

# What's Got to Do With It?

**Scott Pedigo, Ceejaye Peters, and Nakimuli Davis-Primer  
Baker Donelson Bearman Caldwell & Berkowitz, P.C.**

**[spedigo@bakerdonelson.com](mailto:spedigo@bakerdonelson.com)**

**[cpeters@bakerdonelson.com](mailto:cpeters@bakerdonelson.com)**

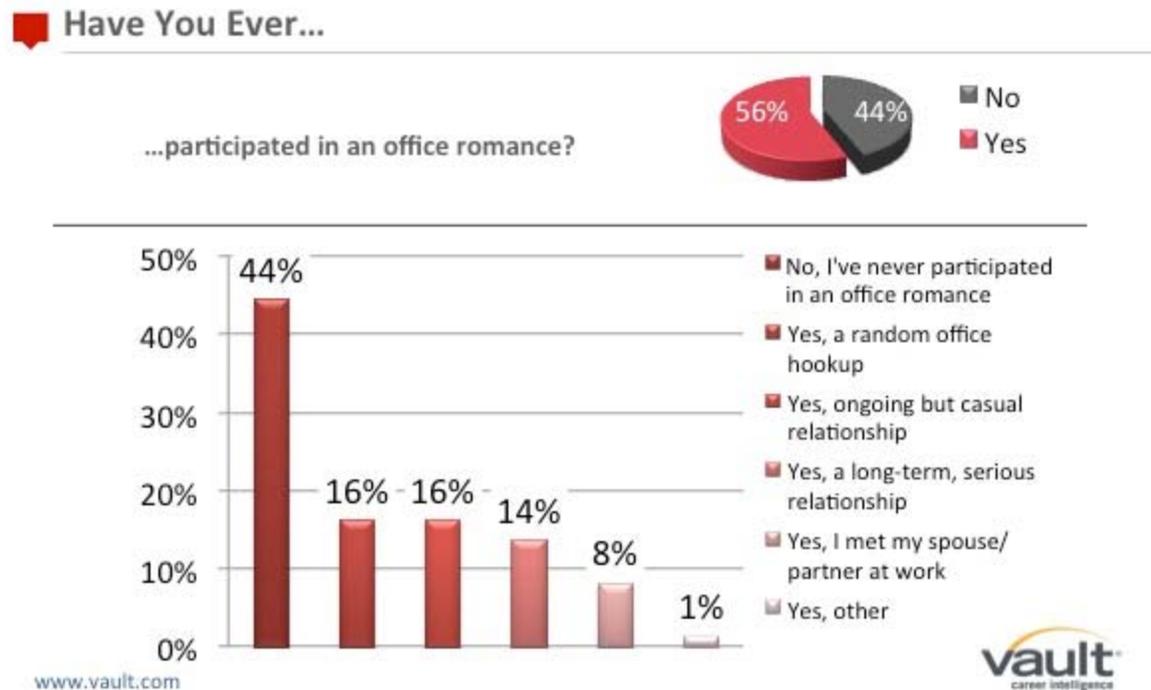
**[ndavis@bakerdonelson.com](mailto:ndavis@bakerdonelson.com)**

# Love Roadmap . . .

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- Love By the Numbers
- What Happens After Cupid Drops In
  - Legal Risks, Rumors & Gossip
- Tips on Conquering the Love Battlefield
- Other Considerations
- What Happens after Cupid's Affect Wears Off . . .

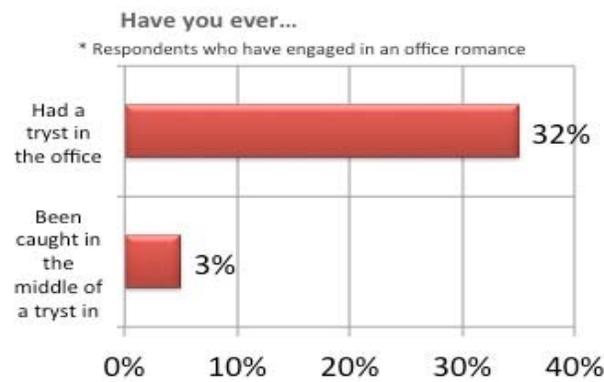
# Love By The Numbers . . .



