
HIRING TO FIRING – WHAT CAN THE MOVIE THE HATING GAME TEACH US ABOUT OFFICE ROMANCES?

Tracey Diamond (00:01):

Welcome to Hiring to Firing, the podcast. I'm Tracey Diamond, a labor and employment attorney with the law firm of Troutman Pepper. My partner, Evan Gibbs, and I handle all employment issues, from hiring to firing. And today, we welcome our special guest, Michelle Rice, Senior Corporate Counsel, Labor and Employment at Yelp. Yelp, as most everybody knows, is a social media platform that publishes crowdsourced reviews about businesses. Welcome, and thanks so much for joining us, Michelle.

Michelle Rice (00:31):

Thank you for having me.

Tracey Diamond (00:33):

So before we get started on our sexy topic of office romances, please tell us a bit about your background and your role at Yelp.

Michelle Rice (00:40):

Sure. Again, thanks for inviting me today. Happy to be here with both of you to discuss this topic and this movie. So I've held various in-house positions across a bunch of different sectors in my time with different companies, so education, manufacturing, consumable electronics, and now most recently in the tech industry with Yelp. Most people are familiar with Yelp as a platform that connects people with great local businesses. It's a fun company to work for. And here I support our people team, like both of you, with all aspects of employment law, what you call hiring to firing, as one of my mentors early on called it womb to tomb. So everything from inception to, and even beyond, termination sometimes, unfortunately. So that's a quick snapshot of who I am.

Tracey Diamond (01:23):

How many employees does Yelp have these days?

Michelle Rice (01:26):

We have over 4,000 employees in the US, and Canada, and Germany, in the UK.

Tracey Diamond (01:34):

Wow. Okay. Today we are going to focus on the 2021 rom-com called The Hating Game, which is a movie based on a novel by the same name. In the movie actors Lucy Hale and Austin Stowell play two executive assistants who are forced to share an office space after their publishing companies are merged. They are complete opposites and can't stand each other, which of course, leads to a steamy office romance, complicated by the fact that they are both seeking the same promotion. The film explores the fine line between hate and love and the effect of a personal relationship on the entire workplace. Let's take a listen.

Audio (02:13):

I'm trapped here day after endless day with my one maniacal nemesis. Four complaints this week, four. This is the period when you take a period and... Put that donut hole away or I'm going to shove it up your... You two are the worst part of my job. We're going to be hiring a managing director. The job is mine, shortcake. If you get the job, I'll resign, just like you will if I do. Ah, but I'm incapable of giving you that pleasure. Oh, it's not the first time you've said that to a woman, is it? What are we doing, this game that we play every day? Hating someone feels disturbingly like falling in love with them. We are competing for the same job. It's impossible to trust each other. I'm in this and you can trust that.

Tracey Diamond (03:02):

After watching the movie, I was curious how prevalent romance in the workplace is. So I Googled it. According to SHRM, a third of us employees are currently involved or have been romantically involved with a coworker. I guess, this isn't surprising given how much time we spend at work. Throughout my career, office romances or office marriages have seemed to be the norm. But as all three of us know very well, office romances can lead to complications. So Michelle, let's start with you. As employment counsel for Yelp, what are the concerns with an office romance?

Michelle Rice (03:39):

I think there are two scenarios that come up here. One is where there is an office romance within the reporting chain, so a manager and a direct report, or maybe a manager and someone who's a few levels below. And then there's the scenario where it comes up where there's two coworkers, not in a reporting relationship. We can talk a little bit more about that in a bit, I think, the distinction or the problems that arise within the two. But generally speaking, I really think there's four concerns that come up for employers when there's an office relationship. The first is, I think, the pretty big one, which is conflicts of interest and perceptions of favoritism, especially where there's a reporting relationship.

One example that I can think of, at a previous company, the office head was in a relationship with someone who wasn't a direct report, but someone who worked in that location. And we received pretty consistent [inaudible 00:04:40] through our anonymous hotline about it. Everything from that person was given a more favorable position because of their relationship, that they were allowed to come and go when they pleased because of their relationship. And even complaints that some things that maybe shouldn't be happening at work were happening behind closed doors, or after hours, or whatever. Even if those things aren't true, perception is everything. And it takes time and resources from the HR team to look into those complaints and conduct an investigation each time and respond to those concerns.

