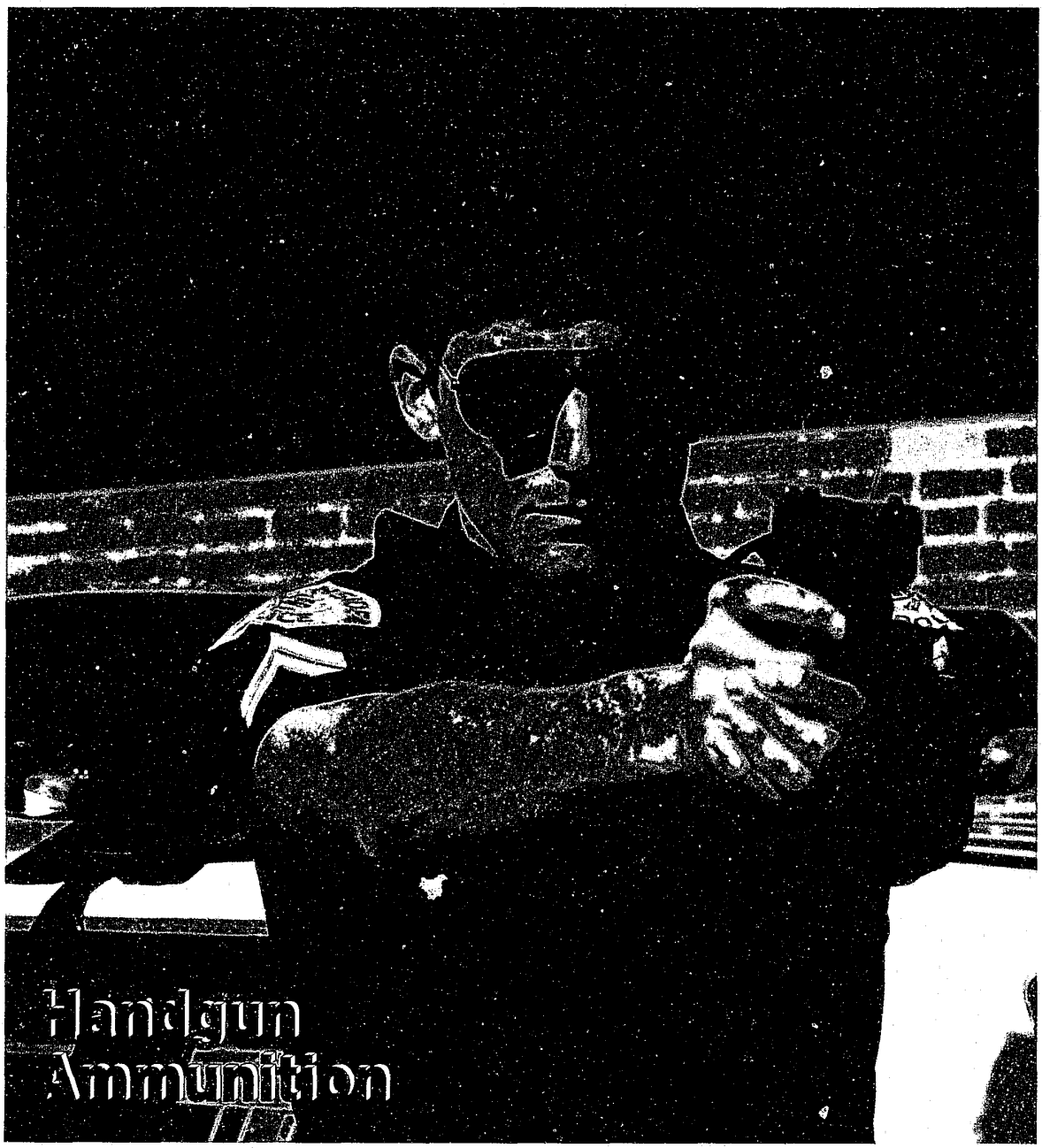
U.S. Department of Justice
Federal Bureau of Investigation

JANUARY 1995

FBI Law Enforcement BULLETIN



January 1995
Volume 64
Number 1

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

Louis J. Freeh
Director

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, FBI Academy, Quantico, VA 22135.

