Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?

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NOTES

ARE CONSENSUAL RELATIONSHIP AGREEMENTS A SOLUTION TO SEXUAL HARASSMENT IN THE WORKPLACE?

I. INTRODUCTION

Imagine yourself as a corporate vice-president, working late hours in a high-stress corporate environment. Your dinner companion for the past month has been an executive in your department. You both finish the project you have been working on and decide to celebrate by eating at a restaurant, rather than your desk. Over dinner and drinks, the discussion turns to the loneliness involved with working long hours and the problems with your respective relationships. As the night moves on, suddenly the truth hits: you and your co-worker are made for each other and you suggest . . . .

The late dinners continue and the relationship runs smoothly for a while. Noticing your companion's potential, you suggest her name to a few co-workers for certain career-enhancing assignments. Soon, rumors start springing up and you find it difficult to concentrate on work while being the subject of accusations and jokes. Your work product begins to suffer, particularly after fighting the night before. The lack of communication between you and your companion begins to seriously affect your job performance. You explain to your companion that the responsibilities of your job and the problems relating to supervising your sexual partner are not working out as planned. You both agree the relationship should not continue.

One week later, your ex-companion claims sexual harassment. She

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1. This is a fictional story for illustrative purposes only. All names, places and events are fictional and any similarity to real people, places or events is purely coincidental.
claims: 1) that she felt coerced into your suggestion to engage in sexual activity on that first dinner date (quid pro quo harassment),\(^2\) 2) the sexual relationship continued because you implied that her job was at stake, and 3) just as she suspected, ever since your relationship ended, you have been intentionally passing her up for promotions and assignments.

The above hypothetical problem has become a reality in today’s workplace.\(^3\) A workplace relationship between a supervisor and subordinate employee may imply coercion.\(^4\) Due to recent Supreme Court decisions regarding an employer’s vicarious liability for sexual harassment claims, not only will the harassing employee be held liable, the company will too.\(^5\)

“Workplace romances are relationships between people working together which are characterized by sexual attraction whether or not they are made known to others through the participants’ behavior.”\(^6\) Workplace romances pose a number of problems for an employer, such as: productivity slowdown, an increase of sexual harassment claims, complaints from co-workers, and employer retaliation.\(^7\) A Consensual Relationship Agreement,\(^8\) which is similar to a prenuptial agreement,\(^9\) is “one of the newest steps employers are taking to shield themselves from potential liability over a love affair gone sour in the workplace.”\(^10\) Con-

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5. See generally Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998) (holding employer liable to employee when employer knew or should have known of harassing behavior); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (same).


7. See Aaron & Thomas, supra note 4, at 1.

8. A Consensual Relationship Agreement is an agreement between co-workers which professes the consensual nature of the parties’ relationship, explains and states behavior which is prohibited should the relationship end, and contains a provision which limits the aggrieved party’s recourse to arbitration. See, e.g., Tom Kuntz, For Water Cooler Paramours, the Ties That (Legally) Bind, N.Y. TIMES, Feb. 22, 1998, § 4, at 7 (providing a model Consensual Relationship Agreement).

9. See id. A Consensual Relationship Agreement is similar to a prenuptial agreement in that both serve a precautionary role at the beginning stage of the relationship, while regulating the potential end of that relationship. See Allison A. Marston, Note, Planning for Love: The Politics of Prenuptial Agreements, 49 STAN. L. REV. 887, 890 (1997). A prenuptial agreement divides a married couple’s assets into marital property and personal property as a precautionary measure for dissolution of the marriage. See id.

Consensual Relationship Agreements were pioneered by the San Francisco law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason ("Littler Mendelson") to prohibit a failed office romance from evolving into litigation. These written agreements show that a relationship is "consensual, that neither [employee] is harassing the other and that [the couple] won't engage in favoritism." However, this new invention spawned by "jittery corporate executives" has not been tested in court.

On July 26, 1998, the Supreme Court handed down two decisions that have increased the stakes for sexual harassment claims. In Burlington Industries v. Ellerth, and Faragher v. City of Boca Raton, the Court held that "an employer is subject to vicarious liability under Title VII to a victimized employee for actionable discrimination caused by a supervisor with or without immediate or successively higher authority over the employee." The impact of this holding is now becoming visible as claims against employers are being decided upon motions of summary judgment. It is quite possible that the implementation of Consensual Relationship Agreements could help buttress the affirmative defense available to employers under the Burlington Industries and Faragher decisions.

The conflicting circuit court decisions pertaining to the viability of contract clauses that require arbitration, are comparable to clauses in Consensual Relationship Agreements which restrain the claimant by mandating an in-house review rather than judicial redress.

11. See Kuntz, supra note 8, at 7. It has come to the authors' attention that there is a dispute as to who originated this type of agreement. See Margaret Hammersley, 'Love Contract' Between Office Sweethearts May Protect Employers from Sexual Harassment Suits, BUFF. NEWS, Apr. 1, 1999, at D1 (giving credit to Rob Carrol for creating the Consensual Relationship Agreement).
12. See Hansen, supra note 3, at 79.
13. L.M. Sixel, Do Pacts Amount to Legal Condoms?, HOUS. CHRON., May 1, 1998, at 1C.
18. Burlington Indus., 118 S. Ct. at 2270; Faragher, 118 S. Ct. at 2292.
20. See discussion infra Part II.B.2.; Burlington Indus., 118 S. Ct. at 2270; Faragher, 118 S. Ct. at 2292.
21. Compare Martens v. Smith Barney, Inc., 181 F.R.D. 243, 255-56 (S.D.N.Y 1998) (allowing arbitration of Title VII claims so long as the arbitral forum is procedurally fair, does not impose financial burdens to access the arbitral forum, and must allow similar statutory remedies to Title VII), with Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202-03 (9th Cir. 1998) (denying an employer the use of compelled arbitration based on Securities Exchange Registration Form U-4).
provision of Consensual Relationship Agreements is the ability to waive one’s right to have the claim adjudicated in federal court. This waiver of judicial redress makes Consensual Relationship Agreements requiring in-house arbitration of claims beneficial, especially from the employer’s perspective.

This Note will outline the utility of Consensual Relationship Agreements as they apply to the workplace. In Part II, the Agreement will be reduced to individual provisions and the law relating to these provisions will be analyzed. This Note will discuss the requirements of a compulsory arbitration agreement. Furthermore, this Note will analyze the effects of recent Supreme Court rulings, paying close attention to the effect of Consensual Relationship Agreements on employer liability.

Part III will provide background information by describing the creation of Consensual Relationship Agreements. This section will discuss what workplaces have done to insulate themselves from liability for sexual harassment. This section will address current office policies that deal with sexual harassment, employment practice liability insurance, strict policies prohibiting office dating, a company’s hands-off approach leaving workplace romances to the employee’s good judgment, and other alternatives. Additionally, this section addresses the overlap of these possible solutions.

