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WORKPLACE ROMANCE AND THE ECONOMIC DURESS OF LOVE CONTRACT POLICIES

IAN J. SILVERBRAND

I. Introduction

EARLY in their careers as reporters at the Daily Planet, Metropolis's leading newspaper, Lois Lane and Clark Kent excelled while working individually.\(^1\) Even so, Perry White, the newspaper's editor-in-chief, believing that Lois and Clark's articles would be even better if they worked as a team, assigned the two to work together. As a team, Lois and Clark immediately scooped top stories and wrote award-winning articles.

Clark had romantic feelings for Lois even before working with her, but the mild-mannered reporter felt threatened by Lois's interest in his alter ego, Superman. Soon, however, those romantic feelings began to reciprocate as Lois developed interest in Clark—a natural consequence of Lois spending almost all of her waking hours working with Clark. Eventually, romance ripened. Romance did not adversely affect their performance, as romantically involved Lois and Clark continued to be the best journalists in Metropolis. Eventually, the reporters married. The romantic relationship proved to be a boon to Lois, Clark, and the Daily Planet. It is therefore fortunate that Perry White did not quash the workplace romance.

More recent cultural examples reflect more restrictive attitudes about workplace romance. *Boston Legal*, a primetime television show on ABC, is a legal "dramedy" about the fictitious Crane, Poole & Schmidt firm. In one episode, Paul Lewiston, the firm's managing partner, discovered that Brad Chase, one of the firm's partners, was having an affair with an associate, Denise Bauer.\(^2\) Lewiston demanded that Brad sign a love contract that was intended to protect the firm against legal action arising from the workplace romance.\(^3\) When Brad refused, Lewiston fired him.

Subsequently, one of the founding partners learned of Brad’s termination and offered to rehire him if Brad were to sign the agreement. Brad successfully petitioned for a hearing before the firm's partnership. At the hearing he launched an emotionally charged diatribe:

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1. This paragraph loosely describes the relationship detailed in the Superman comic books that my parents read to me as a child. I thank them for introducing me to the best of Western literature.


3. For a detailed discussion of "love contracts," see *infra* notes 76-93 and accompanying text.
This policy isn’t to give you notice; it’s to chill relationships, just nip them in the romantic bud. . . . Do you farts have any idea how hard it is for someone who is single, who works 60 hours a week, to meet someone? The deck is already stacked against us without you piling on these oppressive contracts! . . . I am sick of being lonely. You can all go to hell, and you don’t own me!  

Thereafter, Brad stormed out of the meeting thinking that his plea had failed. His paramour met him in his office and on impulse he proposed marriage telling her, “You don’t have to respond. I just want you to know the offer is on the table. That’s a ‘love contract’ I’ll actually sign.” Denise accepted the proposal, and the firm ultimately informed Brad that it decided to terminate the love contract policy. Like Brad and Denise, other pop culture workplace romances have encountered initial reluctance by employers followed by positive outcomes for employees.

These pop culture examples illustrate different attitudinal perspectives towards workplace romance. Although some employers value workplace romances, many frown upon such relationships. These attitudes permeate employment law and human resource policies. Part II of this Article describes the diatomic approaches to workplace romance. Part III identifies the relevant legal provisions. Part IV defines one of the most popularized human resource policies to combat workplace romance—love contract policies. Part V evaluates the enforceability of love contract policies in light of the economic duress doctrine. Part VI concludes by summarizing the findings of this Article.

II. APPROACHES TO WORKPLACE ROMANCE

Vicki Schultz identified the dominant historical perspective on workplace romance. She noted that “[t]he idea that sex has no place in the workplace is not new. At least since the early 1900s, corporate managers have seen sexuality as something that properly lies ‘outside’ the workplace—something that preexists and threatens it.” Today, a more accepting attitude exists. These perspectives about the appropriateness of

5. Id. (distinguishing between marriage and love contract).
6. See id.
7. See, e.g., Ally McBeal: Pyramids on the Nile (FOX television broadcast Feb. 15, 1999). In this episode of Ally McBeal, Cage, Fish & McBeal took on a sexual harassment case. The case involved two coworkers who began to date in spite of their employer’s love contract policy. The coworkers did not disclose their relationship to their employer because they found the policy so demeaning. The employees were terminated for violating the company’s policy. The employees sued the company, won at trial, and were awarded $942,000 in damages. See id.
workplace romance shape how employers respond to sexuality in the workplace.

A. Love Is for Bedrooms, Not Boardrooms

Historically, employers generally believed that the only love employees should have while at work is love for their job. That is, emotional feelings of interpersonal love had no place in the office. This attitude resulted largely from the widespread implementation and acceptance of principles of scientific management.

Frederick Taylor, one of the intellectual leaders of the Efficiency Movement of the early twentieth century, developed the theory of scientific management. The theory, often times termed Taylorism, recommends extreme division of labor to allow the employer to acquire “the remainder of the skill which the craftsman still retains in his head and hand not yet transferred to machinery.” Believing that granting employees control over the work process created inefficiencies, Taylor called for the development of a class of managers to “assume new burdens, new duties, responsibilities never dreamed of in the past.” The new class of managers would bear the “burden of gathering together all of the traditional knowledge which in the past has been possessed by the workmen and then of classifying, tabulating, and reducing this knowledge to rules, laws, and formulae which are immensely helpful to the workmen in doing their daily work.”

The managers would consequently become the employer’s head and the workmen the hands; managers would develop a science for each element of a task and select and train workmen to perform each element. Together, managers and workmen would cooperate to ensure that the work is being done properly.

Implicit within the managers’ control of the employees’ work performance is the dehumanization of the workplace. Sociologists have interpreted the Taylorized, bureaucratic workplace to be overridden with

10. See Schultz, supra note 8, at 2063 (“One of American society’s most cherished beliefs is that the workplace is—or should be—asesexual.”).
11. See Frederick W. Taylor, Scientific Management (1911).
14. Id. at 15–16.
15. See id.; see also Schultz, supra note 8, at 2073 (“Managers were to be the ‘heads’ and workers the ‘hands’ of the organization.”).
concern for "efficiency and consistency in the application of rules," and have stated that the ideal type of such an organization would be based on "impersonality, functional specialization, a hierarchy of authority and the impartial application of rules." 17

To ensure that these efficiencies manifest and that a perfectly, scientifically managed workplace results, advocates of scientific management call for "a separation of the public world of [formal] rationality and efficiency from the private sphere of emotional and personal life." 18 This point bears directly upon workplace romance. There is nothing more irrational and emotional than love. 19 Sociological and management theories, therefore, warn that the irrationality with which love is associated could spill over to the workplace, resulting in inefficiencies in product production, which in turn would reduce the prosperity of the employer and employee. 20 The natural consequence of this logic is that employers should restrict workplace romance, 21 and that employers should act within their managerial rights to limit workplace romance and ensure the smooth functioning of their firm, a necessary component to maximizing prosperity. 22