So it's definitely time consuming. And then the potential environment that it creates for others. In this movie it was very clear that it was creating an issue in the workplace. There was a lot of fighting between the two of them. And it caused a lot of complaints to the HR team and just an overall uncomfortable environment for their coworkers.

Tracey Diamond (05:29):

I think that HR person said something along the lines of, "You two are the worst part about my job."

Michelle Rice (05:35):

Totally. And that's tricky, especially where you have a close-knit team or an office that is smaller or whatever, that is like this microcosm of employees that are sitting in there. And then of course, as the three of us know, the potential for sexual harassment and discrimination complaints, especially when the relationship goes south. That's always something that, from a legal perspective, that the company has to respond to later on and needs to be managed well.

And then lastly, workplace violence. Of course, we hope this never happens. And it rarely does. But I can think of one scenario that had come up at a previous company where one of the employees who were in the relationship was married and the spouse found out and threatened to come to the building to beat up the person who was having the relationship. So we had to deal with that, get security involved, et cetera. So those are, I think, the big ones for me that come up when a workplace relationship comes up.

Evan Gibbs (06:30):

I'm curious, and this includes you Tracey, but have either of you ever dealt with a situation where there was a relationship between an employee and an external vendor, or a client, or something like that? What immediately comes to mind for me, if you both watch *The Office*, if you remember when Meredith was exchanging favors, we'll say, in exchange for free or reduced paper, I think is what it was. They had a supplier. And I have not personally had a situation where a client's employee was involved with somebody outside the company. But that can also create issues. I'm curious if y'all ever dealt with that.

Michelle Rice (07:05):

Definitely. I can think of a scenario where it wasn't quite as bad as that example you bring up in *The Office*. But it was an example where we had an outside person in a relationship with the employee that she was supporting. And actually, as it turns out, that's the scenario I was just referencing with the husband coming in.

Tracey Diamond (07:23):

That's a double whammy.

Michelle Rice (07:25):

Yeah, so it has come up for me, although not quite as bad as exchanging those types of things for some sort of benefit to the company. Tracey, what about you?

Tracey Diamond (07:34):

So I've heard of a couple instances in a professional services organization where someone who's an accountant or an attorney was having a relationship with a client. And also in the medical field. And that of course, brings up a whole host of issues of professional responsibility, in addition to the sort of employer-employment concerns. Michelle, when you were talking about harassment and discrimination, another situation I had in the past came to mind, where an employee complained that they were the only one that the store manager wasn't sleeping with. And so they thought that they were the person that was left out of the mix, because everybody else was getting more favoritism, because they were all sleeping with the boss except for her.

So I think that can go both ways. They brought it as a harassment or, I guess, more of a discrimination type of complaint, although they were the ones not being part of the relationship.

So it's just interesting. But getting back to this idea of perceptions of favoritism, even where there isn't actually favoritism going on, we're dealing with human beings. And I think that's why all three of us are employment lawyers, is because we love that part of our jobs. We love the fact that crazy human behavior happens every single day. Given the fact that we're all humans, is it realistic for a company to just put an all-out ban against workplace romances?

Michelle Rice (08:52):

In my opinion, no. That'd be really difficult to enforce, I think, because every relationship that happens, you'd need to figure out a way to either manage that conflict or manage the relationship. And if you're banning it, then you'd need to take some sort of action. I just don't think it's realistic. I think it's totally okay to, and you should, ban any sort of relationship between a manager and an employee. An all-out ban, I think, is tricky to enforce.

Evan Gibbs (09:23):

I think, that's the real problem. And then what do you do if you have that policy in place? And what do you do when you find somebody that's violating it, but it's a totally consensual relationship? And maybe it's a key person in the organization. Are you prepared to really enforce it? If you are, if you do figure out a way to police it or it comes to your notice, what if the company's doing great under the leadership of this particular CEO? But let's say, that the CEO is having a consensual relationship with the Chief Operating Officer, is the company prepared to terminate the key executives who are really critical to the company? Or you could even say somebody lower down the chain, a sales leader, or a really good salesperson.