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FBI Law Enforcement Bulletin

Features

Departments

ISSN 0014-5688 USPS 383-310

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Managing Relations Between the Sexes in a Law Enforcement Organization

By
WILLIAM U. McCORMACK, J.D.

In a 1978 magazine article concerning relationships in the workplace, renowned anthropologist Margaret Meade contended that with the increasing number of women in the workplace, society needed a taboo that clearly and unequivocally stated, "You don't make passes at or sleep with the people you work with."[1] While many law enforcement managers are understandably reluctant to impose regulations on the personal lives of employees that may interfere with their constitutional right to privacy, some regulations may be necessary to protect against sexual harassment claims and to ensure a professional and efficient working environment.

Managers in law enforcement organizations face two competing legal issues when analyzing their ability to regulate or restrict relations between the sexes in their department. On one hand, the Supreme Court and lower courts have recognized a constitutional right to privacy and a first amendment freedom of association right that in some situations limits a manager's authority to restrict certain personal relationships. On the other hand, emerging theories of sexual harassment and the need to implement prudent policies to prevent sexually hostile and abusive work environments counsel in favor of restricting certain co-worker relationships, particularly those between a supervisor and a subordinate. Within the framework of the right to privacy and the need to prevent sexual harassment, this article sets forth the legal limits on rules restricting employee relationships.

The Right to Privacy

The Supreme Court first recognized the constitutional right to privacy in its landmark decision *Griswold* v. *Connecticut*,[2] in which the Court held that a State statute

Special Agent McCormack is a legal instructor at the FBI Academy.

> ***"Courts generally uphold discipline in cases...where there is a superior/ subordinate relationship and a potential for conflicts of interest."***

prohibiting the use of contraceptives violated a married couple's constitutionally based right of privacy. The exact contours of this right to privacy have not been clearly defined, but they certainly include "matters relating to marriage, procreation, contraception, family relationships and child rearing and education."[3]

The Supreme Court has not ruled on the extent to which government employers may regulate the private, consensual sexual behavior of their employees.[4] However, lower courts have provided guidance to law enforcement managers concerning their authority to restrict relations between co-workers.

In *Kukla* v. *Village of Antioch*,[5] the U.S. District Court for the Northern District of Illinois analyzed the constitutional rights of a supervisory employee in a police department to cohabit with a subordinate and determined that the department legitimately restricted the officer's relationship. In *Kukla*, a male sergeant and a female dispatcher were fired for living together, and the sergeant sued alleging, among other claims, that the firing violated his constitutional rights of privacy and freedom of association.

The district court, in denying the sergeant's claims, balanced the weight of the government's interest at stake in the particular situation against the strength of the constitutional right asserted by the employee.[6] The court noted that the government, as the employer, may generally limit an employee's conduct to a greater extent than the government can regulate the conduct of a private citizen, particularly when the employee's exercise of the right interferes with the provision of government services.[7]

The court concluded that restrictions on a public employee's rights of cohabitation and sexual conduct must be supported by a reasonable belief that the conduct would have a significant negative impact on the employee's job performance, the operations of the police department, or the public's perception of the department.[8] In applying this balancing of interests test, the court ruled in favor of the department's restriction because the police department was small, with only two sergeants; members of the force unavoidably had to work together closely; and past experience had demonstrated that a former dispatcher was protected from criticism or discipline because of the sergeant's relationship with her.[9]

The court in *Kukla* also recognized that there are special needs in law enforcement that support regulating employee conduct, which set law enforcement apart from other government employers. The court stated that a police department needs a high degree of discipline, because at any time, officers may be called on to work together in an intensely cooperative way.[10] Other courts, when analyzing the constitutionally based employment rights of law enforcement officers, also have recognized the unique nature of police work, which requires a particularly urgent need for close teamwork in a high-stakes field dependent on order, discipline, and esprit de corps.[11]