- This is the same as last year, but down from 59% in 2011

# Love By The Numbers . . .

## Do Not Disturb



*"After hours in the office. It was exciting to go into that area during the work day and remember what we did in there."*

*"That's disgusting and unprofessional."*

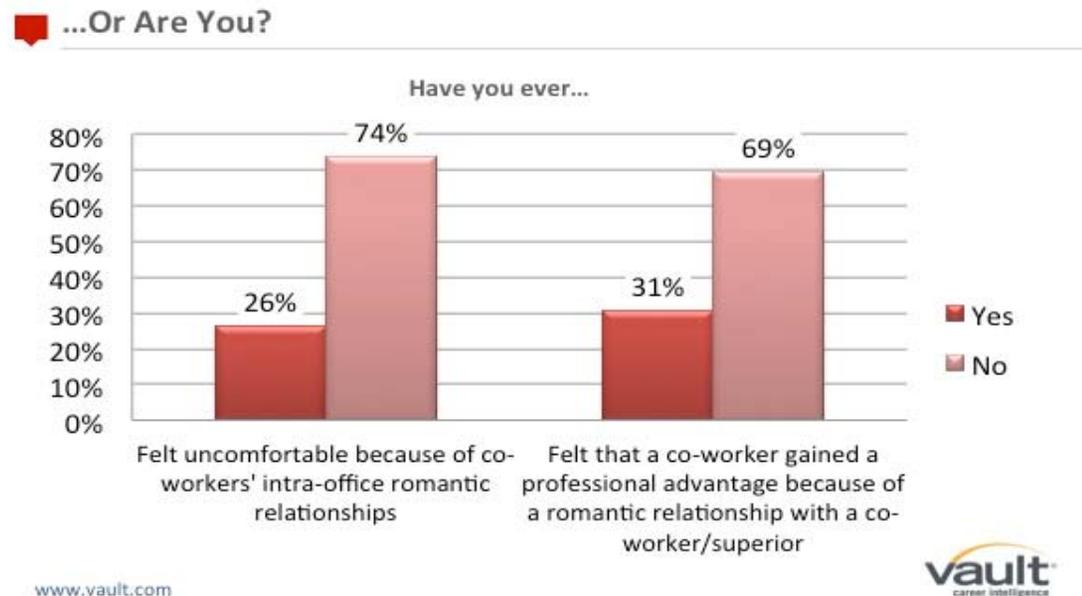
*"Does the parking lot count?"*

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- 32% said they had a tryst in the office

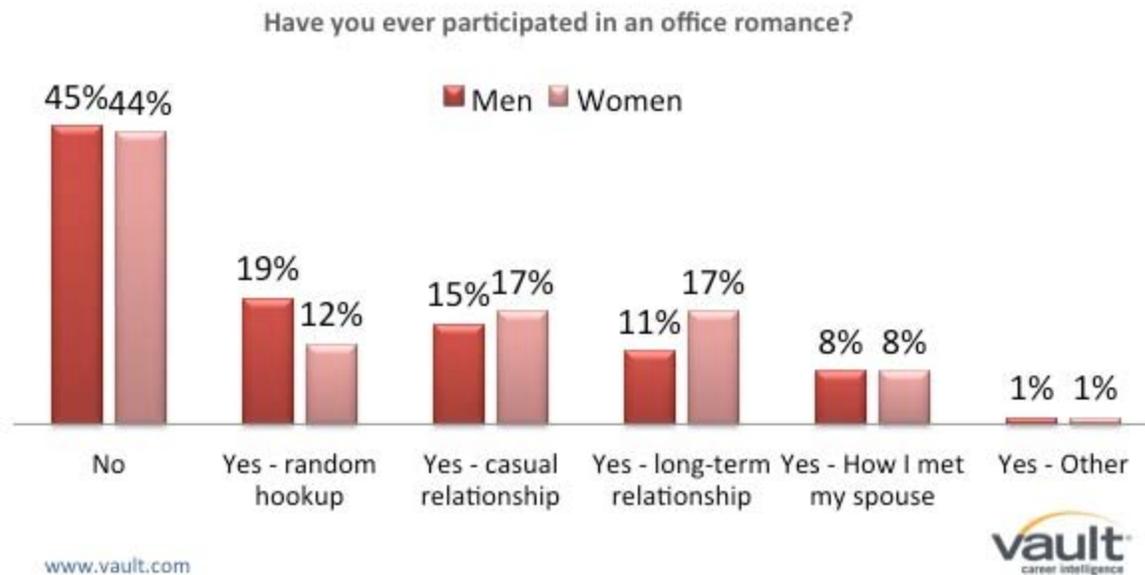
# Love By The Numbers . . .



