

Comments

LOVE AND MARRIAGE IN THE AMERICAN WORKPLACE: WHY NO-SPOUSE POLICIES DON'T WORK

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Imagine this hypothetical situation: You start your new job at Corporation X. You meet Mr. Right (or Ms. Right) at the copy machine over a helping of double-sided copying. Over the next few weeks, you engage in an appropriate level of mutual flirting—enough to make a point, but not enough to be obvious. After a few months of cautious dating, during which time you have successfully avoided becoming the subject of pernicious office gossip, you decide to get married. You dream of living happily ever after as Mr. and Mrs. Right. However, your wedded bliss is unexpectedly interrupted by an untimely wedding present from Corporation X—one of you has been fired for violating the company's "no-spouse" policy prohibiting spouses from working together in the same company.

Consider this variation: Ms. Right (or Mr. Right) works for Corporation Y, Corporation X's largest competitor. You have been dating in secret for a few months and you decide to marry. You are both closet law junkies and therefore are aware that State A, where you both work and reside, has an antidiscrimination statute prohibiting marital status discrimination. Despite this statutory protection, one of you is fired.

Are these employment decisions legal? According to case law, probably.

It is a well-established legal principle that marriage is a fundamental

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right.¹ It is also established that every married couple has a fundamental right to procreate, to control procreation through the use of birth control,² and, subject to some limitations, to terminate a pregnancy.³ There is, however, no general right to employment,⁴ much less a right to work with one's spouse. Thus, in the hypothetical situations outlined above, either Mr. or Mrs. Right will be gainfully unemployed as a result of the marriage. Unfortunately, current law affords the Rights little recourse. Absent a state prohibition to the contrary (or even in the face of such a prohibition), an employer may discriminate against an employee because of his or her marital status through no-spouse and antinepotism policies.⁵ In addition, courts frequently decide in favor of employers who have discriminated against employees based on marital status, even in states that specifically prohibit marital status discrimination.⁶

The New American Webster Dictionary defines "nepotism" as "undue

1. See *Loving v. Virginia*, 388 U.S. 1, 17 (1967) (stating that "[u]nder our Constitution, the freedom to marry, or not marry, . . . resides with the individual and cannot be infringed by the State"); see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.").

2. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding that a Connecticut law forbidding the use of contraceptives was unnecessarily broad and invasive of constitutionally-protected freedoms).

3. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a Texas criminal abortion statute prohibiting abortions at any time during pregnancy, except to save the life of the mother, was unconstitutional).

4. Employment relationships are generally governed by contract law. Absent an express written agreement defining specifically the length of employment, an employer-employee relationship is deemed "at will."

5. In general, "no-spouse" policies encompass "any rule against husband-wife employment." 1996 *Guide to Fair Employment Practices*, 535 LAB. L. REP. (CCH) ¶ 320, at 85 (Jan. 24, 1996) [hereinafter 1996 *Guide*]. In contrast, antinepotism policies generally prohibit relatives from working together. Since there is no set form for such policies, most employers adopt a hybrid policy. See Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75, 81-82 (1982) (discussing the vast differences among employer antinepotism and no-spouse policies). Employers may use antinepotism policies as a means of preventing spouses from working together. See, e.g., *id.* at 78. Thus, antinepotism policies can have the same effect as no-spouse policies. Although this Comment will deal specifically with the arguments for abolishing spousal policies, similar arguments may be applied to antinepotism policies. Therefore, the terms "antinepotism" and "no-spouse" will be used interchangeably at times.

6. See, e.g., *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 793 (Alaska 1996) (holding that under Alaska's antidiscrimination statute, which includes a provision making it unlawful to discriminate based on marital status, an employer is not prohibited from discriminating against an employee based upon the identity of a spouse); *Boaden v. Department of Law Enforcement*, 642 N.E.2d 1330, 1335 (Ill. App. Ct. 1994) (holding that under Illinois' marital discrimination statute, "no-spouse policies precluding employment on the basis of spousal identity do not constitute unlawful discrimination based upon marital status").

favoritism to relatives.”⁷ Derived from the Latin word for nephew,⁸ nepotistic practices were originally “directed at the hiring of incompetent male relatives.”⁹ Thus, when originally conceived, these rules had little or no impact on the female workforce. “Undoubtedly because women did not constitute a significant part of the professional or managerial workforce . . . [decades ago], such rules had minimal effect on daughters, nieces, female cousins, or wives. In recent years, however, women have begun to enter the workforce in unprecedented numbers.”¹⁰ The growing popularity of no-spouse and antinepotism policies in the workplace, in combination with the increase in the size of the female workforce (especially in high-level positions) has adversely impacted women by restricting the number of jobs available to them.

No-spouse and antinepotism policies come in various forms.¹¹ Some company policies prohibit either relatives or spouses (or both) from working in the same plant, office, branch, department, or company. Other policies prohibit a supervisory relationship between spouses and/or relatives.¹² Still further, some companies consider the identity of one’s spouse when making hiring and firing decisions.¹³ Regardless of form, however, no-spouse and antinepotism policies in the workplace are unjustifiable, antiquated, and unnecessary for running an effective and profitable business.

One reason why no-spouse and antinepotism policies are unsound is that they are based on inaccurate and antiquated notions about spousal relationships. For example, typical business justifications for such policies rely on outdated stereotypes regarding the inability of spouses to work together. As one commentator has noted, since governments have enacted antidiscrimination statutes to prevent discrimination based on stereotypical notions of classes of people, no-spouse policies should also be prohibited

7. THE NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 356 (1981). Professor Wexler, in her seminal piece on antinepotism policies, traces the roots of nepotistic practices throughout history, finding such practices commonplace during the Industrial Revolution and in the Roman Catholic Church during the Middle Ages. In the United States, “[t]he founders of large corporations and other businesses often followed the English practice of keeping management ‘in the family,’ believing that an important purpose of a prosperous business was to provide employment for sons and other kin.” Wexler, *supra* note 5, at 76.

8. See Wexler, *supra* note 5, at 75.

9. *Id.* at 77.

10. *Id.*; see also Dennis Alerding, Note, The Family that Works Together . . . Can’t: No Spouse Rules as Marital Status Discrimination Under State and Federal Law, 32 U. LOUISVILLE J. FAM. L. 867, 868 (1994).

11. See 1996 Guide, *supra* note 5, at 85; see also Alerding, *supra* note 10, at 868-89.

12. See Stephen B. Humphress, Note, State Protection Against Marital Status Discrimination by Employers, 31 U. LOUISVILLE J. FAM. L. 919, 927 (1992).

13. See, e.g., Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 793 (Alaska 1996) (upholding BP’s antinepotism policy that considered spousal identity).

because these policies are based on the stereotypical assumption that spouses are "unable to leave their personal problems at home, are competitive, and . . . cannot adequately supervise [each other]."¹⁴

No-spouse policies are also unsound because they do not take into account the changing composition of the American workforce and thus have the effect of discriminating against women by restricting the labor market. The American workforce is approximately forty-five percent female.¹⁵ By the year 2000, the American workforce will be sixty percent female.¹⁶ Employers and potential employees alike are significantly affected by the adverse and unexpected consequences of antinepotism and no-spouse policies. "A shrinking high-skill labor pool and the growing number of women entering the workforce is requiring more employers to face the issue of nepotism."¹⁷ Conversely, the female labor force is facing a restrictive labor market, making it difficult for them to find and secure jobs.

Ultimately, however, the strongest argument against no-spouse policies is that they implicate protected constitutional rights, such as the right to marry and the right of association. By strictly enforcing antinepotism and no-spouse policies in the workforce, "[e]mployers have attempted to control or interfere with the most intimate and personal details of an individual's life."¹⁸ Despite this admonition, however, courts have continued to rule that antinepotism policies do not infringe on one's fundamental right to marry or associate.¹⁹ In so ruling, courts contend that, in theory, employees remain free to marry, so long as they do not marry a coworker. Courts also maintain that spouses are free to work elsewhere. However, courts have consistently ignored the *practical* aspects of their holding: antinepotism policies punish coworkers who marry, *because* of their decision to marry. What results is a court-sanctioned policy that inadvertently discourages marriage and promotes cohabitation and divorce.

