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Relatives and Romance: Nepotism and Fraternization

Contents

- Hiring Preferences - Familial Affinity Discrimination
- Employment of Married Couples
- The Small Public Safety Agency
- Romantic Entanglements – Discrimination Complaints
- Romantic Entanglements – Disciplinary Actions
- References

Hiring Preferences - Familial Affinity Discrimination

Nepotism and consanguinity refer to employment preferences for relatives. It is not uncommon to find, in larger police or fire departments, the employment of fathers and sons, uncles and nephews, brothers and sisters, and even husbands and wives.

Cronyism refers to preferences given to friends or their children, fellow church members, classmates, etc. Nepotism and cronyism can form the basis of a valid Title VII lawsuit if such practices perpetuate racial, religious, national origin, or other forms of unlawful discrimination. A qualified plaintiff would have to be a member of a protected class, show that the practice resulted in a disparate rejection rate for class members, prove that he or she was otherwise qualified and allege that he or she would have been hired but for the hiring preference.

What if the applicant is a white male? A federal court in Minnesota dismissed a civil rights action filed by a rejected applicant who sued, alleging an **Equal Protection** {N. 1} violation, because 3 of the 4 persons who were appointed were related to other members of the fire dept. Backlund v. Hessen, 904 F.Supp. 964 (D.Minn. 1995).

The appellate court reversed. The plaintiff had received the highest score on the firefighters entry exam, but was not offered a job. Instead the city hired a son of an assistant chief, a brother of a captain, and a brother of a training officer. The panel held:

“We think that ... nepotism in governmental hiring requires some measure of justification before it can pass constitutional muster. Such justification must connect the challenged hiring criterion to the capacity of the applicant to perform the duties of the job applied for. That showing is absent from this record.”

[Backlund v. Hessen](#), #95-4229, 104 F.3d 1031 (8th Cir. 1997).

Recently an appellate court in New Jersey ruled that it was not unlawful to pass over firefighter applicants to hire candidates that are related to current or former city employees. The state’s discrimination laws did not include “familial status,” as an unlawful employment practice. The panel said:

“As a result, while we do not endorse nepotism to the extent that it promotes hiring on a basis other than merit, the practice is clearly not prohibited by the [statute], even if plaintiff fell within the statutory definition, which he does not.”

[Bumbaca v. Twp. of Edison Fire Dept.](#), A-6279-02T3, 373 N.J. Super. 239, 861 A.2d 156, 2004 N.J. Super. Lexis 415 (2004).

A nepotism rule would prevent a newly elected county clerk from firing three at-will deputies to hire three relatives. The same rule might require a newly elected sheriff to fire a sergeant with ten years of job experience because he is the sheriff’s first cousin.

- One way to prevent unfairness is to allow exceptions that are approved by the city council, county commission or other legislative body. New Mexico statutes provide this solution. {N. 5}

Employment of Married Couples

More typically, judicial challenges are brought by coworkers that intermarry. Most, but not all, courts have upheld regulations that prohibit married spouses from working for the same employer.

A U.S. Army captain that was married to an enlisted woman once received a letter

of reprimand which began: “It has come to the attention of this headquarters that you are living with your wife. This must cease at once.” Washington Post, Mar. 2, 1947; The Women’s Army Corps at 404, Lt. Col. Mattie Treadwell (1954).

A recent law review article noted:

“Antinepotism rules and nonfraternization policies are disquieting to advocates of workers’ rights because they threaten employees’ right to privacy. These regulations may have the effect of forcing employees to choose between their job and their intimate relationship.

“This issue is particularly alarming since it is usually the woman who eventually gives up her job when heterosexual couples are forced to make a choice, for example, when no-spouse rules are applied to couples who work together and want to get married. Therefore, these facially neutral policies disparately impact the employment opportunities of women ...”

Love at Work, Sharon Rabin-Margalioth, 13 Duke J. of Gender L. & Pol’y 237 (2006).

The Eighth Circuit has stated that there must be a “compelling need” for a no-spouse rule and that the rule must be aimed at a problem that is concrete, demonstrable, and not just perceived. Moreover, “the rule must be essential to eliminating the problem, not simply reasonable or designed to improve conditions.”