- 31% of those surveyed felt a co-worker gained a professional advantage because of a romantic relationship with a co-worker or superior
- 26% said they felt uncomfortable at work because of co-workers office romances

# Love By The Numbers . . .

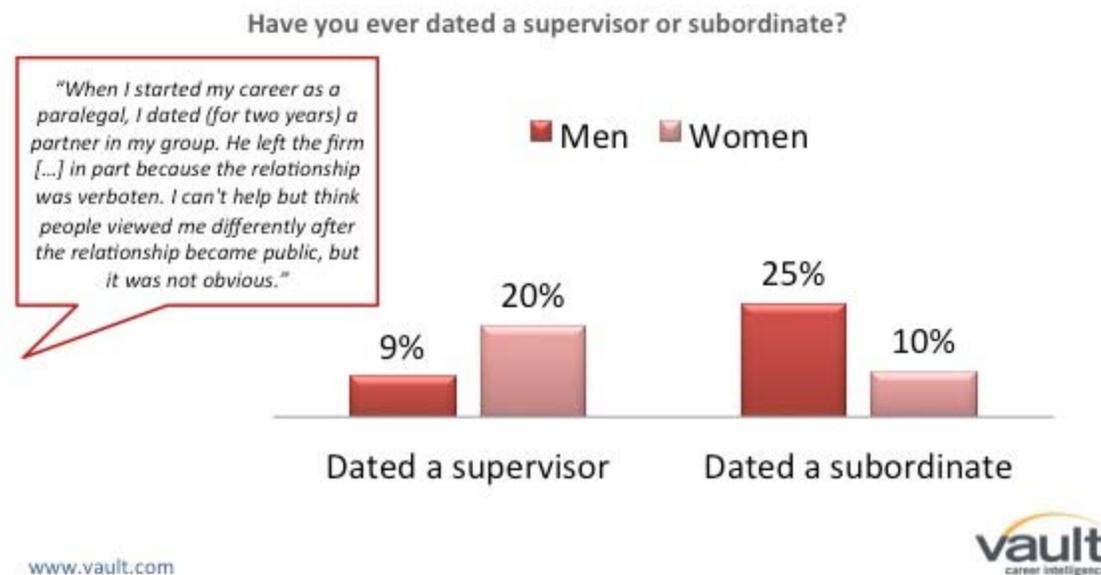
## The Gender Gap, Part 1



- Men are more likely to have had a random hookup with a colleague
- Women are more likely to have casual and long-term relationships