18. Id.; see also Marion Crain, The Transformation of the Professional Workforce, 79 CHI.-KENT L. REV. 543, 556 (2004) ("Scientific management, as its name implies, purports to subject workers and employers to the objective laws of science rather than to the arbitrary whims of human beings."); John Fabian Witt, Speedy Fred Taylor and the Ironies of Enterprise Liability, 103 COLUM. L. REV. 1, 14 (2003) ("In advocating the importance of managerial control, Taylor also announced a new principle of managerial responsibility. Firms can be, and indeed, properly ought to be, responsible for managing widespread American social life.").
19. See BUREAU OF NAT'L AFFAIRS, CORPORATE AFFAIRS: NEPOTISM, OFFICE ROMANCE & SEXUAL HARASSMENT 35 (1988) ("The workplace is not designed to accommodate people falling in love. Love is an irrational emotion; the workplace is . . . built on a foundation of rationality."); Schultz, supra note 8, at 2073 ("If work is the sphere of rationality and order, and if the irrational side of life must be kept at bay, then it is clear that sexuality must be banished. Few forces are perceived as more at odds with rationality than sexuality."). The irrationality associated with love persists even after a relationship's cessation. See Appellant's Reply Brief at 1, Williams v. Joe Lowther Ins. Agency, Inc., 177 P.3d 1018 (Mont. 2008) (No. 06-609) [hereinafter Appellant's Reply Brief, Williams] ("When a completely consensual intra-office relationship breaks down, feelings of jealousy and rejection naturally replace the love and caring the parties previously shared."). The manager of a romantically involved employee must, therefore, be concerned with the full gamut of emotions that are derivative of a romance should he or she not attempt to restrict the romance from its beginning.
20. Cf. TAYLOR, supra note 11, at 1.
21. Cf. Investigation of Taylor Systems of Shop Management: Hearings Before Special Committee of the House of Representatives to Investigate the Taylor and Other Systems of Shop Management Under Authority of H.R. 90, 62d Cong. 1416 (1912) (statement of Frederick Winslow Taylor) (noting that scientific management requires workers to reconsider "their duties toward their work, toward their fellow man, and toward their employers").
22. See Schultz, supra note 8, at 2073 (illustratively noting that "Max Weber recognized, it wasn't just people's hands that were to be controlled; it was also their hearts."); see also ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORA-
The belief that workplace romance would hinder the efficiency of the employer’s business remains to this day. When asked to comment on the effect that an employer’s restriction of workplace romance has upon sexual expression in the workplace, Catharine MacKinnon, the renowned feminist law professor, retorted that “[s]omebody ought to get worried about the fact that no work is getting done. And the workplace is not a place for sexual recruitment exclusively.” Others have similarly noted that “[p]rofessionalization and desexualization of work are not just worthy goals for their own sake; they are good for business, for effective work organizations.” Some have made a variant of this argument and suggested that workplace romances can impugn the reputations of employers and romantic coworkers alike, thereby forcing employers to inefficiently expend resources to protect their reputation in the marketplace.

Related to efficiency, employers worry that workplace romance may lead to unwarranted favoritism by and between romantic coworkers, thereby facilitating potentially unwarranted promotions and salary raises. Surveys have shown that a small, but significant, percentage of the working force engages in workplace romance for career advancement.

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25. See, e.g., Elizabeth A. Nowicki, Not in Good Faith, 60 SMU L. REV. 441, 487 n.172 (2007) (“The board of directors of Boeing forced Boeing’s president and chief executive, Harry Stonecipher, to resign after the board learned about Mr. Stonecipher’s extra-marital affair with a female executive. The board determined that Mr. Stonecipher used poor judgement and placed Boeing in a potentially damaging situation.”); Marshall Loeb, Five Tips to Consider When You Fall in Love on the Job, CAREERJOURNAL.COM, Sept. 22, 2005, http://www.careerjournalceurope.com/myc/officeLife/20050922loeb.html (“Romancing your boss most often looks like you’re trying to get ahead at work, and dating your subordinate reeks of desperate play for power.”). But see Carol Hymowitz & Joann S. Lublin, Many Companies Look the Other Way at Employee Affairs, WALL ST. J., Mar. 8, 2005, at B1 (“Usually when a top executive has to resign over having had [consensual] sex with an employee, that’s just an excuse to get rid of that executive,” says Kathleen Peratis, a partner at law firm Outten & Golden.”).

26. See Rosemary Haefner, Office Romances Rarely Kept Secret, CNN.COM, Feb. 13, 2008, http://www.cnn.com/2008/LIVING/worklife/02/13/office.romance/index.html (“Although 98 percent of those who dated a higher-ranking co-worker say the relationship has no affect on their career advance, many people will assume a promotion—not mutual attraction—is your motivation.”); Nick Mathiason, Salary, Hours, Benefits, Holiday Entitlement . . . and a Love Contract, OBSERVER (U.K.), Dec. 23, 2007, at 3 (“There is evidence that a significant number of directors have benefited from an office affair. A survey out this weekend from TakeLegalAdvice.com reveals that 4 percent of directors of companies with more than 1,000 employees say either that their career benefited from an affair, or that they promoted a lover.”).
Marcuse, a prominent philosopher often associated with the sexual liberation movement, theoretically recognized that workplace sexuality contributes to career advancement. He wrote:

The sexy office and sales girl, the handsome, virile junior executive and floor walker are highly marketable commodities, and the possession of suitable mistresses—once the prerogative of kings, princes, and lords—facilitates the career of even the less exalted ranks in the business community.27

Nevertheless, the career advancement of some as a result of workplace romance is problematic to others. Workplace romance decreases motivation for uninvolved coworkers, thereby likely causing a net loss in productivity for the employer.28 Uninvolved coworkers may perceive the workplace romance as giving the paramours an unfair competitive advantage. This realization may result in decreased job motivation and decreased job performance. Mary Kate Sheridan has noted that workplace romance can, therefore, result in "employees [being] assessed according to their sexual conduct, rather than their work product. Favoritism may convey to employees that their sexuality, rather than their hard work or creativity, is the currency needed to gain benefits in the workplace."29

B. Cupid Can Strike at Any Time, So Embrace His Work

An emerging perspective is that employers should not meddle in workplace romance because workplace romance is inevitable.30 The traditional work schedule was eight hours a day, five days a week, but the prevalence of the traditional work schedule is declining. Employees now more frequently work on nontraditional schedules,31 which often involve longer

27. **Herbert Marcuse, One Dimensional Man** 76 (1964) (asserting that inter-office relationships facilitate participants’ careers).

28. See generally Gary N. Powell & Sharon Foley, *Something to Talk About: Romantic Relationships in Organizational Settings*, 24 J. MGMT. 421, 445 (1998) (“Two kinds of romances have the most damaging effect on group morale and organizational effectiveness, (a) hierarchical romances in which one participant directly reports to the other and (b) utilitarian romances in which one participant satisfies personal/sexual needs in exchange for satisfying the other participant’s task-related and/or career-related needs.”).