Despite this special need for discipline, when law enforcement agencies have attempted to restrict the off-duty relationships of an officer with a private citizen rather than a co-worker, the courts have supported, in most cases, the officer's claim that the restriction constitutes an unconstitutional intrusion into his or her rights of privacy and freedom of association.[12] However, when the department can demonstrate a significant adverse impact on the department, other than just community or moral

disapproval of the officer's relationship, courts have upheld disciplinary action against the officer.[13]

Courts generally uphold discipline in cases such as *Kukla* where there is a superior/subordinate relationship and a potential for conflicts of interest.[14] Supporting this type of restriction on co-worker relationships are cases in which courts have upheld antinepotism rules or regulations that prohibit married couples or family members from working in the same department or agency.[15]

While arguably marriage or family relationship should receive greater constitutional protection than unmarried cohabitation or dating, because marriage and family relationships are at the core of the right to privacy protection, courts have uniformly upheld reasonable antinepotism rules based on governmental concerns over favoritism in job assignments, promotions and pay increases, and increased potential for morale and discipline problems.[16] Courts also recognize an increased potential for conflicts of interest and impairment of judgment in high-risk situations where law enforcement officers might have a tendency to favor a family member over their duty to the job.[17] These same arguments also can be made when a dating or cohabitation relationship develops between co-workers in a law enforcement agency.

First Amendment Freedom of Association

The first amendment right to freedom of association is linked closely to the right to privacy, even though it often is asserted separately by officers challenging restrictions on their personal relationships. In *Roberts* v. *United States Jaycees*,[18] the Supreme Court recognized that the constitutionally protected right to freedom of association includes the right to enter into and maintain certain intimate relationships[19] and the right to associate with others in pursuit of a wide variety of cultural ends.[20] As a general matter, law enforcement restrictions on the associational rights of law enforcement employees are subjected to the same legal analysis as are restrictions affecting an employee's right to privacy.

> ***"An...increasingly important reason to regulate relationships between the sexes in the workplace is the need to prevent sexual harassment."***

Illustrative is *McCabe* v. *Sharrett*,[21] in which the U.S. Court of Appeals for the 11th Circuit upheld the demotion and transfer of a police chief's personal secretary because she married a police officer in the department. The court determined it not only was reasonable but also necessary for the chief to transfer the secretary to preserve the confidentiality of his office. Noting that the secretary had access to confidential material, such as internal affairs files, the court concluded that spouses tend to possess a higher degree of loyalty to their marital partners than to their superiors and often discuss workplace matters with each other.[22]

Law enforcement officers also have claimed that restrictions on their personal relationships violate their first amendment free speech rights. However, because public employee speech is protected only if it is a matter of public concern, that is, social, political, or community concern,[23] these claims have not succeeded.

For example, in *Swank* v. *Smart*,[24] the U.S. Court of Appeals for the Seventh Circuit held that an off-duty police officer's free speech and association rights were not violated when he was disciplined for talking to and giving a motorcycle ride to a 17-year-old college student. The court stated that the purpose of the free-speech clause and the right of association is to protect the public expression of ideas and not casual chit-chat between two people.[25]

Sexual Harassment

An additional and increasingly important reason to regulate relationships between the sexes in the workplace is the need to prevent sexual harassment.[26] The Supreme Court's decision in *Harris* v. *Forklift Systems*[27] provides guidance on what constitutes a hostile work environment and reemphasizes the importance of maintaining a work environment that is free of sexual hostility or abusiveness. Arguably, both types of sexual harassment—abusive work environment and *quid*

pro quo harassment[28]—are more likely to occur in a work environment where dating and cohabitation between co-workers are not reasonably regulated.