- 25% said they had dated a subordinate, most prevalent in men

## ■ The Gender Gap, Part 2



# What lights the match?

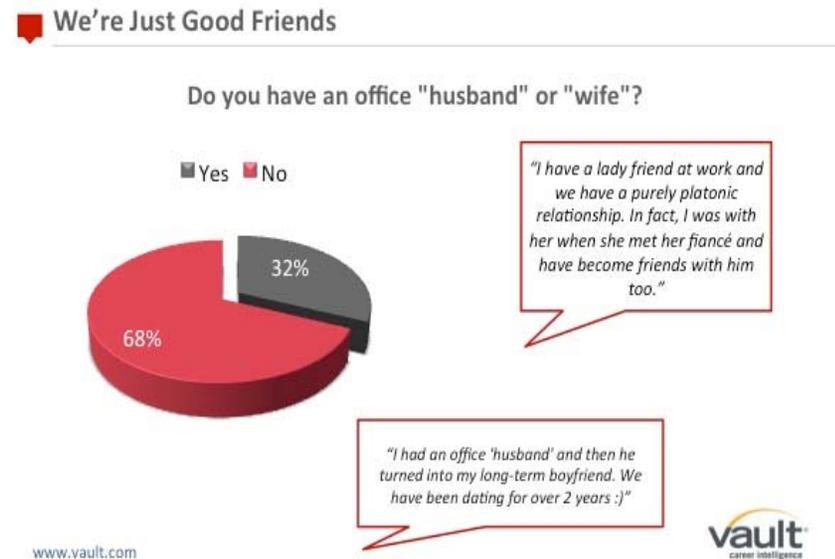
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- Ran into a co-worker outside of work
- Met at happy hour
- Met at lunch
- Met working late nights
- Overnight trips

# Work Spouses . . .

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- Platonic Relationship
  - Lunch Buddy
  - Confidant
  - Sounding Board
- More prevalent among women
  - 38% Women
  - 27% Men
- Can lead to romantic relationships



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# When Cupid Drops In At Your Office

# Legal Risks

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- Sexual Harassment
- Intentional Infliction of Emotional Distress
- Assault and Battery
- Slander/Libel
- Sexual Favoritism
- Sex Stereotyping

# eHarmony = disharmony

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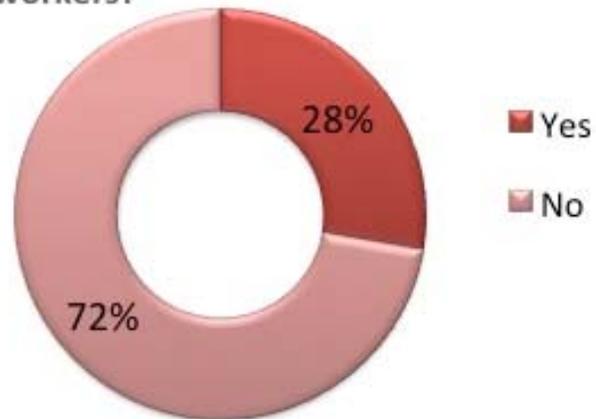
- Lost productivity
- Loss of credibility
- Divided loyalties
- Breach of confidentiality
- Conflicts of interest
- Unprofessionalism

# Rumors and Gossip

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## Are They Jealous...

If you participated in an office romance, did it impact your personal or professional relationships with other coworkers?



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*"When it ended I had less people to chat with."*

*"Once it became publicly known, there was the usual gossip."*

*"One of my hookups became my boss and slammed me on a performance review a year later."*

