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EMPLOYMENT PRACTICES HOTLINE

Sexual Harassment Issues Could Compromise Closely Held Corporations

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An employee of a light manufacturing facility in Massachusetts recently informed the facility's owners that one of her male managers is having sexual relations with two other female employees on the company's premises during working hours.

The company is a closely held corporation owned by three family members.

The situation is complicated by two disturbing facts—the two female employees are minors and the male employee is the son of one of the owners.

The employer immediately investigated the report and substantiated the allegations. The son of one of the owners implicated in the incidents is 27 years old. The first generation of family members who own the company had planned to turn over the business to this son within the next three years.

The son admitted to having sexual intercourse with the female employees, one of whom reports to him as a subordinate. He claimed that the encounters were entirely consensual and during "break" times.

The two female employees initially denied the allegations but eventually admitted to the interactions when confronted with the admission of the male manager, although each female employee had no knowledge of the other's liaisons with the male manager.

The two female employees stated that they agreed to have sexual relations with the male manager and that the "consensual" conduct did not constitute sexual harassment.

The employer called the EPL hotline for advice in dealing with this situation. If at all possible, the business wishes to keep the male manager in its employ.

The EPL counseled that the actions of all three undoubtedly rise to the level of inappropriate workplace behavior worthy of immediate termination and the action of the manager constitutes a crime.

The fact that the manager is the son of one of the owners, coupled with the fact that the two female employees are minors raises ethical, moral and legal issues for this business.

Termination of all three employees seems inevitable. All three employees were engaged in the same conduct, so terminating the male employee but not the female employees or vice versa, would open the business up to charges of sex discrimination.

Employees who commit similar rules violations must be disciplined in an equal manner or discrimination charges are apt to be brought.

The business could probably justify retaining the two female employees on the grounds that the male manager committed a crime and female employees did not commit a crime. However, such a personnel decision could set a dangerous standard for future rules transgressions.

The decision to refrain from terminating the two female employees for obviously inappropriate behavior would allow future rules transgressions by other male employees to be subject to that precedent. For example, male employees terminated for a rules violation would

charge sex discrimination by pointing to an instance where the employer simply tolerated the inappropriate behavior of the two female employees.

Undoubtedly the two female employees as well as their parents would not be pleased that they were terminated. They could certainly go to the police and file a criminal charge of statutory rape.

Even though the female employees agreed to have sex with the male manager, their consent is irrelevant in a criminal law sense since they are minors. If the employer retains the manager, it will have ratified the manager's criminal act.

While the current owners had hoped that he could be the future head of the business, retaining him in the employ of the company would expose the business to the risks of future litigation. For these reasons, the manager should be terminated.



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There is also the risk that the female employees could file a charge of sexual harassment with the EEOC. They could easily claim that they never really consented to have sex with the male manager.

Certainly, one could envision a credible argument that the female employees were actually coerced into having sex with the male manager because of his position as their manager and the son of one of the owners.

Since consent is an issue of fact, the employer likely would not prevail on a

motion for summary judgment. Further legal costs also would be incurred to resolve the matter—another reason why the manager should be terminated.

The specter of punitive damages is an additional and critical component underlying the stakes in the employer's personnel decision. The business is now on notice of the male manager's proclivity to engage in sexual behavior in the workplace with employees.

By retaining him, the employer would be subject to substantial exposure to

punitive damages should a third female employee allege and prove a sexual harassment charge against the male manager.

In light of these issues, employers in these unfortunate situations should be careful to treat employed family members as they would any other employee. The slightest hint of favoritism or making exceptions to policies and procedures would be a costly mistake and set a precedent for the future that could have devastating consequences. 