And so there's that balance of, what are you going to do if you find somebody violating the policy? And I think that's why most of the time we see, and I'd like to hear your feedback on this as well, but most of the time what my clients have implemented, and what I've usually recommended, is more of a policy that requires disclosure as opposed to a prohibition. Has that been y'all's experience with your clients and what you've typically advised?

Michelle Rice (10:30):

Definitely. If there's a reporting relationship and there's a relationship there, we always ask them to disclose it to us. So that way we can work with them to figure out how we can best manage the situation.

Tracey Diamond (10:42):

I often wonder though, how well that's enforced. How often is it that there's a relationship and the company just isn't aware of it? Because truth be told, if they're in a reporting relationship they know what's going to happen if they disclose it. If one of them can't be moved so that they're not in a reporting relationship, they're probably going to have to leave the company. So there's some sticks there and not just carrots, if the disclosure happens. So let's say we have this relationship. It's out in the open. Let's say, it's the CEO of the company. And so it's not directly in a reporting relationship, a couple of levels away. And there are these perceptions of favoritism, even if they aren't justified. How do you handle that with regard to the rest of the workforce?

Michelle Rice (11:28):

You can put those controls into place to try to manage the conflict, but the problem is they're invisible to the workforce. So the scenario that I was talking about before, where the office head was in a relationship, and they were actually married, was in a relationship with the person who

worked in that office, recognizing that conflict, we had that person report to someone outside of the office head. So that way, the reporting relationship was different. And the married partner wouldn't have any sort of impact on any sort of hiring decisions or compensation decisions, et cetera, for that person.

The rest of the workforce saw that as, "Oh, this person got a better job." It's tricky. I think that when the complaints come in, you have to address them each individually. Do an investigation if it's warranted. And then try to explain in a way that doesn't expose confidentiality for those other employees, that there isn't an issue here. We're aware of it. We're taking steps to address any sort of conflict or decision making that this person may have. And leave it at that.

Evan Gibbs (12:30):

I'm curious, I've never provided this advice or asked a client to do this. And it, just frankly, hasn't come up. But I think it's something worth discussing. But have either of you had a situation where the client either asked you for feedback on or you recommended that... Let's say if it's somebody who leads an office or leads a team or something like that, have you ever had a situation where the recommendation was to ask the person in charge, the supervisor or manager, to have a conversation with the other subordinates who aren't in the relationship to address that perception problem?

To tell them, "Hey, look, I'm in a relationship with someone. But I want you all to know that HR is aware. There are protections in place so that there's no favoritism and things like that. And I'm going to treat you all the same." And conversations like that. I'm curious if y'all ever had a client do that? Or if you've ever recommended that? I have not. I think in certain situations it might make sense if the person's willing to do it. And I don't think the company could force somebody to have a conversation like that. But if they're willing to, I'm just curious what your thoughts are?

Michelle Rice (13:43):

In my experience, I haven't advised them to do that, mostly because the person who is delivering the conversation, I wasn't quite confident at how they would deliver it and if it would be taken the right way. But I've always just had that message come directly from HR. So it's more coming from the horse's mouth, so to speak, by saying, "Outside of that relationship, we're aware of it. And we're working towards making sure that there is no favoritism, there is no conflict," all of that kind of stuff to make sure that it's addressed. But Tracey, I'd love to hear your thoughts, too.

Tracey Diamond (14:16):

I haven't had that as an option either, but I kind of like it. I think, depending on the culture of the organization and the situation, of course, whether it makes sense, I could see where there could be some benefits to having it out in the open by the people who are actually in the relationship. If there is a good relationship amongst the whole team and the thinking is that the team is going to be receptive to hearing it from the people in the relationship, at least it gets it all out in the open and people aren't dancing around it and talking about it behind closed doors. But with this idea-

Evan Gibbs (14:46):

The response typically that I've seen, and I think we've all talked about, is sort of a reactionary response to specific complaints from other employees who aren't involved in a relationship, "Oh, I see favoritism." And it's addressed on a one-off basis. And in my experience, those conversations are usually, "Yes, we're aware of it and nothing bad's going to happen." But there's sort of the other side of getting it out in the open and telling people that, "Hey, we're looking after

everybody here. And we're going to protect everybody from favoritism," and whatnot. To me, it's like you said, I think it depends on the culture. But I think that really helps build a collaborative and open culture. And I think it's a good strategic move, as long as we're confident about the ability of the person who's going to make the communication.

