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IF YOU LOVE ME DEAR, PLEASE SIGN HERE: WILL THE “LOVE CONTRACT” PLAY A ROLE IN PROTECTING EMPLOYERS FROM SEXUAL HARASSMENT LIABILITY?

JESSICA LYNN MOK O’NEILL*

I. NEED MORE OFFICE SPACE?

Anne met Shane her first day on the job. She knew from the moment she saw him that she had to date him. Their first date was perfect. Their second date was magic. The third date was even better; but on the fourth date, Shane told Anne they needed to talk. She assumed it was “the talk” and that Shane was giving her the dating pink slip. Instead, Shane told Anne that if they wanted to continue dating they would have to sign a “love contract.”¹ Company policy insisted that all couples sign an agreement ensuring that their relationship is consensual.²

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1. See, e.g., Peter Geier, *Baltimore Lawyers Discuss Use of ‘Love Contracts’ to Protect Businesses From Sexual Harassment Suits*, THE DAILY RECORD (Baltimore, MD), Apr. 15, 2005, § News (defining a “love contract” as a form confirming that both parties to an interoffice relationship consent to the relationship and understand the sexual harassment policy of the employer).

2. As an example of what might have been presented to Anne in the fictional story, the proceeding is a list of elements that might be contained in a love contract, though the list is not comprehensive:

- The individuals’ names and their respective positions.
- An agreement that the relationship is voluntary and consensual and that employment has not been conditioned upon the relationship.
- Ground rules for how the couple will behave at work.
- An acknowledgment of the employer’s sexual-harassment policy.
- An agreement to report any unwelcome conduct or harassment immediately.

The next morning, the two of them went to sign the agreement. When they arrived, the human resources manager smiled at the sight of Shane. "Would you like me to pull your folder, Shane?" she asked. Anne was confused until she saw the giant folder of love contracts all signed by Shane at earlier dates

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- An acceptance of appropriate follow-up action by the company, including a change of supervision if the individuals are in a management-subordinate role.

Yvette Armendariz, *Firms Avert Trouble From Office Dating*, THE ARIZONA REPUBLIC, Feb. 14, 2005, at 1D (listing the elements as reported by Leslie Smith, an employment attorney at Snell & Wilmer and Neil Alexander, a shareholder at Littler Mendelson); *'Love Contracts' Help Keep Employers Out of Court; On-the-job Romance Can Be Costly, Says Littler Mendelson*, PR NEWswire US, Jan. 31, 2005. Other pertinent parts not mentioned above are excerpted from an actual consensual dating agreement and are provided below, including an arbitration clause:

STIPULATIONS

The Parties stipulate that:

- ...
- E. Male employee's desire to undertake, pursue and participate in said Social Relationship is completely and entirely welcome... consensual and is unrelated to the Company, male employee's professional or work-related responsibilities or duties, or male employee's and female employee's respective positions in the Company or business relationship to each other
- ...

AGREEMENT

- ...
5. The Company shall immediately and impartially investigate said violation, suspected violation or incident and take any and all appropriate remedial action, up to and including termination, pursuant to established Company policy and law Appropriate steps will also be taken to deter any future violations or incidents
- ...

Male employee and female employee acknowledge and agree that he and she, respectively, has the right and ability to end said Social Relationship at any time without repercussion of any work-related nature

...

9. Male employee and female employee have executed and agree to be bound by the Company's Agreement to Abide by Arbitration Procedure. . . . Paragraph 5 of this Acknowledgment and Agreement and Company Arbitration Procedure shall set forth the exclusive remedy for, and shall constitute the exclusive forum for resolution of, any and all disputes which arise or may arise out of the Social Relationship and any claims of harassment, discrimination or retaliation by or between male employee and female employee

Tom Kuntz, *Word for Word/ Consensual Relationship Agreements: For Water Cooler Paramours, The Ties That Legally Bind*, N.Y. TIMES, Feb. 22, 1998, § 4, at 7.

with different women. Instead of signing, Anne gave Shane the pink slip. Now every time he makes a pass at her³ in an attempt to re-illicit her feelings for him she considers filing a sexual harassment suit.⁴

While this scenario is fictional, it is hardly impossible.⁵ The invasive love contract is as real as love itself.⁶ The question is will it fail employers, like love failed Anne, or will it protect employers from vicarious liability against sexual harassment suits?⁷ Even if it does offer some protection, is the protection enough to warrant invading the privacy of the employees?⁸ Would the employer be better off having a pink slip policy, presenting the ultimatum of job loss if employees date?⁹

In an attempt to answer the important questions the love contract presents, Part II will examine the history of workplace sexual harassment, beginning with its origins in interoffice dating and explore the sexual harassee's main vehicle for filing a sexual harassment claim, Title VII of the Civil Rights Act of 1964¹⁰ (Title

3. In this situation, and in all sexual harassment cases, the courts would consider both what a reasonable person would find to be severe and pervasive enough to be considered hostile or abusive and the subjective response of the employee to the alleged sexual harassment. See Deborah F. Buckman, Annotation, *Conduct of Plaintiff As Defense In Action For Employment Discrimination Based On Sexual Harassment Under Federal Civil Rights Statutes*, 145 A.L.R. FED. 459, 2a (2004) (determining that the employee's subjective response to alleged sexual harassment would be considered in proving a claim); Sarah L. Johnson, Annotation, *When Is Work Environment Intimidating, Hostile, or Offensive, So As To Constitute Sexual Harassment in Violation of Title VII Civil Rights Act Of 1964, As Amended (42 U.S.C.A. §§ 2000e et seq.)*, 78 A.L.R. FED. 252 (2005) (setting forth a hypothetical situation and analyzing it under what a reasonable person would find hostile).

4. Anne's thought is common in the situation of a failed workplace relationship. See Jennifer J. Hamilton, *Labor of Love — Part I*, 6 CONN. EMPL. L. LETTER, Dec. 1998. ("Failed workplace romances may account for up to half of all sexual harassment claims.")

5. See Sarah Elizabeth Richards, *Wanna Go Out On a Date? Sign Here First, Please; Love Contracts Between Co-Workers Protect Employers*, CHICAGO SUN-TIMES, July 24, 2005, at 3. (relaying the true story of a couple, now married, who signed a love contract before they went on their first date).

6. Armendariz, *supra* note 2.

7. See, e.g., Deanna Hodgin, *Lawyers Try to Define Terms of Endearment*, RECORDER, Sep. 28, 1998, at 1 (debating the purpose of love contracts).

8. *Id.*

9. See generally Jennifer L. Dean, *Employer Regulation of Employee Personal Relationships*, 76 B.U. L. REV. 1051 (1996) (assessing the benefits and drawbacks to no-dating and no-spouse policies in the workforce); Randi Wolkenbreit, *In Order to Form a More Perfect Union: Applying No-Spouse Rules to Employees Who Meet at Work*, 31 COLUM. J.L. & SOC. PROBS. 119 (1997) (addressing the issue of employers having policies which prohibit married couples from working together).

10. Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e-1 to -17 (2000)).

VII) and the court's interpretation of the statute.¹¹ Part II will also hone in on the genesis of the imputation of sexual harassment liability to the employer. Finally, the creative development of the consensual dating agreement will be addressed.¹²

Part III will then question the validity and purpose of the consensual dating agreement, as well as its proper use in the workplace and in the courtroom, while also addressing the adverse effects caused by the agreement on both the employer and employee. Lastly, Part IV will suggest how the love contract can be used to assist the employer in protecting the company from liability for sexual harassment suits.

II. DON'T KNOW MUCH ABOUT HISTORY BUT I DO KNOW THAT I LOVE YOU

A. *Hello Rosie, Goodbye Heart*

Between 1942 and 1944 women were ushered into the workforce in droves while their husbands, brothers, and friends sailed away to save the nation during World War II.¹³ Rosie the Riveter¹⁴ led the campaign that would make everlasting changes to institutions of employment by mixing the genders.¹⁵ Once diversified, the workplace provided a new venue for finding a companion.¹⁶ In 2004, nearly sixty percent of women over the age

11. See *infra* text and accompanying notes 48-52. (referencing cases that interpret Title VII in sexual harassment suits).

12. The phrases "consensual dating agreement" and "love contract" are used synonymously throughout many sources and will be used interchangeably in this comment as well.

13. David E. Shi & Holly A. Mayer, *Introduction to Mark Jonathan Harris, Franklin D. Mitchell, and Steven J. Schechter, The Homefront* (1984), reprinted in 2 FOR THE RECORD: A DOCUMENTARY HISTORY OF AMERICA, at 254 (David E. Shi and Holly A. Mayer eds., 1st ed. 1999) (contextualizing the increase of females in the workplace in the forty's by introducing the stories of two women from among the six million who entered the workforce).

14. Greg Cannon, *Auction Set for Norman Rockwell's Rosie the Riveter Painting*, KNIGHT RIDDER/TRIBUNE BUS. NEWS (Wash.), May 21, 2002, at 1. Rosie the Riveter was a character used in posters and signs to recruit women into trades and factories during World War II. *Id.* Rosie became a famous icon of the times, as she was represented in print, commercials, and even in a song. *Id.* The two most famous images of her, which were used during the campaign, were created by the famous artists, Norman Rockwell and J. Howard Miller. *Id.* Rosie was modeled after real life "Rosie Monroe," who starred in a film promoting war bonds. Amanda Kaiser, "Rosie the Riveter" an Indiana Businesswoman, INDIANA BUSINESS MAGAZINE, July 1, 1997, at 7.

15. Shi & Mayer, *supra* note 13.

16. See Mark A. Konkel, *Love as a Matter of Contract?*, 12 No. 11 EMPL. L. STRATEGIST 1 (2005) (claiming the workplace has become a principal place to find a companion since World War II).

of sixteen were in the workforce.¹⁷ Add an increase in same-sex couples,¹⁸ plus an increase in work hours,¹⁹ and one is likely to find many reasons why thirty percent of individuals in a recent survey reported they have dated an office colleague.²⁰ While the American Management Association (AMA) reports that forty-four percent²¹ of interoffice relationships end in marriage, it is the other fifty-six percent²² that have employers fearing possible liability for sexual harassment.

B. Love Potion No. 9 v. Title VII

Title VII is fundamentally an act for the prevention of employment discrimination.²³ Under Title VII, employment

17. THE AMERICAN MARKETPLACE: DEMOGRAPHICS AND SPENDING PATTERNS 218 (7th ed. 2005) (finding that about sixty percent of women sixteen or older worked in 2004, a figure which represents an increase of 1.7 percentage points since 1990).

18. David Whelan, *Do Ask, Do Tell — Homosexual Demographics*, AMERICAN DEMOGRAPHICS, Nov. 1, 2001 (measuring the increase in same-sex households).

