

5 Ways To Avoid Legal Heartache From Office Romance, *Law360*, ft. Ivan Smith

Ivan D. Smith, Partner at Kaufman Dolowich & Voluck LLP in New York City, was quoted in an article written by Vin Gurrieri for Law360.

Even though Valentine's Day is in the rearview mirror, a recent Ninth Circuit ruling that a police officer can pursue claims that she was illegally fired for having an affair with a colleague is the latest proof that legal questions about interoffice romances are here to stay.

The Ninth Circuit ruled Feb. 9 that a married former Roseville, California, police officer can pursue allegations that she was wrongly fired because the department disapproved of her having an affair with another married cop. The appellate panel found that her sexual conduct was protected by her constitutional right to private, off-duty intimate association and that her employer offered no proof that it meaningfully affected her job performance.

But even though the Ninth Circuit's ruling dealt exclusively with employers in the public sphere, it also shines a spotlight on some of the issues that private businesses often face when they create or modify office fraternization policies.

Watch the Power Dynamics

Ivan Smith, a partner at Kaufman Dolowich Voluck LLP, told Law360 that best practices for private employers involve making sure that supervisors can't date their subordinates — which if allowed opens the door to a flood of potential problems like sexual harassment and perceptions of favoritism.

"You want to make sure that if two coworkers are dating that everybody understands that it's consensual, and if it turns into a situation where it's not consensual, then you need to be aware of it so you can address it," Smith said.

Even if a relationship starts out as consensual, Smith said, "it's always going to be a problem" if the couple breaks up, which is why employers should have a policy in which supervisors can't date subordinates.

"The reason it's a problem with subordinates is because of sexual harassment. Sexual harassment is about power," Smith said.

"Whether or not the [supervisor] seems to think it's consensual, the subordinate can always allege that 'because the person had power over the terms and conditions of my employment that's why I'm dating them, or that's why I did date them, or that's why I did have sex.'"

Know What's Going On

For employers, the overarching goal of any policy is to get knowledge of relationships between employees so they can address issues quickly when they arise, according to Smith, who added that "knowledge is power" for employers.

When it comes to employees at the same level dating each other, such as rank-and-file employees, Smith advises employers to set a policy that they be notified of the relationship.

That, he said, is because co-workers can sexually harass each other even without the supervisor-subordinate power dynamic, and because one member of the relationship could conceivably be promoted at some point and necessitate one of them being transferred to avoid the appearance of a conflict of interest.

“People are going to date at work sometimes, and what you’re trying to make sure is that it’s a consensual relationship,” Smith said. “Really, the policy you want is if you’re dating at work, then you notify the employer. Therefore, if something happens ... the employer can address it earlier.”