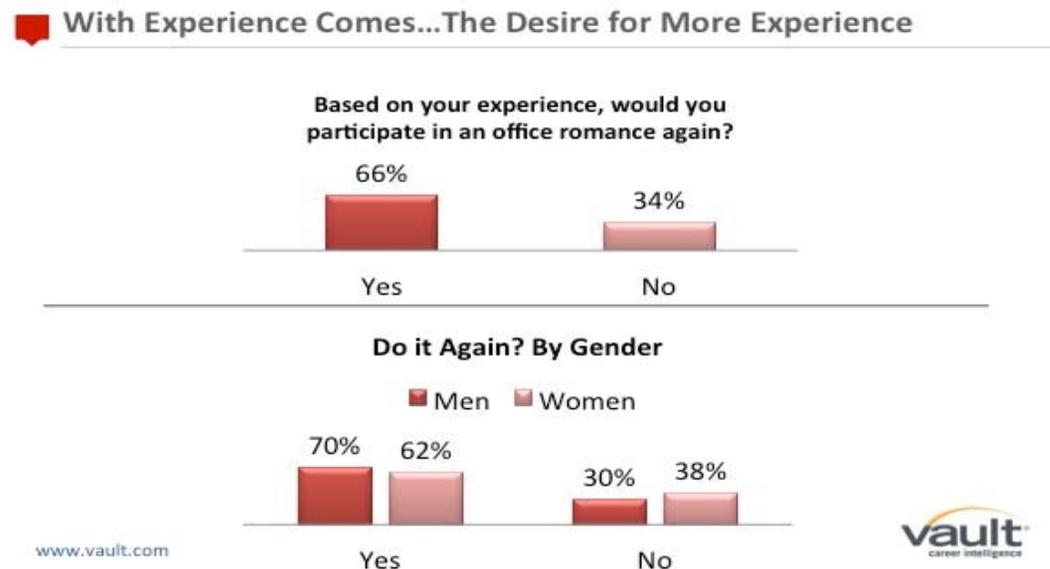
*"Before we got together, my partner and I used to socialize with a group of coworkers. Another guy was interested, so it created a bit of tension."*

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# Cupid's Arrow Conquers . . .

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- If given the chance, most people who have had one office romance will go back for more.



- General consensus was “Why not?”
  - Work long hours, easier than meeting someone at a club, the right person is the right person

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# Love is an Employer's Battlefield

## 3 Tips to Conquer in the War of Love

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- Develop a policy on personal romantic relationships and distribute to all employees
- Develop HR guidelines for responding to personal romantic relationships between all levels of employees
- Provide training to managers/employees on the practical realities of being romantically involved with someone at work and show your door is open if they have a concern about unwanted romantic attention

# 1. Develop a Policy

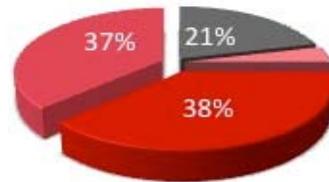
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## Ignorance Is Bliss?

Does your company have a policy regarding intra-office relationships?



What is your company/firm's general attitude toward office romances?



- It discourages office romances
- It encourages/supports office romances
- It is indifferent toward office romances
- I'm not sure

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- More than 1/3 of those surveyed were not even sure whether their company had a policy regarding workplace relationships
- Goal is develop a policy that recognizes reality of human existence but also manages potential risk

# Policy Considerations

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1. Assess state laws (off-duty conduct, privacy etc.)
2. Address company rules about dating between peers and subordinates and decision-making process if such a relationship is revealed/discovered.
  - a) Outright ban may not be the best option
  - b) Ban may create awkward position to either ignore its own policy or fire a pair of otherwise productive employees
3. If dating is permitted, address duty to notify management.
4. Address expectations for appropriate behavior during workplace relationship and expectations for conduct if relationship ends
5. Address prohibitions against favoritism, conflict of interest, discrimination, harassment, and retaliation.

## 2. HR Guidelines

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1. Is the relationship consensual or not?
2. If not, handle pursuant to typical investigation and resolution structure.
3. If consensual, does it violate company policy?
4. Does the relationship have potential negative intangible consequences for the Company?
  - Embarrassment
  - Conflict of Interest/confidentiality concerns
  - Disruptive in the workplace

## HR Guidelines (continued)

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5. Consider your right to hold management and particularly senior manager to higher standards of business and personal conduct. (Check state law)
6. Do you want to take proactive steps to try to prevent legal or practical problems as a result of the relationship?
7. Or, do you want to sit and wait for the phone to ring . . .
8. Create an open-door policy and work environment
  - Usually falls on HR to be the safety valve for those employees who feel threatened, coerced, or afraid
  - Can create an 800 line
  - Reiterate there will be no adverse consequences
9. Take all claims seriously

### 3. Provide Training . . . Be Proactive

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1. Train the entire work force on company policies.
  1. Consider customizing your training based on the workforce.
2. Once you are aware of a relationship, be proactive!
  1. Meet with each individual and confirm the relationship is consensual.
  2. Advise each individual that if that changes, you expect to be notified immediately.
  3. Remind each individual that professional conduct at work is expected at all times.
  4. Consider a “love contract.”

