nepotism policy.** This precludes employees related by blood or marriage from

working together.

These policies have several implications that should be considered. First, if two employees fall in love and marry, an anti-nepotism policy may limit their employment options, sometime to the detriment of the district as well as the employees. For instance, if two principals marry, an anti-nepotism policy would likely present few practical issues in a large district with several school buildings, but it could present a serious problem if there are only two buildings, or if one seeks to be promoted to superintendent.

Second, collective bargaining may be required before implementing an anti-fraternization or anti-nepotism policy. Check with your school attorney.

Breaking Up Is Hard to Do

It is a fact of life that relationships end, with various consequences. The employees may no longer want to work with each another. Or there could be claim of sexual harassment (quid pro quo or hostile work environment), discrimination, negligent hiring, negligent supervision or similar claims. This reemphasizes the need to have a consistent application of relevant policies, including the maintenance and enforcement of the school district's anti-harassment policy. The school district should also regularly train and retrain its supervisors on how to identify potential harassment and take appropriate action.

Sometimes, despite the school district's best efforts, it may find itself defending a lawsuit arising from an office romance. One of the more common, but certainly not the only, types of lawsuits is one alleging sexual harassment. The U.S.

Supreme Court ruled in 1998 that sexual harassment by a supervisor is not conduct within the scope of employment (*Burlington Industries, Inc. v. Ellerth*). While this can isolate an employer from liability, depending on the circumstances, a school district may be held liable where its own negligence caused the harassment. A school district is subject to vicarious liability for an actionable hostile environment; that is, one in which an adverse employment action was created by a supervisor with immediate (or successively higher) authority over the employee.

When no tangible adverse employment action was taken, the school district may raise the affirmative defense that: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the school district to avoid harm otherwise. The U.S. Supreme Court has stated that the existence of an anti-harassment policy and/or reporting procedure is one of the ways that an employer may demonstrate that it exercised reasonable care.

Other defenses include having an unbiased, rational basis for the employment decision.

When love is in the air, there is always the potential for good and bad ramifications. By keeping an eye on the impact of a budding or even long-term romance, and taking appropriate precautions, an enlightened school district increases its likelihood of avoiding detrimental effects in the workplace and related legal liability.

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