30. Cf. Sharon Jayson, *Workplace Romance No Longer Gets the Kiss-Off*, USA TODAY, Feb. 8, 2006, at 9D (noting that survey by Opinion Research Corporation for America Online found that more than half of single men and two-fifths of all single women would be open to dating their co-worker).

31. See Terrence M. McMenamin, *A Time to Work: Recent Trends in Shift Work and Flexible Schedules*, MONTHLY LAB. REV. Dec. 2007, at 3 (“[N]early one-third of wage and salary workers have flexible schedules on their primary jobs, meaning that they can vary their beginning and ending hours; about one-fifth work a shift
hours. As workers spend more time in the office, it becomes more likely that Cupid’s arrow will strike at the office. A recent survey reported in the *New York Times* found that fifty-eight percent of employees have engaged in workplace romance, fourteen percent of which dated a superior and nineteen percent of which dated a subordinate. A different survey found that forty-four percent of managers who dated a coworker said their relationship led to marriage. Another survey determined that over fifty percent of workplace romances lead to some sort of long-term commitment. Some surveys have subsequently found that “anywhere from one-third to one-half of all romances now start at work.” Studies have also determined that workplace paramours have a high relapse rate. “Twenty percent of the 6,700 surveyed workers have engaged in an office romance more than twice.” This trend has caused one worker to claim that “the workplace serves as a replacement for the bar scene.”

Other than a regular daytime shift on their primary job; and a slightly smaller proportion works on Saturday, Sunday or both.

32. See Peter Kuhn & Fernando Lozano, *The Expanding Workweek? Understanding Trends in Long Work Hours Among U.S. Men, 1979-2004* 3 (IZA, Discussion Paper No. 1924, 2006) (“After declining for most of the century, the share of employed American men regularly working more than 50 hours per week began to increase around 1970. This trend has been especially pronounced among highly educated, high-wage, salaried, and older men.”); see also Stephanie Armour, *U.S. Workers Feel Burn of Long Hours, Less Leisure, USA Today*, Dec. 16, 2003, at 1B (“Combined weekly work hours for dual-earning couples with children rose 10 hours per week, from 81 hours in 1977 to 91 hours in 2002.”).


34. See Mireya Navarto, *Love the Job? What About Your Boss?, N.Y. Times*, July 24, 2005, at H1-9; see also Jayson, supra note 30, at 9D (“Forty percent of employees reported being involved in such a romance at some point in their careers.”).


36. See Thrilling Scoop, supra note 33 (recognizing majority of workplace romances result in long-term commitments).


Public perception of workplace romance has improved because employees significantly benefit from the relationships that they develop. Romantic coworkers in marriages or other long-term relationships are happier with themselves and their work situations. There is strong theoretical support for this belief. Alluding to Sigmund Freud’s pleasure principle, Marcuse has noted that workplace sexuality should be encouraged as a means of gratification on otherwise boring jobs. The emotional excitement associated with workplace romance would theoretically result in higher levels of personal and job satisfaction.

In theory, these higher levels of satisfaction could also benefit the employer. Marcuse suggested that workplace sexuality may “be useful in terms of morale, as a kind of libidinal ‘indulgency pattern.’” He explained that employers should permit workplace romance because when sexuality is integrated into the workplace, it becomes subject to “(controlled) satisfaction . . . [b]ut no matter how controlled . . . it is also gratifying to the managed individuals. . . . Pleasure, thus adjusted, generates submission.” Some social scientists have found evidence to support the perspective that marital status, and implicitly romantic status, is positively related to job satisfaction levels.

41. See generally Sigmund Freud, Beyond the Pleasure Principle (James Strachey trans., Liveright Publ’g Corp. 1961) (1920).
42. See Marcuse, supra note 27, at 12 (describing workplace romance as employee incentive).
44. See Gouldner, supra note 43, at 70–71.
45. See, e.g., Cathy F. Bowen, Rama Radhakrishna & Robin Keysor, Job Satisfaction and Commitment of 4-H Agents, J. EXTENSION, June 1994, available at http://www.joe.org/joe/1994june/rb2.html (“Job satisfaction of agents was significantly related to . . . marital status.”); C. Carnall & Ray Wild, Job Attitudes and Overall Job Satisfaction: The Effect of Biographical and Employment Variables: Research Note, 11 J. MGMT. STUD. 62, 66 (1974) (“Marital status appears to have a relatively substantial effect on the relationship of self-actualization and job satisfaction and on the relationship of overall satisfaction and attitudes to supervision, personnel/industrial relations, training, social peer relations and the amount of work and effort required.”); Charles N. Weaver, Sex Differences in the Determinants of Job Satisfaction, 21 ACAD. MGMT. J. 265, 267 (1978) (implying that serious workplace romance benefits romantic coworkers); see also id. (stating that “employed married women should be more job satisfied when their husbands are employed”); Andrea Kay, Would You Sign a ‘Love Contract’?, HONOLULU ADVERTISER, Apr. 23, 2007 (on file with author) (“[C]o-workers who spend more time at work, have higher motivation, fewer sick days and less turnover.”).
III. IS CUPID AIMING HIS ARROW AT THE EMPLOYER’S WALLET?

The law contributes to the reason why most employers accept the restrictive perspective. The law makes employers legally and financially liable should workplace romance go awry.46

Workplace romance implicates the law of sexual discrimination. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in hiring, and from limiting, segregating, classifying, or discharging employees on the basis of sex.47 Title VII, however, provides little guidance as to what discrimination based on sex means. In fact, Title VII’s reference to sex was a late addition to the drafted legislation. While being debated on the House floor, Representative Howard W. Smith of Virginia offered an amendment to include “sex” to Title VII.48 Many have suggested that the “sex” term was added in order to undermine the bill’s viability.49 Perhaps as a result of this history, the Equal Employment Opportunity Commission (EEOC) “viewed the sex amendment as a fluke, conceived out of wedlock, and tried to ignore its existence . . . .”50 The EEOC’s initial slow foot is to some extent understandable—no committee hearing or report within the Congressional Record exists to explain why the amendment was adopted or what it was intended to do.51

In light of that obscurity, academics began to theorize about how Title VII should function. MacKinnon not only paved the road for recognizing a claim for sexual harassment by deftly negotiating the legal, social, and political issues involved in such a claim in her revolutionary scholarship,52 but she also served as co-counsel to the respondent in the first Supreme Court case to recognize sexual harassment as sexual discrimination

46. See Schultz, supra note 8, at 2064–65 (“Libertarian critics claim that the threat of employer liability under Title VII, combined with a vague definition of harassment, gives employers an incentive to go overboard in regulating employee conduct.”).