The employer’s no-spouse policy violated Title VII’s ban on sex discrimination. Equal Employment Opportunities Commission v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986).

More recently, the Sixth Circuit upheld a management policy requiring one spouse to resign if two employees intermarry; holding that the rule did not impede a constitutional right to marriage. Vaughn v. Lawrenceburg Power System, #00-5466, 2001 U.S. App. Lexis 22508, 2001 FED App. 0375P (6th Cir.).

Some communities allow spouses to work for the same agency, but insist that they work in different areas or on different shifts. In Oklahoma an arbitrator upheld a rule requiring two married firefighters to work on different shifts; there was no duty to bargain on the issue with the union. Ada, Okla. and IAFF L-2298, FMCS Case #98/0812-14048-7, 112 LA (BNA) 530 (Eisenmenger, 1999).

Similarly, the Iowa Supreme Court held that a city was not required to bargain

with employee unions before adoption of a municipal antinepotism ordinance, which included “cohabitation.” Police Officers’ Assn. v. Sioux City, 496 N.W.2d 687 (Iowa 1993), citing Parsons v. Co. of Del Norte, 728 F.2d 1234 (9th Cir. 1984).

However, in New York, the state’s Public Employee Board held that the state police had a duty to negotiate with the union before adopting a policy prohibiting the supervision of a relative. Matters of promotion, assignment, appointment or the transfer of employees are a mandatory subject of bargaining. PBA of NY St. Troopers and St. of N.Y., #U-11239, 23 NYPER (LRP) P4563, 1990 NYPER (LRP) Lexis 2162 (NY-PERB, 1990).

In Illinois, the Supreme Court rejected a discrimination suit by intermarried state troopers who wanted to work together; the policy did not violate state’s marital status discrimination law. Boaden v. Illinois Dept. of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61, 171 Ill.2d 230 (1996). The court wrote:

“...marital status discrimination is discrimination based on an individual’s legal status as married, single, separated, divorced, or widowed. In our view, a policy prohibiting spouses from working together presents an entirely different kind of harm than discrimination based on an individual’s legal status. In order to find discrimination under these facts, we must consider not only the individual’s legal status, but also the individual’s relationship to a particular employee. Had the legislature intended to reach this kind of conduct, it would have done so in specific and certain terms.” 664 N.E.2d at 65

The Eleventh Circuit sustained a Georgia police dept. rule requiring one of two intermarried officers to resign. Parks v. City of Warner Robins, 43 F.3d 609 (11th Cir. 1995). See also, Parks v. City of Warner Robins, 841 F.Supp. 1205 (M.D.Ga. 1994).



The Small Public Safety Agency

In Stearns v. Estes, 504 F. Supp. 998 (C.D. Cal. 1980) a California police officer married a dispatcher that had been hired five months before him. After the wedding, the less-senior employee -- the police officer -- was to be terminated. He

sued, claiming a violation of his state and constitutional rights.

Although the court abstained from deciding the state law marital-discrimination claims, it held that the officer was entitled to a preliminary injunction in order to preserve his federal constitutional claim. The judge wrote:

“Because the City should be able to avoid plaintiff’s working on the same shift as his wife or at least minimize the overlap in their working hours, whereas termination of plaintiff’s employment will deprive him of the opportunity to work and to continue to develop his skills in his chosen profession, I find that the balance of hardship tips sharply in plaintiff’s favor.”

Wives of Wisconsin police officers that were denied jobs as dispatchers lost their civil action. The court found that the anti-nepotism rule served a legitimate employment purpose. Sebetic v. Hagerty, 640 F.Supp. 1274 (E.D. Wis. 1986).

In a rural Washington county, the sheriff was sued for refusing to commission as a fulltime officer, a reserve deputy who was married to another fulltime deputy.

In the trial court, the Sheriff of Los Angeles County filed a declaration of reasons to bar the employment of a wife of a law enforcement officer from employment in the small agency. Los Angeles is in the same federal appellate circuit.

If hired, she would have worked in an area where only six deputies reside. There were only fourteen officers in the department. State law prohibits marital discrimination; Wash. Rev. Code § 49.60.010.

Sheriff Block’s declaration cited a possible conflict of interest and an instinctive desire and need to protect and defend one’s spouse to the detriment of the public.

