

Love Contract—A Misnomer

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Shayne Kahn was working as an executive recruiter for Objective Solutions International, a placement firm located in New York City, when she was fired. Ms. Kahn, an exemplary employee with a flawless work history, who was neither criticized nor disciplined prior to her termination, was abruptly terminated when her affair with the owner and operator of the business, Steven Wolfe, was discovered by his wife. Ms. Kahn pleaded for her job after her boss told her that she was being let go because his family "disapproved" of her. In response to Ms. Kahn's pleas, Steven Wolfe told her to call his wife and if his wife agreed to permit her to continue working, he would rescind the termination. Ms. Kahn did so and reached Mr. Wolfe's wife at her therapist's office where she was discussing the aftermath of her husband's affair. She was not in a forgiving mood. The termination was not rescinded and in his parting words Mr. Wolfe said to Ms. Kahn that "if he could not be intimate with her, he no longer wanted her around."¹

Not surprisingly, that break-up triggered a lawsuit. Ms. Kahn claimed that she had been the victim of sexual harassment and had been wrongfully terminated from her position. Unfortunately for Ms. Kahn, the court disagreed and dismissed her case. As the court noted, a voluntary, romantic relationship cannot form the basis of a claim of sexual harassment. Both federal law and state law outlaw unwelcome sexual conduct that interferes with an employee's work and makes the work environment hostile. If the conduct is welcome, there is no claim. Because Ms. Kahn admitted that the affair was consensual and welcome, she had no claim. Her complaint that her employer terminated her after the breakup of their relationship at the insistence of his wife is simply not the type of conduct that is prohibited by employment discrimination statutes.

Not only can an employee be terminated for having an affair with the boss because the boss's spouse insists on it, an employee can be terminated if the boss's spouse believes there is an affair, even if there isn't one. Maelynn Tenge was a bit flirtatious.² She began working at an agricultural-product, manufacturing company owned and operated by Scott Phillips as a secretary. However, within ten years of her hire, she had been promoted to positions of increasing responsibility and had become the highest paid employee, working directly with Mr. Phillips. But, that arrangement was unacceptable to Mr. Phillips's wife, Lori Phillips, who also worked at the company. She became convinced that Mr. Phillips and Ms. Tenge were romantically involved and that Ms. Tenge was trying to seduce her husband.

On at least two separate occasions when Lori Phillips and her husband, Scott, were socializing with Ms. Tenge and her husband, Maelynn Tenge and Scott Phillips touched one another in a suggestive manner. Lori Phillips believed that the suggestive touching evidenced a sexual relationship and expressed anger. But, Ms. Tenge was apparently little concerned about Lori

Phillips's feelings. Ms. Tenge wrote sexually explicit notes to Scott Phillips and left them in places where others, including Lori Phillips, could see them. Ms. Phillips found one of the notes and reasonably concluded that Ms. Tenge and her husband were having an affair. She demanded that Ms. Tenge be fired, which Mr. Phillips did. But, he rehired her. That led Ms. Phillips to present Mr. Phillips with an ultimatum—fire Ms. Tenge or get a divorce. Mr. Phillips told Ms. Tenge that his wife was "making [him] choose between [his] best employee or her and the kids." He chose 'her and the kids' and Ms. Tenge was fired for good.

Ms. Tenge, who Mr. Phillips agreed had never failed to perform an assigned task well, sued, claiming that she had been terminated because of her sex. Ms. Tenge conceded that her behavior could have led Ms. Phillips to believe that she was having an affair with Ms. Phillips's husband. But, she argued that Mr. Phillips's stated choice between his "best employee" and his marriage was a form of sex discrimination.

The court rejected her arguments. Sex discrimination or sexual harassment claims must be based on a person's sex, not because of his or her sexual partner or his or her sexual affiliation. Employment discrimination statutes are designed to protect a person from discrimination based on that person's sex or gender. They are not designed to protect a person because of that person's sexual conduct. Thus, Lori Phillips's belief, even if erroneous, that Ms. Tenge posed a threat to her marriage and family was a non-discriminatory reason for the termination. Termination because of real or perceived consensual sexual conduct with an employer or supervisor is not discrimination on the basis of the employee's sex.

Thus, the law is clear. Consensual sexual relationships that are welcome cannot form the basis of a sexual harassment claim. However, when romantic or sexual relationships end, often feelings are bruised and egos are hurt. In that state, many an employee can convince himself or herself that he or she would have never entered into the romantic or sexual relationship, but for the fact that his or her boss pressured him or her into doing so. Many employees persuade themselves that the relationship was not welcome.

To address the hazards of a broken relationship in the workplace and to provide some insulation from liability, some employers have required their employees to sign "love contracts." "Love contracts" have received widespread publicity as several prime time television shows have introduced them into their plots. Simply stated, a love contract is a statement that the employee has freely and voluntarily entered into a relationship with another employee. The nature of the relationship is purposefully left vague and the employees who are parties to the love contract acknowledge that they are familiar with the employer's policy against sexual harassment and nothing in their relationship conflicts with the employer's policy. Of course, the employer's policy explicitly prohibits any unwelcome sexual attention or advances. Employers reason that by having the employees sign the "love contract," they have reduced the risk of litigation. But, reliance on "love contracts" may be misplaced.