50. Freeman, supra note 48, at 163–64 (internal quotations omitted).

51. See Gold, supra note 49, at 458 (rationalizing EEOC’s resistance to prosecute sex discrimination).

52. See, e.g., Catharine A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Catharine A. MacKinnon, 10 Cap. U. L. REV. ix (1981) (“As the first legal wrong to be defined by women, sexual harassment has been called a feminist invention.”).
under Title VII. In one book, MacKinnon categorized "quid pro quo" and "condition of work" sexual harassment and noted that, regardless of the form of sexual harassment, the conduct should come within the purview of Title VII because "[w]omen are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality . . .".

When Sexual Harassment of Working Women: A Case of Sex Discrimination was first published, most courts believed that sexual harassment was not based upon sex, but instead based upon behavior and therefore outside the scope of Title VII. For example, in Barnes v. Train, an employee refused to have a sexual relationship with her supervisor and brought forth a sexual discrimination claim after being reassigned. The district court judge did not believe the reassignment was based on sex, but instead based on behavior and therefore not within the scope of Title VII. He noted:

The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.

Ultimately, this decision was reversed on appeal in Barnes v. Costle, as were other district court decisions with analogous reasoning.

Such reversals reflect the slow change in judicial attitudes towards sexual harassment that eventually culminated in the Meritor Savings Bank, FSB v. Vinson decision. There, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." The Court noted that to be actionable, sexual harassment "must be sufficiently severe

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54. MacKinnon, supra note 52, at 174.
56. See id. at 124.
57. Id.
58. 561 F.2d 983 (D.C. Cir. 1977).
60. 477 U.S. 57 (1986).
or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 62

Though many feminists endorsed the result of this decision, some were unfavorable in their assessment of the case. In particular, Schultz has been critical of the expansion of Title VII to include sexual harassment. She has noted that there is no statutory basis to believe that Title VII referred to sexuality or sex harassment. 63 Instead, she claims, Title VII was intended to end job discrimination. 64 Schultz noted that:

[early on, as we have seen, the promise of sex harassment law to help dismantle sex segregation and inequality was lost and replaced with an emphasis on eradicating workplace sexuality. In the process, sexual harassment law has bestowed new life and increased legitimacy on an age-old managerial dream of achieving a perfectly rational workplace devoid of sexuality and other distracting passions. 65

Despite such concerns, the Supreme Court validated sexual harassment law and continued to develop this evolving doctrine. For example, in Burlington Industries, Inc. v. Ellerth 66 and Faragher v. City of Boca Raton 67 the Supreme Court held that employers are potentially liable for harassment by supervisory employees even if the victim did not experience "tangible retaliation." 68 Ellerth and Faragher, however, do provide employers with an affirmative defense to vicarious liability where there is no tangible retaliation, if the employer demonstrates that he "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 69

Because courts subject employers to legal liability for the unauthorized actions of their employees but shield them from liability if they attempt to prevent sexually harassing behavior, many employers feel compelled to vigilantly monitor workplace romance. If they do not, employers can be subjected to costly legal liability on numerous grounds. 70

62. Id. at 67 (internal quotation omitted).
63. Schultz, supra note 8, at 2075.
64. See id.
65. Id. at 2191.
68. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee."); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding same).
69. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 778.
70. See Jessica Lynn Mok O'Neill, If You Love Me Dear, Please Sign Here: Will the 'Love Contract' Play a Role in Protecting Employers from Sexual Harassment Liability?, 40
For example, when a workplace romance ends, romantic coworkers may claim that the relationship was not consensual and that they experienced sexual harassment or retaliation by the other coworker attempting to revive the relationship.

Some courts have recently expanded the scope of sexual harassment law to include employees who are not the actual object of harassment.\footnote{J. Marshall L. Rev. 311, 320 (2006) ("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."); see also HR.BLR.com, 'Love Contracts' Lessen Liability from Consensual Workplace Dating (Feb. 6, 2006), http://hr.blr.com/whitepapers.aspx?id=17668.} An example of this expansion is Miller v. Department of Corrections,\footnote{71. See generally Cheryl L. Howard, Romeo and Jullets: A Modern Workplace Tragedy, 9 U. Pa. J. Lab. & Emp. L. 805 (2007).} in which plaintiff employees claimed sexual harassment based upon the conduct of the warden at the state prison where the plaintiffs were employed. The plaintiffs alleged that the warden engaged in sexual affairs with three subordinate employees and subsequently gave those employees unwarranted favorable treatment.\footnote{72. 115 P.3d 77 (Cal. 2005).} Though those subordinates might have been able to argue that the favorable treatment was warranted and predictable in light of Marcuse's theoretical perspective, the subordinates essentially admitted that the treatment was unwarranted. One subordinate even said that she received a promotion because she could "'take him [the warden] down' with her knowledge of 'every scar on his body.'"\footnote{73. See id. at 80.} The Supreme Court of California concluded that the plaintiffs had established a cause of action for hostile work environment stemming from sexual harassment because a "hostile environment may be created even if the plaintiff never is subjected to sexual advances" and because a hostile environment can be proven by "demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions."\footnote{74. Id. at 82.} Clearly, employers need not only concern themselves with the effects of workplace romance upon the paramours, but also upon other coworkers.

IV. Love Contract Policies Defined

In economic terms, opponents of workplace romance believe that romantic coworkers create considerable externalities in the form of potential employer legal liability and coworker demotivation. Where the externalities created by workplace romance outweigh the combination of the benefits of the relationships and the costs of restricting them, it is economically rational for an employer to attempt to force employees to internalize the externalities by sanitizing the workplace through the restriction of workplace sexuality. Developed in 1982 by attorneys at Littler
Mendelson of San Francisco, the love contract policy is a device that employers can utilize in order to restrict workplace romance and limit their potential liability.

Love contract policies merge elements of non-fraternization policies and consensual relationship agreements. Non-fraternization policies prohibit social relationships between employees, most usually between supervisors and subordinates. Consensual relationship agreements are written attestations signed by romantically involved coworkers that acknowledge their relationship to be consensual and agree that a breakup will have no adverse impact on job performance. Drawing upon both of these devices, a love contract policy dictates that an employee who is romantically involved with a coworker must inform the employer of the relationship and sign a love contract. If the employees fail to fulfill these duties, the employer can then terminate the employees. In order to give employees notice of the love contract policy, employers integrate it into corporate employee handbooks and widely disseminate it throughout the office.

Underlying the love contract policy is an actual legal document—the love contract. Love contracts primarily protect the employer from a sexual harassment suit by evidencing that the outset of a romantic workplace relationship was consensual. Echoing this sentiment, Robin Bond has noted that love contracts are "'all about CYA,' . . . using the acronym for 'Cover your ass.'"


77. The form and substance of love contracts have changed with time. Jeff Tannenbaum, one of the contract's creators, explained that originally, the love contract was a written warning. He has explained that the earlier form of the love contract was "in the form of a counseling notice or company memo to remind or warn the employee about the company's sexual harassment policy." Id.