19. Konkel, *supra* note 16, at 1.

20. See American Management Association, AMA's 2003 Survey on Workplace Dating, http://www.amanet.org/research/pdfs/dating_workplace03.pdf (last visited Jan. 17, 2007) (finding thirty percent of the 390 people surveyed had dated a colleague). Cf. James Gallagher, *Dating Co-workers is Risky Business*, THE AUGUSTA CHRONICLE (Georgia), Mar. 1, 2005, at C07 (citing a Vault.com survey where forty-seven percent of those surveyed said they had a romantic relationship at work); Konkel, *supra* note 16, at 1 (noting that, according to some reports, nearly sixty percent of employees engaged in a relationship with a colleague); Salon.com, Sarah Elizabeth Richards, *Before We Hook Up, Please Sign This*, http://archive.salon.com/mwt/feature/2005/07/21/love_contracts/index.html (reporting that CareerBuilder.com's 2005 survey showed that out of 1,300 workers more than half said they dated a colleague and fourteen percent said they dated a superior) (last visited Jan. 17, 2007).

21. American Management Association, *supra* note 20. Out of 112 American Management Association (AMA) members, forty-four percent said that the outcome of the interoffice relationship was marriage. *Id.*

22. *Id.* For the purpose of the survey, the question asked was "what was the outcome of the relationship?" *Id.* The relationship refers to the interoffice relationship. The percentages found in answer to this question were taken from the 30% who had dated someone at their work. *Id.* Of those who dated a colleague, 44% selected the outcome of "marriage," 23% selected "long-term relationship," 11% selected "still continuing," 12% selected "since ended," and 33% said that the outcome was a "short-term relationship." *Id.*

Out of 390 AMA members surveyed, 67% believed it was okay to date an employee. *Id.* When the 67% were asked in a more categorical format, 96% said it was okay to date a co-worker, 24% said it was okay to date a superior, and 21% believed it was okay to date a subordinate. *Id.*

23. Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e-1 to -17 (2000)). In pertinent part:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

opportunities cannot be afforded or withdrawn based on gender.²⁴ Title VII has been interpreted to cover sexual harassment as a basis for discrimination in the workplace.²⁵ The Act applies equally to men and women, as well as same-sex sexual harassment.²⁶ Enforcement of Title VII is overseen by the United States Equal Employment Opportunity Commission (EEOC).²⁷ Through the EEOC, two types of sexual harassment claims can be filed under Title VII: (1) *quid pro quo* and (2) hostile work environment.²⁸ In *Meritor Savings Bank v. Vinson*, the Court

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
 (2) to limit, segregate or classify his employees or applicants for employment in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2. In terms of the above, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day." *Id.* at 2000e; see also 45A AM. JUR. 2D *Job Discrimination* § 2 (2005) (briefing the topic of Title VII).

24. 42 U.S.C. § 2000e-2.

25. See generally The U.S. Equal Employment Opportunity Commission, Sexual Harassment, http://www.eeoc.gov/types/sexual_harassment.html [hereinafter *Sexual Harassment*] (defining sexual harassment as a form of sex discrimination which is in violation of Title VII) (last visited Jan. 17, 2007).

26. *Id.*; see also Mark Hansen, *Love's Labor Laws: Novel Ways to Deal With Office Romances After the Thrill is Gone*, 84 A.B.A. J. 78 (1998) (citing *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75 (1997), which extended Title VII to cover same-sex sexual harassment).

27. The U.S. Equal Employment Opportunity Commission, Federal Equal Employment Opportunity (EEO) Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Jan. 17, 2007). The EEOC received 12,679 charges of sexual harassment during the Fiscal Year 2005. Sexual Harassment, *supra* note 25. Sexual harassment claims can be filed with or without economic injury by either a man or a woman, a supervisor or co-worker, the harassed person, or an offended third party. *Id.* If the conduct is unwelcome, then the EEOC will look at the entire context of the claim. *Id.*

28. Alison Chen & Jonathan A. Sambur, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace*, 17 HOFSTRA LAB & EMP. L.J. 165, 169 (1999); see also 29 C.F.R. § 1604.11 (2001). Section 1604.11(a) of the Code of Federal Regulations defines provides:

Harassment on the basis of sex is a violation of section 703 of title VII.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

presented the two claims as distinct claims covered by Title VII.²⁹ Though separate, there is a fine line between the two.³⁰ When a quid pro quo claim is filed, a hostile work environment claim is often filed as well.³¹ However, the distinction becomes important when liability of the employer is to be determined.³²

1. *What's Not to Love?: Quid Pro Quo Claims*

Quid pro quo harassment exists in cases where there is a conditioning of a "concrete employment benefit on sexual favors."³³ This type of harassment is prevalent in supervisor-subordinate relationships where the supervisor uses his or her powerful position to inappropriately control the subordinate.³⁴ In a quid pro quo claim the plaintiff must show: "(1) her³⁵ supervisor made sexual advances toward her because of her sex; (2) she rejected the sexual advances; (3) she suffered a tangible job detriment because she rejected the supervisor's sexual advances"; and, in the case of employer liability, that "(4) the employer is liable for the supervisor's conduct."³⁶ The sexual advance of the employer is inherently unwelcome, thus one need not prove "unwelcomeness" in quid pro quo claims.³⁷

2. *What's Love Got to Do With It?: Hostile Work Environment Claims*

Whereas quid pro quo plaintiffs need not prove that the

Id.

29. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (reaching the conclusion that where sexual advances are unwelcome, the fact that the acts were not "forced" but "voluntary" does not act as a defense); *See also* Chen & Sambur, *supra* note 28, at 169 (writing on the implications of *Meritor*).

30. The U.S. Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, <http://www.eeoc.gov/policy/docs/currentissues.html> [hereinafter Policy Guidance] (last visited Jan. 17, 2007).

31. Nilofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability to Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325, 329 (1999) (quoting the EEOC manual).

32. Policy Guidance, *supra* note 30; *see also* Burlington Indus, Inc. v. Ellerth, 524 U.S. 742, 751 (1998) (using "quid pro quo" and "hostile work environment" in making a "rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility", in an employer liability case).

33. Dean, *supra* note 9, at 1054.

34. *Id.*

35. The pronouns "her" and "she" are used merely because it is a direct quote. Quid pro quo claims can be made by men as well as women.

36. Nejat-Bina, *supra* note 31, at 329; *cf.* Chen & Sambur, *supra* note 28, at 169 (listing different elements for quid pro quo, though the elements are similar in effect).

37. Nejat-Bina, *supra* note 31, at 329.

sexual advance was unwelcome,³⁸ in hostile work environment claims, the advance is presumed to be welcome unless proven otherwise.³⁹ When a plaintiff brings a hostile work environment claim, they must show that:

(1) she was subjected to sexual advances, requests or other verbal or physical sexual conduct . . . ; (2) the harassment was based on her sex; (3) the . . . conduct was unwelcome; (4) the harassment was sufficiently severe and pervasive to create an abusive working environment and in the case of employer liability, that (5) there is some basis for holding the employer liable.⁴⁰

3. *Dating Game Meets the Blame Game*

a. Agency principles and the affirmative defense

Once the honeymoon is over and sexual harassment has occurred, the parties rightfully look for someone to blame. The use of agency law has been implemented to place this liability on the harasser *and* his or her employer.⁴¹ In quid pro quo cases, the employer is strictly liable for the employee's harassment based on the principle that the supervisor's use of power or position is an essential element in the claim.⁴² In hostile work environment cases, the employer often has the opportunity to use an affirmative

38. *Id.*

39. *Id.*

40. *Id.* at 330. See also generally *Meritor*, 477 U.S. 57, *Ellerth*, 524 U.S. 742, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) pertaining to the elements the Court uses in holding that there was sexual harassment in the workplace.

41. *Ellerth*, 524 U.S. at 756 ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." (citing RESTATEMENT (SECOND) OF AGENCY § 219(1))). Section 219 of the Restatement (Second) of Agency reads in full:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless (a) the master intended the conduct or the consequence, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219.

42. Stacey Dansky, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435 (1997) (discussing the use, or rather misuse of agency principles in quid pro quo cases); see also Dean, *supra* note 9, at 1054 (addressing the regulation of supervisor-subordinate relationships).

defense,⁴³ which is why the love contract seems more constructive when placed in the context of a hostile work environment claim.⁴⁴

There are two kinds of hostile work environment claims for purposes of employer liability: (1) where harassment comes from a tangible employment action (treated much like *quid pro quo*); and (2) where harassment occurs absent a tangible employment action.⁴⁵ For the first type, an employer is strictly liable, and for the second, an affirmative defense is allowed.⁴⁶ The affirmative defense has two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."⁴⁷ The affirmative defense and Title VII have been interpreted in several cases.

b. Title VII in the Court

Several cases have interpreted Title VII in conjunction with agency principles to find employers vicariously liable for sexual harassment committed by their employees in the workplace.⁴⁸ In *Meritor Savings Bank v. Vinson*, the Court did not find a bank vicariously liable for sexual harassment due to the presence of disputed facts. However, the Court did state that agency principles should govern claims of sexual harassment.⁴⁹ Later, in *Burlington Indus. v. Ellerth* the Court held that an employer would vicariously liable for a hostile work environment claim if it

43. See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004) (setting a precedent for the split lower courts, which establishes that an employer still has an affirmative defense in hostile work environment-constructive discharge cases).

44. Nejat-Bina, *supra* note 31, at 328 (addressing the issue of dating waivers in hostile work environment cases).

45. *Suders*, 542 U.S. at 143; see also *Meritor*, 477 U.S. at 73 (holding that employers are not automatically liable, under Title VII, for the actions of their supervisors because Court will take context into account).

46. *Suders*, 542 U.S. at 143.

47. *Id.* at 137-38; *Ellerth*, 524 U.S. at 765 (setting out the affirmative defense, while still holding the defendant liable for sexual harassment); *Faragher*, 524 U.S. at 807 (requiring the City of Boca Raton to satisfy the same elements to establish the affirmative defense).

48. *Meritor*, 477 U.S. 57; *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775; *Suders*, 542 U.S. 129.