No-spouse policies that formally or informally discriminate based on

14. Anna Giattina, Note, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 WAYNE L. REV. 1111, 1126 (1987).

15. See Bureau of Labor Statistics, *Table A-1, Employment Status of the Civilian Population by Sex and Age* (visited Oct. 30, 1998) <<http://www.bls.gov/news.release/empst.t01.htm>>.

16. See Alexis A. Yerkes, *Tips on Making a Point Like a Man*, WORKING WOMEN, Mar. 2, 1997, at 6F.

17. *Anti-Nepotism Policies Said Increasing; Care Needed in Developing Good Policies*, 20 Daily Lab. Rep. (BNA) at C-1 (Feb. 2, 1987) [hereinafter *Anti-Nepotism Policies Said Increasing*].

18. Nancy Erika Smith & Kyle M. Francis, *Beyond the Company Town: Employees' Right to Privacy Regarding Off-Duty Conduct*, N.J. LAW., Jan. 1994, at 13.

19. See, e.g., *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir. 1995) (holding that the city's antinepotism policy did not infringe on Brenda Parks's fundamental right to marry).

spousal identity, occupation, and employment are, arguably, the most indefensible of the no-spouse policies. Employers seeking to justify these policies argue for the need to preserve confidentiality and loyalty in the workplace. They fear that if an employee is married to a competitor, or to a supervisor in the same company, the relationship may create a conflict of interest.²⁰ The fact that only married relationships are prohibited in this context, as opposed to unmarried relationships, proves inconsistent with employers' concerns.²¹

Part I of this Comment will argue, generally, that no-spouse policies explicitly forbidding married couples from working for the same employer should no longer be upheld by the courts. Even in light of supposedly legitimate business concerns, courts must assign more weight to the constitutional interests at stake if they are to discourage discrimination in the workplace effectively. In particular, Part I argues that company policies that discriminate based upon the identity of a person's spouse should be prohibited because such policies lead to inconsistent results. Furthermore, they place unnecessary burdens upon a person's right of association and fundamental right to marry.

Part II of this Comment will examine recent legal interpretations of the term "marital status" in marital status discrimination suits. Based on varying definitions of marital status, courts have reached "vastly different conclusions" about what constitutes unlawful marital status discrimination.²² Some courts have followed a narrow approach, finding discrimination only when an individual is treated differently based on whether he or she is married or unmarried, but not when an individual is treated differently based on the identity of his or her spouse.²³ Other courts have adopted a broader approach, including spousal identity within the broad definition of marital status.²⁴ In defining marital status, courts have relied on the legislative intent of the existing statutes pertaining to

20. See KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE* § 7.27, at 337 (1987) (stating that it is considered a "legitimate business practice" to disqualify "male and female applicants or employees who are married to a competitor's employees").

21. See *Thompson v. Board of Trustees*, 627 P.2d 1229, 1231 (Mont. 1981) (stating that interpreting marital status narrowly is "unreasonable, and could lead to an absurd result. . . . [I]f [the] plaintiff and his wife were simply to dissolve their marriage, both could keep their jobs. But for the fact [that] this plaintiff is married, he would still be working.").

22. John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1419 (1991).

23. See, e.g., *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 415 N.E.2d 950, 964 (N.Y. 1980) (finding that marital status involved "a choice among 'married,' 'single,' etc., but would not . . . include an identification of one's present or former spouse").

24. See, e.g., *River Bend Community Unit Sch. Dist. No. 2 v. Human Rights Comm'n*, 597 N.E.2d 842, 846 (Ill. App. Ct. 1992) (liberally construing the term "marital status" to include spousal identity).

antinepotism and antispoise policies.²⁵ Few statutes, however, clearly outline the legislative intent behind including the term “marital status.” Therefore, courts are left to their own devices in defining the term. In response to the differing definitions of marital status available, this Comment argues that courts should adopt the more expansive interpretation, as this interpretation is most consistent with the legislative intent of most state antidiscrimination statutes.

I. WHY NO-SPOUSE POLICES DON’T WORK

A. *The “New Look” of the Twenty-First Century Workforce*

The rise in the number of working females, particularly married females, has brought increased attention to employment policies restricting spousal employment.²⁶ Of the 105 million women sixteen years of age and older living in the United States, sixty-three million were considered “labor force participants” (working or looking for work) during 1997.²⁷ Furthermore, the Federal Bureau of Labor Statistics estimates that there are currently more than fifty-three million married couples in the United States.²⁸ Of these married couples, approximately 28.4 million had both spouses working outside the home in 1997.²⁹

25. See Beattie, *supra* note 22, at 1428; see also *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996) (“In construing the meaning of a statute, we look to the meaning of the language, the legislative history, and the purpose of the statute in question.”).

26. John J. Ross, *The Employment Law Year in Review*, 547 P.L.I. LITIG. 9, 123 (1996).

In 1966, 66.9 percent of the population age 16 years and older had a job at some point during the year. . . . [That number increased to 69.5 percent in 1994 and 1995.] This long-term rise in work activity reflects the increasing likelihood that women will work outside the home. While women are still less likely than men to engage in market work, the proportion of women who work rose from 50.4 percent in 1966 to 63.1 percent in 1996.

Bureau of Labor Statistics, *Work Experience Summary* (visited Oct. 30, 1998) <<http://www.bls.gov/news.release/work.nws.htm>>.

27. See Bureau of Labor Statistics, *Table A-1, Employment Status of the Civilian Population by Sex and Age* (visited Oct. 30, 1998) <<http://www.bls.gov/news.release/empstat.t01.htm>>. In 1992, the number of female labor force participants was 58 million. See Bureau of Labor Statistics, *Access to historical data for the “A” tables of the Employment Situation News Release* (visited Oct. 30, 1998) <<http://www.bls.gov/cpsatabs.htm>>.

28. See James Podgers, *Marriage Traps in the Workplace: Nepotism Rules Make it Harder For Spouses to be Colleagues in Public Sector*, 82 A.B.A. J., Jan. 1994, at 46.

29. See Bureau of Labor Statistics, *Table 2. Families by presence and relationship of employed members and family type, 1996-97 annual averages* (visited Oct. 30, 1998) <<http://www.bls.gov/news.release/famee.t02.htm>>. In 1993, 24.8 million couples were two-

The magnitude of these figures produces two distinct consequences: more couples are likely to meet at work and more married couples are likely to become coworkers. On the issue of coworker dating, one observer has noted that “although the [B]ureau [of Labor Statistics] does not have figures on how many of those couples work for the same employer, it stands to reason that, with more women in the work force—in a growing variety of positions—more people are likely to meet their spouses at work.”³⁰ Most importantly, however, is the interaction between these figures and the increased enforcement of antinepotism and no-spouse policies by employers. Since more women in the workplace means that “a greater possibility exists that husbands and wives will seek employment in the same field,”³¹ it follows that married couples will be facing stubborn applications of no-spouse policies, oftentimes with little rational justification. This effect is more “salient as more and more women enter the labor market in which their husbands are already employed.”³²

No-spouse policies also raise problems when a married couple seeks employment simultaneously in the same labor market, perhaps because the couple has moved to a new area. In this situation, where it does not matter which spouse was employed first, no-spouse policies may operate to limit the couple’s overall marketability, thereby preventing them not only from working together, but also from obtaining the best possible jobs. “In small communities with one or two major employers, spouses may have a difficult time finding jobs with different employers.”³³ The problem becomes more obvious when both spouses are actually employed in the same field. In the academic world, for example, “married couples [for several decades] . . . have confronted rules barring them from employment

career couples. See Podgers, *supra* note 28, at 46.