Part IV will discuss the benefits and liabilities of Consensual Relationship Agreements from the competing perspectives of employers and employees.

Part V will discuss whether Consensual Relationship Agreements pose a solution to sexual harassment in today’s workplace.

22. See Kuntz, supra note 8, at 7 (relying on section 9 of sample Consensual Relationship Agreement excerpted in article); Hansen, supra note 3, at 79.

23. See Hansen, supra note 3, at 79.


II. SEXUAL HARASSMENT LAW PERTAINING TO CONSENSUAL RELATIONSHIP AGREEMENTS

A. A Beginner’s Guide to Sexual Harassment Law and Title VII

Sexual harassment claims arise from Congress' enactment of Title VII. There are two recognized types of sexual harassment claims. These claims are quid pro quo and hostile work environment harassment. Quid pro quo harassment involves the “conditioning of concrete employment benefits on sexual favors.” Hostile work environment claims do not include sexual harassment manifested through economic benefits, but rather involve harassment which creates a hostile or abusive work environment.

In order to establish a quid pro quo harassment claim, a plaintiff must prove five elements. A plaintiff-employee must demonstrate that: 1) the plaintiff-employee is a member of a protected group; 2) the sexual advances were unwelcome; 3) the harassment was sexually motivated; 4) the employee’s reaction to the supervisor’s advances affected a tangible aspect of her employment; and 5) respondeat superior liability has been established. Quid pro quo harassment relates to Consensual Relationship Agreements in that a plaintiff in a sexual harassment suit could base her claim upon quid pro quo harassment, and that the claim arose prior to the signing of the agreement. Thus, the plaintiff could claim that the agreement was agreed upon, only due to the coercion in-

27. See Jana Howard Carey & Theresa C. Mannion, New Developments in the Law of Sexual Harassment from Meritor to Harris, Karibian and Steiner, H-524 PRACTICING LAW INSTITUTE/LITIGATION 7, 18 (1995).
28. See id.
30. See Meritor, 477 U.S. at 62.
32. Id. “’Tangible adverse employment action’ includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job . . . .” Durham Life Ins. Co. v. Evans, 166 F.3d 139, 144 (3d Cir. 1999). Tangible adverse employment action has been defined as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
33. For instance, Jill, who is Jack’s supervisor, tells Jack that he must accompany her up the hill for a sexual liaison or else she will fire him. Later, Jill also tells Jack to sign a Consensual Relationship Agreement, which would proclaim the “consensual” nature of the relationship between them. Unfortunately for Jill, she has not avoided a sexual harassment suit because Jack’s claim arose before the signing of the agreement.
herent within the quid pro quo claim.

A claim of discrimination due to a hostile work environment can be raised when an employer's conduct interferes with an individual's work performance, or creates an "intimidating, hostile or offensive work environment." The Second Circuit has stated that in a hostile work environment action:

[A] complaining employee is required to prove that . . . [the] conduct [at issue] was unwelcome, that the conduct was prompted simply because of the employee's gender, and that the conduct was sufficiently pervasive to create an offensive environment antithetical to the priority of merit—not sex or some other prohibited criterion—in the workplace.

The court continued by setting out a five-part test, similar to the court's test for quid pro quo harassment. After the relationship has ended, a hostile work environment claim may arise. However, by entering into a Consensual Relationship Agreement, the parties' dispute would be adjudicated in a non-judicial forum.

B. The Changing Nature of Sexual Harassment Law


The Supreme Court has distinguished and defined the concepts of quid pro quo sexual harassment and hostile work environment. In Meritor Savings Bank v. Vinson, the Supreme Court held that a Title VII sexual harassment claim could be predicated upon either a showing

34. Trotta v. Mobile Oil Corp., 788 F. Supp. 1336, 1348 (S.D.N.Y. 1992). For instance, Jill defeats Jack's quid pro quo sexual harassment claim and remains Jack's supervisor. Ever since their trips to the top of the hill have ended, Jill lets Jack know that she feels that the less a man wears, the better. One day, she tells him, "Jack, I expect to see you without that shirt tomorrow." The next day, Jill sneaks up behind Jack and proceeds to try to remove his shirt. Jack remains clothed, yet, without explanation, he is transferred to a less prestigious job the next week. Jack could maintain a hostile work environment claim against Jill.

35. Trotta, 788 F. Supp. at 1348 (quoting Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989)).

36. See Trotta, 788 F. Supp. at 1348; Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986); cf. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998) (adopting the concept that any action must be based upon an objectively or subjectively hostile work environment).

37. See Hansen, supra note 3, at 79.


of quid pro quo sexual harassment or a hostile work environment. The 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 the harassment must affect "terms, conditions or privileges of employment" according to the framework of Title VII. Furthermore, the Court held that in order "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" However, in Meritor, the Court refused to hold the bank liable for an employee's alleged harassment of a co-worker due to the many unresolved questions of fact. The Court stated that, in theory, the principles of agency should govern sexual harassment claims.

2. Burlington Industries and Faragher: The Creation of Vicarious Liability for Employee Conduct Outside the Scope of Employment

Recent Supreme Court decisions have created an incentive for an employer to take a more active role in regulating workplace relationships and preparing for sexual harassment claims arising from such relationships. In Burlington Industries and Faragher, the Supreme Court held that an employer is subject to vicarious liability under Title VII for unlawful discrimination caused by a supervisor. The fact that an employer will be held responsible for such discrimination should create an incentive to reduce their liability. This could be accomplished by either: 1) taking a more proactive role in investigating claims of harassment or, 2) reducing the likelihood that claims could be pursued in federal court.

40. See id. at 63-67.
41. Meritor, 477 U.S. at 66. The Court justified the creation of hostile work environment claims in the sexual harassment context by comparing them to hostile work environment claims based on race. See id.
43. Meritor, 477 U.S. at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (1982)).
44. See id. at 73.
45. See id. at 72.
47. See Burlington Indus., 118 S. Ct. at 2270; Faragher, 118 S. Ct. at 2280.
48. See Hansen, supra note 3, at 79, 80; see also Faragher, 118 S. Ct. at 2292 (creating an affirmative defense for employers to show they exercised reasonable care in preventing or ending harassment).
49. See Faragher, 118 S. Ct. at 2292.
In Burlington Industries, the Court embraced the Meritor decision as directing courts to look to common law agency principles.50 Furthermore, the Court clarified the extent of employer liability which was never decided in Meritor.51 The Burlington Industries Court admitted that over the preceding years, the claims provided for in Meritor, quid pro quo and hostile work environment claims, took on greater legal significance.52 However, an employer’s vicarious liability for acts done by an employee previously only arose in quid pro quo sexual harassment claims.53 This rule “encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition.”54 Thus, hostile work environment claims were couched in quid pro quo language to enable plaintiffs to hold employers vicariously liable.55 The issue before the Court in Burlington Industries was “whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate’s terms or conditions of employment, based upon sex, but does not fulfill the threat.”56

