

**CHECKLIST OF CONSIDERATIONS FOR INVESTIGATION AND CORRECTIVE ACTION
IN INCIDENTS INVOLVING EMPLOYEES ENGAGED IN SEXUALLY PROMISCUOUS
ACTS, CONSENTING RELATIONSHIPS, ETC. WHICH CAUSE JOB PERFORMANCE
DEFICIENCIES OR WHICH CREATE SEXUAL DISCRIMINATION LIABILITIES**

- ___ Base any and all actions initiated by Management upon the job performance effects that the employees' action cause in either their own job performance areas or the job performance areas of co-workers or those with whom the subject employees routinely work, including Company Rules and Policies abused or violated by the actions of the employees.
- ___ Take immediate steps to ensure that there is no supervisory/management participation in this relationship or in similar relationships which cause negative job performance effects. Do not take this for granted. Address it privately and directly with the supervisor. A review of actual cases indicates that it will be more likely that a violation will be deemed to exist in those cases which arise where supervisory/management participation in a relationship involves an employee with a supervisory reporting relationship to the involved supervisor or manager.
- ___ Require of supervisors involved that any corrective action or disciplinary action of any nature which significantly alters the job duties or obligations of either any of the involved employees be very closely coordinated with the Labor Relations Department and EEO advisors BEFORE dealing directly with the employees.
- ___ Any action taken (job performance counseling, warning, disciplinary) should be directed toward specific employees in private by the immediate supervisor and with the provision (automatically) of a Personnel Department witness of the same sex as the employee being dealt with.
- ___ Do not discuss any action toward involved employees in the presence of other employees or with other employees.
- ___ Maintain all records of any and all such action in a separate sealed envelope in the employee's formal Company Personnel Records with a label affixed which reads:

**CONFIDENTIAL INFORMATION: TO BE OPENED AND EXAMINED ONLY IN THE PRESENCE
OF AND WITH AUTHORIZATION OF THE PERSONNEL MANAGER.**

- ___ Or maintain such records in a file separate and apart from the employee's personnel file. Label the file **Confidential and Highly Sensitive**, and file the information by alphabetical order by employee name and seal each entry in envelope as above with the Confidential Information label.
- ___ Do not grant Personnel Department staff members access to the above sealed records. Only the Personnel Manager or equivalent should be permitted access.
- ___ Maintain extreme confidentiality on all actions taken in such matters. Do not chide, joke, ridicule, tease, or degrade, etc., the participants.
- ___ For employee conduct in areas related to sexual promiscuity/consenting relationships, etc., which occur off-duty, see MARC Manual topics dealing with OFF-DUTY MISCONDUCT.
- ___ Make sure with regard to any action taken for the involved employees that there are not other employees who are engaged/involved in identical or similar actions where similar corrective steps are not in effect or have not been taken.
- ___ Do not take action directly toward only one of the mutually involved employees if there are job performance effects regarding both employees' performance.
- ___ Remember, non-involved employees who work in the presence of such involved employees may become litigants in sexual harassment/discrimination suits in the event they believe they are, as observers, discriminated against or as a result of the involved employees' actions if there are any detrimental job effects upon their own jobs.
- ___ Read the MARC Checklist Manual section on Sexual Harassment/Discrimination and follow the Checklists listed in that section for preventive and responsive measures.
- ___ In any action taken toward the individuals involved, do not make reference to the participants' specific sexes, ages or age differences, or to the years of service.
- ___ Research state codes regarding vulnerability/liabilities for employers/supervisors in the area of "alienation of affection", in so far as consenting relationships are concerned among employees, especially where management officials/supervisors are aware of such relationships.
- ___ Regardless of the state codes, do not allow supervisors to encourage, in any way, such actions or relationships between employees and supervisors including arranging, assisting in subterfuge or disguising, and concealing.