30. Podgers, *supra* note 28, at 46. “As more women have entered the workforce and time to socialize outside of work has decreased, employees have increasingly looked to the workplace as a place to form romantic attachments.” Anna M. DePalo, *Antifraternalizing Policies and At-Will Employment: Counseling for a Better Relationship*, 1996 ANN. SURV. AM. L. 59, 102 (1996). In fact, “[r]ecent studies have found that ‘about 80 percent of employees have either observed or been in a romantic relationship at their workplace.’ As employees spend more time at work, this percentage will certainly increase.” Jennifer Dean, Note, *Employer Regulation of Employee Personal Relationships*, 76 B.U. L. REV. 1051, 1073-74 (1996) (citation omitted).

31. Giattina, *supra* note 14, at 1114-15.

32. Leonard Bierman & Cynthia D. Fisher, *Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints*, 35 LAB. L.J. 634, 634 (1984).

33. Giattina, *supra* note 14, at 1115. See also *Anti-Nepotism Policies Said Increasing*, *supra* note 16, at C-1 (“[E]mployers in remote areas or in one-employer communities are unable to attract talented employees who are part of two-career couples if they exclude spouses from employment”); Wexler, *supra* note 5, at 79 (“Although these restrictions on employment may appear to be de minimis because they leave the spouse free to work elsewhere, that option is frequently not available.”).

in the same college or university.”³⁴ Similarly, marriages between lawyers employed in the same law firm have been met with controversy.³⁵ Generally, marriages between associates are acceptable, perhaps because “firms . . . believe it likely that one or both associates will leave the firm” eventually.³⁶ However, marriages between partners and associates are generally disfavored.³⁷

Although antinepotism policies have existed for much of the twentieth century, it is only in the last thirty years that they have had a significant impact in the business arena. In a 1955 survey, only seven percent of 379 companies had formal antinepotism policies.³⁸ In 1963, a survey of 530 American companies found that twenty-eight percent had formal antinepotism policies.³⁹ In a 1977 survey conducted by the Bureau of National Affairs’ Personnel Policies Forum, sixty percent of respondents had formal antinepotism policies.⁴⁰ These results suggest that during the 1960s and 1970s, corporate America formalized what previously had been an informal policy of preventing spouses and relatives from working together,⁴¹ thus lending credence to the notion that increased application of these policies has mirrored the increase in female participation in the workforce.

The steady growth and enforcement of corporate antinepotism policies also mirrors employers’ increasing concerns about, and interference in, their employees’ personal spheres. Thus, the business world’s concern for profits has led employers down a previously uncharted path—monitoring employees’ personal relationships.⁴²

As a result of this increased monitoring, many employers have enacted “antifraternization” policies in the workplace. These policies are aimed specifically at discouraging and/or prohibiting romantic relationships

34. Wexler, *supra* note 5, at 88. Professor Wexler recounts the story of Maria Geopperet Mayer, who, along with her husband, was a professor at the University of Chicago in the 1950s. Because of the University’s strict antinepotism policy, Mayer received no salary for her services. However, once she and her husband threatened to leave, the University offered Mayer a salary in order to persuade them both to stay. Mayer was later awarded the Nobel Prize in Physics in 1963. *See id.* at 88 n.58.

35. *See id.* at 83-85. It is interesting to note that “[n]epotism has a proud tradition at the bar. During the first half of this century, many of today’s major [law] firms routinely employed sons and sons-in-law.” *Id.* at 83.

36. *Id.* at 84 n.39.

37. *See id.*

38. *See id.* at 77 (citing *The Son Also Rises*, WALL ST. J., Apr. 1, 1964, at 1).

39. *See Bierman & Fisher, supra* note 32, at 634.

40. *See Anti-Nepotism Policies Said Increasing, supra* note 17, at C-1.

41. Indeed, “a survey of 252 members of the American Society for Personnel Administration reveals that nearly 90 percent of the companies had adopted their present policies since 1970.” *Id.*

42. *See Dean, supra* note 30, at 1051.

between coworkers.⁴³ Like antinepotism and no-spouse policies, these rules present a substantial barrier both to individual employee privacy and to broader notions of privacy. Ultimately, they may also hinder the advancement of women.⁴⁴

Antinepotism, antispoise, and antifraternization policies raise serious concerns for both employers and employees. Employers, with some support from the courts, should strive to develop creative solutions that accommodate both their need to maximize profits and the employee's need for privacy.⁴⁵ However, instead of rising to the challenges of the workforce in the new millennium, employers continue to adhere to ineffectual policies that are deeply rooted in historical stereotypes.

B. Addressing the Business Justifications for No-Spouse Policies

Employers provide numerous justifications for no-spouse policies. As noted previously, antinepotism policies were originally aimed at "prohibiting the employment of incompetent male relatives of male employees."⁴⁶ However, these rules now apply to coworkers who marry, as well as husbands, wives, and blood relatives who seek employment with the same employer. Modern business justifications for antinepotism and no-spouse policies presuppose that married persons (and relatives) are unable to remain objective if they work alongside one another or in

43. See DePalo, *supra* note 30, at 59-60. As with antinepotism and no-spouse policies, antifraternization rules may be formal, written, and known to the employees or they may be informal, unwritten, and ambiguous. See Dean, *supra* note 30, at 1051. These policies are generally motivated by a fear of sexual harassment liability, concerns about favoritism, statutory rape charges, and/or workplace violence. See *id.* at 1052-53. For an in-depth analysis of these and other justifications for antifraternization policies, see generally Dean, *supra* note 30 and DePalo, *supra* note 30.

44. Although this result is not so easily inferred in the antifraternization context, it is not difficult to envision a situation where a romantic relationship with a coworker would lead to the termination of one (or both) employees. Since women are more likely to hold lesser positions than men in most industries, the likelihood increases that such terminations may disproportionately affect women.

45. With respect to personal relationships in the workplace, commentators have argued that employers should adopt clear coworker dating policies that restrict coworker dating only in supervisor-subordinate relationships [where the threat of sexual harassment liability is arguably greatest]. With respect to personal relationships outside the workplace, employers should adopt confidentiality agreements with employees, rather than restrictive dating policies, to ensure non-disclosure of confidential information to competitors' employees and others. Such policies will strike the proper balance between the privacy interests of employees and the business interests of the employer.

Dean, *supra* note 30, at 1053. These creative alternatives can also be tailored to fit the needs of married coworkers.

46. Bierman & Fisher, *supra* note 32, at 635.

competing companies. According to employers, this presumed lack of objectivity invariably affects both spouses' abilities to perform their job responsibilities effectively.⁴⁷ However, this presumption is merely a typical manifestation of unreliable stereotypes relating to the ability of couples to work together. "Courts should not permit employers to base employment decisions on stereotypes regarding a married person's ability to perform when a spouse works in the same company for the same reason employers are not permitted to base employment decisions on stereotypes regarding race or sex."⁴⁸

Proponents of antinepotism policies are concerned that employing relatives and spouses may affect productivity and efficiency. For example, companies fear that "[w]ork time may be spent solving personal problems with the spouses rather than working."⁴⁹ However,

[t]o the extent that such reasoning paternalistically attempts to protect the couple involved, it is not persuasive. . . . On the other hand, to the extent this reasoning focuses on the employer's interests, the argument proves too much. If in fact the married couple is always fighting in the office, one or both of them can be terminated—like any other employee—for abusive or inappropriate conduct.⁵⁰

Employing spouses may also result in administrative difficulties involving vacation days, sick days, and scheduling similar shifts.⁵¹ When not fighting, married employees are charged with four sins: 1) advancing their own interests at the employer's expense;⁵² 2) acting out of concern for

47. Such justifications, however, ignore the fact that thousands of successful businesses in the United States are owned and operated by families. According to Professor Wexler:

[T]he idea of the family as both a personal refuge and a principal unit of production is as old as the nation. During the colonial period, women worked alongside their husbands in agricultural pursuits. . . . After industrialization, married couples frequently worked together either in 'mom and pop' businesses, or in factories. Not until the first half of this century did it become far less common for a husband and wife to share a place of employment.