49. *Meritor*, 477 U.S. at 72. In *Meritor*, a female at the bank alleged that she was subjected to the sexual harassment of her male supervisor over the course of four years. *Id.* at 59-60. The Court did not find for Ms. Vinson, however, because there were disputed facts as to whether the relationship was voluntary or not. *Id.* at 60.

knew or should have known of the conduct and still failed to prevent it.⁵⁰

In *Faragher v. City of Boca Raton*, the Court addressed reasonableness in the context of both employer and employee conduct and further advanced the use of the affirmative defense in cases where there is no tangible employment action.⁵¹ Most recently, as a small victory to employers, the Court found that the affirmative defense can be presented in cases combining hostile environment and constructive discharge.⁵²

c. Ex's and O's, X's and O's

In light of the case law, and with the EEOC reporting employer payouts for sexual harassment settlements at \$37.1 million in 2004,⁵³ it is easy to see why employers are scrambling for a solution. The cost of attorney's fees for sexual harassment cases can reach upwards of \$80,000 before a case even makes it to the courtroom.⁵⁴ Co-worker relationships gone awry seem to be the culprit in many filed sexual harassment claims.⁵⁵ Nonetheless, the American Management Association (AMA) reports that eighty-four percent of those surveyed did *not* have a company policy on dating.⁵⁶ In the 90's, in the wake of the President Clinton and

50. *Ellerth*, 524 U.S. at 761. In *Burlington*, Ms. Ellerth was subjected to the sexual advances of her supervisor while working for Burlington Industries. Though he was not an upper-level manager, he had made comments pertaining to her position in the company. Ellerth did not inform anyone of the sexual harassment by her supervisor, even though the company had a sexual harassment policy in place. *Id.* She filed suit with the EEOC claiming she was constructively discharged from her position at Burlington Industries. Ultimately, the Court found that the employer was liable for the actions of one of their supervisors, placed at a level of authority. *Id.*

51. *Faragher*, 524 U.S. at 780. For five years Ms. Faragher worked as a lifeguard for the city. *Id.* She brought an action against her two supervisors and the city, alleging the supervisors persisted in unwelcome touching and lewd comments during work hours. *Id.* One comment made by the supervisors was "date me or clean the toilets for a year." *Id.* The City of Boca Raton did adopt a sexual harassment policy while Ms. Faragher worked there. *Id.* However, she did not file a formal complaint. *Id.* The Court reversed and remanded, holding that the employer would be subject to liability only if the affirmative defense were not met. *Id.* at 807.

52. *Suders*, 542 U.S. at 130.

53. Gallagher, *supra* note 20. The total represented does not include litigation costs, it only includes cases settled out of court. *Id.*

54. *Id.*

55. See, e.g., Hamilton, *supra* note 4, at 326-27 (estimating that up to half of sexual harassment claims spring from a failed relationship with a co-worker). But see Richards, *supra* note 20 (quoting author, attorney and professor, Dennis Powers, as saying that claims of sexual harassment extending from consensual relationships are not that common).

56. Gallagher, *supra* note 20.

Monica Lewinski scandal,⁵⁷ corporate America was seeking a "sign here" and "waive this" solution for their liability of sexual harassment.⁵⁸ Jeff Tanenbaum, a labor and employment attorney crafted maybe the first of these agreements meant to put employer's at ease when faced with an interoffice relationship.⁵⁹ The idea, furthered by the help of his partner Rob Carrol, turned into what is now referred to as the love contract or a consensual dating agreement.⁶⁰

Instead of banning dating and marriage in the work place, Mr. Tanenbaum's perspective was that employers should acknowledge that these relationships will exist and address them directly.⁶¹ The employer should include a few primary acknowledgments in the agreement signed by the dating employees: "that the relationship is voluntary and consensual; that they agree to abide by the employer's anti-harassment policy; that they will behave professionally and not allow the relationship to affect their work; and to avoid behavior that offends others at work."⁶² At the present time, the validity of the written agreement and its power to protect employers from vicarious liability has yet

57. See Hamilton, *supra* note 4 (awarding the Clinton/Lewinsky scandal the title of the greatest tale of workplace romance scandal). Former President Clinton was impeached in 1998 because he committed perjury by lying under oath about his affair with former intern Monica Lewinsky. Roger K. Lowe & Jonathan Riskind, *CLINTON IMPEACHED*, THE COLUMBUS DISPATCH (Ohio), Dec. 20, 1998, at 1A. The ordeal lasted for over a year and made Ms. Lewinsky a public figure. The national news was saturated with coverage of the impeachment and of Monica Lewinsky's personal life. Leo Standora, *Monica Feeling Sorry Full of Remorse Over Role Played in Nation's Ordeal*, DAILY NEWS (N.Y.), Feb. 25, 1999, at 7.

58. See L.M. Sixel, *Do Pacts Amount to Legal Condoms?*, THE HOUSTON CHRONICLE, May 1, 1998, at 1 (summarizing the events leading to the love contract). Jeff Tanenbaum, then of Littler Mendelson in California, was approached by a client who was afraid of sexual harassment liability after reading about a case in a newspaper. *Id.* Mr. Tanenbaum then prepared an agreement for the client to give to a couple that he employed. *Id.*

59. *Id.*; Telephone Interview with Robert K. Carrol, Partner, Nixon Peabody LLP (Sep. 29, 2005). Jeff Tanenbaum and Robert Carol were working at Littler Mendelson at the time the idea was formed. Now both gentlemen are partners at Nixon Peabody in San Francisco, California. *Id.* Littler Mendelson is known for labor and employment law and for its use of preventive tactics to fix problems before they begin. Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice And The Export of American Lawyering Styles To The Global Worksite*, 25 COMP. LAB. L. & POL'Y J. 257, 290 (2004).

60. *Id.*

61. See Andrea Kay, *Work and Play Can Mix, But With Difficulty*, GANNETT NEWS SERVICE, Feb. 6, 2004, § Workplace (mentioning the ineffectiveness of placing a ban on workplace dating).

62. *Id.* (quoting Jeff Tanenbaum's advice to employers who wish to implement a written agreement).

to be tested in court.⁶³ The only courtroom in which the love contract has been tested is the courtroom in the television series *Ally McBeal*.⁶⁴ As the issue waits in the court of public opinion, employers are left to wonder how courts will view consensual dating agreements.

III. THE LOVE-HATE RELATIONSHIP

A. Employers Need More Than Bonbons After A Bad Break-up

Having no specific assurance from any court that the love contract will protect them from vicarious liability, employers can only speculate as to the contract's effectiveness.⁶⁵ Many predict that the love contract will solve the problem of vicarious sexual harassment liability after the termination of a consensual relationship between employees.⁶⁶ Meanwhile, others believe the agreement's value is limited to evidence of consent⁶⁷ or, in the worst-case scenario, is merely a waste of time.⁶⁸ Either way, the

63. Gary Mathison, *Talk of the Nation*, (National Public Radio broadcast, Oct. 7, 1998), available at 1998 WL 2933872.

64. *Ally McBeal: Pyramids on the Nile* (Fox television broadcast, Feb. 15, 1999). *Ally McBeal* was a late 90's television show about a female attorney. Ironically, the episode ends with the star and television attorney, Ally, kissing a co-worker. *Id.* The scenario presenting the love contract was two employees fired for dating without first signing the love contract required by company policy. *Id.* The couple was awarded damages in the fictional scenario. *Id.*

65. See Mathiason, *supra* note 63 (noting that consensual dating agreements had not been legally challenged in 1998 or before); Chen & Sambur, *supra* note 28, at 167 (reporting that agreements had not been tested in court); Konkel, *supra* note 16 (questioning the value of love contracts).

66. See, e.g., Margaret Hammersley, *'Love Contract' Between Office Sweethearts May Protect Employers From Sexual Harassment Suits*, BUFFALO NEWS (N.Y.), Apr. 1, 1999, at 1D (presenting the viewpoint that the love contract may protect the employer from the contention that the employer allowed sexual harassment to occur between his agents); Nejat-Bina, *supra* note 31, at 345 (stating an attorney's opinion that firms perceive consensual dating agreements to be the best way to prevent harassment and employer liability).

67. See Geier, *supra* note 1 (promoting the viewpoint of an attorney who believes that the love contract is not enforceable but perhaps could be used as evidence of the intent of the parties).

68. See Paula Burkes Erickson, *Love Actually; Romance In The Workplace More Common, Still Risky*, THE DAILY OKLAHOMAN, July 15, 2004, at 1B (reporting the opinion of Labor attorney, Jim Priest, that love contracts are not reliable); Geier, *supra* note 1 (pointing out the view of one attorney that the love contract is an "inelegant" solution that he does not recommend); Michael P. Maslanka & Burton Brillhart, *Policies, Handbooks and Procedures: Boon or Bust?*, TEXAS LAWYER, Mar. 1, 2004, at 7 (doubting that any court will approve a waiver of a sexual harassment claim); see also Michael I. Modl, *Good Lovin' Gone Bad*, WIS. EMP. L. LETTER, Feb. 2004 (recommending removal of an employee over the signing of a love contract); Leigh Woosley, *Will Work for One*, TULSA WORLD (Okla.), Mar. 7, 2004, at D1 (quoting a Tulsa

purpose of the contract and how it will be treated will likely depend on the type of sexual harassment suit the employer is faced with.⁶⁹ With distinctions as to the burden of proving employer's notice and employee's welcomeness⁷⁰, quid pro quo and hostile work environment suits provide for somewhat separate analysis.

1. Will Cupid's Contract⁷¹ Save the Day in Quid Pro Quo and Tangible Employment Action Suits?

Since there is a tangible employment action in quid pro quo harassment,⁷² the potential for an employer to overcome a strict liability holding seems unlikely when viewed in light of consistent case law.⁷³ Nonetheless, others find the agreement prospectively useful to employers in quid pro quo suits as well as hostile work environment suits where tangible employment benefits are leveraged for sexual favors.⁷⁴

a. He loves me not

Employers may have a hard time finding a place to duck and cover when a tangible employment benefit is conditioned on sexual favors, especially when conditioned by someone in a managerial

attorney as saying that the love contracts are "not worth the paper they're printed on").

69. See Chen & Sambur, *supra* note 28, at 194 (concluding that the agreements do not negate both quid pro quo and hostile work environment claims).

70. See Mary Jo Shaney, *Perception of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1116-1120 (1986) (detailing the elements of notice and consent in light of employer liability).

71. The term "Cupid's contract" comes from several articles. Its use is synonymous with the terms consensual dating agreement and love contract. *The End of the Office Affair: Face Value*, ECONOMIST, Mar. 12, 2005, § Business; Stuart Derrick & Richard Edwards, *Office Sex — Rules of Engagement; Relationships in the Workplace Can Make for a Heady Cocktail*, GROWING BUS., Aug. 4, 2003, at 36. Other authors refer to the love contract as a "dating waiver." Nejat-Bina, *supra* note 31, at 325.

72. In most cases the tangible employment action consists of threats to take away jobs, employment benefits, or promotions. Dansky, *supra* note 42, at 438-39.