Allowing supervisory personnel to date or cohabit with subordinates particularly is risky for a law enforcement organization because, under *quid pro quo* liability, the supervisor engaged in the relationship may be considered to be acting on behalf of, or as an agent of, the employer. If the romantic relationship between a supervisor and a subordinate is determined to be unwelcomed, the employer is automatically held accountable for sexual harassment by the supervisor.[29] Although a supervisor may believe the relationship is consensual, the potential for a sexual harassment claim still exists, because the sexual advances or activity may nevertheless be considered unwelcome.[30]

Even before a dating relationship develops, flirting and romantic pursuits between co-workers may be viewed as sexual harassment, as illustrated in *Ellison* v. *Brady*,[31] a U.S. Court of Appeals for the Ninth Circuit decision. In *Ellison*, a female revenue agent for the Internal Revenue Service (IRS) was approached by a co-worker, who attempted to strike up a relationship. The female agent did go out to lunch with the male agent, but thereafter, she expressed no interest in a dating relationship. The male agent continued to pester and write notes to the female agent, and the IRS interceded by transferring the male agent temporarily.

Eventually, however, the male agent was transferred back to the same office as the female agent, and she sued alleging a hostile work environment. The Ninth Circuit upheld the female agent's claim, stating that the notes she received from the male agent had a threatening tone when viewed from the perspective of a reasonable woman and thus created a sufficiently abusive and hostile working environment to constitute a valid sexual harassment claim.[32]

In *Spain* v. *Gallegos*,[33] the U.S. Circuit Court of Appeals for the Third Circuit found that rumors of a sexual relationship between an employee and a supervisor could constitute sexual harassment. The court ruled that a hostile work environment may have existed in this case because fellow employees shunned the plaintiff due to the rumors and because this lack of rapport caused her supervisors to evaluate her poorly for promotion purposes.[34]

> **"...some courts have found that a workplace permeated with off-duty relationships between co-workers and supervisors may constitute a hostile working environment."**

Law enforcement managers also should be aware that some courts have found that a workplace permeated with off-duty relationships between co-workers and supervisors may constitute a hostile working environment. In *Broderick* v. *Ruder*,[35] the U.S. District Court for the District of Columbia found that evidence of a work atmosphere permeated with sexual and dating relationships involving employees other than the plaintiff were relevant to the issue of a hostile work environment. The court ruled that the sexual relationships between supervisors and subordinates and other conduct of a sexual nature were so pervasive that it affected the motivation and work performance of those who found such conduct repugnant and offensive.[36]

Law enforcement managers should ensure that policies restricting employee relationships between women and men are stated clearly and are enforced consistently.[37] The policies also should be applied in an even-handed fashion, without considering the sex of the person.

Conclusion

Because of the potential for sexual harassment claims, some may argue that discouraging all dating relationships between co-workers, as advocated by Margaret Meade, is an advisable management policy. However, the cases dealing with the constitutional rights to privacy and association do not support such an across the board prohibition.

The right to privacy cases generally do not support attempts by law enforcement managers to restrict off-duty lawful relationships between an employee and a nonemployee, and few law enforcement cases discuss the constitutionality of restricting dating and cohabitation between co-workers of equal stature in the workplace. However, caselaw does support

reasonable restrictions on superior/subordinate relationships, particularly where the superior is in a supervisory position.

Police managers responsible for fostering a workplace free of sexual intimidation and hostility may be justified in imposing reasonable restrictions on superior/subordinate relationships when necessary. These restrictions serve 1) to reduce the potential for sexual harassment, particularly because requests for sexual favors from a superior to a subordinate may generate automatic liability for the department; 2) to avoid favoritism or the appearance of favoritism in job assignments, promotions, discipline, or pay increases; 3) to prevent morale problems; 4) to prevent a potentially dangerous situation of divided loyalties in high-risk and life-threatening situations; 5) to prevent potential conflicts of interest where an employee has access to confidential information or personnel or internal affairs files; and 6) to protect the reputation of the department in the community.✦

Endnotes

[1] Margaret Meade, "A Proposal: We Need Taboos on Sex at Work," *Redbook*, April 1978, 31-33, 38.