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- ___ The use of Company funds (expense reports, travel expenses, meals) to support consenting relationships, promiscuity, or sexual liaison, etc., aggravate the wrongdoing by the employee; but such wrongdoings uncorrected by management may also increase the employer's vulnerability and increase the employer's/supervisor's liability. (Condonement, encouragement)
- ___ Make sure that Company-sponsored transportation (motor pools, vanpools, buses) is supervised and publish and display in transportation vehicles rules governing employee conduct.
- ___ Do not take action toward an employee in a non-related area to correct problems in areas which are sensitive, with which you would rather not deal. Use multiple-track disciplinary techniques.
- ___ Do not utilize transfer (solely) or promotion by-pass (denial of promotion) as a means to solve the problem, as this may indicate support for or condonement of the action which caused the job performance effect. Address the job performance deficiencies and correct them.
- ___ Enforce the rules among all employees that:
 - "Employees are to remain in their assigned work areas, alert and attending to their job duties," and "No employee is to be out of their assigned work area without the knowledge and approval of his/her supervisors."
- ___ Oftentimes corrective action should be taken toward employees who:
 - A) are not in areas to which they have been assigned,
 - B) are in areas where they have not been assigned, or,
 - C) are in controlled access areas without authorization and/or without a legitimate job performance business reason.
- ___ Supervisors may be required to take corrective action toward an employee(s) whose actions affect the morale of other employees. Such effects upon morale should be determined solely by supervisory sensory fact observations and not based solely upon hearsay, opinions, innuendo, etc.
- ___ A supervisor is often involved in disciplinary action toward an employee for absenteeism and it may become obvious that an absence/sickness pattern exists which coincides with the regularly scheduled days off of another employee or with sickness absences of another employee, where both employees are involved in the same consenting relationship. Such action should be directed toward correction of the absences, not toward the relationship which may be affecting the patterned absences; however, it may be necessary to address the relationship privately with each individual, as it may be contributing to the absence problems.
- ___ **REMEMBER:** It is the employee's responsibility to correct the problem. It is the supervisor's responsibility to:
 - A) inform the employee of the acceptable standard of performance,
 - B) inform the employee of the fact that the employee's present record/pattern is not acceptable, and,
 - C) to provide the employee the opportunity to improve.
- ___ **REMEMBER:** Job performance standards/criteria should be fair and reasonable and should not be arbitrary, capricious, or discriminatory. They should be enforced or demanded in a fair and even-handed manner toward all employees, uniformly and consistently.
- ___ Do not condone or demonstrate support for consenting relationships by allowing employees so involved to obtain each other's paychecks, assignments, etc. Follow company rules/policies regarding release of paychecks directly to the employee, unless the employee has provided the employer with specific current written approval/direction to give his/her paycheck to another person. (See MARC Manual regarding the topic of "ostensible agent.")
- ___ Supervisors should not become involved in family disputes of employees. If calls are received for an employee who is not at work, inform the caller, "I have not seen the employee." If the caller is told that the employee is not at work, the speaker should be absolutely sure that is the case. Do not create problems for the employee who may have been called in to work or who may be visiting the premises on business. Make an effort to confirm whether or not the employee is there. A better response would be, after asking the caller identity, "The employee is not at this number at this time. I do not know of his/her whereabouts. Is this an emergency? Is there a number you would like to leave in the event I see the employee?" At all times follow company policy regarding incoming telephone calls for employees.