73. See, e.g., *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916-917 (7th Cir. 1996) (holding that a tangible benefit was withheld and quid pro quo sexual harassment was established); *Nichols v. Frank*, 42 F.3d 503, 508-512 (9th Cir. 1994) (counting employers as strictly liable where tangible employment benefits are used as a tool for sexual harassment).

74. See, e.g., Chen & Sambur, *supra* note 28, at 194 (concluding that consensual dating agreements will limit quid pro quo lawsuits); Randy Dottinga, *To Date, or Not To Date*, CHRISTIAN SCIENCE MONITOR, Feb. 14, 2005, at 13 (adopting the view of Littler Mendelson's Paula Champagne, that the point of the agreement is to protect the company, though she acknowledges that there are no guarantees).

position.⁷⁵ There is a belief that a love contract cannot withstand the general notion that where a supervisor or manager has committed sexual harassment, the negligence standard disappears and the employer falls into strict liability.⁷⁶ This has even been the case where the relationship began as a consensual affiliation.⁷⁷ Thus, in the instance of quid pro quo and tangible employment actions, some legal minds believe that the courts would find absolutely *no use* for the love contract.⁷⁸ Company policies on sexual harassment generally lack the ability to surmount the strict liability standard of tangible employment actions.⁷⁹ Critics of the consensual dating agreement feel that the love contract would fail in the same way.

One possibility some critics of the agreement might concede to is that the love contract may serve in a limited capacity as evidence of consent between the parties.⁸⁰ In that regard, it would

75. See Anthony Oncidi, *Employer Is Strictly Liable For Supervisor's Sexual Demands*, DAILY JOURNAL (Los Angeles), Sep. 10, 2003 (commenting on the broad Ninth Circuit view that a "tangible employment action" includes the threat of being fired even when the threat is not fulfilled, thereby withdrawing the opportunity for affirmative defense in any like situation); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1167 (9th Cir. 2003) (holding that when the victim has suffered an unlawful "tangible benefit action" the employer will be held liable). *Contra Sims v. Brown & Root Indus. Serv., Inc.* 889 F. Supp. 920, 925-26 (D. W.D. La. 1995), *aff'd with no opinion* 78 F.3d 581 (5th Cir. 1996), *cert. denied* 519 U.S. 817 (1996) (holding that in either a quid pro quo or hostile work environment claim the plaintiff should establish that the employer "knew or should have known" and did not take prompt action).

76. See Dansky, *supra* note 42, at 435-36 (pointing out that the courts, in most quid pro quo cases, do not even bother to evaluate the status of the employees, the policies of the employer, or the actions the employer took, before deciding for the employee).

77. See *Gaskins v. Vencor, Inc.*, IP 99-1122-C T/G, 2001 U.S. Dist. LEXIS 12785, at *60-*72 (D. Ind. Aug. 26, 2001) (denying defendant's motion for summary judgment and holding that the claimed acts could have happened after a consensual relationship, which would account for strict liability imputed to the employer).

78. Tom Kline, a partner at Orrick, Herrington & Sutcliffe's employment group noted his belief that the love contract "most likely will not be given the desired effect" and will be viewed as "coercive." Hodgin, *supra* note 7.

Robin Bond, an employment lawyer and blog author of workplace issues, believes that the agreements "aren't enforceable legal documents" because there is "no precedent." Richards, *supra* note 20.

79. See, e.g., *Ridge v. HCA Health Serv.*, No. 91-1280-PFK, 1992 U.S. Dist. LEXIS 18930, at *11 (D. Kan. Nov. 2, 1992) (preserving precedent holding quid pro quo liability is imputed to the employer even when the supervisor is acting against company policy); *Schroeder v. Schock*, No. 85-1710-K, 1986 U.S. Dist. LEXIS 15982, at *5 (D. Kan. Dec. 29, 1986) (supporting a quid pro quo claim against an employer despite the employers no-sexual-harassment policy).

80. See Konkel, *supra* note 16, at 1 (asserting that, at most, the love contract would be seen as mere evidence of consent and would not bar a lawsuit).

not protect employers from vicarious liability when *actual* sexual harassment occurs so much as it would merely aid in finding that there was *no* sexual harassment to begin with based on the fact that the actions were consensual.⁸¹

Likewise, critics note that it may prevent employees from filing any type of legitimate or non-legitimate sexual harassment suit because they are under the impression (perhaps falsely) that they waived the right to seek a remedy.⁸² In a sense, this would "protect" employers from vicarious liability, but it may have the negative effect of enabling managers and supervisors to sexually harass the employees they formerly dated, while using tangible employment benefits as a tool for harassment.⁸³ The "protection" in that scenario may actually have the effect of being more harmful than helpful in the end. Thus, many attorneys find that, where sexual harassment is found in quid pro quo or hostile environment-tangible employment benefit cases, the love contract may fail to positively serve the employer in court.⁸⁴

b. He loves me

On the other hand, depending on the context of the agreement,⁸⁵ employers may use the love contract to protect themselves from vicarious liability, or at least from the large monetary losses that could follow quid pro quo cases.⁸⁶ Though

81. Alison Davis, *Jilted By Your Employees — Should You Have a Love Contract?*, Krupin O'Brien LLC —Employment Law Update (March 14, 2002), <http://www.krupinobrien.com/enews/newsletter.php?sid=85> (last visited Jan. 17, 2007).

82. See Hamilton, *supra* note 4 (acknowledging that the act of merely signing a consensual agreement may avert employees from filing a suit).

83. See Elizabeth Cohen, *Now, Office Love Contracts; What Next?; Paranoid Employees-In-Lust Sign on the Dotted Line*, N.Y. POST, Feb. 17, 1998, § N.Y. Women, at 21 (citing the then President of the National Employment Lawyers Association as saying that the contract was created to avoid liability but does not avoid the problems of sexual harassment in the workplace).

84. While quid pro quo has a strict liability standard, actions of the employer can help mitigate damages. Therefore, it would still benefit the employer to appear to have assisted the victim of sexual harassment in one way or another. *Schmitz v. Bob Evans Farms*, 697 N.E.2d 1037, 1043 (Ohio App. 1997) (Karpinski, J., concurring).

85. Companies that use love contracts have individualized them to fit the needs of their employers and employees. Some include arbitration agreements while others note consent between the parties. Kuntz, *supra* note 2.

86. Employers are certainly apt to find a way to at least limit the cost of vicarious liability. In a recent Texas case, damages amounted to almost \$10,000,000 for a claim of sexual harassment. The jury verdict, which was affirmed, included an award of "\$347,036 for back pay, \$500,000 in front pay, \$1,000,000 for mental anguish, and \$8,000,000 in punitive damages" on a former employee's claims of both sexual harassment and intentional infliction of emotional distress. *Ford & Harrison LLP, Employee's Harassment Claim*

there is little to support the contention, some employers and their attorneys hope that the agreement could eliminate the employees' rights to sue the employer for sexual harassment in quid pro quo cases.⁸⁷ Many love contracts include a clause stating that the consensual relationship has nothing to do with the employer and is unrelated to what goes on at the company.⁸⁸ Therefore, if an employee sexually harasses another employee, an employer could argue that the contract serves as evidence that the employee was aware that he or she was acting outside of his capacity as an employee, thereby protecting the employer from complete liability under agency principles.⁸⁹

In a similar way, companies may use the consensual dating agreement to show that the discrimination itself was not based on workplace gender discrimination.⁹⁰ Instead, the company would use the agreement to show that the termination was based solely on animosity created by the former relationship. To disprove discrimination, one would have to show that the relationship, as evidenced by the agreement, failed and that *animosity* was the motivation for the tangible employment harassment, rather than *discrimination*.⁹¹ In this respect, the love contract is a strong tool to prevent the suit from going forward — basically holding the court to the theory that the discrimination was not sex based and therefore was not a violation of Title VII.⁹²

Alternatively, a love contract could be viewed as a contractual waiver where the consideration given is the ability to date other employees while keeping one's job.⁹³ Still, it is questionable

Costs Company Almost \$10,000,000, <http://www.fordharrison.com/fh/news/articles/01302002harassment.asp>.

87. See, e.g., Geier, *supra* note 1 (acknowledging one attorney's opinion that the agreements may not prevent preferential treatment and other workplace dating issues, but will help protect against sexual harassment cases).

88. See *supra* note 2 (providing examples of agreement provisions and language).

89. See generally Allan King, *Resist and Report: A Policy to Deter Quid Pro Quo Sexual Harassment*, 50 BAYLOR L. REV. 333, 336-340 (1998) (distinguishing the agency principles used to find strict liability in quid pro quo sexual harassment from other liability standards); Dansky, *supra* note 42 (making a case for the elimination of quid pro quo strict liability).

In regards to § 219 of the Restatement of the Law of Agency, the master is not liable when his servant acts outside of the scope. RESTATEMENT (SECOND) OF AGENCY § 219 (2000).

90. See *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 840 (D. Va. 2002) (finding a distinction between a harassment that is sexual and one that is sexually motivated).

91. Keith Halpern, *End of An Affair: What is An Employer To Do?*, Krupin O'Brien LLC — Employment Law Update (Jul. 5, 2002), <http://www.krupinobrien.com/enews/newsletter.php?pid=42> (last visited Jan. 17, 2007).

92. *Id.*

93. *Cf.* Cohen, *supra* note 83 (alleging that labor lawyers believe the motive of employers is to "strip female employees of their right to sue"). *Contra*

whether this is the type of thing that one can "contract" about.⁹⁴ There are also questions of public policy⁹⁵ and coercion⁹⁶ that loom over the contractual waiver analysis.

As to contractual waiver, proponents of the love contract could attempt to hang their hat on the fact that other claims enforced by the EEOC (for example, age discrimination) permit an employee to release companies from formal suit.⁹⁷ The rights are traded, in these cases, for severance packages, settlements, or other forms of compensation.⁹⁸ However, the consideration may not be as evident in the love contract.⁹⁹ The companies would be

Hodgin, *supra* note 7 (quoting an attorney who believes that there is no consideration for this agreement to be treated as a contract).

94. See E-mail from Professor Spanbauer, Professor of Law, The John Marshall Law School, to author (Oct. 24, 2005, 04:20 CST) (on file with author) (contemplating whether contract analysis is relevant because it appears more like a company's attempt to "protect itself by verifying what would become issues of fact for a jury to resolve in subsequent litigation").

It seems a bit cursory to try to sum up a relationship in the form of a contract. With so many varying outcomes it may be hard to contract this effectively, since there is no way to predict results. See Lindsay Fortado, *Workplace 'Love Contracts' on the Rise*, NAT'L L.J., Feb. 21, 2005, at 24 (reporting an admission of a partner in Kirkpatrick & Lockhart Nicholson Graham's Miami office that love contracts are "intrusive"); Woosley, *supra* note 68 (quoting a Tulsa attorney as saying you cannot "contract liability for your future behavior"). *Contra* Geier, *supra* note 1 (commenting on the fact that one firm does not use consensual dating agreements but recognizes "difficult situations" with communication).