[2] 381 U.S. 479 (1965).

[3] *Paul* v. *Davis*, 424 U.S. 693, 713 (1976).

[4] The Court has not considered fully whether and to what extent State regulation of private consensual behavior might be permissible. *Carey* v. *Population Services International*, 431 U.S. 678 (1977). However, the Court has made clear that not all forms of private consensual conduct between consenting adults is protected from State regulation. In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), the Court ruled that homosexuals have no fundamental right to engage in sodomy.

[5] 647 F.Supp. 799 (N.D. Ill. 1986).

[6] *Id.* at 804.

[7] *Id.* at 805.

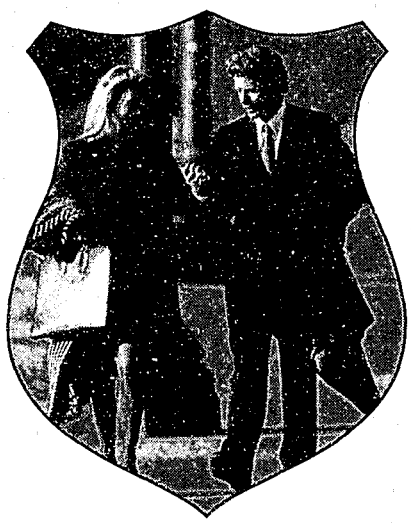
[8] *Id.* at 808.

[9] *Id.* at 810.

[10] *Id.* at 809.

[11] *Breuer* v. *Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990).

[12] *See, e.g., Briggs* v. *North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985) (An officer's dismissal for living with a married woman who was not his wife violated the officer's right to privacy); *Wilson* v. *Taylor*, 733 F.2d 1539 (11th Cir. 1984); and *Reuter* v. *Skipper*, 832 F.Supp. 1420 (D. Ore. 1993), *aff'd*, 4 F.3d 716 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1397 (1994).



[13] *See Fugate* v. *Phoenix Civil Serv. Bd.*, 791 F.2d 736 (9th Cir. 1986)(Officers could be disciplined for on-duty affairs with prostitutes. The protections of the right to privacy in sexual activities of an officer do not extend to cover sexual behavior that is not purely private, that compromises a police officer's performance, and that threatens to undermine a police department's internal work morale and community reputation;) and *Fleisher* v. *City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988)(A police officer's sexual conduct with a minor was not protected by the right to privacy or freedom of association because the conduct was illegal, compromised the officer's performance as an officer, and threatened the department's community reputation and internal morale.)

[14] *Shawgo* v. *Spradlin*, 701 F.2d 470 (5th Cir. 1983), *cert. denied*, 464 U.S. 965 (1983) and *Puzick* v. *City of Colorado Springs*, 680 P.2d 1283 (Colo. App. 1983).

[15] *Parsons* v. *County of Del Norte*, 728 F.2d 1234 (9th Cir. 1984), *cert. denied*, 469 U.S. 846 (1984); *Police Officers' Ass'n* v. *Sioux City*, 495 N.W.2d 687 (Iowa 1993); *Parks* v. *City of Warner Robins, Ga.*, 841 F.Supp. 1205 (M.D. Ga. 1994); and *Collier* v. *Civil Service Com'n*, 817 S.W.2d 404 (Tex. App. 1991).

[16] *Police Officers' Ass'n* v. *Sioux City*, 495 N.W.2d at 691.

[17] *Collier* v. *Civil Service Com'n*, 817 S.W.2d at 407.

[18] 468 U.S. 609 (1984).

[19] *Id.* at 618-620.

[20] *Id.* at 623.

[21] 12 F.3d 1558 (11th Cir. 1994); *See also, Vieira* v. *Presley*, 988 F.2d 850 (8th Cir. 1993)(Conservation officer who was forced to resign because of relationship to individuals under investigation could not claim violation of clearly established constitutional right of association.)

[22] *McCabe*, 12 F.3d at 1572.