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- ___ Consenting relationships and other similar activities by employees often result in phone calls and other interruptions at work by employee spouses, relatives, or friends. Steps should be taken with the employees to correct such interruptions, for example, do not as a corrective measure threaten to, "inform the employee's spouse of the relationship if he/she does not get the spouse to stop calling, interrupting, etc!"
- ___ If involved employees, for the convenience of or for the enhancement of their relationship, purposely exclude others from joint employee participation job performance activities, and if such exclusion has a negative impact upon job performance, training exposure/opportunity, keep-current-ability, etc., then correct the problem with proper attention and controls by the supervisor, and through direction or direct assignment by the supervisor or through presence of the supervisor.
- ___ **REMEMBER:** Observing employees at work is a reasonable means of supervision, but observation should be "reasonable" and related to the employee's job performance obligation and not snooping, entrapment, discriminatory, obtrusive, or otherwise abusive toward the employee.
- ___ Call to the attention of the participants (privately and individually) any telephone misuse emanating from the employee's actions/participation in a consenting relationship, only if similar corrective action is being taken toward other employees engaged in telephone misuse/abuse for any reason.
- ___ **Remember:** Any investigation of any employees involved in such activity should be limited to their actions:
 - A) while on the job and in the performance of their job, or,
 - B) which have a direct negative effect or impact upon their job or jobs of other employees or upon customers, vendors, etc.,
 - C) off the job only when such conduct constitutes a disruptive job-performance effect.
- ___ Consenting relationships which involve or produce joint violations of company rules, policies, or Agreement clauses should be addressed by administering corrective action (job performance counseling, warning, disciplinary action) toward the individuals privately and with reference to the job performance of the individual. Misconduct is, of course, aggravated on the part of each employee where joint action was involved in carrying out the misconduct, such as:
 - ... two employees falsifying records,
 - ... two employees assisting in theft-related misconduct,
 - ... two employees improperly manipulating schedule change provisions, overtime provisions, attendance-overtime, etc. for unfair and unjust personal enrichment, and other similar instances.
 Penalties are usually accelerated or increased in such instances. For illegal acts, prosecution of those involved is recommended.
- ___ Be respectful of the employees' rights to engage in protected concerted activity (e.g., grievances), even though their other actions, which are not protected, are causing job performance difficulties. Do not overreact!
- ___ When conducting fact-finding interviews with or when disciplining bargaining-unit employees for sexual harassment, sexual promiscuity, etc. inform the employee of the general nature of the meeting at the very start of the meeting, in the presence of a Personnel Department representative (same sex as employee) and allow the employee to exercise his/her right (Weingarten) to have a union representative (witness) present for the interview. Companies whose policies provide for "automatic provision" of union representation during disciplinary fact-finding interviews or disciplinary sessions may want to consider this format for employee misconduct/actions which are of a moral turpitude nature (sexual promiscuity, theft-related misconduct, etc.).
- ___ NOTE: The presence of a Personnel Department witness and/or a union representative requested by the employee should not create vulnerability for the employer or the supervisor involved in the areas of defamation, libel, or slander where the supervisor's actions are based upon "due process" guidelines outlined in this manual.
- ___ While some courts and regulatory agencies seem to be supportive of transfer or job reassignment in order to separate employees involved in sexual harassment incidents or consenting relationships which may result in sexual harassment allegations, the use of such transfers or reassignments should not leave the impression that the continuation of the objectionable and inappropriate conduct will be condoned in the new jobs/locations.

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PARAMOUR CLAIMS/REDUCING EMPLOYER LIABILITY FOR CO-WORKER/EMPLOYER CONSENTING SEXUAL RELATIONSHIP

Under Title VII, employers may be liable when employees are denied employment benefits because of a co-worker's consenting sexual liaison or relationship with a representative of the employer. Such claims are called paramour claims.

As with employer liability under Title VII for sexual harassment claims, an employer's potential liability may be predicated upon conduct by agents, supervisors, co-workers, and non-employee third parties.

The EEOC recognizes paramour claims as an issue related to sexual harassment, thereby making paramour issues governed by general Title VII principles.

Employer preventive measures or protections against paramour claims parallel protection against sexual harassment claims and include:

- ___ provisions of an internal complaint/resolution process with confidentiality protections,
- ___ training of all employees in how to make such internal appeals,
- ___ provisions of a policy which prohibits sexual harassment and which addresses sexual liaisons on the job,
- ___ training of supervisors and employees in that policy and specifically warning supervisors of the legal perils associated with sexual liaisons and of the potential for paramour claims,
- ___ promptly identifying and prudently taking steps to correct job performance deficiencies caused by relationships, on or off company premises, between employees and between employees and supervisors,
- ___ utilizing "confidential" record keeping procedures in documenting (such as sealed envelopes with limited access notations), corrective job performance counseling, disciplinary action, or other corrective measures taken toward employees and supervisors,
- ___ requiring that supervisors justify in writing (for review by top-level managers) reasons for all promotions where two or more aspirants or potential promotees exist, whether or not there exists any form of consenting relationship and whether or not there is a difference in sex or sexual preference between the job aspirants or between a job aspirant and the supervisor,
- ___ management review of all such promotions, whether or not sexual liaison/relationships are known to exist, even if company policies do not explicitly prohibit such relationships,
- ___ MARC CHECKLIST/CONSIDERATIONS IN "SEXUAL LIAISON" OR "SEXUAL PROMISCUITY" SITUATIONS.

Reference: EMPLOYEE RELATIONS LAW JOURNAL Vol. 15, No. 1, Summer 1989, pgs. 57-66.