78. See Crosier v. United Parcel Serv., Inc., 198 Cal. Rptr. 361, 366 (Cal. Ct. App. 1983) (upholding employee termination for violation of nonfraternization policy by engaging in sexual relationship with coworker); see also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 585 (5th Cir. 1998) (recognizing that employer's nonfraternization policy did not prohibit "employees from dating if they were not in a direct supervisory relationship.")


80. See HR.BLR.com, supra note 70.

81. Kay, supra note 45; see also Sarah Elizabeth Richards, "Before We Hook Up, Can You Sign This?", SALON.COM, July 21, 2005, http://archive.salon.com/mwt/feature/2005/07/21/love_contracts/print.html (noting that implementing love contract policy is "building your defense"); HR.BLR.com, supra note 70 ("'[L]ove contracts' should be used to supplement a company's antiharassment policy, not in place of a well-implemented policy against sexual harassment.").

82. See Richards, supra note 81 (quoting Robin Bond, Esq.).
Gutierrez, Preciado & House LLP of Pasadena has distributed its sample love contract.\(^83\) It states that by signing the love contract, the employees "notify the company that [they] wish to enter into a voluntary and mutual consensual social relationship" which they "are both free to end . . . at any time. Should the relationship end, [they] agree that [they] will not allow the breakup to negatively impact the performance of [their] duties."\(^84\) The contract can also include recognition of the employer's sexual harassment policy and that "entering into the social relationship has not been made a condition or term of employment."\(^85\) This language is representative. Attorneys have noted that the terms of the love contract should vary based upon the circumstances of the relationship.\(^86\) A drafter can also add language that would explicate that the employees are required to follow reporting procedures if they begin to feel uncomfortable in their romantic relationship.\(^87\)

Scholars, attorneys, and human resource professionals have panned love contracts as overkill,\(^88\) impractical,\(^89\) and misnomers.\(^90\) These same critics have also criticized love contracts for stifling workplace romances regardless of their duration.\(^91\) Sarah Richards described this concern in narrative:

\(^84\) Id.  
\(^85\) Id.  
\(^86\) See HR.BLR.com, supra note 70 (contemplating terms that may vary as result of power differentials between romantic coworkers).  
\(^87\) See Richards, supra note 80 (noting how love contracts should function).  
\(^89\) See HR.com, Doing the Love Contract (June 2, 2003), http://www.hr.com/hr/communities/legal/workplace_regulations/doing_the_love_contract_eng.html ("Many lawyers and professional HR people are coming to the opinion that company policies that just prohibit any kind of romantic attachment between employees aren't practical to enforce and often cause disruption and inefficiency in the workforce.").  
\(^90\) I must mention that there are some generalized concerns that the "love contract" is a misnomer and that there may not be a legally enforceable contract. I believe, however, that the love contract is a binding contract. Very briefly, the romantically involved coworkers are promising to one another that if the relationship sours, they will not let it affect their working relationship. A breach of that promise would result in the employer having a right to terminate employment. Because there are a set of promises, the breach of which creates a remedy, the love contract conforms to the definition of "contract" provided in Restatement (Second) of Contracts § 1.  
\(^91\) See Lagorio, supra note 88 ("But some say a love contract is something only a lawyer could come up with. 'I think it makes a relationship kind of cold . . . I'd almost want to have it more romantic and secret."); Richards, supra note 80 (describing romantically involved coworkers who felt "uncomfortable" about signing love contracts, but eventually did sign and thereafter married, and introducing
Love contracts may enable legally safe sex in the workplace, but they’re about as romantic as nooky in the office supply room. In the typical progression of a relationship—from establishing exclusivity to meeting family to saying ‘I love you’—where exactly does ‘We must sign this legal document so we can protect our company in case I freak out and make your life a living hell’ fit in?92

Despite these critiques, employers continue to implement love contract policies or similar variations thereof with great frequency.93

V. LOVE CONTRACT POLICIES AS A FORM OF ECONOMIC DURESS

Love contract policies are well-known by employment lawyers in the United States,94 yet there is scant case law discussing love contract policies. I am aware of only one American case that related to the legality of love contracts. Williams v. Joe Louther Insurance Agency, Inc. details the conflict relating to an owner of a company who hired his long-term, married mistress to work for his company.95 The romantic relationship waned and the owner informed his employee that he “needed her more professionally.”96 He consequently offered her a severance package and told her that she had the choice of either resuming an intimate relationship or leaving the job. She refused and soon thereafter was terminated.97 The employee claimed that the owner unlawfully subjected her to quid pro quo sex discrimination, and a commission ruled in her favor and ordered the owner to pay damages.98 The owner appealed, claiming that he did not terminate her because of her sex.99

The Supreme Court of Montana rejected the owner’s arguments, noting that the district court had rejected the owner’s claim that the Hearing Examiner prejudiced his rights by virtue of irregularities in the proceed-

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92. Id.
94. Cf. id.
95. 177 P.3d 1018 (Mont. 2008).
96. Id. at 1020.
97. See id.
98. See id. at 1021.
99. See id. at 1023.
ings. For example, the owner attempted to offer expert testimony explaining why the termination was commercially reasonable in light of a love contract that had been entered into by and between the owner and the employee. The love contract supposedly contained a clause that if the romantic relationship were to end, then the employee would leave the company. The court noted that the district court properly refused to hear the expert testimony because it was irrelevant and the existence of a love contract was a question of fact that an expert could not resolve.

This conclusion conformed to the Montana Department of Labor and Industry's Final Agency Decision to reject the owner's attempt to use a love contract as an affirmative defense. There, the Hearing Examiner explained that even if a love contract existed, the contract would be unenforceable as contrary to public policy. The Hearing Examiner explained that the clause that would have required the employee to leave the company if the relationship ended was essentially an agreement to condition employment on the continuation of an affair, which would essentially constitute a waiver of the employee's right to be free from adverse employment action due to sex—a violation of the state's human rights law. The Hearing Examiner also explained that such a clause would cause the contract to be an agreement "in derogation of . . . marriage, a legal relationship defined and protected by Montana law, and, as such, would be void . . . given [the employee's] marital status."

The Hearing Examiner also concluded that the love contract was "a contract of adhesion, given the disparate bargaining powers of supervisor and subordinate." The Hearing Examiner's succinct ruling and analysis implies a concern about the underlying fairness of the agreement. Though the Hearing Examiner did not specify that this unfairness was a result of economic duress, many have noted that economic duress is

100. See id. at 1022.
101. See id.
102. See id.; see also Brief of Appellant at 5, Williams v. Joe Lowther Ins. Agency, Inc., 177 P.3d 1018 (Mont. 2008) (No. 06-609) [hereinafter Brief of Appellant, Williams] ("Lisa assured him that if the relationship led to problems, she would voluntarily and gracefully leave her employment with Lowther Insurance."); Appellant's Reply Brief, Williams, supra note 19.
103. Williams, 117 P.3d at 1022.
105. See id. ("Factually, such an agreement between supervisor and subordinate would expressly condition her continued employment on continuation of the affair. This, on its face, would constitute a waiver of Williams' right, under the Human Rights Act, to be free from adverse employment action because of sex.").
106. Id.
107. Id.
closely related to contracts of adhesion, as both theories relate to contract creation in spite of unconscionability.