[23] *Waters* v. *Churchill*, 114 S.Ct. 1878 (1994) and *Connick* v. *Meyers*, 461 U.S. 138 (1983).

[24] 898 F.2d 1247 (7th Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

[25] *Id.* at 1251.

[26] Because sexual harassment is a form of intentional discrimination, courts allow recovery under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and personal liability against the harasser under 42 U.S.C. § 1983. *Beardsley* v. *Webb*, 30 F.3d 524 (4th Cir. 1994) and *Gierlinger* v. *New York State Police*, 15 F.3d 32 (2d Cir. 1994). In addition, the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3), allows up to $300,000 in compensatory damages against the discriminating department or agency, and § 1983 permits unlimited damages against a city or county under municipal liability claims. *See, e.g., Reynolds* v. *Borough of Avalon*, 799 F.Supp. 472 (D.N.J. 1992).

[27] 114 S.Ct. 367 (1993). In *Harris*, the Court held that psychological injury is not necessary to prove there is a hostile or intimidating workplace; rather, the existence of a hostile work environment is based on a totality of circumstances, including (1) the frequency of the conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; (4) whether it unreasonably interferes with an employee's work performance; and (5) whether it affected the employee's psychological well-being.

[28] *Quid pro quo* harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2)(1993). For an excellent discussion of the legal and policy issues in sexual harassment, *see* Higginbotham, "Sexual Harassment in the Police Station," *FBI Law Enforcement Bulletin*, September 1988.

[29] *Karibian* v. *Columbia University*, 14 F.3d 773 (2d Cir. 1994).

[30] *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 68 (1986). *See also, Poulsen* v. *City of North Tonawanda, N.Y.*, 811 F.Supp. 884 (W.D.N.Y. 1993)(Relationship between patrol officer and lieutenant may be sexual harassment despite chief's finding that the relationship was not coercive) and *Wilson* v. *Wayne County*, 856 F.Supp. 1254 (M.D. Tenn. 1994)(Even though sheriff believed sexual encounter with dispatcher was consensual, both *quid pro quo* and hostile work environment harassment existed.)

[31] 924 F.2d 872 (9th Cir. 1991).

[32] *Id.* at 880. One of the notes sent to the female agent stated, "I know that you are worth knowing with or without sex....Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past two months. Watching you. Experiencing you from O so far away. Admiring your style and elan.... Don't you think it odd that two people who have never even talked together alone, are striking off such intense sparks...."

The reasonable woman standard adopted by the Ninth Circuit in *Ellison* and the Third Circuit in *Andrews* v. *City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) is in conflict with other Circuit Courts of Appeal, which have adopted a reasonable person standard in judging a hostile or abusive work environment.

[33] 26 F.3d 439 (3d Cir. 1994).

[34] *Id.* at 451.

[35] 685 F.Supp. 1269 (D.D.C. 1988).

[36] *Id.* at 1278. *See also, Dirksen* v. *City of Springfield*, 842 F.Supp. 1117 (C.D. Ill. 1994)(Allegation that a commander in a police department was having a sexual relationship with his secretary was sufficient to raise the claim of sexual harassment, because it was alleged that it generally was necessary for women to grant sexual favors for professional advancement.)

[37] *Sarsha* v. *Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993)(Co-worker dating restriction was not communicated clearly to plaintiff, thus his discharge for a violation of the restriction may have been a pretext for age discrimination.) Before implementing a co-worker dating/cohabitation restriction, law enforcement managers also should check to make certain that there are no State statutory restrictions on such policies. *See, e.g., New York* v. *Wal-Mart Stores, Inc.*, 1993 WL 649275 (N.Y. Sup. Dec. 16, 1993), in which a New York court determined that its "Legal Activities" statute, § 201-d2(b)-(c), prohibited employers from restricting off-duty dating relationships of its employees. Colorado and North Dakota also have statutes containing broad statutory language protecting employees against discipline or discharge for engaging in off-duty legal activities. Colorado, Co St. § 24-34-402.5, and North Dakota, ND St. 14-02.4-08.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.