Tracey Diamond (15:33):

I do think that you're a little bit damned if you do, damned if you don't, because if HR has the conversation, I could see where employees are like, "Oh, sure. HR said that. But do they really have the power to ensure that there's no favoritism here?" And if the person in the relationship says it, then I could see employees saying, "Oh, sure. They could say it all they want, but obviously, there's favoritism here." So I'm not sure that either way necessarily gets you where you need to be, but not doing anything at all, I think is worse.

Michelle Rice (16:03):

Totally. And to Evan's point, I think that when someone raises it to HR, oftentimes it's not just that employee who's thinking about it or talking about it. So there probably is some set of employees that are talking about it. And so even if you're delivering that feedback right to the person who complained, it could be that three or four other people have that same opinion. And you're missing the opportunity to talk to those people about it, too. So it could make sense, I think.

Tracey Diamond (16:29):

It's a good point. For every employee who speaks up, there's three others who are thinking it and just aren't speaking up. I also think about the idea of favoritism going in the other direction against the person in the relationship, that there's so much concern that there's going to be this appearance of favoritism, that person actually has their career thwarted, because they're in the relationship. Because there's so much fear that if they get that promotion or they got that increase in salary, that it was because they're sleeping with the boss. I worry about that in terms of a potential harassment discrimination claim down the road and the context of Michelle's points about the issues here.

Evan Gibbs (17:03):

That's right. I mean, it's really complicated, because what if the boss is sleeping with the top salesperson? That really makes it complicated. Whereas if they're sleeping with just somebody who's mediocre, that's maybe not that big of a deal on the plus side or the negative side. They're not a star performer. They're not in line for a lot of promotions. And they're not doing poorly where they're concerned that the boss is going to protect them from getting fired. But certainly, there's some outlier situations where it makes it really complicated and you got to figure it out. I think it's just a matter of internal controls. And I think if the HR Department and/or the employment attorneys in-house or outside counsel, I think being creative in the controls that they put in place for things like performance reviews, I think that's really important.

And we talk to clients about this all the time about how do you measure performance? And when do you measure it? And when do you communicate it with employees? Annual reviews, et cetera, et cetera. And having those sort of formalized controls in place where HR is involved or somebody higher up the chain or something like that, where those other people are involved, I think that can help mitigate those issues. But it's complicated. And I think it's not something that should be decided lightly or quickly. You need to think through it.

Tracey Diamond (18:18):

You're weighing employees' right to privacy against the need to make sure that the workplace is being run in compliance and efficiently, for sure. In the movie, a big part of the movie, the two employees are flirting/bickering/picking at each other. And they don't even realize that they like each other until halfway in when there's this sort of big scene in the elevator. How do you handle that kind of flirtatious relationship where someone's maybe not necessarily, yet anyway, in an office romance, but there's clearly an attraction or if something's leading in that direction? And even if it gets to the point of PDA, public displays of affection, how do you handle that? How do you handle the distractions inherent in an office romance is, I guess, what I'm trying to say here?

Michelle Rice (19:08):

I think that it's a matter of... I suppose it depends on where it's coming from. If you see it, or an HR person sees it directly, perhaps it's something that they could direct to them or talk to them about directly. If there's employees complaining about it, you do an investigation. And if you find there was something that was inappropriate, violates the company policy or otherwise is just creating this distraction from the workplace, I think you have a conversation with the both of them to set the ground rules for what appropriate behavior looks like at work. I think that's step one.