Indeed, the considerations that led the Williams Hearing Examiner to conclude that the love contract was a contract of adhesion would also counsel towards the determination that the love contract was signed under economic duress. The doctrine of economic duress is fundamental in contract law. Where a party to a contract manifested assent as a result of an improper economic threat, the contract may be voidable by the victimized party. Economic duress, which is also described as "business compulsion," can arise in two circumstances: (1) where a party to the contract induces the duessed assent, or (2) where a non-party to the contract induces the duessed assent. Love contract policies implicate only the latter circumstance because the employer does not actually sign the love contract. Love contract policies should be legally unenforceable because they violate the economic duress doctrine.

A. Economic Duress Defined

Where a non-party induces a contractual party's manifestation of assent, the victim usually may void the contract. Although the Restatement

108. See, e.g., R. Epstein, Medical Malpractice Insurance: Its Cause and Cure, in The Economics of Medical Malpractice 245, 255 (S. Rottenberg ed., 1978); J.M. Balkin, Some Realism about Pluralism: Legal Realist Approaches to the First Amendment, 1990 DUKE L.J. 375, 415-16 (1990) (discussing contracts of adhesion and economic duress in union); Theodore J. St. Antoine, Employment-At-Will—Is the Model Act the Answer?, 23 STETSON L. REV. 179, 196 (1993) (same); see also Sian E. Provost, A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law, 73 TEX. L. REV. 629, 632 (1995) ("When the weaker party's bargaining position is due to his financial condition, courts sometimes invalidate contracts because of so-called 'economic coercion,' or 'economic duress.' . . . Also, the suspicion with which courts view contracts of adhesion is based on the same premise—that one party's acceptance is not free in spite of the absence of a threat to violate that party's rights.").


110. For example, both analyses would include consideration of the disparate power distribution.

111. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979).

112. See id. § 175(1) ("If a party's manifestation of assent is induced by improper threat by the other party that leaves the victim with no reasonable alternative, the contract is voidable by the victim.").

113. See id. at ch. 7, topic 2, introductory note (1979).

114. See id. § 175.

115. Id. § 175(2) ("If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim . . . .").
(Second) of Contracts does not explicate under which circumstances a non-party induces assent of a contractual party,\textsuperscript{116} it is clear that the Restatement is contemplating exposure and susceptibility to economic duress.\textsuperscript{117}

Economic duress takes its form through the levy of an improper threat, expressed by words or conduct,\textsuperscript{118} which leaves the victim with no reasonable alternative.\textsuperscript{119} The Restatement identifies numerous examples of threats that are improper. One example of an improper threat is a threat that is a breach of the duty of good faith and fair dealing under a contract with the recipient.\textsuperscript{120} In such a scenario, because the threat is so shocking, courts will not inquire into the fairness of the resulting exchange and the resulting contract is outright voidable.\textsuperscript{121} Another example is a threat in which the threatened action is a crime or tort.\textsuperscript{122}

Nevertheless, sometimes the threat may not be shocking, but the combination of the threat and its resulting unfairness will render the threat improper.\textsuperscript{123} If the resulting exchange is on unfair terms, then a threat may be improper either where the threatened act would harm the recipient but not significantly benefit the party making the threat, or where the threatened act is otherwise a use of power for illegitimate ends.\textsuperscript{124} The commentary explains with respect to the "not significantly benefit" scenario that "[i]f, on the [victim's] refusal to contract, the maker of the threat were to do the threatened act, it would therefore be done maliciously and unconscionably, out of pure vindictiveness."\textsuperscript{125} It cites the example of a threat to make public embarrassing information regarding the victim unless he or she assents to a contract.\textsuperscript{126} The commentary provides an additional example of a threat that does not significantly benefit the party making the threat:

A makes a threat to B, his former employee, that he will try to prevent B's employment elsewhere unless B agrees to release a claim that he has against A. B, having no reasonable alternative,

\textsuperscript{116} See id.
\textsuperscript{117} This is gleaned from the title of this Section of the Restatement: "When Duress By Threat Makes A Contract Voidable." The Comments also provide additional evidence. Comment A notes that "[t]he essence of the type of duress dealt with in this Section is inducement." Id. \textsection 175 cmt. a.
\textsuperscript{118} See id. ("[An improper threat] may be inferred from words or other conduct.").
\textsuperscript{119} See id. \textsection 175(a) cmt. a ("The essence of [economic] duress . . . is inducement by an improper threat."); see id. \textsection 175(a) cmt. b ("A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and takes advantage of it.").
\textsuperscript{120} See id. \textsection 176 (1) (d) (1979).
\textsuperscript{121} See id. \textsection 176 cmt. a.
\textsuperscript{122} See id. \textsection 176 (1)(a) (1979).
\textsuperscript{123} See id.
\textsuperscript{124} See id. \textsection 176 (2).
\textsuperscript{125} Id. \textsection 176 cmt. f.
\textsuperscript{126} See id.
is thereby induced to make the contract. If the court concludes that the attempt to prevent B's employment elsewhere would harm B and would not significantly benefit A, A's threat is improper and the contract is voidable by B.\footnote{127}

Regarding "power for illegitimate ends," the commentary itself is vague as to how this rule operates.\footnote{128} Several illustrations, however, suggest that the rule is a catchall provision that prohibits abuse of negotiating power. One illustration notes that if a municipal water company threatens to refuse to supply water to the developer's property unless the developer assents to an unreasonable contract, then that company's threat amounts to an illegitimate use of its power, thus making the threat improper and the contract voidable.\footnote{129}

Of course, the improper threat must also cause the assent. The Restatement's text focuses upon inducing assent, and the commentary explains this requirement.\footnote{130} Comment C notes that the threat must have substantially contributed to the victim's decision to manifest assent.\footnote{131} It notes that "[t]he test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress."\footnote{132} An evaluation of this requirement should consider all attendant circumstances, including the relationship of the parties.\footnote{133}

In addition to demonstrating that he or she has been exposed to an improper threat, the victim must also demonstrate that he or she had no reasonable alternative to assenting in order to take advantage of the economic duress doctrine. The Restatement's commentary explains that a victim has a reasonable alternative to succumbing to the threat where an alternative legal remedy exists that affords effective relief to the exigencies of the victim's circumstances.\footnote{134} To illustrate the standard, the Restatement contrasts specific situations. A threat of commencing an ordinary civil action to enforce a claim to money would not be duress because the victim can assert his or her rights in the actions, which would be a reasonable alternative to succumbing to the threat and entering into a contract, and then asserting his or her rights in a subsequent action.\footnote{135}