The Court in Burlington Industries relied upon general principles of agency law in order to create a basis for vicarious liability.57 As a general matter, a “master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”58 The Court noted that an employee’s motive in serving the employer is irrelevant when determining whether his conduct is within the scope of employment.59 The Court also stated that “[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employ-

50. See Burlington Indus., 118 S. Ct. at 2264.
51. See id. at 2265-70.
52. See id. at 2264-65.
53. See id.; Davis v. City of Sioux City, 115 F.3d 1365, 1367-68 (8th Cir. 1997) (allowing vicarious liability in quid pro quo cases, but in hostile work environment cases, for vicarious liability to apply, the employer must know of the harassment).
54. Burlington Indus., 118 S. Ct. at 2265.
55. See id.
56. Id.
57. See id. at 2265-68.
59. See Burlington Indus., 118 S. Ct. at 2267; see, e.g., Jamison v. Wiley, 14 F.3d 222, 237 (4th Cir. 1994) (categorizing supervisor’s unfair criticism of subordinate’s work in retaliation for rejecting his sexual advances as not within scope of employment); Wood v. United States, 995 F.2d 1122, 1123 (1st Cir. 1993) (stating sexual harassment which amounts to assault and battery is “clearly outside the scope of employment”); Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171-72 (2d Cir. 1968) (noting the difference between foreseeable risks of employee malfeasance which creates liability, and unforeseeable risks which do not).
ment. However, scope of employment does not provide the sole basis for employer liability when applying agency principles.

The Court in *Burlington Industries* relied on the Restatement (Second) of Agency § 219(2) (1958) to provide a basis for vicarious liability when the actor’s conduct is outside the scope of employment. For employer liability, negligence is the minimum standard. Employer liability will arise “where its own negligence is a cause of the harassment... [and] if it knew or should have known about the conduct and failed to stop it.” However, the standard for vicarious liability, called the “aided in the agency relation standard” is set forth in the Restatement (Second) of Agency § 219(2)(d) (1958). An employer would not be liable for the torts of its employees acting outside the scope of employment unless, “the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.”

The Court defined a tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” This type of action can only occur at the hands of a supervisor or someone acting with the authority of the company; the official power of the enterprise is brought to bear against the victim of the harassment. While the Court did not explicitly define the boundaries of the aided in the agency relation standard, the Court stated that this standard would always be met “when a supervisor takes a tangible employment action against a subordinate.”

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60. *Burlington Indus.*, 118 S. Ct. at 2267.
61. See id.
63. See *Burlington Indus.*, 118 S. Ct. at 2267.
64. Id.
66. *Burlington Indus.*, 118 S. Ct. at 2267 (quoting *RESTATEMENT (SECOND) OF AGENCY* § 219(2)(d) (1958)).
67. Id.
68. Id.
69. See id. at 2269.
70. Id.
Finally, the *Burlington Industries* Court provided for an affirmative defense for employers who would be held vicariously liable for their employee’s action. The defense contains two elements: 1) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and 2) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” The Court noted that the employer will not automatically escape liability by establishing an anti-harassment policy, but establishing such a policy may provide more protection, when compared to an employer who does not have any policy. With regard to the second element, the Court stated proof that an employee failed to avoid harm is not limited to failing to take advantage of any anti-harassment policy promulgated by the employer. However, the employee’s failure to avoid harm will validate the employer’s affirmative defense. Lastly, the Court disallowed the use of this affirmative defense in cases where the “harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”

In *Faragher v. City of Boca Raton*, the Court came to the same decision as that reached in *Burlington Industries*, holding an employer vicariously liable for a supervisor’s acts of sexual harassment. In *Faragher*, the Court examined the affirmative defense introduced in the *Burlington Industries* decision. The Court explained that this affirmative defense would be the proper method for implementing and enforcing Title VII policy because it would “recognize the employer’s affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty.”

An employer may . . . have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unrea-

71. *See Burlington Indus.*, 118 S. Ct. at 2270.
72. *Id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *Burlington Indus.*, 118 S. Ct. at 2270.
77. *See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2280 (1998).*
78. *See id. at 2275, 2280, 2293. See generally Burlington Indus., 118 S. Ct. at 2270 (“[A] defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action . . . .”).
79. *Faragher, 118 S. Ct. at 2292.*
reasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.80

This policy provides the proper incentive for employers, and it encourages the employee's duty to avoid harm by seeking redress through the employer's sexual harassment policy.81

C. Wright v. Universal Maritime Service Corp., and the Employer's Attempt to Avoid Vicarious Liability Through the Use of Contracts

Due to the recent decisions in Burlington Industries and Faragher, employers are currently searching for methods to limit their liability arising out of Title VII claims.82 Rather than rely on the affirmative defense provided for in Burlington Industries and Faragher, employers have begun to limit their employees' ability to bring Title VII claims before a court.83 Recently, the Supreme Court disallowed an employer's practice of compelling union employees, whose union negotiated a collective bargaining agreement, into binding arbitration.84

The recent Supreme Court decision, Wright v. Universal Maritime Service Corp.,85 has had the effect of limiting an employer's ability to compel arbitration of a Title VII claim.86 In Wright, employers were attempting to rely on a collective bargaining agreement, containing an arbitration clause, as a means to contract out of liability arising from Title VII claims and to force those claims into binding arbitration.87

In Wright, the Court held that a general arbitration provision in a collective bargaining agreement may not serve as a waiver of an em-

80. Id.
81. See id.
82. See generally Kuntz, supra note 8, at 7 (discussing the attempt made by dozens of companies in recent years to shield themselves from harassment or discrimination suits by requiring Consensual Relationship Agreements).
84. See id. at 393, 397.
86. See id.
87. See id. at 393-95. The arbitration clause required all disputes between the parties, which could not be settled promptly, to be decided by a committee made up of representatives of the labor union and the employer. See id. at 393.
ployee’s right to bring a Title VII claim in the appropriate court. The Court attempted to reconcile two lines of cases that were at odds with one another. The first line of cases is represented by Alexander v. Gardner-Denver Co., "which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII... if ‘he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.’ Furthermore, “[t]he statutory cause of action was not waived by the union’s agreement to the arbitration provision of the [collective bargaining agreement], since ‘there can be no prospective waiver of an employee’s rights under Title VII.’”

The second line of cases is represented by Gilmer v. Interstate/Johnson Lane Corp. In Gilmer, the Court relied on the federal policy favoring arbitration embodied in the Federal Arbitration Act (“FAA”), and held that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.” Furthermore, the Gilmer Court noted that Alexander held that an employee’s rights under Title VII may not be prospectively waived. However, the Gilmer Court held that a party may waive its right to a federal judicial forum for an Age Discrimination in Employment Act (“ADEA”) claim.