Wexler, *supra* note 5, at 78-79 n.19 (citations omitted).

48. Giattina, *supra* note 14, at 1128.

49. Bierman & Fisher, *supra* note 32, at 635. Furthermore, employers believe that "married individuals may compare their salaries and career progress with each other and become jealous and/or overly competitive." *Id.*; see Kim L. Kim, *No-Spouse Rules in the Workplace under Illinois and Federal Law*, 82 LL. B.J. 414, 419 (1994).

50. Wexler, *supra* note 5, at 136.

51. See Bierman & Fisher, *supra* note 32, at 635; Humphress, *supra* note 12, at 928 (identifying several concerns expressed by employers in adopting no-spouse and antinepotism policies); see also Kim, *supra* note 49, at 419 (noting also that since "[s]pouses are likely to use the same car . . . if one is late or absent, the other will be also").

52. See Bierman & Fisher, *supra* note 32, at 635; Kim, *supra* note 49, at 419; Wexler, *supra* note 5, at 112.

each other in emergency situations, thereby jeopardizing the safety of fellow coworkers;⁵³ 3) pressuring employers to hire (unqualified or qualified) spouses or relatives;⁵⁴ and 4) unfairly procuring two jobs in an already scarce job market.⁵⁵ It is for these sins that married employees are being singled out for terminations, forced resignations, and other sanctions.

These business rationales used to justify antinepotism practices are simply "not persuasive."⁵⁶ First, "[n]one of these potential problems has been demonstrated to occur to any great extent."⁵⁷ As one commentator has noted, while "[m]any times an employer can document instances in which one of these problems has occurred . . . most employers cannot produce evidence that these problems are pervasive in the workplace, and thus cannot support a complete ban on spouses working together."⁵⁸ Second, banning spouses and relatives from the workplace will not necessarily eliminate the concerns expressed. For example, "the problems of jealousy and animosity are not peculiar to spouses; employees who are unrelated but who spend significant amounts of time working together are no more immune from such feelings than are related employees."⁵⁹ Furthermore, favoritism can also occur in situations where employees are dating but are not married.⁶⁰ Hence, "[i]f the evil to be averted is the display of favoritism between spouses, it is not necessary to bar completely the employment of spouses to achieve that goal."⁶¹ Therefore, banning spouses, but not friends or significant others, from the workplace seems inconsistent with the underlying business rationale for the rule.

An employee acting as a supervisor for his or her spouse presents more difficult problems. Employers fear that, in this situation, the supervising spouse might display favoritism toward the spouse in disciplinary and other matters, thereby causing resentment among fellow employees.⁶² These concerns are legitimate and should be addressed by employers.⁶³ However, there are alternatives to firing (or not hiring) when

53. See Bierman & Fisher, *supra* note 32, at 636; Kim, *supra* note 49, at 419.

54. *See id.*

55. *See id.*

56. Wexler, *supra* note 5, at 112.

57. Bierman & Fisher, *supra* note 32, at 636.

58. Kim, *supra* note 49, at 419.

59. Wexler, *supra* note 5, at 136; *see* Bierman & Fisher, *supra* note 32, at 636 ("[T]he alleged problems could occur just as easily between good friends at work as between spouses.").

60. *Cf.* Bierman & Fisher, *supra* note 32, at 636 ("[I]n the case of spouses who marry after employment, if problems along these lines did not occur during courting and engagement, there is little reason to expect them to occur after marriage.").

61. Wexler, *supra* note 5, at 134.

62. *See* Bierman & Fisher, *supra* note 32, at 636.

63. Indeed, even states with marital status provisions in their antidiscrimination statutes grant employers the ability to regulate (and even prohibit) a supervisory relationship

spouses have (or would have) a supervisory-subordinate relationship. For example, applicants seeking employment with their spouse's employer could be hired into another department or division without raising concerns about confidentiality, diminished job performance, or favoritism. Courts may find that a no-spouse policy that does not "forbid employment or force a married spouse's termination," but recognizes that some positions are inappropriate for spouses to hold, does not place unfair restrictions on employees.⁶⁴ Another alternative to the supervisory relationship would be to "allow both [spouses] to advance at their own rate[s] but [to forbid] the higher placed spouse . . . [from making] decisions concerning the mate."⁶⁵ These alternatives can effectively address business concerns without unduly burdening the rights of employees.

Proponents of antispoouse and antinepotism rules also argue that policies disqualifying an applicant or employee who is married to a competitor's employee are necessary given the need to protect business confidentiality. Such policies are legitimate, according to employers, because married people may reveal important confidential information about their jobs or employers to a spouse.⁶⁶ Once again, such concerns are premised on the perceived inability of spouses to be objective members of the workforce. No-spouse policies that address concerns about spouses working for competitors are paternalistic because they assume that the spouses are unable to act professionally and ethically in such a situation.

C. *Embracing Relatives and Spouses: The New Workforce*

Some antinepotism laws in effect today are so archaic that they date back to the 1800s. For example, in the spring of 1995, President Bill Clinton nominated William A. Fletcher to a federal judgeship.⁶⁷ At that time, Mr. Fletcher's mother, Betty Binns Fletcher, was a seventeen-year veteran of the Court of Appeals for the Ninth Circuit. In an effort to block Mr. Fletcher's appointment, opponents of his nomination cited an 1888 law, amended in 1911, which states that "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or

between spouses. *See, e.g.*, WASH. ADMIN. CODE § 162-16-150 (1980) (restricting no-spouse employment policies with exceptions for compelling business interests and supervisory relationship between spouses).

64. DECKER, *supra* note 20, at 340 (noting that "[e]mployer policies regarding no spouses will have the best chance of being sustained when they do not outright forbid employment").

65. Bierman & Fisher, *supra* note 32, at 637. Note, however, that such an alternative may not be feasible in a rigidly structured bureaucracy. *See id.*

66. *See Anti-Nepotism Policies Said Increasing, supra* note 17, at C-1.

67. *See* Joan Biskupic, *Panel Votes on Mother-Son Judgeships; Professor Approved After Liberal Parent Agrees to Semi-Retirement*, WASH. POST, May 17, 1996, at A3.

consanguinity within the degree of first cousin to any justice or judge of such court.”⁶⁸ Although the decision to apply the archaic law in this case is best explained as a product of political partisanship,⁶⁹ its existence and acceptance illustrates that antinepotism policies (and more specifically no-spouse policies) need to be reexamined for their effectiveness and necessity in this changed arena.

One reason why no-spouse policies have endured is that “a generation ago, corporate America was more prudish.”⁷⁰ Companies did not look favorably on office romances, and, therefore, no-spouse and antifraternalization policies became an effective tool to curb such romances. Recently, however, prudishness has been replaced by concerns about sexual harassment suits in the workplace. One commentator notes that “[p]erhaps due to concern for potential liability for sexual harassment, employers have promulgated policies forbidding dating or sexual relationships between supervisors and those under their control or, more broadly, between all coworkers. In some cases, discipline has been imposed without a formal policy in place.”⁷¹

While the American workforce has changed dramatically, workplaces have been slow to implement changes. In 1950, only an estimated seventeen million American women worked outside of the home.⁷² By 1984, that number had tripled to fifty million.⁷³ Between 1982 and 1992, women accounted for sixty percent of the labor force growth.⁷⁴ Recognizing this change in the workforce, some companies have permitted the employment of spouses, albeit reluctantly. Although the trend has not gained widespread acceptance, corporate America has given spouses a modest reception in the workplace. As one recent article reported:

[U]nlike the situation in years past . . . many . . . couples now find their companies actually encouraging them to get together. Gone are the days when office relationships were scorned for fear of favoritism, impropriety or security problems. Now, some companies—regardless of size, industry, age or location—are providing opportunities for people to socialize, date and find

68. *Id.*

69. *See id.* (noting that the antinepotism law had not previously been used to stop the rare situation of close relatives serving on the bench together).