“Marital relationships, unlike any other relationships, generate intense emotions, which could interfere with an employee’s job performance as well as the cohesiveness of the unit,” he wrote. He noted that marital problems occurring at home would be “transported to the work place and vice-versa.”

In small departments, a family emergency would decimate the workforce by two officers. Additionally, if one spouse filed a grievance, the “other spouse might be expected to take the same side in the dispute.”

Sheriff Block noted that if one spouse is promoted, the other might resent the promotion. If employed in the same unit, a promotion would prevent objective evaluation of the subordinate or impair effective disciplinary action. Other employees “would be unlikely to appraise or discuss the performance of the

supervisor's spouse.”

He added that some officers might resent the marital “advantage,” whether or not favoritism is actually shown. [Declaration of Sheriff S. Block](#) (Mar. 4, 1993).

The District Court upheld the sheriff, and the Ninth Circuit affirmed. Potential conflicts of interest justified the sheriff's anti-spouse rule. [Brennan v. San Juan County](#), 1994 U.S. App. Lexis 22017 (Unpub. 9th Cir.); 34 F.3d 1071 (Table entry.).

Sheriff Block's affidavit was critical, because Washington prohibits marital discrimination.

At least twenty-one states plus the District of Columbia prohibit employment discrimination based upon marital status. {N. 2} In Illinois, a teacher won the right to teach at the same school where her husband was employed as the principal. [River Bend Sch. Dist. v. IL Human Rts. Cmsn.](#), 597 N.E. 842 (Ill.App. 1992), review denied, 606 N.E.2d 1235 (Ill. 1992). See also: [Ross v. Stouffer Hotel](#), 816 P.2d 302 (Haw. 1991), based on a similar state law involving hotel employees. Other cases have upheld or rejected nepotism regulations for a variety of reasons. {N. 3}

- Local no-spouse laws and rules usually allow two coworkers to cohabitate, and even to have children together, provided they do not get married.
- If public employers also have residency requirements, then a married couple cannot lawfully work for two different agencies.

Romantic Entanglements – Discrimination Complaints

In 1990 the Equal Employment Opportunity Commission decided that favoritism toward a paramour, spouse, or a friend may be unfair, but it does not discriminate against women or men in violation of Title VII, “since both are disadvantaged for reasons other than their genders.” [EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism](#), EEOC Notice No. 915-048.

The EEOC distinguished favoritism based on a romantic relationship from coerced sexual conduct, which is sexual harassment, and from widespread sexual favoritism in the workplace. Most of the appellate circuits that have found that coworkers were not discriminated against because of their genders; they were disadvantaged because they were not romantically involved with their superior. The cases are:

- [Tenge v. Phillips Modern AG](#), # 05-2803, 446 F.3d 903 (8th Cir. 2006).
- [Beecham v. Henderson County](#), #04-5845, 422 F.3d 372 (6th Cir.2005).
- [Schobert v. Illinois Dept. of Transp.](#), #01-1598, 304 F.3d 725 (7th Cir. 2002).
- [Womack v. Runyon](#), #97-8637, 147 F.3d 1298, 1300 (11th Cir. 1998).
- [Taken v. Oklahoma Corp. Cmsn.](#), #96-6312, 125 F.3d 1366 (10th Cir. 1997).
- [Becerra v. Dalton](#), #95-2582, 94 F.3d 145 (4th Cir. 1996).
- [DeCinto v. Westchester Co. Med. Ctr.](#), 807 F.2d 304 (2d Cir. 1986).

Romantic Entanglements – Disciplinary Actions

Some employers, both private and public, have prohibited or regulated romantic involvements among coworkers. The rule might be unrestricted, or apply only where there is a supervisor-subordinate relationship, or where the employees work on the same shift and in the same facility or territory.

Employers justify such restrictions for the same reasons advanced in support of the no-spouse hiring rule.

The [National Labor Relations Board](#), in a 2-to-1 decision, upheld an employer's work rule that directs employees not to “fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees”

The rule was designed "to provide safeguards so that security will not be compromised by interpersonal relationships either between ... fellow security guards or between ... security guards and clients' employees." [Guardsmark, LLC and Service Empl. Int. Union](#), L-24/7, #20-CA-31573-1, 2005 NLRB Lexis, 344 NLRB No. 97 (NLRB 2005). The ruling is not binding on public employers, but has persuasive influence.