\footnotesize{127. Id. § 176 cmt. f, illus. 12.}
\footnotesize{128. See id. § 176 cmt. f ("Clause (c) is concerned with cases in which the threatened act involves the use of power for illegitimate ends. Many of the situations encompassed by [other clauses of this Section] involve extreme applications of this general rule, but it is more broadly applicable to analogous cases.").}
\footnotesize{129. See id. § 176 cmt. f, illus. 16.}
\footnotesize{130. See id. § 175(b) (1979).}
\footnotesize{131. See id. § 175 cmt. c ("In order to constitute duress, the improper threat must induce the making of the contract.").}
\footnotesize{132. Id.}
\footnotesize{133. See id. ("All attendant circumstances must be considered, including such matters as age, background and relationship to parties.").}
\footnotesize{134. See id. § 175 cmt. b (explaining when no reasonable alternative exists).}
\footnotesize{135. See id. § 175 cmt. b, illus. 1.}
hand, if the victim is exposed to threats that involve the seizure of property, the use of oppressive tactics, or the possibility of emotional consequences, then there are no reasonable alternatives to assenting to the threat.\textsuperscript{136}

Even if a contractual party has been subjected to an improper threat to which the party had no reasonable alternative, the doctrine of economic duress is inapposite where "the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction."\textsuperscript{137} The commentary explains that "'[v]alue' includes a performance or a return promise that is consideration."\textsuperscript{138}

\section*{B. Economic Duress Applied}

The love contract policy is a classic example of economic duress. An application of the law of economic duress to love contract policies in the abstract substantiates this belief. After acknowledging that a contract exists, a victim can plead that his assent was the product of economic duress and that the contract should therefore be voidable if the prerequisite elements are met.

First, there must have been a levy of an improper threat. The threat of termination from employment, the non-fraternization policy aspect of the love contract policy, is improper.\textsuperscript{139} The Restatement notes that one can identify an improper threat based upon either the substance of the threat or the substance of the transaction.\textsuperscript{140} The paradigmatic love contract scenario involves an improper threat based upon both grounds.

A tenuous argument exists that the threat to terminate employees for failing to sign a love contract alone may be so shocking as to be improper.\textsuperscript{141} Such a finding, however, would run counter to a relatively con-

\textsuperscript{136} See id. § 175 cmt. b (discussing scenarios when no reasonable alternative exists).
\textsuperscript{137} Id. § 175(2) (1979).
\textsuperscript{138} See id. § 175 cmt. e.
\textsuperscript{139} Tangentially, the threat has been communicated to the employees sufficiently under the Restatement. This threat has been expressed to the employees in a variety of ways, including corporate employee handbooks and e-mails reminders. Surely if a threat can be implied from conduct, then an express written policy is adequate. See id. § 175 cmt. a (stating threat can be implied from conduct).
\textsuperscript{140} Compare id. § 176 (1), with id. § 176 (2).
\textsuperscript{141} It is worth noting that the ultimate consequence for violation of a love contract policy need not be termination of employment in order to implicate the analysis of this paragraph and those that follow. Other procedures mandated by a love contract can be problematic. For example, constructive discharge, a cause of action closely related to wrongful discharge, refers to situations where the employee is not fired but quits under circumstances where the working conditions have made continued employment intolerable. See Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998); see also Trosper v. Bag 'N Save, 734 N.W.2d 704, 711 (Neb. 2007) ("An employee's right to be free from retaliatory demotion for filing a workers' compensation claim is married to the right to be free from discharge.").
stant principle in a significant body of case law and literature that non-fraternization policies are legal because the underlying activity, sexual relationships by and between coworkers, is not typically considered a protected activity and because employers possess good reasons to limit workplace romance.\(^{142}\) Despite this, based in part upon the circumstances of the love contract policy’s implementation and prior to its application by the employer, it is possible that some jurisdictions may interpret termination for failing to sign a love contract as an actionable employment tort for violation of the employer’s well-recognized duty of good faith and fair dealing.\(^{143}\) Most particularly, such a termination could represent wrong-

Courts have noted that constructive discharge encompasses factual scenarios where the changed conditions can include a demotion, reduction in salary, reduction in job responsibilities, and reassignment to menial or degrading work. See, e.g., Hunt v. Rapides Healthcare Sys., LLC, 277 F.3d 757, 771–72 (5th Cir. 2001). If the love contract itself specifies that the romance’s end can affect any such condition, then the substance of the contract may itself make the contract unenforceable.

142. Cf. Parks v. City of Warner Robins, 43 F.3d 609, 614–15 (11th Cir. 1995) (analyzing statutory anti-nepotism policy that prohibited relatives of city employees in supervisory positions from working in same department) (internal citations omitted). The court noted:

   Accordingly, the statute will not violate the Due Process Clause if it is rationally related to a legitimate government interest. Warner Robins has advanced several such interests: avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; preventing family conflicts from affecting the workplace; and, by limiting inter-office dating, decreasing the likelihood of sexual harassment in the workplace. A rule that would prevent supervisory employees from having to exercise their discretionary power to hire, assign, promote, discipline or fire their relatives is rationally related to each of these practical, utilitarian goals. Therefore, we hold the anti-nepotism policy adopted by Warner Robins is a reasonable attempt to achieve legitimate government interests; as such, it is valid under the Due Process Clause.

Id.; see also Gary M. Kramer, Limited License To Fish off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization, 22 W. New Eng. L. Rev. 77, 97 (2000) (“[A] narrowly-tailored employer policy, addressing only the problem of supervisor-subordinate romances, will normally withstand judicial scrutiny under almost every common-law, statutory, and constitutional attack.”); Douglas Messengill & Donald J. Peterson, Legal Challenges to No Fraternization Rules, 46 Lab. L.J. 429, 435 (1995) (“[E]mployers have essentially free rein to impose prohibitions against fraternization between employees even when those employees are away from the workplace.”); Rabin-Margalioth, supra note 93, at 248 (“Legal challenges to nonfraternization policies have been unsuccessful where employers forewarned their employees about them and then applied them consistently.”). But see Guardsmark, LLC v. NLRB, 475 F.3d 369, 378–80 (D.C. Cir. 2007) (finding nonfraternization rule that “sweeps . . . broadly” to be unlawful in part because National Labor Relations Act guarantees employees right to associate for purposes of discussing terms and conditions of employment), rev’d, Guardsmark, LLC, 344 NLRB No. 97 (2004) (finding nonfraternization rule to be lawful because it would not “reasonably tend to chill protected employee activity”).

143. See Richard J. Kohlman, Wrongful Discharge—Bad Faith Dismissal of At-Will Employee, 48 AM. JUR. PROOF OF FACTS 2d §§ 1, 2 (2007) (explaining how bad faith discharges of at-will employees can create actionable employment tort).
ful discharge if a finder of law accepted that dismissal of the employee would violate a fundamental principle of public policy.