95. Hodgin, *supra* note 7. *Contra* Rogers v. General Electric, 781 F.2d 452, 454 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.").

96. It is foreseeable that if an agreement were used in court the plaintiff could say that he or she was forced to sign it in the first place. This would be especially probable where one of the parties is in a higher position in the company. See Erickson, *supra* note 68 (discussing the ease with which one could claim that they were forced to sign a love contract).

97. *Glugover v. Coca Cola Bottling Co.*, 91 Civ. 6331 (PKL), 1994 U.S. Dist. LEXIS 14182, at *1 (S.D.N.Y. 1994). In *Glugover*, the plaintiff-employee brought a claim against her employer, Coca Cola, for discriminating against her based on gender, national origin, age, and for retaliation under Title VII and the Age Discrimination in Employment Act. *Id.* at *1 The plaintiff-employee had at one point signed a release and covenant not to sue Coca Cola. *Id.* Because the release was signed voluntarily and knowingly it was a complete bar to any recovery for the employee. *Id.* at *10.

98. *Taylor v. Camillus House Inc.*, 149 F. Supp. 2d 1377 (D. Fla. 2001). In *Taylor*, an employee was found to have voluntarily and knowingly waived a Title VII claim for the consideration of an \$8,500 settlement. *Id.* at 1380. The agreement was clear and he had plenty of time to review the agreement. *Id.*

99. *Cf.* Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986) (establishing that the consideration of eligibility for \$800 bonuses was sufficient for waiving a claim under Title VII age and sex discrimination, on or before the date of release). Consideration has to be more than what the employee is already entitled to. *Puentes v. UPS*, 86 F.3d 196, 198 (11th Cir. 1996).

trading a release from suit for the ability to date another at work without being relocated or fired. This is more than the employee is entitled to already and may thereby suffice as consideration.¹⁰⁰ Moreover, one virtue of the agreement is that both parties have the potential to assist in the terms of the agreement.¹⁰¹ In cases where releases were discussed, it was necessary that the employee had a meaningful chance to review the agreement and that it was made voluntarily.¹⁰² Furthermore, in many cases the employee had to have a thorough understanding of the legal ramifications of releasing his right to sue.¹⁰³ If courts could find a parallel between these waivers and the love contract, the agreement may act as a shield against employer liability.

While the main objective of a love contract is to prevent any legal responsibility, when faced with strict liability standards, most employers would likely settle on using the love contract as a way to lessen costs.¹⁰⁴ Since in quid pro quo claims the employer has failed to prevent liability by creating a sexual harassment policy, the employer can attempt to limit liability by ensuring that dating employees know the company policies and adhere to them before and after the relationship.¹⁰⁵ The love contract could be an important tool in ensuring that the employees understand behavior guidelines for the work environment. For example, many consensual dating agreements have a clause prohibiting the subordinate in the relationship from reporting to the supervisor

100. *Puentes*, 86 F.3d 196, 198; *Beadle v. City of Tampa Bay*, 42 F.3d 633, 635 (11th Cir. 1995).

101. *Puentes*, 86 F.3d at 199. In *Puentes*, the court discussed the fact that *Puentes* lacked a role in deciding agreement terms as a shortcoming of the release. *Id.*

102. See *Bledsoe v. Palm Beach Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998). In *Bledsoe*, the plaintiff and the plaintiff's employer reached a settlement during which the plaintiff signed a release of the company from all further liability. *Id.* at 818. Plaintiff later pursued a claim under Title II of the American with Disabilities Act. *Id.* The district court entered summary judgment for the employer, but was overturned. *Id.* at 819, 825. However, the court here acknowledge that a Title VII claim can be waived as a part of a "knowing and voluntary" settlement. *Id.* at 819.

103. *Puentes*, 86 F.3d at 199. Plaintiff was unable to discuss the release with an attorney because he was only given 24 hours to review it. *Id.* This resulted in a substantial question of material fact and summary judgment for the employer was overturned. *Id.*

104. See *supra* notes 53, 88 and accompanying text (elaborating on the possible costs to employers when sexual harassment suit occurs).

105. The love contract usually includes an affirmation that the parties read, know, or understand the company sexual harassment policy. See *supra* note 2. The benefit here is that if employees are aware of consensual dating agreements they will look at the company policy before it is too late. *Melody Finnemore, Romance at Work: With Care, Mixing Personal and Business Lives Can Succeed*, 60 OR. ST. B. BULL. 15, 16-17 (1999).

she is dating.¹⁰⁶ Meanwhile, other consensual dating agreements are only furnished for employee-employee relationships, refusing to permit supervisor-subordinate relations.¹⁰⁷ Either way, if employees go into the relationship with the understanding that benefits at work cannot be conditioned on sexual favors, that knowledge could be equated with the result of less sexual harassment before a court even has to decide how to treat the agreement.¹⁰⁸

Taking that view one step further, the agreement has been viewed by some assessors as a contract binding the party to proper behavior and procedure.¹⁰⁹ In this respect, if one of the parties to the couple demotes or fires the other party after the break-up, it would be considered a breach of the contract and the company could hold the breaching party liable.¹¹⁰ In this way, a love contract does not prevent liability of the employer so much as it allows an alternate way to recover losses.

Alternatively, the love contract could be viewed as a contract only as to its forum waiver, provided the attorney has included an arbitration agreement.¹¹¹ Although this may render the rest of the agreement unnecessary, an employer that requires dating parties to sign the agreement can be sure that they will not have to attend lengthy and costly trial proceedings.¹¹² An employee can, in fact, sign an agreement that he or she will arbitrate if a claim arises.¹¹³

106. Kuntz, *supra* note 2.

107. *Id.*

108. See generally Nancy Pritikin, *No Safety From Sex Harassment Claims But Companies Can Help Themselves With Good Policies, Training* (1998), in CORP. LEGAL TIMES, Sept. 1998, at 36 (hosting a table discussion on the benefits and shortcomings of training for sexual harassment).

109. See Carol Sanger, *Consensual Sex and The Limits of Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 77, 87-9 (Catharine A. MacKinnon & Reva B. Siegel ed., 2004).

110. *Id.*

111. See Cohen, *supra* note 83 (discussing the agreement through the comments of attorney Mary Anne Seday who believes the agreement is used as a way to sign into mandatory arbitration).

112. AMERICAN ARBITRATION ASSOCIATION, FAIR PLAY: PERSPECTIVES ON CONSUMER AND EMPLOYMENT ARBITRATION, (Jan. 2003), available at <http://www.adr.org/si.asp?id=1843>. Studies done by the association and other external sources show that litigation in court could take at least two years, while arbitration typically takes less than eight or nine months. *Id.* at 3. The studies also show that arbitration saves the employer money and allows for both parties to be more fairly represented. *Id.* at 29.

113. See *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004). In *Cooper* the court found that the Plaintiff did have to submit to arbitration for her Title VII claim. *Id.* at 505. Despite the arguments that: (1) it was a contract of adhesion; (2) she was unaware she was signing away her rights; and (3) Title VII claims "belong" in court, she was still held to binding arbitration unless the costs calculated on remand were found to be prohibitive. *Id.* at 513.

Courts could validly support upholding the consensual dating agreement as an agreement to arbitrate.¹¹⁴ The only inadequacy is that if the employee files with the EEOC, instead of a private suit, the EEOC has the right to bring that claim in whatever forum it chooses, thereby circumventing the arbitration clause altogether.¹¹⁵

Looking at the big picture, it is possible that attorneys, employers, and (potentially) courts will face a greater challenge determining the value of love contracts in quid pro quo cases rather than in hostile environment cases.¹¹⁶ Still, employers, already offered the protection of an affirmative defense in hostile environment cases, would rather the love contract be “the solution” in quid pro quo cases.¹¹⁷

Since quid pro quo and hostile work environment claims are often brought simultaneously, it would not be surprising if the first court to interpret the use of the consensual dating agreements had to do so in the context of both types of sexual harassment.¹¹⁸ It is possible that views on the interpretation of the love contract in quid pro quo scenarios would also apply in hostile work environment claims (where no tangible employment action exists).¹¹⁹ Nevertheless, the love contract, in the context of hostile work environment claims, presents its own uncertainty.

114. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (validating a compelled arbitration agreement); see also *EEOC v. Waffle House Inc.*, 534 U.S. 279, 284 (2002) (stating that federal policy does favor “private” agreements to arbitrate).

115. *Waffle House Inc.*, 534 U.S. at 291. When the EEOC brings an enforcement action against an employer they are not limited by any private arbitration agreement made by the employee and employer — they can bring the action in court. *Id.* at 297-98.

116. See generally *Nejat-Bina*, *supra* note 31 (discussing the effect of the unwelcomeness element in a hostile work environment claim and the consequences of consensual dating agreements).

117. See *id.* at 358 (asserting that the more stringent the standard of liability the more drastic the measure the employer will take).

118. See Steven M. Warshawsky, *Ellerth and Faragher: Towards Strict Liability Under Title VII for Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMP. L. 303, 306-07 (addressing the distinction between the two types of sexual harassment, and noting the probable limited utility of this distinction recognized by Justice Kennedy for purposes of determining an employer’s vicarious liability).

119. See Misty Gill, *The Changed Face Of Liability For Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in Faragher v. City Of Boca Raton and Burlington Industries, Inc. v. Ellerth*, 32 CREIGHTON L. REV. 1651, 1652 (1999) (noting that the Courts’ decisions find no bearing on the difference between quid pro quo and hostile work environment when deciding liability).

2. Will Cupid's Contract Rescue Employers from Costly Hostile Work Environment Claims?

The differences between quid pro quo and hostile work environment claims, such as the requirement of proving unwelcomeness,¹²⁰ the lack of tangible employment action,¹²¹ and the option of using the affirmative defense,¹²² leave attorneys wondering as to the amount of protection the love contract will provide.

a. She Loves Me

At the time the two parties sign the agreement, they are consenting to the relationship in writing.¹²³ Does this mean they forfeit the opportunity to claim the comments and actions of their partner are unwelcome? This may be so during the relationship but it might be difficult to claim after the break-up. Case law concedes that once a consensual relationship ends, actions previously consented to can later be considered sexual harassment.¹²⁴ Still, case law has never addressed the issue when the consent was placed in writing, dated, and signed.¹²⁵ Employers hope that the contractual establishment of consent prevents some liability by refuting unwelcomeness.¹²⁶ However, since sexual

120. See *supra* notes 40, 47 and accompanying text.

121. *Id.*

122. *Id.*

123. Kuntz, *supra* note 2.

124. See Sixel, *supra* note 58 (articulating the problem of workplace relationships, that consensual can turn into non-consensual, therein creating issues of sexual harassment); Fortado, *supra* note 94 (reporting that many problems come from relationships that begin as consensual and then end).