70. Susan Diesenhouse, *Once Taboo, Office Romance Now Encouraged In Some Firms; Happily Coupled Employees Believed To Be More Productive*, STAR TRIB. (MINNEAPOLIS-ST. PAUL), May 19, 1996, at 10E.

71. MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 153 (1995).

72. *See* Peggy A. Simpson, *A Revolution in the Workplace*, in *THE 1985 WORLD BOOK YEAR BOOK* 119, 119.

73. *See id.*

74. *See* Bureau of Labor Statistics, *Access to Historical Data for the “A” Tables of the Employment Situation News Release* (visited Oct. 30, 1998) <<http://www.bls.gov/cpsatabs.htm>>.

mates.⁷⁵

The reasons for this trend are simple—people are working harder and working longer.⁷⁶ Also, the need for highly-skilled workers is greater now than it has ever been. As a result, companies are being forced to institute more employee-friendly policies, such as day care facilities and flexible hours, in order to keep personnel satisfied. According to Joanne Brandes, Vice President of Communications for Johnson Wax in Racine, Wisconsin, her company, which once banned married couples from its staff, decided to adapt because employees, women in particular, did not react favorably to such restrictive policies.⁷⁷ Furthermore, the combination of longer working hours and the increased presence of women in the workforce has made office romances a more common occurrence in many companies.⁷⁸

Hiring spouses does have advantages for employers. For instance, an employer may experience less turnover because couples are less likely to look for new jobs.⁷⁹ Employers who want to lure exceptional candidates may be more successful in obtaining those candidates if they offer employment to the spouse as well.⁸⁰ Employers may also find a spouse to be more highly qualified than unrelated job candidates.⁸¹ In that situation it would be unfair to the organization to “pass up the best candidate simply because his or her spouse is already employed with the firm.”⁸² Most importantly, an employee may find it more satisfying to work with a spouse than to work with an unrelated employee or alone, thus improving the quality of work. “[P]eople do a better, more productive job if they are happy, and human resources officers find that workers are happy when mingling at the office is not taboo. ‘There is a direct link between employee satisfaction, customer satisfaction and higher corporate profits.’”⁸³ Moreover, employees may regard their places of employment more favorably if their employers embrace spouses and families.⁸⁴

Another reason for abandoning no-spouse policies is that they may produce an adverse effect on women. As Wexler notes:

75. See Diesenhouse, *supra* note 70, at 10E.

76. See *id.* (noting that forty-five percent of American workers work more than forty hours a week, while ten percent work more than sixty hours, according to the Families and Work Institute of New York).

77. See *id.*

78. See *id.* (noting that at least thirty-three percent of all romances now start at work).

79. See Kirn, *supra* note 49, at 419.

80. See *id.* at 420.

81. See *id.* at 419.

82. Bierman & Fisher, *supra* note 32, at 636.

83. Diesenhouse, *supra* note 70, at 10E.

84. See *id.* Cf. Wexler, *supra* note 5, at 79 (“[B]y enhancing the interests of one spouse at the other’s expense, antinepotism rules may be causing more friction in the home than they prevent in the workplace.”).

This effect is both direct and subtle. When a rule requires that one spouse leave the workplace, or not be invited in, for various reasons that spouse in all likelihood will be female. Furthermore, because women generally enter the labor market on a permanent basis later than men, a policy which limits the employment of spouses necessarily favors men over women.⁸⁵

Therefore, employers "may aid in reaching affirmative action goals" by abandoning no-spouse policies and, in turn, may promote goodwill toward their employees.⁸⁶

II. ROADBLOCKS TO SUCCESSFULLY CHALLENGING NO-SPOUSE POLICIES IN THE COURTS

A. *No-Spouse Policies and Marital Status Discrimination: A Definitional Nightmare*

As noted earlier, no-spouse and antinepotism policies exist in various forms.⁸⁷ Some company policies may prohibit either relatives or spouses (or both) from working at the same plant, office, branch, department, or company. Other policies may prohibit a supervisory relationship between spouses and/or relatives.⁸⁸ Some companies consider the identity of one's spouse when making hiring and firing decisions.⁸⁹ Complications may arise in the application of antispouse and antinepotism policies because statutes and policies often provide ambiguous definitions of "spouse," "relative," and "marital status."

1. "Spouse" and "Relative"

A "spouse" is, most obviously, a legally-recognized husband or wife. Not so obviously, the term "spouse" has been interpreted to include persons who are not legally married but are cohabiting, "with all the attendant responsibilities and commitments" of a legally-recognized married couple.⁹⁰

A relative is one "connected by blood or affinity."⁹¹ Given this broad

85. Wexler, *supra* note 5, at 79 (footnotes omitted).

86. Bierman & Fisher, *supra* note 32, at 637.

87. See Wexler, *supra* note 5, at 81-82.

88. See Humphress, *supra* note 12, at 927.

89. See *id.* at 929.

90. Espinoza v. Thoma, 580 F.2d 346, 349 (8th Cir. 1978) ("[T]he interpretation of the word 'spouse' to include a person who lives in an espoused relationship is valid and logical.").

91. THE NEW AMERICAN WEBSTER HANDY DICTIONARY 445 (1981).

definition, an antinepotism policy that simply prohibits “relatives” from working together is ambiguous and likely to be misapplied. For example, the term “relative” may be extended to include “mother, father, sister, brother, child, stepmother, stepfather, stepsister, stepbrother, stepchild, niece, nephew, cousin, uncle, aunt, grandparent, grandchild, and in-laws within these categories.”⁹² The employer generally bears the responsibility of specifying which relatives are covered by its antinepotism policy.

2. Marital Status

Most employers provide their employees with employee handbooks containing statements affirming their commitment to provide equal employment opportunities to all persons. These handbook clauses generally mirror state statutory provisions extending similar protections to married couples.⁹³ However, statutes that specifically prohibit marital status discrimination rarely provide a reliable definition of “marital status.” Of the twenty states (plus the District of Columbia) that prohibit private employers from discriminating against employees based upon marital status,⁹⁴ only six legislatures provide a definition of “marital status.”⁹⁵

92. Bless Stritar Young & Alisa M. Chevalier, *A Model Anti-Nepotism Policy*, 42 PRAC. LAW. 75, 78 (1996).

93. Note that only twenty states plus the District of Columbia prohibit marital status discrimination by a private employer. See ALASKA STAT. § 18.80.200(a) (Michie 1996); CAL. GOV'T CODE § 12940(a) (West 1992); CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 1995); DEL. CODE ANN. tit. 19, § 711(a)(1) (1995); D.C. CODE ANN. § 1-2512(a) (1992); FLA. STAT. ANN. § 760.10(1)(a) (West 1997); HAW. REV. STAT. § 378-2(1) (1993); ILL. COMP. STAT. 5/1-102(A), 5/2-102(A) (West 1993); MD. ANN. CODE art. 49B, § 16(a) (1997); MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 1985); MINN. STAT. ANN. § 363.03 (West 1996); MONT. CODE ANN. § 49-2-303(a) (1997); NEB. REV. STAT. § 48-1115 (1995); N.H. REV. STAT. ANN. § 354-A:7(I) (1995); N.J. STAT. ANN. § 10:5-12(a) (West 1996); N.Y. EXEC. LAW § 296(1)(a) (McKinney 1993); N.D. CENT. CODE § 14-02.4.03 (1997); OR. REV. STAT. § 659.030(1)(a) (1995); VA. CODE ANN. § 2.1-715 (Michie 1987); WASH. REV. CODE ANN. § 49.60.180(1) (West 1996); WIS. STAT. ANN. § 111.321 (West 1988).