The Wright Court eventually denied the defendant’s claim and held that the “petitioner’s statutory claim [is] not subject to a presumption of arbitrability; we think any [collective bargaining agreement] requirement to arbitrate... must be particularly clear.”

The standard the Court used in Wright was first discussed in Metropolitan Edison Co. v. NLRB. In Metropolitan Edison, the Court stated that § 8(a)(3) of the National Labor Relations Act (“NLRA”)...
allows a union to waive its officers' statutory right to be free from anti-union discrimination, if such a waiver is clear and unmistakable. The Court stated that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right, unless the undertaking is 'explicitly stated.'" This clear and unmistakable standard must be met when a union waives a statutorily protected right of its members. The *Wright* Court embraced this standard and held that the Longshore Seniority Plan did not contain the requisite clear and unmistakable waiver, but the Court never reached a decision on whether this type of waiver would be enforceable.

Thus, a union-negotiated employment contract that requires arbitration of claims arising from employment, may not compel mandatory arbitration of Title VII claims. However, the Court's ruling did not address whether a specific provision of an employment contract, having the effect of waiving the employee's right to use judicial means to resolve a Title VII claim, was permitted by Title VII.

Whereas *Wright* involved a union-negotiated waiver, *Gilmer* involved an individual waiving his own right to a statutory claim. The Court in *Gilmer* recognized an individual's ability to waive a statutory claim and to subject that claim to arbitration. The Court stated that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" Furthermore, "'[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" The method of determining whether Congress intended to preclude waiver would be to look to the text of the statute, its legislative history, as well as any conflict between arbitration and the statute's underlying purposes. In *Gilmer*, the Court found that the ADEA did not evince Congressional intent

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102. *See Metropolitan Edison*, 460 U.S. at 708.
103. *Id.* (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956)).
104. *See Wright*, 119 S. Ct. at 397; *Metropolitan Edison*, 460 U.S. at 708.
105. *See Wright*, 119 S. Ct. at 397.
106. *See id.* at 396.
107. *See id.* at 397.
108. *See id.* at 392-93; *Gilmer*, 500 U.S. at 23.
110. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).
111. *Id.* (quoting *Mitsubishi*, 473 U.S. at 628).
112. *See id.*
to preclude waiver, and enforced a contract which required arbitration of any ADEA claim. Ultimately, the Court has allowed the waiver of statutory rights provided: 1) they are waived by the actual individual whose rights are being waived; 2) the contractual waiver is clear and unmistakable, and 3) there is no clear Congressional intent showing otherwise.

III. EMPLOYER SEXUAL HARASSMENT POLICIES AND OTHER OPTIONS USED TO REDUCE EMPLOYER LIABILITY

A. The Creation of Consensual Relationship Agreements

Consensual Relationship Agreements were created by Jeffrey Tanenbaum, a partner at Littler Mendelson in San Francisco. Gary Mathiason, a partner at Littler Mendelson, explains that the Consensual Relationship Agreement “was developed for situations where you have typically an executive that wants to have a relationship with an employee, and is very mindful of the legal land mine that they’re about to walk in, and tries to build in some understandings and protections.”

The agreement accomplishes three objectives:

Number one, it confirms in writing the relationship is voluntary. Number two, it very specifically has both parties agree that if there’s something that happens that is unwanted—one party breaks off the relationship, the other one doesn’t want it broke off—that they would at least use the company’s complaint procedure. And finally, if there is a disagreement, a real problem later on, it gets resolved through mediation and arbitration. It stays out of the courts.

These contracts, which are in their infancy, have yet to see the in-

113. See id. at 26-27, 33-35.
114. See Gilmer, 500 U.S. at 34-35 (allowing an individual to waive his own statutory right to judicial redress); cf. Wright, 119 S. Ct. at 396 (prohibiting a union from waiving the collective statutory rights of its members to seek redress).
115. See Wright, 119 S. Ct. at 396.
117. See Hansen, supra note 3, at 78-79; Hammersley, supra note 11, at D1.
119. Id.
side of a courtroom. They are rarely constructed or recommended.

**B. Consensual Relationship Agreements: The Relevant Terms of These Contracts**

The defining characteristics of Consensual Relationship Agreements include: the designation that the relationship is consensual, a provision that provides for arbitration in case of breach, and that one party to the contract holds a higher position than the other party and both are employed by the same entity. These provisions have numerous effects and each serves a different purpose in protecting the parties from harm, should the social relationship between the parties end. These agreements serve to insulate an employer from vicarious liability by removing the case from the court and compelling arbitration.

120. See Hansen, supra note 3, at 79.
121. See NPR Broadcast, supra note 118.
122. See Hammersley, supra note 11, at D1; see, e.g., Kuntz, supra note 8, at 7 (exemplifying a typical Consensual Relationship Agreement). Consensual Relationship Agreements, as other contracts, can differ substantially. These agreements should represent the intentions of the parties and also contain the aforementioned provisions.
123. See Kuntz, supra note 8, at 7.
124. See Hansen, supra note 3, at 79; Kuntz, supra note 8, at 7.
125. The following is an example of a Consensual Relationship Agreement which was printed in Tom Kuntz's article, For Water Cooler Paramours, the Ties That (Legally) Bind:

**STIPULATIONS - The Parties stipulate that:**

A. [Male employee] is presently employed by the Company in the position of [position].
B. [Female employee] is presently employed by the Company in the position of [position].
C. [Female employee] is not presently, and has never been, under the direct supervision of [male employee]. Although the professional obligations and work responsibilities of [male employee] and [female employee] occasionally involve interaction on a professional level, the regular assignments and job tasks of [male employee] and [female employee] do not require, necessitate or provide occasion for such interaction.
D. [Male employee] and [female employee] each, independently and collectively, desire to undertake and pursue a mutually consensual social and/or amorous relationship ("Social Relationship") with the other.
E. [Male employee's] desire to undertake, pursue and participate in said Social Relationship is completely and entirely welcome, voluntary and consensual and is unrelated to the Company, [male employee's] professional or work-related responsibilities or duties, or [male employee's] and [female employee's] respective positions in the Company or business relationship to each other. As of the date this Acknowledgment and Agreement is executed by [male employee]... agrees that nothing in any way related to, stemming from, or arising out of his relationship with [female employee], be it their business-related interaction or their Social Relationship, constitutes, has resulted in, or
has caused a violation of the Company's Sexual Harassment Policy or any law or regulation.

F. [Female employee's] desire to undertake, pursue and participate in said Social Relationship is ... entirely welcome, voluntary and consensual [etc., vice versa the entire preceding paragraph to cover the female employee].