125. See Gary Kramer, *Limited License to Fish Off the Company Pier: Toward Express Employer Policies On Supervisor-Subordinate Fraternization*, 22 W. NEW ENG. L. REV. 77, 138-139 (2000) (pronouncing the fact that the love contract remains untested in court).

Kramer's article also advances the theory that a jury might be less sympathetic to the employee in a sexual harassment suit if they signed a love contract. The effects of which would lead to less damages for the employee or perhaps even a finding of welcomeness. *Id.*

126. In Title VII cases the plaintiff bares the burden of showing welcomeness along with the other requirements to prove a hostile work environment claim. Nejat-Bina, *supra* note 31, at 130. When the behavior becomes unwelcome, the agreement will hopefully lead the employees to be more assertive and communicative of the unwelcomeness. Often times, a part of the consensual dating agreement will be that the party report to the employer as soon as the actions become unwelcome. Kuntz, *supra* note 2. The EEOC explains the importance of the role of the victim to establish when the conduct becomes unwelcome, especially when there is a prior consensual agreement. Policy Guidance, *supra* note 30. Furthermore, the courts may really appreciate the fact that there is a tool to assist them in discerning the challenging requirement of being welcome, since courts have found it challenging to draw the line between "invited", "un-invited-but-welcome", "offensive but tolerated,"

advances are already presumed to be welcome, the love contract is evidence of something that is already presumed, which may not prove extremely helpful.¹²⁷

Once it is established that no tangible employment action exists, the employer can step in and assert their affirmative defense.¹²⁸ The love contract could certainly be viewed by courts as the key to the affirmative defense. The employer would hope that one of two things happen. First, that the agreement is provided as a “preventative measure” and the court finds this to be enough to qualify as “reasonable.”¹²⁹ Second, that the failure to sign a consensual dating agreement, when one is provided as part of the policy, is a failure to take advantage of the “corrective measures.”¹³⁰ The challenge is where other measures exist in conjunction with the consensual dating agreement and the employees take advantage of those measures.¹³¹

The Supreme Court’s recent decision to expand the use of the affirmative defense, when there is a constructive discharge claim,¹³² may also be good news for those who view ‘love contracts’

and “flatly rejected.” *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring).

127. Since the conduct is presumed to be “welcomed” the employer is not burdened to prove that it was welcomed by using the love contract. Instead, the plaintiff must show that it is unwelcomed conduct. If the plaintiff succeeds, the love contract might then be a defense to her proof. *Nejet-Bina*, *supra* note 31, at 330.

128. *See supra* note 43-47 and accompanying text.

129. In *Williams v. Mo. Dep’t. of Mental Health*, the court found for the defendant, Department of Mental Health, because they had taken “reasonable” steps toward prevention, while plaintiff had failed to take advantage of these steps. 407 F.3d 972, 976-79 (8th Cir. 2005). The steps taken by the employer equated to allowing victims to skip the “chain of command” and report harassment to a non-offending supervisor. *Id.* at 976. The employer also passed along the zero tolerance and non-retaliation sexual harassment policy to all employees during new employee orientation. *Id.* at 977.

130. *Pickett v. Oleinik*, 209 F. Supp. 2d 999, 1007 (D.S.D. 2001). The employee in this case failed to report her Title VII claim until months later, despite the fact that the employer had procedures in place for reporting Title VII disputes. *Id.* 1005. The court held that she was unreasonable in her failure to comply with the policies put in place. *Id.* at 1007. Thus, the affirmative defense set out by the Supreme Court was established in *Pickett*.

131. For clarification, this could occur where the employer has an extensive sexual harassment and employee dating policy with a complaint procedure. The question posed is what happens when they properly file a complaint after there was sexual harassment, but a prior consensual relationship is exposed and the parties never signed a love contract. Were the parties “reasonable” in not taking a preventative step, even though they took a remedial step?

132. *Suders*, 542 U.S. at 140-41. The Supreme Court used the logic of the First Circuit to settle the discrepancy between the lower courts, in cases where there is a hostile work environment claim laced with a constructive discharge claim. *Id.* at 150.

as part of the affirmative defense. If the case begins a trend towards strengthening the requirements to constitute a "tangible employment action."¹³³ the courts may be more willing to look positively at steps the employers take in preventing the problem — namely the love contract — but negatively at the steps the employee fails to take.¹³⁴

b. She Loves Me Not

In the past, specific sexual harassment policies and complaint procedures have sufficed to satisfy the affirmative defense. Many are saying then, "why bother" with the love contract?¹³⁵ Although consensual dating poses a specific problem in the workplace, adversaries contest that the love contract poses problems as well, making it not worth the risk.¹³⁶ As to the affirmative defense, critics argue that the love contract is not enough to stand alone as the *sole* "reasonable" measure taken by the employer.¹³⁷ Under the second requirement of the affirmative defense, adversaries note that taking other steps, while failing to sign the agreement, would be enough to establish the affirmative defense, so the agreement is useless.¹³⁸ Additionally, while it sets forth a preventative measure, it lacks a remedial action on the part of the employer, thereby not quite fulfilling the affirmative defense.¹³⁹

133. *Id.* The *Suders* Court cited *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003) to find that the acts of the supervisor leading to the constructive discharge were "unofficial and involved no direct exercise of company authority" and was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed", thus finding no tangible employment action. *Id.*

134. *Suders* was remanded to the lower court allowing them to review the affirmative defense including whether both the employer and the employee took the correct steps in preventing the issue. However, before the appeal, the District Court looked negatively on the fact that proper time for response was not allotted to the defense to cure the problem. *Id.* at 138.

135. See Perkins Coie, *Don't Let Love Become a Battlefield When Cupid Strikes at Work*, 2 OR. EMPL. L. LETTER 2, Oct. 2005 (standing on the notion that love contracts are a poor safeguard because coercive measures could have been avoided).

136. See generally Geier, *supra* note 1 (listing practical and legal issues that attorneys have with the love contract).

137. Actually signing the agreement might bring about the need for other measures, such as monitoring the relationship and questioning the parties as to its continued existence, in conjunction with the love contract to make the measure reasonable. Hodgin, *supra* note 7.

138. Other cases that establish an affirmative defense appear to offer a solid complaint procedure as well as other policies for sexual harassment. Kramer, *supra* note 125, at 78. This is not to say that most companies with love contracts do not use them in conjunction with extensive sexual harassment policies and complaint procedures, just to say that when those are intact a love contract seems unnecessary or insufficient.

139. See Kuntz, *supra* note 2 (failing to show a remedial measure in the contract wording).

Others contend that the consensual dating agreement actually induces a hostile work environment.¹⁴⁰ To some extent it does endorse relationships in the workplace and can create favoritism amongst employees.¹⁴¹ Certainly, there is some support for the theory that it is no better, and maybe that it is worse than following a general sexual harassment policy.¹⁴²

B. Even Cupid Can Misfire

Adversaries of the consensual dating agreement take aim at the agreements for reasons that apply across the board to both quid pro quo and hostile work environment claims. They believe that courts will fail to look positively upon the agreements no matter the type of sexual harassment because, besides being ineffective, they pose many other complicated problems.

1. Legalities

Companies hoping to use the love contract may have to keep in mind legal issues besides sexual harassment.¹⁴³ One such issue is invasion of privacy.¹⁴⁴ Invasion of privacy can arise in at least two different ways in the context of a sexual harassment claim.

140. See Telephone Interview with Robert K. Carrol, Partner, Nixon Peabody LLP (Oct. 17, 2005) (saying that he could see other attorneys making this argument); see also Shelia Anne Feeney, *Love Contracts*, WORKFORCE MGMT., Feb. 1, 2004, at 40 ("That's harassment right there.").

141. Another problem that employers have to consider not covered within the confines of the love contract is third party suit for the hostile work environment created by office relationships. California recently held that employees could sue the company under Title VII when a prison warden who showed favoritism to those he slept with created a hostile work environment, even though neither of the employees were involved in the affairs but still had standing because the favoritism was reflected in giving others benefits they did not receive. *Miller v. Dep't of Corrections*, 115 P.3d 77, 91 (Cal. 2005); see also LRP Publications, *Establish Clear Office Dating Policies to Avert Charges Of Favorable Treatment*, 8 HR ON CAMPUS 9 (Sep. 1, 2005) (analyzing *Miller*).

142. See Michael P. Maslanka & Burton D. Brillhart, *Policies, Handbooks and Procedures: Boon or Bust?*, TEX. LAWYER, Mar. 1, 2004, at 7 (recommending instead that employers adopt a comprehensive policy, covering any and all possible romantic relationships); Hamilton, *supra* note 4 ("It is unlikely, however, that a love contract will protect you any better than a well-enforced sexual harassment policy.").

143. See BARBARA LINDEMANN & DAVID D. KADUE, PRIMER ON SEXUAL HARASSMENT 119-124 (1992) (listing several actions in tort that may occur simultaneously with sexual harassment, including defamation, intentional infliction of emotional distress, and invasion of privacy).

144. *Id.* This action can be derived from implications in the Constitution in cases of public employers, or from tort and statute in the case of private employers. Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 COLUM. J.L. & SOC. PROBS. 435, 444-45 (1993) (discussing privacy concerns related to protection of employers from liability).

First, the harassed could allege that the harasser invaded their privacy by discussing intimate details. The harasser could then attempt to impute the liability to the employer.¹⁴⁵ Second, the employee who signs the love contract could claim that the company has invaded his or her right to have a private relationship without company interference.¹⁴⁶

As to invasion of privacy by the harasser, the love contract may actually negate a claim of this nature.¹⁴⁷ While one might claim that the harasser is invading their privacy by discussing private information in the workplace,¹⁴⁸ when employee's consents to sexual advances, they waive their right to an invasion of privacy claim.¹⁴⁹ The love contract would show that there was consent at some point in the relationship.

When addressing the second instance, where the employee claims that the employer is invading privacy by requesting a consensual relationship agreement, employers will be only slightly concerned. The employer is provided the right to maintain a professional and well-organized work environment.¹⁵⁰ If the employer can justify the signing of a love contract by proving that they are merely attempting to control the work environment then they will probably be justified in so acting.¹⁵¹ However, employers can cross the line. Employees do have the right to retain

145. LINDEMANN & KADUE, *supra* note 143, at 122.

146. *Id.* The book actually supplies three ways for invasion of privacy to occur and categorizes them by: (1) intrusion upon seclusion; (2) false light publicity; and (3) public disclosure of private facts. *Id.* The two categories mentioned in the text are not directly the same, but are derived from these categories.