# Love Contract

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- Confirms the relationship is voluntary and consensual.
- Can be used for all, not just superior/direct subordinate relationship.
- Shows the employer took proactive steps to increase awareness about their employment policies.
- Can provide a method of addressing and documenting the elements of a defense for hostile work environment claims, *Ellerth/Faragher* Defense.
- In the contract the employees:
  - Agree to abide by employer's discrimination, harassment, retaliation, and workplace policies.
  - Promise to report any perceived harassment/retaliation to HR.
  - Agree to behave professionally and not let relationship interfere with work.
  - Agree to avoid behavior that could offend others in the workplace and not to engage in favoritism.

**Other Considerations . . .**

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**Don't Forget About Typical Role  
Reversal or Same-Sex Relationships**

## Other Considerations (cont)

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**Be open to employees who may have concerns about favoritism or an expectation that dating is the only way to advance their career.**

**If Cupid's Affect Wears Off . . .**

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**Be Prepared to Address Both  
Potential Legal Risks and  
Practical Realities of  
the Workplace Romance.**

# What happens when love goes wrong?

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## Harassment claims

## The Hostile Work Environment Claim. . . .

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ANY CONDUCT THAT HAS THE **PURPOSE OR EFFECT** OF UNREASONABLY INTERFERING W/EMPLOYEE'S WORK PERFORMANCE OR CREATING **INTIMIDATING, HOSTILE, OR OFFENSIVE WORKING ENVIRONMENT**

# The Basis of a Harassment Claim

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## ALL PROTECTED CATEGORIES

Race

Color

Religion

Sex

Gender [Gender Stereotyping]

National Origin

Age (over 40)

Disability

# HWE Harassment

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- Unwelcome Conduct
  - Sexual advances
  - Jokes, comments, touching
  - Animosity based on protected class
- No objection need be voiced
- INTENT DOES NOT MATTER

# HWE Harassment

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- Severe or pervasive BUT ONE INCIDENT IS SUFFICIENT
- Unwelcome BUT INTENT DOES NOT MATTER

# Who can harass and create a HWE?

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- Managers/supervisors
- Co-workers
- Third parties
  - Vendors
  - Customers
  - Independent contractors

## Work Environment

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- Did organization pay for or sponsor event?
- Is it a regular gathering of employees?
- Is it organized using organizational resources (like email)?
- Are there a number of employees present? - If you look around and everyone you see is a co-worker, the policy probably applies, no matter where you are.
- Does the event get talked about a lot back at the workplace?
- Was work discussed during the gathering?

## Approach with Caution . . .

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- Comments on personal appearance
- Work-related off-premises conduct
- Nicknames
- Stereotypes
- Touching
- Dating/initiating personal relationships
- Retaliating
- Cartoons, posters, pictures, apparel, t-shirts
- Email/Internet
- Jokes, sarcasm, or innuendo about race, color, religion, sex, gender, national origin, age, disability, sexual orientation, military service

# Sexual Harassment

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Harassment is unlawful when it is a “term or condition of employment; when submission to or rejection of sexual advances is used as the basis for an employment decision; or when such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.”

# Examples of Sexual Harassment

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- Asking an employee for a date
- Asking an employee for sexual favors
- Fondling, hugging or touching an employee

## Same Sex Harassment

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**HARASSING CONDUCT NEED NOT BE  
MOTIVATED BY SEXUAL DESIRE TO  
SUPPORT AN INFERENCE OF  
DISCRIMINATION ON THE BASIS OF SEX**

# EEOC v. Boh Brothers Construction Company

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- Sexual stereotyping can be used to establish a same-sex sexual harassment claim
- No evidence that the plaintiff's supervisor was homosexual or sexually attracted to the plaintiff
- But, the supervisor's inappropriate conduct was "because of . . . sex" and it was so objectively offensive as to alter the conditions of the plaintiff's employment

# What could Boh Bros. have done?

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Does harassment by a supervisor mean the employer is automatically liable?