G. [Male employee] has entered into said Social Relationship after having discussed in depth with [female employee] the ramifications and implications of entering into a Social Relationship with a co-worker of [female employee's] professional position and after having had the opportunity to discuss such matters with counsel of choice or any other person of his choosing.

H. Vice versa the entire preceding paragraph to cover the [female employee].

AGREEMENT

1. [Male employee] and [female employee] have, after reading this Acknowledgment and Agreement, carefully reviewed the Company' [sic] Sexual Harassment Policy, a copy of which is attached hereto. ... [Male employee] and [female employee] understand and agree to abide by and be bound by said Policy.

The agreement then requires the signers to notify the company representative witnessing the agreement of any violations of the sexual harassment policy or related laws, or if the relationship is "negatively affecting in any way the terms and conditions" of their employment. But there is another option:

4. If, for any reason, either employee does not believe that reporting said violation, suspected violation or incident to [Company representative] would result in a full and fair investigation and remedy, either employee may instead report said violation, suspected violation or incident to the Director of Human Resources of the Company. Said report may be written or verbal and should include details of the incident[s] and names of witnesses.

5. The Company shall immediately and impartially investigate said violation, suspected violation or incident and take any and all appropriate remedial action, up to and including termination, pursuant to established Company policy and law. Remedial action will be commensurate with the circumstances. Appropriate steps will also be taken to deter any future violations or incidents.

6. [Male employee] and [female employee] understand and agree that conduct or speech in the workplace which is sexual or amorous may be objectionable or offensive to others. Therefore, [male employee] and [female employee] agree not to engage in such conduct on Company property or when performing work-related tasks in public areas. Such prohibited conduct includes, but is not limited to, the following: holding hands or touching in an affectionate or sexually suggestive manner; kissing or hugging; romantic or sexually suggestive gestures; romantic or sexually suggestive speech or communications, whether oral or written; and display of sexually suggestive objects or pictures.

7. [Male employee] and [female employee] acknowledge and agree that he and she, respectively, has the right and ability to end said Social Relationship at any time without repercussion of any work-related nature, and without retaliation of any form by the other.

8. While the Social Relationship continues [male employee] and/or [female employee] will not request, apply for, seek in any way, or accept a direct supervisory or reporting relationship by or between [female employee] and [male employee].

9. [Male employee] and [female employee] have executed and agree to be bound by the Company's Agreement to Abide by Arbitration Procedure. ... Paragraph 5 of this Acknowledgment and Agreement and [Company] Arbitration Procedure shall set forth the exclusive remedy for, and shall constitute the exclusive forum for resolution of, any and all disputes which arise or may arise out of the Social Relationship and any claims of harassment, discrimination or retaliation by or between [male employee] and [female employee].
C. Employer Sexual Harassment Policies

The recent decisions in *Burlington Industries* and *Faragher* provide for an affirmative defense which can be utilized by an employer in a sexual harassment case. In order to rely on this defense, an employer is required to offer evidence that it has an existing sexual harassment policy. The existence of such a policy would be used to show that an employee failed to take advantage of any preventative or corrective opportunities provided by the employer. Sexual harassment policies have no magical provisions that provide absolute protection from liability. However, the mere presence of the policy provides a basis for protection under the affirmative defense.

Company sexual harassment policies vary greatly from company to company. Some companies ban inter-office relationships, while others acquiesce to these relationships. While any specific company policy will reflect the views of that company, each policy should address the following items. Each policy must provide a clear statement that sexual harassment is strictly forbidden and describe the types of conduct the policy forbids. An employer must indicate the consequences for violating the policy. An employer should include a complaint mechanism that permits employees to bypass a supervisor involved in the harassment. Furthermore, any policy should be distributed to all employees and the employer should receive a signed acknowledgment of receipt from the employee. Moreover, any current policy should be re-
evaluated and reissued to take into account any changes in the law. Lastly, any complaint must be acted on promptly, corrective action should be taken immediately, and an employer must prevent retaliation against any employee who makes a complaint.  

D. Legal Risks Associated with Office Romances

Consensual Relationship Agreements try to accomplish the same goal as anti-harassment policies - avoiding employer liability. In contrast to anti-harassment policies that delineate proper conduct in the workplace, Consensual Relationship Agreements address the problems that may occur should co-workers enter into a workplace romance. In theory, these agreements clarify the intent of the parties, i.e. the consensual nature of the signatories’ relationship and the method of redress should a party breach the agreement. However, in practice, these agreements provide limited protection to the employee in the higher position, as well as the employer. These agreements do not dispel the possibility of litigation, but may serve as evidence of the parties’ intent in any subsequent litigation should the relationship fail and a claim of harassment ensue.

Those contemplating having a romantic relationship within the workplace, and their employers, can benefit from Consensual Relationship Agreements. Although many office romances turn out to be beneficial to the parties and the workplace, the fear of an office romance gone sour must be addressed. A failed workplace relationship may result in: a sexual harassment claim, loss of a job, a productivity slowdown, lowered morale among workers, meritocracy complaints or suspicions from co-workers, employer retaliation, a company’s non-

135. See id.
137. See Kuntz, supra note 8, at 7.
138. See NPR Broadcast, supra note 118.
139. See Rubenstein, supra note 136, at 4.
140. See id.
142. See NPR Broadcast, supra note 118.
143. See Paul & Townsend, supra note 6, at 25.
144. See id.
145. See Jonathan J. Higuera, Workplace Romance, TUCSON CITIZEN, Nov. 2, 1998, TREND$ (Magazine), at 17 (meritocracy complaints); see also Dwight R. Worley, Employers Struggle with Romances at Workplace, FLA. TODAY, Nov. 8, 1998, at 1E (suspicions from co-workers).
146. See Paul & Townsend, supra note 6, at 25.
professional appearance and inevitable office gossip. The employer can face the potential problems of a failed relationship either before the relationship begins, or after it ends. A Consensual Relationship Agreement acknowledges the various legal risks assumed by all parties when consenting to an office romance.

E. Statistics and Reports

In the past six years, sexual harassment complaints in the workplace have more than doubled. According to the Equal Employment Opportunities Commission ("EEOC"), complaints have risen from 6,883 in 1991 to 15,589 in 1997. Within the same time period, sexual harassment damage awards rose from $7.1 million to $49.5 million. These numbers would frighten any employer, yet a surprising number of companies do not have written policies for office romances.

According to a 1994 American Management Association study, 80 percent of the 485 managers surveyed have either had or have known of an office romance. Additionally, a Bureau of National Affairs study conducted in 1988 concluded that at that time, one-third of all relationships started in the workplace. The surveys also found that between 25 percent to 33 percent of employees admitted to having had an office romance.