Evan Gibbs (19:44):

I think that's right. I think that's right. It can be so fact specific and depending on the circumstances, because there's a difference between... I've had the issue come up before where someone was perceived as being overly flirty with other folks in the workplace, with multiple people in the workplace. And there was a discussion had with this individual. And the response was one of anger. "No, I wasn't. That's just my personality. I can't believe you would accuse me of something like that." And so that was the type of situation where you got to think through exactly how you want to handle it, because that's a very subtle area where there was nothing expressly sexual ever said, there were no comments on anybody's appearance, or anything like that. It was much more subtle.

Tracey Diamond (20:32):

It's all about the tone, the tone and the way the person's body language is, which is definitely all sort of soft stuff.

Evan Gibbs (20:40):

Yeah. And stuff like winky face in an email. I mean, stuff like that. And you're like-

Tracey Diamond (20:40):

Cringey!

Evan Gibbs (20:46):

Is that person being flirty? Or did they just not know how to use emojis? And why is that in an email? You know what I mean? Communication is so subtle, those interpersonal communications. But then it's different if you've got people who are maybe touching one another or something like that, blowing kisses, something that's more overtly PDA, it becomes an easier question. But often, it's not that easy. You got to think about how you want to approach it to risk really getting

somebody really upset. And maybe the person who complained is just, maybe they're a prude. And they thought, "Oh, this person is there being too flirtatious."

Tracey Diamond (21:24):

Is the person offended? And is it reasonable for the person to be offended? So Michelle, you advise your HR team, I assume, probably, daily on various things. But how do you handle that sort of uncomfortable conversation? Or how do you advise them to handle those kind of uncomfortable conversations about something as personal as someone being flirty at work?

Michelle Rice (21:46):

In our context, currently we are remote first. Yelp is remote first. So this doesn't come up quite as much as it may have when-

Tracey Diamond (21:54):

One of the benefits of remote working.

Michelle Rice (21:56):

Yeah, this doesn't come up quite as often as it used to. And when it does, quite frankly, it's usually through some sort of chat or something, that there's a clear record of it. But in any case, if there is some sort of behavior that doesn't quite violate a policy, but sits under the surface of that, I think that's when the HR person uses their sort of skills to relate with the person directly. And just say, "Hey, this has come to our attention. Here are the things that have been reported to us. Here's how other people have perceived it."

And then remind them that whatever that they thought what they were doing, that that potentially, that other people perceive it in different ways. And they need to think about how other people might be perceiving it, and even the people around them that they may not even be directly interacting with. So it's this soft conversation to remind them about the impact that their behavior has, even though they themselves might not think that they're being offensive.

Tracey Diamond (22:48):

This is where you get into the world of harassment investigations. And it always becomes this tension between the person wanting to know who it is that complained or what it is that they said. Give me examples. Because without giving examples, it's hard to get someone's behavior to change, because it all just then becomes labels with protecting the privacy of the person who felt uncomfortable in the first place. So that becomes really tricky.

Evan Gibbs (23:11):

I have to throw this example out there. Speaking of remote work, I had a client. This was so earlier this year or last year. But there was some tension between two employees. And it was never really clear to me if there was maybe some flirtation in the workplace that went south. Or maybe one person wanted to date or take it further and the other person didn't and there were some hurt feelings. But one of the individuals involved complained to HR that during Zoom meetings, that the other individual was staring at her chest during the entire Zoom meeting. And so you can imagine how hard it was to investigate this. It was like, "How do you know that the person is staring at your chest during these Zoom meetings?" And the response was, "I can just

tell. I can see. I know what they're looking at." And I raise that issue just to point out the fact that this can become, in the digital world, these issues do arise in a remote workplace.

It was surprising. When the client came to me, I was like, "How do we handle this?" I was at a loss for words. How do we investigate whether this person was staring at someone's chest? So ultimately, the recommendation, I think where we landed on the advice was we advised the individual who felt ogled on the Zoom meetings that, "Hey, these are internal team meetings. You're welcome to turn your camera off. You're welcome to adjust the camera angle if you want." But there's really nothing that we can do to prevent what somebody's looking at on a computer screen. There's no way for us to control that. There's no way for us to police that or know what someone's looking at if it's in your Zoom window." So I point that out just to say that I suspect that's a probably very rare complaint. But actually, that was a live one.