A few years after Joe Lowther became the sole shareholder and owner of an insurance agency when his father died, he met Lisa Williams, who was the receptionist at a health care facility where he was a patient.³ At the time they met, Mr. Lowther was a divorced father of three children and Ms. Williams was married with two children. Mr. Lowther approached Ms. Williams about coming to work for the agency he owned and operated. Initially, she declined, but eventually she accepted the offer joining two other employees at the office. A few months after she began working for Mr. Lowther, she and Mr. Lowther entered into a consensual, sexual relationship. Not surprisingly, the two other employees became uncomfortable and left, leaving Ms. Lowther as the sole employee. Also, not surprisingly, they hid their affair from Ms. Williams's husband.

As the affair progressed, Mr. Lowther pressed Ms. Williams to divorce her husband. But, Ms. Williams and her husband initiated proceedings to adopt a third child. This simply resulted in

Mr. Lowther increasing the pressure, which Ms. Williams resisted for months. She told Mr. Lowther that she couldn't leave her husband while the adoption was pending. She then told Mr. Lowther that she could not leave her husband during the holiday season. Her husband lost his job and he decided to stay home with their children. Ms. Williams then told Mr. Lowther she could not leave her husband while he was staying home taking care of their children. The tension between Mr. Lowther and Ms. Williams escalated and they stopped having sexual relations. They fought in public and the work environment was tense with Ms. Williams and Mr. Lowther the only people in the office.

Finally, Mr. Lowther gave Ms. Williams an ultimatum. He said that he could not take it any more. He told her that he needed her more "personally" than he needed her "professionally." Therefore, he insisted that Ms. Williams either resume sexual relations with him or be terminated with a severance package. Ms. Williams, needing her job to support her family, was shocked and angry. She rejected the demand and went to a lawyer the next day. After receiving legal advice, she warned Mr. Lowther that he would be in "big trouble," if she were fired. Mr. Lowther upped his offer of severance and again insisted that she choose him and her job or her husband and severance. Ms. Williams again refused.

But, two months later, Mr. Lowther again presented her with the stark choice, telling her again that he needed her more "personally" than he needed her "professionally." When she again refused, he fired her. Ms. Williams complained to executives of the insurance company for whom Mr. Lowther was writing and servicing insurance policies. Though she denied having a "physical" relationship, she admitted having an "emotional" relationship with Mr. Lowther. She led the insurance company executives to believe that Mr. Lowther had pursued a sexual relationship with her that she had resisted and found offensive. When the insurance company executives questioned Mr. Lowther, he denied having a sexual relationship but admitted that he had a relationship with Ms. Williams and shared notes that they had sent to each other. He also described gifts that the two had exchanged and confirmed that he had told Ms. Williams that he needed her more "personally" than "professionally." The insurance executives terminated the agency's contract and effectively terminated Mr. Lowther.

Ms. Williams followed with a lawsuit claiming that she was the victim of sex discrimination harassment and that she had been subjected to unwelcome quid pro quo sexual harassment. Mr. Lowther raised several defenses, including an argument that terminating an employee at the end of romantic or sexual relationship is not sex harassment. Also, he sought to rely on a "love contract" that he had Ms. Williams sign to show that the relationship was welcome and voluntary.

According to Mr. Lowther, during the more than two year period that his romantic and sexual relationship with Ms. Williams existed, he and Ms. Williams frequently discussed what would happen if the relationship were to end. Again, according to Mr. Lowther, both he and Ms. Williams recognized that if the romantic and sexual relationship were to end, the work relationship would sour becoming unprofessional and unproductive. Therefore, if the romantic and sexual relationship were to end, the employment relationship must also end and Mr. Lowther insisted that Ms. Williams knowingly and willingly assumed that risk. This conclusion that if the romantic and sexual relationship were to end, the employment relationship must also end, was in Mr. Lowther's view simply a reflection of the reality of operating a small business. Certainly, the owner could not walk away from the business; the employee in the broken relationship must. This "love contract" was not in writing. But, Mr. Lowther insisted it was real nevertheless.

The court rejected Mr. Lowther's arguments and showed limitations of a "love contract." There was a dispute over whether there even was a "love contract" because Ms. Williams denied ever having discussions about what would happen if their romantic and sexual relationship ended. Obviously, if the "love contract" had been in writing, there could be no dispute over its

existence. But, even if there were such discussions and even if there was an agreement, a "love contract" did not preclude her claim.

It is well established that

unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. . .4

Although terminating an employee because a romantic or sexual relationship ends may not constitute sex discrimination and an employee's agreement to a "love contract" may constitute an admission that the sexual conduct was welcome, that is not what happened in this case.

Mr. Lowther told Ms. Williams that he needed her more "personally" than he did "professionally" and he gave her a choice—resume sexual relations with him or get another job. Ms. Williams was fired, not because she had had a sexual relationship with Mr. Lowther. She was fired because she refused to continue a sexual relationship with him. Even assuming that the "love contract" existed, she was not fired for the welcome conduct during the affair. She was fired for the unwelcome conduct when the affair ended. The "love contract" provided no protection from liability.