A 1993 survey by the Society for Human Resources Management reported that 84 percent of responding companies allowed husband-wife teams. Companies may even encourage these teams, leading to the relationship jargon of "joint partnering." A 1991 Human Resource Management survey reported that 98 percent of all companies allow co-
workers to date.\textsuperscript{160}

A 1998 poll from the Society for Human Resource Management shows that out of 617 employers, 13 percent had written policies.\textsuperscript{161} In the same survey, 14 percent of the employers had unwritten policies and another 72 percent had never addressed relationship issues.\textsuperscript{162} Other reports show that companies handle relationship issues as they arise.\textsuperscript{163}

Those organizations that have a workplace romance policy propose different consequences to violators of the policy. “Consequences include[] transfer within the organization (42 percent), termination (27 percent), counseling (26 percent), formal reprimand (25 percent) and demotion (7 percent). In addition, 25 percent do not have any consequences.”\textsuperscript{164}

In a 1997 Strategic Outsourcing survey, 91 percent of 592 companies stated they had “no formal policies regulating dating among co-workers.”\textsuperscript{165} Generally, employers prefer to let employees use their common sense with office romances because employers are reluctant to get involved.\textsuperscript{166} However, the pressure of employer obligations with respect to harassment is forcing companies to rethink their passive approach.\textsuperscript{167}

\textbf{F. Samples of Individual Office Policies that Deal with Sexual Harassment or Office Romance}

Employers have adopted different anti-harassment policies depending on the particular work atmosphere and employee situations. Sometimes a manager will observe a workplace relationship, recommend discretion, and separate the individuals.\textsuperscript{168} Other employers have certain policies to deal with inappropriate relationships, i.e. relationships when a partner supervises, assigns work and/or overtime, or affects the other partner’s assignments.\textsuperscript{169}

New Jersey Attorney General Peter Verniero applied a date-and-tell policy for his agency, requiring supervisors to report any consensual

\begin{flushright}
160. See POWERS, supra note 155, at 11.
161. See Worley, supra note 145, at 1E.
162. See Higuera, supra note 145, at 1T.
163. See Worley, supra note 145, at 1E.
164. Id.
165. Carter & Carter, supra note 147, at 4E.
166. See Worley, supra note 145, at 1E.
167. See id.
168. See NPR Broadcast, supra note 118.
169. See id.
\end{flushright}
personal relationships with subordinates. The policy came into effect the day after a large sexual harassment case was lost, where a former deputy attorney general was awarded $350,000. Large damage awards compel employers to institute new anti-harassment policies or review their current ones.

Melbourne-based Space Coast Credit Union has a far more stringent policy, which requires one worker to resign in a workplace couple that gets married. This policy lets the couple decide who is going to resign.

Other companies possess less stringent requirements. "We don't require that our employees tell us if they're in a relationship' with a co-worker, said Shirley Emily [a corporate vice-president of human resources]. 'But we tell them it is best they do for their own protection and the company's protection.'"

1. Employer Practice Liability Insurance

New tactics, similar to the Consensual Relationship Agreement, are springing up everywhere to protect employers from liability. For example, there is a new type of insurance employers can obtain to protect themselves from litigation and costly financial losses. "The insurance, known as employment practices liability coverage or ['EPLI'], provides protection from sexual harassment, wrongful termination, discrimination and other employment-related legal claims." EPLI, once only available through a few companies, has grown into "one of the industry's best-selling products today. About [seventy] companies now offer [EPLI] coverage, and more than half of all Fortune 500 companies have it."

171. See Ritter, supra note 170, at 1.
172. See Worley, supra note 145, at 1E.
173. See id.
174. See id.
175. See id.
176. Id.
177. See Hansen, supra note 3, at 80.
178. Id.
179. Id.
2. Date-and-Tell Policy

Kissing and telling was never the respected protocol for workplace relationships, however, it is now required at New Jersey’s most powerful law enforcement agency. As introduced earlier, after a jury verdict of $350,000 against his Office, New Jersey Attorney General Peter Verniero “instituted a policy requiring supervisors to reveal if they are involved in an intimate relationship with a subordinate.” After the Attorney General’s Office is notified of the existence of the relationship, the Office will consider the reassignment of one of the employees. Date-and-tell policies mandate disclosure of consensual personal relationships. Generally, employers define consensual personal relationships as “dating and other ongoing relationships of an intimate or close personal nature... [including] marriage, cohabitation, and engagement.” It does not include, however, “purely social friendships.”

3. Overlapping of Policies

As an employer must attempt to limit their own liability, it is important to note that as part of the process of creating a Consensual Relationship Agreement, a couple is required to review their company’s sexual harassment policy. There are typically eight stipulations in a Consensual Relationship Agreement. These stipulations include: mutual consent to engage in the relationship, a voluntary relationship that is not business related, the relationship poses no violation of the company’s sexual harassment policy, and each individual is able to terminate the relationship without adverse consequences.

Two excerpts from a sample Consensual Relationship Agreement and cover letter are shown below:

Though I know you have received a copy of [our company’s] sexual

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180. See Ritter, supra note 170, at 1.
181. Id.
182. See id.
183. See id.
184. Id.
185. Ritter, supra note 170, at 1.
187. See id.
188. See id.
189. See Kuntz, supra note 8, at 7.
harassment policy, I am enclosing a copy . . . so that you can read and review it again. Once you have done so, I would greatly appreciate your signing this letter below, if you are in agreement with me.

I have read this letter and the accompanying sexual harassment policy and I understand and agree with what is stated in both this letter and the sexual harassment policy. My relationship with [name] has been (and is) voluntary, consensual and welcome. I also understand that I am free to end this relationship at any time and, in doing so, it will not adversely impact on my job. 199

This language demonstrates the sensitivity and stringent attention given to the mutual consent which is required to make these agreements work.

4. Benefits and Disadvantages of Consensual Relationship Agreements Expressed Through Practitioner Viewpoints

Not everyone is in love with the love contract. 191 A partner in a nationally prominent law firm’s employment group believes that these agreements are inherently coercive. 192 He is also concerned about privacy issues and whether it is the parties’ intent to enter into a contract, especially when third parties notify the employer about the relationship, and the employer then asks the parties to sign a contract. 193

A senior partner at a leading employment law firm expresses concern over waiving statutorily protected rights, such as the right to be free of employment related bias. 194 Another practitioner expresses concern over unintended consequences, the contract being discriminatory on its face, or an absence of consideration. 195 Others have characterized these agreements as overkill that may be destructive to morale. 196 Another disadvantage is the insecurity employers could experience because this

190. Id.
191. See Hogdin, supra note 186, at 1.
192. See id.
193. See id.
194. See Rubenstein, supra note 136, at 4
195. See Hogdin, supra note 186, at 1.
type of agreement does not guarantee immunity from sexual harassment claims, but merely provides an indeterminate measure of security because these agreements have not been tested in court.  