147. *See id.* (suggesting that if there is consent a right to privacy claim is waived).

148. *See id.* (noting examples of unwanted touching and questions of sexual relations as invasions of privacy).

149. *See Morash v. Anne Arundel County*, CIVIL NO. JFM-04-2260, 2004 U.S. Dist. LEXIS 21688 (D. Md. Oct. 28, 2004) (finding no invasion of privacy because no one invaded her private space). The argument is that where one is consenting private space is not invaded. *See also Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872, 884 (D. Ga. 1983) (stating a physical intrusion is necessary to constitute an invasion of privacy).

150. Marisa Anne Pagnattaro, *What Do You Do When You Are Not At Work?: Limiting The Use of Off-Duty Conduct As The Basis For Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 677 (2004) (suggesting that case law supports the premise that an employer's need to know outweighs an employee's right to privacy).

151. *Id.* The Pagnattaro article further states the business-related and liability prevention reasons for the need-to-know policy regarding private matters pertaining to their employees. *Id.* In the case of consensual relationships both a business and liability reason exists. The business reason for employer knowledge is to make sure that the couple conducts themselves with professionalism and without letting the relationship distract from job responsibilities, and the liability reason is to prevent sexual harassment. *Id.*

relationships and associations outside of the workplace.¹⁵² Employers avoid problems by treading lightly, suggesting that love contracts will be required from the onset,¹⁵³ but trying to refrain from firing based solely on relationships that exist outside of work.¹⁵⁴

In a non-legal sense, employees are likely to consider their relationships to be private. However, employers have some rights to invade for the sake of order in the workplace. Whether they choose to, and risk employees feeling invaded, is a question of interest balancing.¹⁵⁵

2. Practicalities

As a practical matter, there is concern about the effect on workplace relations. The love contracts are likely to create a bad rapport among employees by forcing them to “okay” their private matters with their employer. To require employees to sign a love contract is a trade off to possibly upsetting a copasetic, functioning workplace.¹⁵⁶

Another practical concern is that some may not actually be willing to disclose a relationship and sign the agreement.¹⁵⁷ This is especially so in high-risk areas, such as extra-marital affairs. If the agreement cannot protect against these potentially high-risk areas, it may be difficult to recognize a significant value in the agreement. In the same way, is also difficult for the employee to

152. See, e.g., Finnemore, *supra* note 105, at 17 (recognizing the right of employees to have lives outside of work); Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off The Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 81-94 (1997) (addressing employer interference with rights to associate).

153. See Hallinan, *supra* note 144, at 444 (revealing that employers who create exceptions to employee expectations of privacy at the onset are further permitted to invade that aspect of employees lives).

154. See, e.g., N.Y. LAB. LAW § 201 (2005) (stating that many state statutes provided protection for employees so that they may not be fired for circumstances existing outside of the workplace, such as recreational activities).

155. See Otis Grant, *Law and Perceptions: Internal Investigations and Employee Privacy Interest in Public Sector Employment*, 71 UMKC L. REV. 1, 2, 20 (2002) (discussing the balance between employee privacy and employer's needs).

156. See Geier, *supra* note 1 (describing the feelings of an employee as “upset” because management was “sticking their nose” in her relationship).

157. There are at least four reasons that one may not want to disclose a relationship to an employer, for example, in cases where: (1) they do not want the employer to know of their sexual preference in the case of a same-sex couple; (2) the work relationship is an extramarital affair; (3) at the onset of a relationship it is hard to foresee that it will end in a sexual harassment suit; and (4) fear of being forced to quit, move or change positions. Nejat-Bina, *supra* note 31, at 355; Skoler, Abbott & Presser, *True Test of Love: Employee Chooses Girlfriend Over Job*, 6 MASS. EMPL. L. LETTER 2 (1995).

decide at what point the agreement needs to be signed.¹⁵⁸ It certainly is not an astoundingly romantic way to begin a first date.¹⁵⁹

IV. THE BEGINGING OF A BEAUTIFUL RELATIONSHIP

The original 1990's hype over love contracts¹⁶⁰ may have fizzled, but the flames are being reignited by recent scandalous affairs on the front pages of corporate America.¹⁶¹ Now more than ever, employers have no choice but to get into the business of those in their business.¹⁶² Sexual harassment claims are continuing with no end in sight,¹⁶³ and it is likely that a judge will soon have a love contract on his or her desk. It is difficult to say exactly how the judge will view this creature of the modern sexual harassment domain, but it is clear that employers have to keep moving in the direction of protecting themselves when it comes to liability for employees' actions.¹⁶⁴

A. *The Courtship Has Sailed*

There is no doubt that women and men alike should be able to put in a full day's work without feeling violated. However, punishing the employer for the employee's actions is not likely to put an end to this perpetual problem, especially in cases where the employer flatly rebuffs sexual harassment from the beginning.¹⁶⁵ Reevaluation of the sexual harassment problem may benefit all

158. Sixel, *supra* note 58.

159. *See id.* (reminding those who are using the contract to wait until the relationship at least advances past the first date).

160. Telephone Interview with Robert K. Carrol, *supra* note 59. Mr. Carrol believed that the love contract was most talked about in the late 90's, though he says there is always interest in them around Valentine's Day.

161. L.M. Sixel, *Looking for Love At Work? Better Play The Rules: While Some Have Found Happiness, Boeing CEO's Career Suffers an Untimely Landing*, THE HOUSTON CHRON., Mar. 8, 2005, § A (Star Edition), at 1. The married CEO of Boeing was fired after his interoffice affair was exposed. *Id.* Sixel's article suggests love contracts for situations such as this, which could later give rise to sexual harassment. *Id.*

162. *See generally* Dean, *supra* note 9, at 1054-58 (covering the justifications employers have for monitoring relationships between employees).

163. *See* The U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1992 - FY 2005*, <http://www.eeoc.gov/stats/harass.html> (last visited Jan. 17, 2007) (totaling the number of sexual harassment charges reported each year to the EEOC and local Fair Employment Practices agencies, including the 2004 total of 13,136).

164. *See* Richards, *supra* note 5 (communicating a love contract recipient's thought that one must attempt to protect his business from litigation).

165. *See* Mark McLaughlin Hager, *Harassment As a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 389-425, 438 (1998) (concluding that Title VII does not deter harassment well and that it would be better to simply impose tort liability on the perpetrator and leave the employer out of it).

parties involved.¹⁶⁶ Although courts have put their foot down when it comes to tangible work environment sexual harassment suits,¹⁶⁷ they might want to reconsider holding the employer strictly liable.¹⁶⁸ Hopefully a love contract case can invoke a reevaluation of strict liability against the employer. Perhaps then, courts would allow employees an affirmative defense in all cases.¹⁶⁹

Arming the employers with an affirmative defense regardless of whether there is a tangible employment action would have positive implications for the love contract.¹⁷⁰ The courts could more easily find the love contract to be a reasonable preventative measure where an affirmative defense is allowed, as long as it is in conjunction with a firm sexual harassment policy.¹⁷¹ As for critics who say that a sexual harassment policy is enough without the agreement, they fail to recognize the unique scenario that the workplace consensual relationship presents.¹⁷² The love contract, though a bit invasive, is a wonderful tool that the courts will unquestionably appreciate when evaluating such an affirmative defense.¹⁷³

166. *Id.*

167. See Steven M. Warshawsky, *Ellerth and Faragher: Towards Strict Employer Liability Under Title VII For Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMP. L. 303, 307-08 (1999) (solidifying the fact that courts have generally held quid pro quo to a strict liability standard).

168. See Dansky, *supra* note 42, at 455-69 (proposing a negligence standard for quid pro quo rather than a strict liability standard). See generally King, *supra* note 89 (suggesting a policy that would assist employers in curtailing quid pro quo liability and wisely noting that quid pro quo fails to align the employer and the harassed against the harasser).

169. The *Ellerth/Faragher* affirmative defense is a way of encouraging employers to create worthy sexual harassment policies and to get involved in prevention and discipline. The EEOC and Title VII are supposed advocates for the employer taking steps to prevent sexual harassment. Misty Gill, *The Changed Face Of Liability For Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in Faragher v. City Of Boca Raton and Burlington Industries, Inc. v. Ellerth*, 32 CREIGHTON L. REV. 1651, 1715-16 (1999). Extending this notion could hardly be frowned upon.

170. See *supra* notes 128-34 and accompanying text (explaining how courts might view the love contract as part of the employer's affirmative defense).

171. Merely having a harassment policy is not enough without acting on it. PETER C. REID, *THE EMPLOYER'S GUIDE TO AVOIDING JOB-BIAS LITIGATION; HOW TO PINPOINT AND REMEDY DISCRIMINATION BEFORE YOU'RE SUED* 40, 216 (1986). In saying that an employer should have a sexual harassment policy it is also intended to mean that the employer follow through with the policy. Taking actions under the policy and using the love contract as a tool to advise employees of the policy is a possible way to show that the employer is making a commitment to preventing the problem, which is sensible for the employer. *Id.* at 218.

172. Sixel, *supra* note 161 (reviewing issues that arise from consensual relationships).

173. See *supra* notes 128-34 and accompanying text (noting how love contracts fit into affirmative defenses).

A problematic hypothetical case concerning the affirmative defense exists where *both* the employer and employee took all the reasonable steps to satisfy the affirmative defense, including signing the love contract. In such scenarios, the employer will be left back at square one, almost certainly liable to a rebutted affirmative defense.¹⁷⁴ To prevent liability in these cases the employer should include in the love contract language showing that actions of harassment would be action outside of one's employment. The employer should then be permitted to defeat the agency principle with an opportunity to prove two additional defense elements: (1) that while acting in sexual harassment the harasser signed and understood that he was *not an agent* for the employer because he was acting outside the scope of employment; or alternatively, (2) that whether or not the harasser was acting within the scope of employment, the employer failed to act negligently.¹⁷⁵

By using the love contract to set out the premise that an employee acts outside of the scope of employment if he sexually harasses another employee, the employer has then proved, by enforcing the love contract, that the employee was not an agent and the company would then avoid liability.¹⁷⁶ The love contract is an excellent means of proof to show that the employer warned the employee that acting on his feelings of love or lust is outside the scope of his work.¹⁷⁷ Having shown this, the employer should be held liable, at most, for nominal (and not compensatory) damages when there is a tangible employment action.¹⁷⁸

With policies intact and remedial measures abounding, employers are doing everything right and still paying the price in cases where there is a tangible employment action.¹⁷⁹ In the meantime, as the love contract stands now, courts may find little

174. See *supra* note 47 and accompanying text (setting forth the affirmative defense).

175. See *infra* note 176 and accompanying text.

176. Though no well-known case has dared to present this logic post-*Ellerth/Faragher*, the logic presented that predates those cases is not necessarily unsound, just not adopted. *Sims v. Brown & Root Indus. Servs.*, 889 F. Supp. 920, 926-28 (W.D. La. 1995), *cert denied* 519 U.S. 817 (1996); *Indest v. Freeman Decorating*, Civil Action No. 95-16 § N, 1996 U.S. Dist. LEXIS 1684, at *6-*9 (E.D. La. 1996).

