

IS LOVE BLIND TO LAWSUITS?

QUESTION: I own and operate a family-style restaurant. I say “family style” because we serve a lot of comfort food like fried chicken and apple pie. But we also want to maintain a family-friendly atmosphere, so we supply crayons, coloring books and hand out lollipops to our young customers.

About three months ago, I hired Helen, a new waitress. She does her job very well, but it’s quite obvious that she and the restaurant manager, Bob, are very attracted to each other. I’ve seen them giggling and touching when they pass each other and one of my employees said he saw Bob and Helen “making out” at the wine cooler. In my opinion, this certainly does not fit the family-friendly atmosphere we are trying to create. It also hasn’t escaped my notice that Bob seems to be scheduling Helen for some of the more desirable shifts, where she’s more likely to get good tips.

Should I be concerned about this situation? It seems good for employees to feel positive about their co-workers. Also, I feel that what they do on their own time is none of my business and I don’t want to get involved in anyone’s personal life. In fact, my brother married a co-worker 10 years ago, and they’ve done just fine. So should I just look the other way when I see them carrying on?

ANSWER: You are right that in general, it’s not a good idea to get involved in employees’ personal lives. It’s also usually not appropriate for an employer to regulate employees’ behavior when they are off the clock. Such intrusions could certainly lower employee morale as well as leave you vulnerable to invasion of privacy claims. But while it’s understandable that you don’t want to interfere in your employees’ personal lives, the fact is that their personal lives are now interfering with your business.

It is thus not only appropriate – but probably your duty – to get involved. Here’s why: Bob is a manager, and state and federal law provide that actions of a manager are generally considered to be the actions of their employer for purposes of liability. Bob may already be scheduling Helen so she can make better tips than other employees. He also may have influence in determining who gets promoted. And let’s say Helen is up for a promotion to bartender. Any favoritism by Bob toward Helen is unfair to the other employees he supervises and sends a message that it helps to flirt or engage in a relationship with the boss if you want to make better tips or get promoted.

Oregon law provides that there may be employer liability when employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, and other individuals were qualified for but denied that opportunity or benefit. (OAR 839-005-0030 (9)) In addition, if what appears to you to be a mutual flirtation between manager Bob and employee Helen is actually being instigated by Bob, you may be vulnerable to a charge by Helen that she is being sexually harassed by Bob. Finally, whether mutual or not, if the workplace flirtation offends other employees they may complain of a sexually harassing atmosphere.

There’s simply no way that Bob as a manager or you as an employer can win in this situation. Helen or other employees could file a harassment claim against the company as well as against Bob in his personal capacity.

You should definitely get legal advice here. Your attorney may suggest that you immediately tell Bob that flirtatious or romantic behavior between employees is not acceptable in your workplace, and discuss your suspicion that he is scheduling Helen for more favorable shifts. If your business is large enough to place Helen under someone else's supervision, that should be done right away. (However, demoting or terminating either employee, unless their behavior has been egregious, is probably not the best choice as it could lead to a charge of discrimination based on the gender of the affected employee.)

After dealing with the immediate situation, your attorney may advise you to develop written policies and train all your employees to make it clear that you comply with all laws required in workplaces, and do not tolerate any discrimination including harassment based on "protected" characteristics such as sex and race. Such a policy may prohibit in your workplace behavior that is sexual or romantic in nature and clarify that personal relationships must be conducted away from the workplace. A prohibition against supervisors engaging in sexual or romantic relationships with subordinates helps prevent claims that such relationships either result in favoritism or are based on sexual harassment.

For more information on this as well as other topics of interest to Oregon employers, visit our website at www.oregon.gov.boli. On that website you will also find information about upcoming seminars presented by BOLI's Technical Assistance Unit. In addition, feel free to call us at 971-673-0824.