The Ninth Circuit has held that inquiries about an employee's personal and sex life must be justified by a strong showing of governmental interests, including a proof that the information would likely impact on job performance. [Thorne v. City of El Segundo](#), 726 F.2d 459 (9th Cir. 1982).

The Sixth Circuit overturned a verdict won by a former police officer that disobeyed the chief's order to stop dating a subordinate. Such rules prevent favoritism and sexual harassment complaints. [Anderson v. City of LaVergne](#), #02-6094, 371 F.3d 879, 2004 FED App. 0180P (6th Cir. 2004).

However, an employer must actually have an anti-fraternization policy before punishing an off-duty relationship. [Monterey County and Individual Grievant](#), CSMCS No. ARB-01-0050, 117 LA (BNA) 897 (Levy, 2002).

If a no-dating or no-cohabitation policy exists, it must be enforced without regard to gender. Enforcement of a rule prohibiting dating among coworkers, if applied to an employee because of her gender, would state a disparate practice claim under Title VII. Zentiska v. Cardinal Industries, #CV488-47, 708 F.Supp 1318 (D. Ga. 1988). {N. 4}

- In those agencies that are required to engage in collective bargaining, a new rule regulating off-duty relationships is probably a mandatory topic for negotiation with the concerned bargaining units.

Notes:

1. The Fourteenth Amendment to the federal Constitution provides that “no state shall... deny to any person within its jurisdiction the equal protection of the laws.”

2. Alaska Stat. Sec. 18.80.220 (1991); Cal. Govt. Code Sec. 12940 (West 1992); Conn. Gen. Stat. Sec. 46a-60 (Supp. 1992); Del. Code Ann. Tit. 19, Sec. 711 (1985); D.C. Code Ann. Sec. 1-2512 (1987); Fla. Stat. Ann. Sec. 760.10 (1986); Haw. Rev. Stat. Sec. 378-2 (1991); Ill. Rev. Stat. Ch. 68, Para. 1-102 (1989); Me. Rev. Stat. Ann. Tit. 5, Sec. 7051(2) (West 1989) [Civil service workers only]; Md. Ann. Code Art. 49b Sec. 16 (1991); Mich. Comp. Laws Ann. Sec. 37.2202 (West Supp. 1992); Minn. Stat. Ann. Sec. 363.03 (West 1991); Mont. Code Ann. Sec. 49-2-303 (1991); Neb. Rev. Stat. Sec. 48-1104 (1988); N.H. Rev. Stat. Ann. Sec. 354-A:8 (Supp. 1991); N.J. Rev. Stat. Sec. 10:5-12 (Supp. 1992); N.Y. Exec. Law Sec. 296 (McKinney 1982); N.D. Cent. Code Sec. 14-02.4-03 (1991); Ore. Rev. Stat. Sec. 659.030 (1991); Va. Code Ann. Sec. 2.1-716 (Michie Supp. 1992); Wash. Rev. Code Sec. 49.60.180 (1990); Wis. Stat. Sec. 111.311 (1988).

3. Cases upholding nepotism rules:

- California: Parsons v. County of Del Norte, 728 F.2d 1234 (9th Cir. 1984).
- Texas: City of Carrollton v. Peters, 843 S.W.2d 186 (Tex. App. 1992) and Collier v. Civil Serv. Cmsn., 817 S.W.2d 404 (Tex. App. 1991).

Cases rejecting nepotism rules:

- Alabama: Owen v. Stokes, 523 So.2d 1085 (Ala. Civ. App. 1988).
- Nebraska: Voichahoske v. City of Grand Island, 321 N.W.2d 124 (Neb. 1975).
- New Jersey: Hughes v. Lipscher, 906 F.2d 961 (3rd Cir. 1990).

4. The employer ultimately prevailed on the facts; Zentiska v. The Pooler Motel, #CV488-47, 708 F. Supp. 1321 (S.D. Ga. 1988).

5. N.M. Stat. 10-1-10: *Nepotism prohibited; exceptions*. It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided that this act shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

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