177. See Kuntz, *supra* note 2 (elaborating on the contents of an agreement including the employer's note to the employee that sexual harassment is not permitted).

178. See King, *supra* note 89, at 360 (proposing a different approach to reporting relationships that would negate all but a nominal damage for the employer).

179. See RAYMOND F. GREGORY, *WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY* 156 (2003) (exploring the concept of a tangible employment action).

use for them in quid pro quo cases.¹⁸⁰ Courts are likely to view it as a showing of consent when there is a question as to whether or not sexual harassment occurred at all.¹⁸¹ But, courts will likely find it difficult to decide that an actual waiver of the claim against the employer exists in the agreement.¹⁸² At a minimum, courts should uphold arbitration clauses within love contracts, allowing for some relief for the employer.¹⁸³

B. An A-fair Fix to Remember

Employers want to solve the sexual harassment problem, that much is obvious. Of course, it is not just about saving money and staying out of court. Employers want sexual harassment to stop for numerous benevolent reasons.¹⁸⁴ To some end, the love contract is a means to help them achieve this goal. However, as it exists right now it is not a sure fire way to protect the employer from vicarious liability for the actions of their employees. A few tweaks to the agreement, however, might make it more fair and favorable in court.

First, the key is to avoid the harsh standard of strict liability.¹⁸⁵ Therefore, the love contract should always take away the tangible rights of the dating employees. They should not be allowed to “hire, fire, demote or take benefits away from each other.”¹⁸⁶ Instead, the contract should set up an exterior hierarchy,

180. See *supra* notes 72-79 and accompanying text (posing the possibility that love contracts are a hard sell as a measure of protection in quid pro quo claims).

181. See *supra* notes 80-81 and accompanying text (valuing the idea that written consent may be used as evidence).

182. See *supra* notes 93-103 and accompanying text (analyzing the idea of the contract as a waiver); see also Maslanka, *supra* note 142 (“We doubt if any court will approve a future waiver of a sexual harassment claim.”).

183. The benefit to courts upholding at least the arbitration clause is that arbitrators are less likely to find sexual harassment where a consensual relationship once existed. ALBA CONTE, 1 SEXUAL HARASSMENT IN THE WORKPLACE § 11.2[G], at 731 (Panel Publishers 2000) (1990).

184. Statistically employers counter many issues when they eradicate sexual harassment in the workplace. Fifteen percent of women quit their jobs because of harassment at work. WILLIAM PETROCELLI & BARBARA KATE REPA, SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT 4/4 (Ralph Warner & Marcia Stewart eds., Nolo Press 3d ed. 1998). Sexual harassment causes at least a ten percent drop in productivity to victims and a two percent drop in productivity to those who know of the harassment but are not actually the victim. *Id.* Sexual harassment can induce low morale, low productivity, and the overall loss of qualified and valued employees. *Id.*

185. See CONTE, *supra* note 183, at § 2.04[B][3] (addressing the extreme of the strict liability standard imposed on employers in sexual harassment suits).

186. See *id.* at § 3.04[D][2] (enumerating examples of tangible employment actions).

while leaving the employees' current positions intact.¹⁸⁷ If a genuine, non-discriminatory issue exists that may be legitimate grounds for removal or demotion, the superior should report it to someone above him or parallel in position and that person should then evaluate the situation and take the action, thereby taking the tangible employment rights from the dating employee.¹⁸⁸ Thus, CEO's or presidents should be forced, by language inserted in the love contract, to relinquish to a supervisor below them, the right to hire or fire the person they are dating.¹⁸⁹

Second, to ensure that only the harasser is punished for his inappropriate actions, the employer should include an indemnification clause.¹⁹⁰ This clause would state that in the event that both are held liable, the employee would indemnify the employer for any amount that the employer had to pay out because of the employee's actions.¹⁹¹ The purpose of this would be two-fold. First, it would discourage the employee from engaging in sexual harassment for fear of the cost, which would be a far better deterrent for the harasser than the fear that his employer will be sued. Second, it would allow the company to recover losses for an action it never condoned in the first place.

187. See Stephanie Davis, *All Work and No Play: How Much Should an Employer Control Love Lives?*, EMPLOYMENT SOURCE NEWSLETTER, Sept. 27, 2005, available at <http://www.epexperts.com/print.php?sid=2016> (entertaining the idea of using different policies for employee dating situations). This would be an alternative to the policy that many companies take, which is to move one of the dating employees to another location or department. Such a relocation policy poses particular problems for small businesses. Carol Elliott, *Mixing Business, Pleasure; Workplace Romances Are Common, But Companies Often Have No Policies in Place*, SOUTH BEND TRIBUNE (Indiana), Feb. 13, 2005, at B1 (listing common workplace dating policies); see Erickson, *supra* note 68 (describing the policy of a hospital in Oklahoma which transfers or terminates employees who develop a relationship). Another potential problem might occur with transferring, when the policy is to transfer the lower level employee and the company has mostly men at the top level. If that is the case it is quite possible that it would cause a gender discrimination issue to surface. See Coie, *supra* note 135.

188. See John LeCrone, *CA Supreme Court Expands Protection For Workers*, EMPL. L. STRATEGIST, Oct. 2005, at 1 (recommending that "at minimum" the employers should remove the supervisors right to make tangible employment decisions).

189. This suggestion goes to satisfy the argument that a relationship with a CEO or company president could not be consensual because a level of coercion will always exist due to the power the CEO or president holds. See Coie, *supra* note 135. The suggestion would allow the CEO or president to willingly relinquish his ability to enforce tangible employment actions against the person he is dating, putting the couple on less coercive grounds.

190. See generally 41 AM. JUR. 2D *Indemnity* § 12 (2004) (explaining in detail how indemnity works).

191. See Amy E. Decker, *Women In Corporate Law: Rewriting the Rules*, 4 AM. U.J. GENDER & LAW 511, 534 n.127 (1996) (recommending a like clause in a partnership agreement for a firm).

Though it is done more often than not, for emphasis, it is worth reminding the employer to attach their complete and comprehensive policy on sexual harassment and a policy on workplace dating.¹⁹² This gives the love contract a more significant effect.¹⁹³ Additionally, to consign more protection to the employer, the love contract should include a clause that requires them to report any incident of sexual harassment to the employer before they file a suit.¹⁹⁴ This will give the employer more time for internal investigation of the incident so they can try to remedy the problem and avoid the lawsuit.¹⁹⁵ Although the employer would likely prefer to remain outside of the couple's relationship, it is to their benefit to have the couple report the "break-up" so the employer can more closely monitor possible sexual harassment.¹⁹⁶ Many employers find this a waste of company time. Nonetheless, inevitable relationships between employees and extremely high damage awards make it necessary.¹⁹⁷ Of course, employers could simply ban relationships or fire any employees who date. This is not a realistic solution and these policies host their own slew of possible problems, including the loss of qualified employees.¹⁹⁸

V. BETTING ON LOVE

Some workplace relationships end in marital bliss,¹⁹⁹ while others end in frightful disarray. Employers should not have to monitor the love lives of each person they hire, but they are left

192. When asked if their organization had a written policy on dating eighty-four percent said that they did not. American Management Association, *supra* note 20.

193. See Gillian Flynn, *'Love Contracts' Help Fend Off Harassment Suits: Are You Better Off With the Contract than Without It?*, 78 WORKFORCE MANAGEMENT 3, at 106 (March 1999) (alleging that the inclusion of a sexual harassment policy confirms the employee's knowledge of the policies existence).

194. CYNTHIA STODDARD & ANTOINETTE LITTLE, SEX DISCRIMINATION IN EDUCATION EMPLOYMENT 63 (1981).

195. See LINDEMANN & KADUE, *supra* note 143, at 159-71 (devoting a great deal of discussion to the internal investigation process).

196. See Hodgin, *supra* note 7 (implying that employers will have to continue to monitor the relationship once they are on notice of it); Hamilton, *supra* note 4 (questioning whether or not the company would be responsible for updating the love contract as relationship conditions change).

197. See *supra* note 86 and accompanying text (putting forth an example of possible damages awarded by the employer to the sexually harassed).

198. See LINDEMANN & KADUE, *supra* note 143, at 156-57 (offering a number of problems associated with policies prohibiting dating or spouses).

199. In 2003 the American Management Association's survey showed that forty-four percent of office romances end in marriage. American Management Association, *supra* note 20. For a real world example of love at work done right, look to Bill Gates, whose wife was once his product manager. Nejat-Bina, *supra* note 31, at 326.

with little choice.²⁰⁰ As long as the queen of hearts is mixed in with the deck, employers will struggle to find a way to prevent workplace relationships from turning into costly sexual harassment liability. The love contract is an ingenious attempt to solve the problem.²⁰¹ With any luck, courts will give employers some credit for trying to prevent sexual harassment. Until employers can change the standards of liability,²⁰² they can sway the odds in their favor by utilizing the love contract along with a sexual harassment policy, a complaint procedure, and remedial disciplinary action.²⁰³ The love contract works to ensure a more solid affirmative defense in hostile work environment claims, but employers still lack an ace in the hole when it comes to quid pro quo.²⁰⁴ Hopefully, courts will reevaluate the policy behind strict liability and cut the deck evenly, making it more fair for employers, and rendering the love contract more useful. If employers choose to bet on the reality that employees are going to date, than the love contract seems to be the next step in recognizing possible repercussions.

200. See Hager, *supra* note 165, at 375 (acknowledging the thoughts of two business owners who are adverse to monitoring their employees all the time); see also Aissatou Sidime, *Love In The Workplace; Employers Differ On Workers' Romances*, SAN ANTONIO EXPRESS-NEWS (Texas), Apr. 12, 2004, at 1E (acknowledging the reluctance with which employers regulate the relationships of their employees while also noting the necessity of the practice).

201. See Chen & Sambur, *supra* note 28, at 193 (praising the invention of the love contract).

202. See *supra* notes 73-79 and accompanying text (discussing the firm stance on quid pro quo strict liability).

203. See REID, *supra* note 171, at 216-19 (developing a plan for employers to help prevent sexual harassment).

204. *Id.*