Courts in certain circumstances have held that a threat to terminate employment due to a workplace romance violated public policy and constituted a viable claim of wrongful discharge.\footnote{144} For example, in \textit{Williams}, the Hearing Examiner determined that a clause in the love contract that required the employee to leave the company following a workplace romance’s termination was void for public policy reasons.\footnote{145} The Examiner so reasoned because such a clause would essentially condition employment upon the continuation of an affair, thereby constituting a waiver of the employee’s right to be free from adverse employment action due to sex.\footnote{146}

That analysis seems relevant here, where an employer requires romantic coworkers to sign a love contract or else be terminated. In some circumstances, this threat alone can be rather shocking. For example, if in the aftermath of a failed workplace romance, the employer strictly interprets the love contract provision that requires former lovers to agree not to allow the breakup to negatively impact the workplace environment and holds both employees responsible for any negative impact, then the policy would effectively cause employees to remain in workplace romances for fear of being terminated in any aftermath. Some may interpret this consequence like the Hearing Examiner did in \textit{Williams} and conclude that the threat of termination conditioned employment on the continuation of the romance, thereby inhibiting the employees from being free from adverse employment action due to sex. If, however, employees generally knew of the love contract policy throughout their employment and employers uniformly applied it, this would decrease the probability that a court would find the threat of termination alone violated either public policy or employment law.

An easier route to the conclusion that the love contract policy involves an improper threat would be under \textit{Restatement (Second) of Contracts} § 176 (2), which identifies threats as improper where there is a combination of unfair terms and the threat of termination. Here, the terms of the

\footnote{144} See id. § 1 (listing examples of situations where threat to terminate employment creates actionable employment tort); cf. Richard K. Zuckerman & Sharon H. Berlin, \textit{Romance in the Workplace: Employers Can Make Rules If They Serve Legitimate Needs}, 71 N.Y. St. B. J. 43 (1999) (noting that there is no clear determination as to whether nonfraternization policies are legal in New York) (citing Pasch v. Katz Media Corp., 94 Civ. 8554 (RPP), 1995 WL 469710, at *1 (S.D.N.Y. Aug. 8, 1995)) (refusing to dismiss plaintiff’s claim that she had been demoted in violation of state labor law for living with former co-employee because cohabitation and social activities with workers is lawful recreational activity).

\footnote{145} Though the \textit{Williams} Hearing Examiner discussed the substance of the love contract, see Hearing Examiner, \textit{Williams}, supra note 104, at *17, which brought the analysis beyond the scope of \textit{Restatement (Second) of Contracts} § 176 (1) because the substance of the agreement there relates so closely to the content of the threat in the paradigmatic scenario, its analysis is persuasive here.

\footnote{146} See Hearing Examiner, \textit{Williams}, supra note 104, at *17.
exchange are entirely unfair. The victims of the threat derive no real benefit from the resulting love contract. The love contract does not bestow upon its signatories any substantive rights. They receive no defined legal rights and no additional financial compensation for signing the contract.

By contrast, the contract creates obligations that the signatories owe to their employer. Indeed, several commentators have noted that the love contract is a document that is intended to protect the employer from its employees. The entirety of the circumstances, therefore, suggests that though the terms of the love contract are of great benefit to the employer, the love contract is unfair to the employee signatories.

These conditions likely satisfy Restatement (Second) of Contracts § 176 (2)(a) because the employer does not appear to "significantly benefit" by threatening to terminate employees who fail to sign love contracts. Though the employer believes termination will protect it from sexual harassment suits, termination may create an alternative claim of wrongful discharge. Likewise, the love contract does not even limit liability for sexual harassment. Instead, it creates circumstantial, documentary evidence to support the employer in certain, discrete sexual harassment actions. Given the limited function of love contracts, one should conclude that the threat of termination is improper because the love contract does not bestow significant benefits upon the employer.

The employer's threat of termination also uses "power for illegitimate ends." By virtue of the nature of an employment relationship, the employer possesses a great degree of power over the employee. The employer's threat to use that power to sever the relationship is improper because the creation of a love contract serves an illegitimate end. Through the love contract policy, the employer exposes employees to threats that involve their continued employment, which courts have interpreted to involve a property interest. This inherently oppresses the employee. The threat of termination, therefore, serves illegitimate ends, making the threat of employment termination improper.

Once a court determines that there was an improper threat, victims must show that the threat actually induced their assent. As applied, this means that the threat of termination must have substantially contributed to the victim's decision to assent to the love contract. Undoubtedly the threat of termination substantially, if not entirely, causes the victim to sign a love contract. The victim derives no real benefit from signing the love contract; instead, the victim owes new obligations to their employer. Also, the substance of the exchange and the power difference by and between the employer and the employees plays a significant role. It is therefore


148. See Restatement (Second) of Contracts § 175 cmt. c.
unfathomable that a court could find that the threat of employment termination would not have induced the victim's assent.

The victim must also have had no reasonable alternative to assenting to the threat. Here, the victim lacks a reasonable alternative. If employees do not assent to the threat and refuse to sign the love contract, the employer will terminate them. The termination will come at great expense to the victims; termination results in a loss of future income, decreased marketability for future employment, and even lower levels of mental health.\textsuperscript{149} No legal remedy affords effective relief to the exigencies of the employee's circumstance. The employer's threat is not a threat to begin an internal termination process in which the employees can assert their rights; instead, the employer exposes employees to a threat that will result in an immediate and direct loss. The only way in which employees could assert their rights is by some subsequent action that the threat does not contemplate. The victims therefore have no reasonable alternative to assenting to the love contract policy.\textsuperscript{150}

Additionally, the exception to the economic duress doctrine would not apply. The doctrine does not apply where the other party to the transaction possesses reason to know of the duress.\textsuperscript{151} Both parties to a love contract clearly have reason to know of the duress—the threat of termination of employment if the love contract is not signed is known by both parties to the contract, as the policy appears in the corporate employee handbook and is widely disseminated. Because both parties to a love contract know of the duress to which the other is subjected, here the exception is inapplicable.

\section*{VI. Conclusion}

Despite the restrictive legal and social perspectives about the propriety of workplace romances, employers do not have an unrestricted right to attempt to prohibit such romances. The love contract policy is one attempt that is misguided. A contractual law analysis raises serious questions about the enforceability of love contract policies. Because love contracts are signed under economic duress, they become wholly voidable; courts can release love contract-bound employees from any additional obligations that they owe their employer, and any attempt to use the terms of the love contract in any employment litigation would be legally impossible. Employers who seek to restrict workplace romance should therefore consider alternative human resource policies. Perhaps employers will even


\textsuperscript{150} \textit{But see Restatement (Second) of Contracts} § 175 cmt. c ("Since alternative sources of funds are ordinarily available, a refusal to pay money is not duress, absent a showing of peculiar necessity.").

\textsuperscript{151} \textit{See id.} § 175(2).
come to accept that Cupid can strike at any moment and will simply embrace his work; unfortunately, such an attitudinal change is likely nothing more than the idyllic wish of a romantic sap.