5. Employer Regulation of Personal Relationships

One argument against the validity of Consensual Relationship Agreements is possible discrimination by an employer. Once the employer realizes the protection this agreement gives him, he will try to get couples at work to enter these agreements as soon as possible. The problem arises when an employer discriminates, e.g., discharges or fails to promote an employee who will not enter into one of these agreements. Depending on the state, there are laws that protect an employee from this type of discrimination. However, laws prohibiting employer regulation of personal relationships are "sparse and conflicting ... it is unclear whether an employer may regulate dating between his or her employees under any circumstances."

Company anti-fraternization policies have increasingly been adopted in an effort to prohibit romantic relations among co-workers. While trying to support employee rights, several states have enacted laws protecting employee relationships. Thirty states and the District of Columbia have already adopted laws which serve to protect employees' privacy outside the workplace. However, only Colorado, North Dakota, and New York have enacted statutes which are general enough to protect nearly all non-employment related activities. Inter-

197. See Higuera, supra note 145, at 1T.
199. Borden, supra note 198, at 365.
200. See Rogers, supra note 198, at 687.
201. See id.
202. See id. at 698-99.
203. See COLO. REV. STAT. ANN. § 24-34-402.5 (Supp. 1999) (stating that is an unfair practice to discriminate against employees for engaging in lawful activities while not at work or during work).
204. See N.D. CENT. CODE § 14-02-4-0.8 (1997) (making it unlawful to discriminate in hiring or firing for a lawful activity outside work which does not interfere with the business interests of the employer).
205. See N.Y. LAB. LAW § 201-d (McKinney Supp. 1999) (stating that employers cannot discriminate against anyone for outside legal activities that occur away from the workplace).
206. See Rogers, supra note 198, at 699.
Consensual Relationship Agreements

Consensually, the statutes of New York, Colorado, and North Dakota all have nearly identical language, however, only in New York and Colorado has the issue of co-worker dating been raised.\textsuperscript{207}

The New York statute differs from those in Colorado and North Dakota by its inclusion of the word "recreational" which describes the protected activity.\textsuperscript{208} In respect to co-worker dating, this particular word has clouded the otherwise clear meaning of the New York statute.\textsuperscript{209} The ambiguous phrase "legal recreational activity" has not been resolved by the courts and the two cases brought under section 201-d of the New York Labor Law have achieved inconsistent results.\textsuperscript{210}

In \textit{New York v. Wal-Mart Stores Inc.},\textsuperscript{211} the court held that the definition of "recreational activities," was unambiguous and did not include a dating relationship with someone other than the party's husband or wife.\textsuperscript{212} The court in \textit{Pasch v. Katz Media Corp.}\textsuperscript{213} held that:

\begin{footnotes}
\item[207] See id. at 700.
\item[208] See id.
\item[209] See id. Colorado and North Dakota use the term "lawful activities," which clearly protects employee office romances and dating of a co-worker. See id.
\item[210] See id. "Section 201-d was intended generally to ensure that individuals who partake in an infinite variety of activities outside of work are secure in their employment, provided they are competent employees. What is less clear, however, is the intended breadth of Section 201-d's protection." Borden \textit{supra} note 198, at 356-57; cf. Jennifer L. Dean, Note, \textit{Employer Regulation of Employee Personal Relationships}, 76 B.U. L. Rev. 1051, 1067-68 (1996) ("Although no state statute specifically protects coworker dating, three state statutes extend protection to all legal off-hours activities, as long as those activities do not pose a direct conflict with the employer's legitimate business interests.").
\item[212] See id. at 152. Defendant discharged two employees who violated a written company policy prohibiting a dating relationship between a married employee and someone other than their spouse. See id. at 151. Plaintiff argued that this discharge violated section 201-d(2)(c) of the New York Labor Law because this was a legal recreational activity pursued outside of work. See id. The court responded:

To us, "dating" is entirely distinct from and, in fact, bears little resemblance to "recreational activity." Whether characterized as a relationship or an activity, an indispensable element of "dating," in fact its raison d'être, is romance, either pursued or realized.

\ldots [T]he voluminous legislative history to the enactment, including memoranda issued in connection with the veto of two earlier more expansive bills, evinces an obvious in-
\end{footnotes}
legislative history show[ed] ... the purpose of the statute is to prohibit employers from discriminating against their employees simply because the employer does not like the activities an employee engages in after work. The legislative history indicates the statute was intended to include social activities, whether or not they have a romantic element, so long as the activity occurs outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property; and does not create a material conflict of interest related to the employer’s trade secrets, proprietary information, or other proprietary or business interest.214

Unfortunately, Colorado, New York, and North Dakota have not yet reached a consensus on whether workplace romances are protected legal activities.215

6. Benefits of Consensual Relationship Agreements

Consensual Relationship Agreements, unlike some of the above mentioned company policies, offer the employee’s active participation in the creation of the agreement, its terms, and the consequences of failing to abide by the agreement. These agreements also provide hard-to-dismiss evidence of a consensual relationship in any future litigation. A partner at a leading employment law firm conceded that an employer’s risk of liability is not eliminated by this agreement.216 However, “it’s certainly not going to be the kind of case where a jury will feel much sensitivity’ toward someone suing for harassment.”217 Even though such contracts may not eliminate all of the employer’s liability, they do “provide a measure of legal protection for employers who lack other options.”218 Employers may not want to lose their best employees just because they are engaging in a relationship within the

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Id. at 152 (citations omitted).
213. 10 Individual Empl. Rts. Cas. (BNA) 1574 (S.D.N.Y. 1995). Plaintiff argued she was constructively terminated from her employment when Defendant replaced her with a male employee with fewer qualifications. See id. at 1575. “Plaintiff [assistant to the Vice-President/Divisional Manager] contends that [her]... demotion occurred solely because Plaintiff continued to maintain a personal relationship with Mr. Braunstein [Vice-President and General Sales Manager] and that it occurred in an effort to humiliate her and force her to quit.” Id.
214. Id. at 1578.
215. See Rogers, supra note 198, at 699-700.
216. See Silverstein, supra note 196, at D6.
217. Id.
218. Worley, supra note 145, at 1E.
IV. A COMPARISON OF CONSENSUAL RELATIONSHIP AGREEMENTS AND PRENUPTIAL AGREEMENTS

By comparing Consensual Relationship Agreements to the other love contract, prenuptial agreements, we gain valuable insight about the probable success of Consensual Relationship Agreements and what they contribute to individual relationships. Specifically, these points will be addressed by looking at the public’s view of prenuptial agreements and the negative inference which accompanies a contract based on love.