94. See ALASKA STAT. § 18.80.200(a) (Michie 1996); CAL. GOV'T CODE § 12940(a) (West 1992); CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 1995); DEL. CODE ANN. tit. 19, § 711(a)(1) (1995); D.C. CODE ANN. § 1-2512(a) (1992); FLA. STAT. ANN. § 760.10(1)(a) (West 1997); HAW. REV. STAT. § 378-2(1) (1993); ILL. COMP. STAT. 5/1-102(A), 5/2-102(A) (West 1993); MD. ANN. CODE art. 49B, § 16(a) (1997); MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 1985); MINN. STAT. ANN. § 363.03 (West 1996); MONT. CODE ANN. § 49-2-303(a) (1997); NEB. REV. STAT. § 48-1115 (1995); N.H. REV. STAT. ANN. § 354-A:7(I) (1995); N.J. STAT. ANN. § 10:5-12(a) (West 1996); N.Y. EXEC. LAW § 296(1)(a) (McKinney 1993); N.D. CENT. CODE § 14-02.4.03 (1997); OR. REV. STAT. § 659.030(1)(a) (1995); VA. CODE ANN. § 2.1-715 (Michie 1987); WASH. REV. CODE ANN. § 49.60.180(1) (West 1996); WIS. STAT. ANN. § 111.321 (West 1988).

95. See Humphress, *supra* note 12, at 927 & n.55 (stating that only Hawaii, Illinois, Minnesota, Nebraska, Wisconsin, and the District of Columbia provide statutory definitions of marital status and that “[l]ittle accord exists as between these definitions”).

Furthermore, these definitions vary from state to state. Some states define marital status as the status of being married or single.⁹⁶ Other states go further and define it as the status of being married, single, divorced, separated, or widowed.⁹⁷ Adding to this confusion, the courts are split on whether the term “marital status,” as used in state statutes, should be interpreted narrowly or broadly.⁹⁸ The cases that follow provide illuminating illustrations of this definitional nightmare.

a. The Narrow Interpretation

In *Boaden v. Department of Law Enforcement*,⁹⁹ an Illinois court interpreting that state’s antidiscrimination statute held that “marital status discrimination,” as defined by the statute, did not prohibit discrimination based upon the identity of one’s spouse.¹⁰⁰ In that case, Jim and Colleen Boaden were both state troopers assigned to the same squad.¹⁰¹ When they informed their supervisor of their plans to marry, the captain informed them that “an unwritten policy existed which prohibited spouses from working in the same squad, patrolling the same area at the same time.”¹⁰²

[The captain’s] stated reason for the policy was a fear that married troopers might not react with objectivity if one were injured, might present supervisory problems, and might become dissatisfied with the arrangement because troopers on the same squad did not have the same vacation and days off. In addition, [Captain] Ryan was concerned that their credibility could be questioned as witnesses in court or internal investigations.¹⁰³

After the Boadens filed charges with the Illinois Human Rights Commission, the Commission rejected the State Police argument that its antinepotism policy was not marital status discrimination. The Commission found that “marital status does include the identity of an employee’s spouse and noted that had petitioners not married, no action

96. See, e.g., HAW. REV. STAT. § 378-1 (1993); NEB. REV. STAT. § 48-1102(12) (1995).

97. See, e.g., D.C. CODE ANN. § 1-2502(17) (1992); ILL. COMP. STAT. 1-103(J) (West 1993); WISC. STAT. § 111.32(12) (1988).

98. See Giattina, *supra* note 14, at 1116 (“The interpretation of the term ‘marital status’ is at issue in those states prohibiting marital status discrimination because few state legislatures sufficiently clarified their intent upon enacting their respective statutes. Consequently, state courts have the burden of determining legislative intent until the respective legislature [sic] adequately defines the term.”).

99. 642 N.E.2d 1330 (Ill. App. Ct. 1994).

100. See *id.* at 1335.

101. See *id.* at 1331.

102. *Id.* at 1331-32.

103. *Id.* at 1332.

would have been taken against them.”¹⁰⁴

The Illinois Appellate Court rejected the Illinois Human Rights Commission’s statutory interpretation that marital status discrimination includes acts based upon the identity of a spouse; in fact, the court refused to construe the terms liberally to achieve the purpose of the statute.¹⁰⁵ The court found that “[i]f the legislature [had] intended to proscribe policies based upon an individual’s marital relationship to another, it would have stated as much in express terms.”¹⁰⁶

Similarly, in *Muller v. BP Exploration (Alaska) Inc.*,¹⁰⁷ the Alaska Supreme Court ruled that the state’s antidiscrimination statute,¹⁰⁸ which includes a marital status provision, does not prevent an employer from discriminating against an employee based upon the identity of a spouse. In that case, Muller and Relkin became romantically involved while working at British Petroleum (“BP”). Having informed BP of their relationship, BP replied that, while there was no express policy forbidding their relationship, if the relationship led to marriage, Relkin would have to step down as training coordinator.¹⁰⁹

The Alaska Supreme Court found that the term “marital status,” if construed in accordance with its common usage, refers only to the “actual condition of being married or unmarried.”¹¹⁰ The term, therefore, “does not extend to include the identity of the person to whom one is married.”¹¹¹ Furthermore, the court found that “the purpose of [the statute] is to prohibit discrimination against a person based on his or her condition of being married or unmarried, not on the identity of one’s spouse. To whom one is married is not a class-defining factor, unlike all the other factors listed in

104. *Id.* In its decision, the Commission relied on *River Bend Community Unit School District No. 2 v. Human Rights Commission*, 597 N.E.2d 842 (Ill. App. Ct. 1992). *See id.* However, the Commission dismissed the Boadens’ claim because “the actions taken by the State Police had not altered the terms or conditions of petitioners’ employment in violation of the Illinois Human Rights Act.” *Id.* at 1331. The Boadens appealed that decision.

105. *See Boaden*, 642 N.E.2d. at 1334 (citing the Commission’s interpretation of “marital discrimination” in a previous case).

106. *Id.* at 1335.

107. 923 P.2d 783 (Alaska 1996).

108. Alaska Statute § 18.80.220(a) provides, in relevant part:

[I]t is unlawful for . . . an employer to refuse employment to a person . . . or to discriminate against a person . . . because of the person’s age, physical or mental disability, sex, *marital status*, changes in marital status, pregnancy or parenthood *when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy or parenthood.*

ALASKA STAT. § 18.80.220(a)(1) (Michie 1997) (emphasis added).

109. *See Muller*, 923 P.2d at 785.

110. *Id.* at 788.

111. *Id.*

[the statute].”¹¹²

Courts commonly justify their narrow interpretations of marital status by referring to legislative intent.¹¹³ For example, one court reasoned that “[a] legislature’s failure to discuss the specific meaning and effect of the term ‘marital status’ indicates that it did not intend the term to include the identity of one’s spouse.”¹¹⁴ In *Whirlpool Corp. v. Michigan Civil Rights Commission*, the Michigan Supreme Court interpreted marital status to refer only to a person’s status as married, single, divorced, or widowed.¹¹⁵ The majority concluded that a narrow interpretation of marital status was consistent with the legislative intent because, had the legislature intended a broader interpretation, they would have been more explicit.¹¹⁶

Similarly, the court in *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board*,¹¹⁷ construed the term “marital status” to include only the status of being married, single, divorced, separated, or widowed.¹¹⁸ In that case, the plaintiff had been employed under the supervision of her husband for four years before being discharged. In reviewing her claims, the New York Court of Appeals observed that the legislature did not intend “to prohibit discrimination based on an individual’s marital relationships rather than simply on an individual’s marital status.”¹¹⁹ Furthermore, “[t]he disqualification of the complainant was not for being married, but for being married to her supervisor.”¹²⁰

According to the court in *Boaden*, these narrow interpretations

generally rest on the view that the statutory language refers to the general classification of marital status as a status, rather than to spousal identity, and thus the legislature would not have enlarged the proscription and extended a right to be employed by the same

112. *Id.* at 791.

113. *See, e.g., id.* at 788; *Whirlpool Corp. v. Michigan Civil Rights Comm’n*, 390 N.W.2d 625, 627 (Mich. 1986).