The idea of a "love contract" is not without merit. In two United States Supreme Court decisions, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court established a defense to claims of sexual harassment. Absent a tangible job action, an employer can raise an affirmative defense to liability or damages for the sexually harassing conduct of its supervisors if the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. In short, if the employer has an effective sexual harassment prevention policy and the employee fails to avail himself or herself of that policy, he or she is effectively precluded from bringing an action for sexual harassment.

Sandra Speaks was employed as a public safety aid with the City of Lakeland Police Department when she began to have sexual relations with Michael Chin, who at the time was a sergeant in the department.⁵ As a public safety aid, Ms. Speaks was a non-sworn employee without either the authority to carry a weapon or make an arrest. Public safety aids were responsible for handling routine calls in one of four geographic areas in the city.

Ms. Speaks claimed that Sergeant Chin, who was assigned to a different area and was not her supervisor, made sexual advances to which Ms. Speaks acquiesced. According to her, the two had sexual intercourse both at times when they were on duty and at other times when one or the other was not on duty. Ms. Speaks claimed that she only reluctantly agreed to the sexual relationship because she feared Sergeant Chin. She also claimed to be afraid of being fired or transferred. Oddly after the demands for sexual intercourse had begun, Ms. Speaks requested a transfer so that she would be directly supervised by Sergeant Chin. The police department, unaware of the affair, honored her request.

But, the relationship between Ms. Speaks and Sergeant Chin deteriorated, and they argued. On one occasion, Sergeant Chin placed a note in Ms. Speaks's desk telling her that he would transfer back to her former unit where she would be required to work with a supervisor she did not like. Upon reading the note, Ms. Speaks became angry. When she went home that night she told her husband about her relationship with Sergeant Speaks. After weighing the matter for a few hours, Ms. Speaks's husband went to the police department and reported the affair.

He also relayed his wife's comments that she had been pressured into the affair because she feared the loss of her job.

Ms. Speaks's husband's report was the first time that the police department was aware of the issue. It conducted an investigation that concluded that the relationship was inappropriate, although there was insufficient evidence to conclude that the relationship was unwelcome. Sergeant Chin was demoted and suspended without pay. Ms. Speaks sued, claiming that she had been a victim of sexual harassment.

The court noted that her case was unusual. Ms. Speaks sought to hold her employer liable for sexual harassment based on a relationship that began before Sergeant Chin was her supervisor and when he was not in her direct chain of command. And, she voluntarily transferred under his supervision after the relationship began. But, assuming that her allegations were true, the court held that there was no claim.

Ms. Speaks's employer had taken reasonable steps to prevent sexual harassment by instituting a policy and providing employees with a mechanism to complaint of harassment. Ms. Speaks failed to use that mechanism. She did not make any complaints. When her husband brought her affair to the attention of the police department, it conducted an investigation and disciplined her supervisor. In short, it took prompt remedial action.

As the prompt remedial action from the police department insulated it from liability, a "love contract" is designed to insulate employers from liability. By signing a "love contract" in which the employee states that the relationship is consensual and voluntary, the employee is relieving the employer of any obligation to act. Also, by reinforcing the employer's sexual harassment policy and informing the employee that he or she may report any instance of sexual harassment, the "love contract" is strengthening the employer's *Ellerth/Faragher* defense and making it more difficult for an employer to later claim that the relationship was unwelcome.

But, the "love contract" need not be as direct as several television shows have presented it. The employer is just as well served by discussing its sexual harassment policy with an employee that the employer has reason to believe is engaged in a romantic relationship with another employee, especially if that employee is a supervisor. The employer may simply state that unwelcome conduct is unacceptable in the workplace and no one will be retaliated against for rejecting unwanted romantic or sexual advances. After restating the employer's policy against sexual harassment, the employee is asked if he or she has anything to report. If not, the meeting is documented and at least through the date of the meeting, the employee will have a difficult time claiming sexual harassment. If the employee does report unwelcome conduct or being pressured into a romantic or sexual relationship, the employer can take prompt remedial action thereby limiting liability.

¹ Kahn v. Objective Solutions, Intern., 86 F. Supp. 2d 377, 82 Fair Empl. Prac. Cas. (BNA) 495 (S.D. N.Y. 2000).

² Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 97 Fair Empl. Prac. Cas. (BNA) 1667, 87 Empl. Prac. Dec. (CCH) P 42359 (8th Cir. 2006).

³ Williams v. Joe Lowther Ins. Agency, Inc., 2008 MT 46, 341 Mont. 394, 177 P.3d 1018, 102 Fair Empl. Prac. Cas. (BNA) 1510 (2008).

⁴ 29 C.F.R. § 1604.11(a).

⁵ Speaks v. City of Lakeland, 315 F. Supp. 2d 1217, 93 Fair Empl. Prac. Cas. (BNA) 1371 (M.D. Fla. 2004) (M.D. Fla. 2004).