Prenuptial agreements “detail the division of property or other assets upon death or divorce [of a marriage partner], they may also include provisions regulating the ongoing marriage.” They “allow couples to specify which assets should be considered marital property and which assets should be treated as personal property upon dissolution of the marriage.” Similar to prenuptial agreements, Consensual Relationship Agreements may: attract a negative public image, manifest unfair bargaining positions, detail the legal consequences should the relationship end, and require informed consent from the couple before entering the agreement.

A negative image seems to develop naturally from the timing and purpose of prenuptial agreements. Prenuptial agreements are seen as roadblocks to the romantic notion of love and marriage. It is hard to contemplate divorce and death while being in love. Addressing possible unfavorable conclusions in a relationship is antithetical to why the parties began the relationship.

A negative stereotype of prenuptial agreements is highlighted by the argument that these agreements perpetuate the unfair bargaining position of women and the less-financially secure spouse.

[One argument] against prenuptial agreements is the allegation that one party may not be treating his or her fiancé in a fair manner. Not surprisingly, the wealthier party may impose terms on the less well-off

219. Marston, supra note 9, at 889.
220. Id. at 890.
221. See id. at 888. “Viewed by many as the province of the wealthy, the age disparate, the heartless, or the simply greedy, prenuptial agreements are often regarded with distrust and hostility.” Id.
222. See id. at 893.
223. See id. at 894, 911.
party. Many critics argue that prenuptial agreements overwhelmingly hurt women by virtue of their inferior bargaining position.\footnote{224} The benefit of planning for disaster can be seen through the advantages of having a prenuptial agreement. A prenuptial agreement reduces family tension, creates open communication, encourages honesty and illustrates the equality within a marriage by requiring equitable treatment upon divorce.\footnote{225}

Some commentators believe that prenuptial agreements possess one major flaw - a lack of safeguards.\footnote{226} For instance, prenuptial agreements do not require the parties to consult independent counsel before recognizing the agreements to be valid.\footnote{227} This particular omission in prenuptial agreements creates an awareness of a similar deficiency present in Consensual Relationship Agreements. Although Consensual Relationship Agreements require couples to: 1) knowledgeably enter into the agreement, 2) review the contract and an attached copy of the office sexual harassment policy, 3) take an active part in creating the terms of the contract, and 4) sign the agreement,\footnote{228} these agreements could also benefit from an additional requirement compelling the parties to seek independent counsel.

If we were to require an attorney from each party to be present at the signing of the contract, this would be problematic for those who cannot afford an attorney. One must consider this possibility, even though these agreements appear to be tailored to high-income and highly-placed employees.

Extending this analogy, the contractual validity of prenuptial agreements strengthen the validity of Consensual Relationship Agreements. The contractual law governing prenuptial agreements may be summarized as follows:

\begin{quote}
\footnote{224} Marston, \textit{supra} note 9, at 911. "Courts often fail to acknowledge the impact of unequal bargaining power on the provisions of prenuptial agreements by emphasizing the contract itself rather than the legal rights the parties have forgone by signing it." \textit{Id.} at 912. \textit{But see} \textit{id.} at 894 (pointing out that "some experts argue that prenuptials may actually benefit women because ['w']omen, who have traditionally had less power, may feel their rights are best protected if they are formalized") (quoting \textit{LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW} 243 (1981)).

\footnote{225} \textit{See id.} at 895, 906-07.

\footnote{226} \textit{See id.} at 888, 915-16.

\footnote{227} \textit{See id.} at 913. Since most laypeople are unaware of the legal ramifications of a prenuptial agreement, a rule which encourages parties to seek independent counsel would work to reduce potential problems by informing a party of the rights he or she is waiving by signing the agreement. Additionally, an independent counsel requirement would serve to level the playing field for those without counsel and make these agreements more palatable to the general public.

\footnote{228} \textit{See discussion supra} Part III.A-B.
\end{quote}
Consensual Relationship Agreements

Prenuptial agreements must adhere to the normal rules of contract: They must be entered into voluntarily, "made by competent parties, supported by consideration, comply with any applicable statute of frauds and be consistent with public policy." However, unlike ordinary contracts, the parties need not show consideration; the marriage itself fulfills that prerequisite. Nevertheless prenuptial agreements remain more vulnerable to attack than commercial contracts because of special standards that govern their enforcement. Provisions of prenuptial agreements that conflict with public policy will not be enforced.2

However, there exist two major differences between prenuptial agreements and Consensual Relationship Agreements: 1) prenuptial agreements are based on common law rather than statutory law prohibiting sexual harassment and, 2) sexual harassment law, which was created by the legislature and influenced by public policy, encompasses problematic quid pro quo cases.2 A quid pro quo case would rarely be affected by the presence of a Consensual Relationship Agreement due to claims of coercion. In this particular situation, a claim of coercion would normally arise before the parties signed the Consensual Relationship Agreement.

V. IS A CONSENSUAL RELATIONSHIP AGREEMENT A SOLUTION TO SEXUAL HARASSMENT?

The primary purpose of the Consensual Relationship Agreement is to limit liability and prevent sexual harassment lawsuits. However, is a reduction in liability all this new agreement can accomplish? Consensual Relationship Agreements curb pseudo-harassment which does not qualify as severe or pervasive enough to fall within Title VII's prohibitions. Furthermore, these agreements regulate a couple's romantic behavior in the workplace, which may offend other employees or otherwise affect morale. Consensual Relationship Agreements are not a panacea to the current state of affairs in sexual harassment law. However, the agreement's judicial waiver and arbitration provisions are valid, and when taken as a whole, do serve to protect the signatories from sexual harassment.

The authors agree on two points. First, the authors agree that the invention of a Consensual Relationship Agreement should be praised

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229. Marston, supra note 9, at 898 (quoting Emy Sigler, Comment, Elgar v. Probate Appeal: The Probate Court's Implied Powers to Construe and to Enforce Pre-Nuptial Agreements, 9 CONN. PROB. L.J. 145, 148 (1994)).
230. See id. at 897.
and considered a bold attempt to find a solution to sexual harassment in the workplace. Second, the authors question the validity of a Consensual Relationship Agreement that provides unequal benefits to the parties.

The Consensual Relationship Agreement clearly benefits the superior employee of the couple by reducing the potential for a successful lawsuit against the higher-placed employee. However, it limits the lower-placed employee's right to bring a sexual harassment action in court by providing an alternative forum for their claim. The one benefit the inferior party gains is the ability to be free from any non-actionable harassment from a scorned lover after the relationship ends. For this reason, both parties would have an extra incentive to maintain a cordial working relationship with each other, should the intimate relationship fail. With the exception of being in love, it remains difficult to explain why the lower employee might enter such an agreement.

In terms of the possible benefits to employers, this agreement provides a great amount of protection with a minimal amount of risk. Even though such agreements do not negate both hostile work environment and quid pro quo claims, such agreements would clearly benefit the employer by limiting potential lawsuits to quid pro quo claims, which have traditionally allowed vicarious liability.

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