114. *Muller*, 923 P.2d at 788; *see Giattina, supra* note 14, at 1116 (explaining that “few state legislatures sufficiently clarified their intent upon enacting” no-spouse employment policies). Compare *Humphress, supra* note 12, at 930 (citing *Kraft v. Minnesota Dep’t of Human Rights*, 284 N.W.2d 386 (Minn. 1979), which referred to legislative intent in granting a broad interpretation to marital status).

115. *See Whirlpool*, 390 N.W.2d 625 (Mich. 1986).

116. *See id.* at 627. Note, however, that no legislative history was available to aid in determining legislative intent regarding marital status. *See Giattina, supra* note 14, at 1122 n.77.

117. 415 N.E.2d 950 (N.Y. 1980).

118. *See id.* at 964; *see also Maryland Comm’n on Human Relations v. Greenbelt Homes, Inc.*, 475 A.2d 1192, 1196 (Md. 1984) (“As we see it, ‘marital status’ connotes whether one is married or not married.”); *Miller v. C.A. Muer Corp.*, 362 N.W.2d 650, 653 (Mich. 1984) (holding that the state statute mandated inquiry into whether the discrimination was based on marital status, not spousal identity).

119. *Manhattan Pizza Hut, Inc.*, 415 N.E.2d at 953.

120. *Id.* at 954.

employer as one's spouse without a clearer expression of its intent.¹²¹

To rely on a lack of legislative intent to justify a narrow interpretation of marital status belies the entire problem. Antidiscrimination statutes are promulgated to remove discriminatory practices from the workplace. That is their over-arching intent. By limiting a statute's application to instances of pure marital status discrimination only, courts are not serving the legislative intent of these statutes. Thus, their reliance on legislative intent to justify applying a narrow interpretation is misplaced.

In general, a narrow interpretation of marital status makes it harder to challenge spousal policies.¹²² According to Professor Wexler, "successful attacks against antinepotism policies may be maintained in states which prohibit marital status discrimination if courts [apply a broader interpretation] . . . rather than the approach of . . . *Pizza Hut*."¹²³ The reasons for this are obvious—the more subtle forms of discrimination produced by no-spouse and antinepotism policies cannot be included under the narrow interpretation of marital status. Rather than leave it up to the courts, a more effective solution would be for legislatures to explicitly define the parameters of marital status or for "human rights commissions to promulgate specific regulations to clarify the application of antidiscrimination statutes to antinepotism policies and practices."¹²⁴ This clarity of intent, although ideal and unlikely in our day, would leave the courts with little choice but to broaden their interpretations of "marital status."

b. *The Broader Interpretation*

A broader definition of marital status was applied in *Thompson v. Board of Trustees*.¹²⁵ In that case, the school district barred spouses of school administrators from being employed in any capacity by the school system.¹²⁶ In holding that the employer's no-spouse rule violated the state's antidiscrimination statute, the Montana Supreme Court rejected a narrow interpretation of marital status in favor of a broad interpretation.¹²⁷ The court held that the term "marital status," for purposes of the Montana

121. *Boaden v. Department of Law Enforcement*, 642 N.E.2d 1330, 1334 (Ill. App. Ct. 1994).

122. *See Humphress*, *supra* note 12, at 932.

123. Wexler, *supra* note 5, at 131.

124. *Id.* at 131-32.

125. 627 P.2d 1229, 1231 (Mont. 1981).

126. *See id.* at 1230.

127. *See id.* at 1231 ("We find that the term 'marital status' should be more broadly interpreted to accomplish the legislative objective of removing discriminatory practices in employment . . .").

statute, included the identity and occupation of an individual's spouse.¹²⁸ The court concluded further that because the Board of Trustees had terminated a superintendent and demoted a school administrator because of their marriages to teachers within the school system, the school district's no-spouse policy violated the state prohibition against marital status discrimination.¹²⁹

Similarly, in *River Bend Community Unit School District No. 2 v. Human Rights Commission*,¹³⁰ the court accepted the Human Rights Commission's liberal construction of the term "marital status" to include the identity of one's spouse.¹³¹ In that case, the River Bend Community School District denied Virginia Ray a transfer to Fulton Elementary School, where her husband was principal.¹³² After Ray filed a complaint with the Illinois Human Rights Commission, the appellate court acknowledged that the Illinois Human Rights Act's¹³³ stated policy of securing "for all individuals within Illinois the freedom from discrimination . . . because of marital status . . . in connection with employment"¹³⁴ reasonably could require them to construe the term "marital status" liberally.¹³⁵

The school district in that case argued that their policy did not violate the Human Rights Act because it presented a bona fide occupational qualification exception.¹³⁶ The court rejected that claim, finding that although the Act "should be liberally construed to effect its purposes, the . . . exemptions must be construed narrowly."¹³⁷

Courts that interpret marital status liberally reason that employees who are transferred or terminated because they would be supervised by or supervising a spouse are being singled out because of marital status. "If the employee were to divorce or to remain single and cohabit with the supervising or supervised employee, the employee would not be subject to the [no-spouse] policy."¹³⁸ This, according to one commentator, leads to an "absurd result."¹³⁹

128. *See id.*

129. *See id.* at 1231-32.

130. 597 N.E.2d 842 (Ill. App. Ct. 1992).

131. *See id.* at 846.

132. *See id.* at 843-44.

133. *See* 775 ILL. COMP. STAT. 5/1-102 (West 1998).

134. 775 ILL. COMP. STAT. 5/1-102(A) (West 1998).

135. *See River Bend*, 597 N.E.2d at 845.

136. *See id.* at 846.

137. Kirn, *supra* note 49, at 415.

138. *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 793 (Alaska 1996) (Compton, C.J., dissenting).

139. Wexler, *supra* note 5, at 128 (quoting *Thompson v. Board of Trustees*, 627 P.2d 1229, 1231 (Mont. 1981)).

B. *The Case for a Broader Definition*

Marital status occupies a unique position in antidiscrimination legislation.

Unlike sex, race, or disability . . . a person can change [his or her] marital status with relative ease. It is not uncommon for some individuals to be single, then marry, later divorce, and then marry again. Therefore, a person's marital status may change several times, whereas for most people race, sex, and disability are immutable characteristics.¹⁴⁰

Marital status's inherent flexibility requires courts to consider it in its broadest context. This need for a more expansive definition of marital status stems from the fact that the federal government offers little or no protection against employment discrimination based on marital status. Because the federal government offers no employment protection to married couples, many states have enacted statutes prohibiting marital status discrimination in various areas, including employment, housing, public accommodations, and credit. Hence, aggrieved employees must hope that their states have enacted statutes that prohibit marital status discrimination.¹⁴¹

As the number of . . . statutes [with marital status provisions] indicates, many states are seriously concerned about marital status discrimination by private employers. As the federal government persists in denying protection from employment discrimination based on marital status, state law continues to shape and define this discriminatory employment practice.¹⁴²

1. Lack of Federal Remedies

Although the Supreme Court has long recognized a person's fundamental right to marry,¹⁴³ federal legislation has not provided any guarantee that, once married, individuals will be protected in their places of employment from hiring and firing decisions made based on their marital

140. Beattie, *supra* note 22, at 1428 (footnote omitted).

141. Note that only twenty states (plus the District of Columbia) specifically prohibit marital status discrimination. *See supra* note 93. However, all but four states have some form of a fair employment practices act protecting against employment discrimination by private employers. *See Giattina, supra* note 14, at 1116 n.33 (noting that Alabama, Arkansas, Mississippi, and Virginia do not have state statutes that protect employees from discrimination by private employers).