Tracey Diamond (24:56):

Digital evidence is really big in harassment cases now. Emails, text messages, and the interactions we're having even in a remote workforce could give rise to these types of claims, for sure.

Evan Gibbs (25:14):

This is my last point I'll throw in. But I wonder how much companies are thinking, and this is honestly, the first time I've really thought about this, but if we've got a BYOD policy and someone is engaged in these types of romantic communications on their personal device, obviously, I think that's going to become evidence in a lawsuit. Or it makes it much more likely to be discoverable in a lawsuit, if we have a BYOD policy that allows employees to use their cell phones for work and things like that. So I don't know how much this really implicates that. But it's just a passing thought I'd throw out there.

Tracey Diamond (25:50):

It certainly is. It does complicate things for sure when there's all this sort of blurring of the lines between personal lives and work lives. I want to go back to Michelle's point about harassment and discrimination and the potential for those types of claims. Because as we all know, for every good marriage, there's three relationships that go south, not to be a total cynic. But is there a concern here where something starts off as a consensual relationship that there is the potential that it will turn into a harassment claim down the road. And what can you do about that?

I can give you an example that I experienced in one of my previous jobs where the general counsel of the company found out at a leadership retreat that the head of sales was having a relationship with another executive and literally had them at the bar when he first found out about this on a napkin that this was a consensual relationship. So that was a very interesting version of what we call a love contract. What do you think about this concept of love contracts and what can HR do to prove consent?

Michelle Rice (26:53):

This is always a concern, because what starts out as a consensual relationship can often be later characterized in an EEOC charge as something that was more nefarious. Because at the time when two employees are engaging in what they think is friendly banter, later on when it's written in a complaint in black and white, it can just sound bad. So a good example from this movie, Lucy, the female character, let's say, she later files her EEOC charge based on sexual harassment and

discrimination at work. She writes in the description he often called her, was it cupcake? Or shortcake? He often called her shortcake, repeatedly. And repeatedly she says, "Don't call me that." And they think it's this banter between the two of them. But later on-

Tracey Diamond (27:38):

I think he says at one point that a favorite part of his day is her pretending that she doesn't like it when he calls her shortcake.

Michelle Rice (27:43):

Right. You're watching that. And then in our minds, I'm thinking, "Oh gosh, when this is written in the EEOC charge later on, instead of calling me by my name, he would only refer to me as shortcake. I asked him several times that he stop, but he kept on doing it."

Tracey Diamond (27:58):

Classic!

Michelle Rice (27:59):

And that's only one of many examples in that movie that could go very wrong for that company if she ever filed her charge. But in any case, I think your best chance is if you know about the relationship when it's happening, like if it gets disclosed or you otherwise find out about it. I've never advised using a love contract, especially a napkin user love contract. I think what's helpful is that during those discussions with the employees who are in the relationship, that you're saying, "Okay, I understand that you two are in a relationship here. The controls or the guardrails that we're putting into place to manage any sort of conflict of interest..."

And then, what's super helpful is to document that conversation and email after the fact and say, "As we discussed today, you disclosed to us that you're in a mutual personal relationship." That way, later on, if we ever needed to respond to some sort of complaint, that is documented in that email. They had the opportunity to write back in and refute it if they said it wasn't true. That's how I would document it, rather than using a love contract. Or that's how I always have, in any case.

Tracey Diamond (29:01):

I think that's wise counsel, Michelle. And I would add to that that it would be a good opportunity to remind both parties of the company's harassment policies and what the requirements are, what their rights and obligations are that policy as well as under the retaliation provision in a harassment policy.

Michelle Rice (29:17):

A hundred percent.

Tracey Diamond (29:19):

All right, well, listen, this has been so much fun. And we really appreciate you joining us today. As we wrap up, I want to remind our listeners to please check out our blog, hiringtofiring.law, which is your go-to resource for information about cutting-edge human resources issues across the country. And also, please be sure to subscribe to our podcast, which is available on all the major platforms. And leave us a review, letting us know what you think. Thanks again, for listening.

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