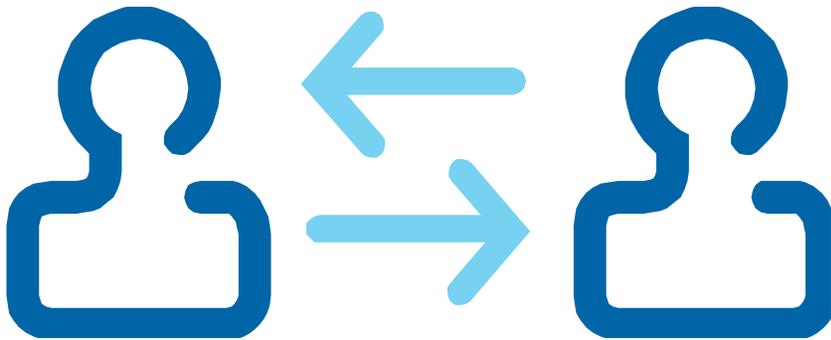
# Two General Categories of Harassment

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- Quid pro quo
- Hostile Work Environment

## Quid Pro Quo

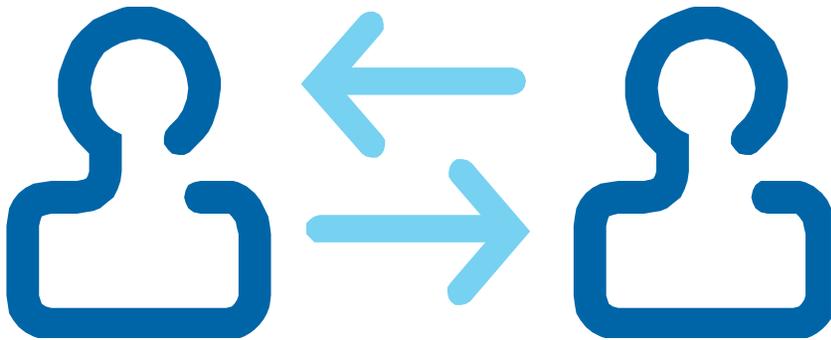
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- Quid pro quo harassment arises when acquiescence to sexual demands is made an express or implied condition of employment or advancement.

## Quid Pro Quo

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- Form of Supervisor Harassment
- Employer is strictly liable for quid pro quo harassment when employee's refusal to submit to sexual demands results in a **tangible employment action.**

# TANGIBLE EMPLOYMENT ACTION

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Examples of tangible employment actions include:

- Hiring and firing (including, in some cases, constructive discharges)
- Promotion and failure to promote
- Demotion
- Undesirable reassignment
- A decision causing a significant change in benefits
- Compensation decisions
- Work assignment

# What about hostile work environment created by a supervisor?

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## ***Ellerth/Faragher* Defense to Supervisor Harassment**

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- 1) The employer exercised reasonable care to prevent and promptly correct harassment; AND
- 2) The employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer

## Plaintiff's Failure to Complain

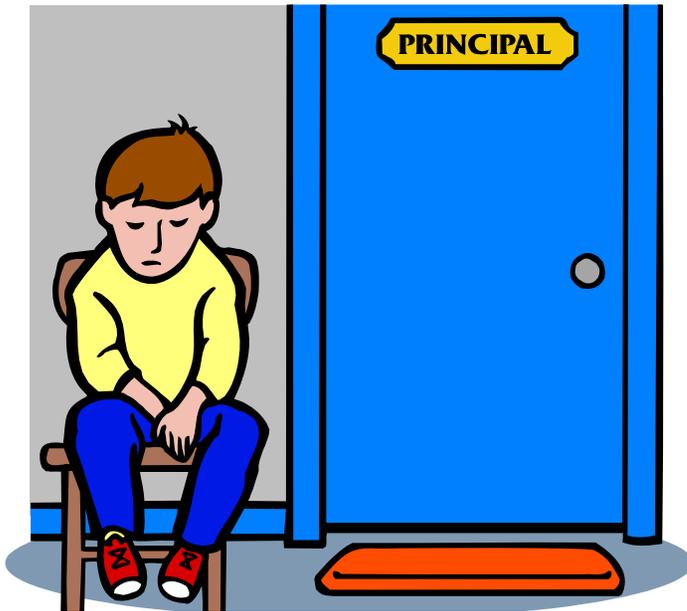
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- May have complained to his foreman “2-3 times”
- Didn’t mention sexual harassment
- He “didn’t like how [the harasser] spoke to him”
- Didn’t complain about the conduct because he was afraid “to cause more conflict”

## Plaintiff's First Real Complaint

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- After he was facing discipline for a terminable offense
- Only then did he complain in detail about his harasser's conduct.

## ***Ellerth/Faragher* Defense to Supervisor Harassment**

---

- 1) The employer exercised reasonable care to prevent and promptly correct harassment; and
- 2) The employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer

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“An employer can satisfy the first prong of the *Ellerth/Faragher* defense by implementing suitable institutional policies and educational programs regarding [unlawful] harassment.”

*EEOC v. Boh Brothers*, 731 F.3d 444, 462 (5<sup>th</sup> Cir. 2013)



- Maintained a broad nondiscrimination policy only
  - No specific guidance about sexual harassment
  - Employees did not know about the policy even if it had been specific
  - Managers did not know that sexual harassment not motivated by sexual desire could constitute unlawful harassment



- No specific instructions regarding how to assert or investigate harassment complaints
  - Boh Bros. failed to provide supervisors with any guidance on how to investigate, document, and resolve complaints once reported
  - Company merely told supervisors to call its EEO coordinator with questions

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“We have considered the existence of a written complaint procedure to be an important variable in the *Ellerth/Faragher* analysis.”

*EEOC v. Boh Brothers*, 731 F.3d 444, 464 n. 22 (5<sup>th</sup> Cir. 2013)



- Boh Bros. did little else to implement the policy
  - Plaintiff's general superintendent received only 5 minutes of sexual harassment training
  - Did not understand sexual harassment included conduct that was not motivated by sexual desire
  - The harasser did not know his conduct violated policy or the law



- Jury could have viewed the investigation of Plaintiff's complaint as belated, cursory, and unfair
  - Only a 20 minute investigation
  - No notes
  - After hearing complaint, Plaintiff was sent home without pay for three days
  - The person investigating did little to follow-up



- Boh Bros. arguable failed to discipline the harasser
  - Harasser never received a write-up
  - Only a “conversation” held in which focus was on other issues and was only told to behave in a more professional manner with respect to safety

# Lesson Learned

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## EFFORTS TO PREVENT HARASSMENT SHOULD INCLUDE:

- Implementation of anti-harassment policy and complaint procedure
- Training of supervisors and employees
- Implementation of effective investigation procedure
- Documentation of all steps taken

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“[I]f the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care.”

*EEOC Enforcement Guidance:  
vicarious employer liability for  
unlawful harassment by  
supervisors*

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“If the harasser is a coworker, then the employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.”

*EEOC Enforcement Guidance:  
vicarious employer liability for  
unlawful harassment by  
supervisors*

# Simplifying the Investigation Process

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1. Conduct regular training on the art of the investigation
2. Create a system:
  - Overall investigation checklist
  - Standard receipt of complaint letters
  - Standard notification to accused letters
  - Standard outlines for general questions/opening/closing of interviews
  - Standard closure letters to accused and complainant
  - Standard procedure for who makes recommendations and who has final approval on determinations
3. Follow the system