Workplace Romance: Still Unwise, But Not Unlawful

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Last summer, the Ninth Circuit Court of Appeals considered for the first time whether an employer violates Title VII's prohibition against sex discrimination when a supervisor makes employment decisions in favor of a subordinate employee who is his or her romantic or sexual partner.[1] The court joined several other circuit courts of appeal in holding that this claim does not exist under the law. Because this activity disadvantages every other employee who is not the favored "paramour"—both men and women—it is not an adverse action based on sex.

The Facts

William Maner worked as a biomedical design engineer in an obstetrics and gynecological lab in Phoenix with his supervisor, Dr. Robert Garfield, and a researcher, Dr. Leili Shi. Dr. Garfield and Dr. Shi were in a long-term romantic relationship the entire time that Mr. Maner worked with them, and he was well aware of that relationship. Mr. Maner alleged in his lawsuit that, because of that relationship, Dr. Garfield favored Dr. Shi in a number of ways. For example, he brought Dr. Shi with him to conferences when other employees were not invited, and she was listed as a co-inventor on patent applications undeservedly.

Mr. Maner eventually relocated to Texas and worked remotely for about a year. His performance suffered during that time, and when the lab lost some funding and had to a eliminate a position, he was the obvious choice.

Mr. Maner brought a Title VII claim against his employer, alleging that Dr. Garfield eliminated Mr. Maner's position, instead of Dr. Shi's, based solely on their romantic relationship. Mr. Maner argued that favoring an employee based on a sexual relationship is an impermissible act of discrimination "because of sex."

After losing on summary judgment, Mr. Maner appealed to the Ninth Circuit. This "paramour preference" theory of liability had been previously considered and rejected by other circuit courts of appeal (and the EEOC), but until recently, the Ninth Circuit had never opined. Although represented by counsel at the district court level, Mr. Maner proceeded pro se on appeal. Interestingly, the Ninth Circuit appointed pro bono counsel to represent him through the appellate process.

The Holding

The court ordered the parties to address how the United States Supreme Court's landmark ruling in *Bostock v. Clayton County*[2] impacted Mr. Maner's claim. *Bostock*, decided in 2020, expanded Title VII by holding that discrimination "because of sex" includes discrimination based on sexual orientation and gender identity. *Bostock* relied on a long line of Title VII cases to arrive at its holding, reiterating that any action taken even in part because of sex is unlawful.

The Ninth Circuit, in turn, relied heavily on *Bostock* in concluding that discrimination based on a romantic or sexual relationship is not discrimination because of sex. *Bostock* described a "simple test," derived from Title VII precedent, to determine if sex discrimination occurred: "if changing the employee's sex would have yielded a different choice by the employer," the employer has violated the law.

In Mr. Maner's case, the Ninth Circuit reasoned, the outcome would not have been different if Mr. Maner's sex were different, because he still would not have been the person in a romantic relationship with Dr. Garfield; changing Mr. Maner's sex would make him woman, but it would not make him Dr. Shi.

In reaching this holding, the court rejected the argument that "sex" under Title

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VII includes "sexual activity." Citing well-accepted principles of statutory interpretation, the court explained that text of the statute refers to an "*individual's* sex"—implying that sex in this context is something an individual owns or possesses. The expansion suggested by Mr. Maner would turn a noun into an adjective.

Mr. Maner also argued that simple statistical analysis establishes that sex is unavoidably a factor in any decision made that favors a paramour. As the Ninth Circuit described it, "If an employer protects a supervisor's female paramour from termination in a reduction in force, the argument goes, the chance that a male will be selected for termination increases because fewer females are available for termination." This of course ignores a scenario where there are no male employees at all to choose from, or a scenario where the supervisor and the paramour are of the same sex. More important, statistics do not tell us anything about why the person who actually suffered the adverse employment action was selected—in other words, it adds nothing to the analysis of whether *intentional* discrimination occurred.

Notably, EEOC regulations regarding sexual harassment allow a cause of action under similar (but distinguishable) facts: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."

The court concluded that this regulation applies only to hostile work environment claims, where the employer's actions suggest that employees must engage in sexual conduct in order to advance in their careers—a claim Mr. Maner never made.

The opinion concludes with an oft-cited proposition—a favorite among employment defense lawyers—which rings especially true here: "Title VII is not a 'general civility code,' and employment practices are not unlawful simply because they are unwise."

Key Takeaways

Most employers prohibit relationships between supervisors and and their subordinate employees—no doubt for very good reasons. If a supervisor displays favoritism toward any of his or her direct reports, on any basis, it can affect employee morale. It may result in higher turnover, lower productivity, and increased claims of unlawful discrimination (even if ultimately meritless). Workplace romances gone bad also may give rise to legitimate sexual harassment claims.

The Ninth Circuit declined to extend Title VII in a way that certainly would have given rise to a host of new claims. For example, had this decision gone the other way, a family-owned business could have faced Title VII liability if the owner of a business promoted his or her spouse instead of another employee. Employers can rest easier knowing they will be absolved of liability for discrimination based on romantic favoritism, but this case should not be read to encourage these types of potentially problematic pairings in the workplace. Employers should continue to monitor romantic or familiar relationships among employees and avoid direct reporting lines between the employees involved.

endnotes

1. *Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021).
2. 140 S. Ct. 1731, 1741 (2020).

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