142. Humphress, *supra* note 12, at 921 (footnote omitted).

143. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting that "[m]arriage is one of the 'basic civil rights of man'" when declaring Virginia's miscegenation statute unconstitutional).

statuses. Title VII of the Civil Rights Act of 1964,¹⁴⁴ the federal antidiscrimination statute, makes it unlawful for an employer to discriminate against employees on the basis of race, color, religion, sex, or national origin.¹⁴⁵ Title VII does not, however, provide a federal cause of action for discrimination based on marital status.¹⁴⁶ Furthermore, the United States Supreme Court has held that the Equal Employment Opportunity Commission ("EEOC") does not have the power to add new items to the federal list of forbidden grounds of employment discrimination under Title VII.¹⁴⁷ Despite these limitations of the federal Civil Rights Act, no-spouse and antinepotism rules have been challenged under Title VII using disparate impact or disparate treatment theories.¹⁴⁸

In disparate treatment cases challenging marital status discrimination, an employer must have "treated a married male employee differently than a married female employee."¹⁴⁹ This theory presents serious evidentiary difficulties in marital discrimination claims. "Because no-spouse rules are facially neutral, they do not literally fail to treat women and men on an equal basis."¹⁵⁰ Thus, no policy or practice of discrimination will be discernible. Moreover, as Wexler argues, direct proof for an intent to treat women discriminatorily in all likelihood will be unavailable.¹⁵¹

In disparate impact cases, a facially neutral policy may be held to have a disproportionate effect on women (or men) working or seeking a job with a company where their husbands (or wives) already work.¹⁵² A challenge to such a policy "does not require a showing of intent,"¹⁵³ but it does require a showing of disparate impact, primarily through statistical proof.¹⁵⁴ This requirement places plaintiffs at a disadvantage because statistical

144. 42 U.S.C. § 2000e (1995).

145. See 42 U.S.C. § 2000e-2(a)(1) (1995) (providing that "[i]t shall be an unlawful employment practice for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

146. See Wexler, *supra* note 5, at 97 n.99 ("Title VII does not expressly address discrimination on the basis of marital status, and no legislative history on that issue exists").

147. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973) (rejecting the EEOC's broad interpretation of "national origin" to include citizenship); see also Humphress, *supra* note 12, at 919-20.

148. See Kim, *supra* note 49, at 417; see also Humphress, *supra* note 12, at 925 ("[S]tates readily apply many of the rules formulated under Title VII, despite the fact that Title VII does not recognize marital status discrimination.").

149. Kim, *supra* note 49, at 417; see Giattina, *supra* note 14, at 1115 ("[A]n employment policy prohibiting the employer from hiring wives of male employees, but not husbands of female employees, is discriminatory on its face.").

150. Wexler, *supra* note 5, at 98.

151. *Id.*

152. See Kim, *supra* note 49, at 417.

153. Wexler, *supra* note 5, at 98.

154. See *id.* at 101.

proof of disparate impact is hard to obtain and evaluate.

One approach in the use of statistics to measure disparate impact involves "comparing the percentage of blacks or women in the general population that are excluded by a particular employment requirement with the percentage of excluded whites or males in the general population."¹⁵⁵ Another approach allows members of a protected class to establish a prima facie case of disparate impact if they can show that "a given hiring practice selects applicants for employment in a pattern that diverges significantly from the makeup of the applicant pool."¹⁵⁶ Both approaches can be problematic for plaintiffs because statistical evidence cannot prove the actual existence of discrimination in any given case; it can only show a probability that such discrimination occurred. As evidenced by the low percentage of successful disparate impact cases, courts do not like to deal with mere probabilities.

In *EEOC v. Rath Packing Co.*,¹⁵⁷ the Eighth Circuit invalidated the defendant's no-spouse policy on the grounds that the policy had a disparate impact on women and therefore violated Title VII.¹⁵⁸ The court was persuaded by the abundant statistical evidence produced by the plaintiff showing that, during a five year period, only seven out of ninety-five female applicants were hired.¹⁵⁹ Additionally, twenty-six women, whose husbands were employed at Rath Packing, were denied employment during this time.¹⁶⁰ As one commentator has pointed out, this case is "the seminal case on the possible vulnerability of no-spouse rules under Title VII and demonstrates the importance of using verifiable, cogent statistics to prove disparate impact."¹⁶¹ However, reliable and thorough statistics, such as those produced in *Rath Packing*, are not always readily available to plaintiffs, thereby making it difficult for plaintiffs to succeed under a disparate impact theory.

In a disparate impact case, the employer may rebut the presumption of discrimination by showing a "business necessity." This defense was clearly articulated in *Griggs v. Duke Power Co.*,¹⁶² where the Supreme Court held that an employer may withstand a challenge to a facially neutral employment practice having a disparate impact on blacks if the employer can prove that the challenged practice is a business necessity.¹⁶³ The business necessity defense, however, arises only after a plaintiff has

155. *Id.*

156. *Id.* at 102-03.

157. 787 F.2d 318 (8th Cir. 1986).

158. *See id.* at 328.

159. *See id.* at 322.

160. *See id.*

161. Kirn, *supra* note 49, at 417.

162. 401 U.S. 424 (1971).

163. *See id.* at 432.

established a successful prima facie case of disparate impact; thus, a plaintiff with inadequate statistical evidence will be unable to point to an employer's unjustified exclusionary policy as a means to bolster her case.

In *Yuhas v. Libbey-Owens-Ford Co.*,¹⁶⁴ the Seventh Circuit dismissed the plaintiff's statistical evidence and ruled in favor of the defendant company, reasoning that because the employer had shown a reasonable business necessity, and because women were not penalized because of "their environmental or genetic background," there was no Title VII violation.¹⁶⁵ In this case, the plaintiff had prevailed in district court by showing that since the inception of the company's no-spouse rule, seventy-one women and only three men had been denied employment by the defendant.¹⁶⁶ The Seventh Circuit, however, found this statistical evidence lacking.¹⁶⁷

In marital status discrimination cases under Title VII, an employer should find it difficult to overcome a presumption of discrimination because typical business rationales for implementing no-spouse and antinepotism policies are not persuasive. Courts, however, have consistently deferred to perceived legitimate business concerns where the employer has demonstrated that its policy "is essential to the safe and efficient operation of the business."¹⁶⁸ Thus, even assuming that the plaintiff has adequate statistical evidence to prove disparate impact, the practical application of Title VII's disparate impact theory does not generally result in favorable plaintiff verdicts.

2. The Fundamental Right to Marry

No-spouse policies have been challenged as a violation of the employee's right to marry. It has been argued that no-spouse rules impinge on the right to marry because "[o]ne is restrained or penalized for taking part in life's basic relationship of husband and wife."¹⁶⁹ Such challenges have generally been unsuccessful in court.¹⁷⁰ For example, in *Parks v. City of Warner Robins*,¹⁷¹ the Eleventh Circuit held that the city's antinepotism policy did not infringe on the fundamental right to marry because the

164. 562 F.2d 496 (7th Cir. 1977).

165. *Id.* at 500.

166. *See id.* at 496.

167. *See id.*

168. Wexler, *supra* note 5, at 111.

169. DECKER, *supra* note 20, at 335.

170. *See* Humphress, *supra* note 12, at 925 (noting that challenges raising constitutional claims of a fundamental right to marry are not easily won); Kim, *supra* note 49, at 418 ("In all but one case this challenge has been unsuccessful.") (citation omitted).

171. 43 F.3d 609 (11th Cir. 1995).

policy did not absolutely prevent the marriage of city workers.¹⁷² The court reasoned:

Any increased economic burden created by the anti-nepotism policy [in this case the requirement that the spouse with less seniority leave the department] is no more than an incidental effect of a policy aimed at maintaining the operational efficiency of Warner Robins' governmental departments, not a direct attempt to control the marital decisions of city employees.¹⁷³

In *Loving v. Virginia*¹⁷⁴ and *Zablocki v. Redhail*,¹⁷⁵ the Supreme Court recognized the right to marry as a fundamental right under the Constitution. Despite this recognition, the Court in *Zablocki* made clear that not all restrictions upon that right would receive strict scrutiny.¹⁷⁶ Therefore, it is unlikely that a court would subject most state or federal antinepotism policies to strict scrutiny.¹⁷⁷

In light of the *Zablocki* decision, courts employ a lower standard of review in examining constitutional challenges to antinepotism policies. This relaxed standard of review will, in effect, diminish the ability of plaintiffs to prove an infringement on the right to marry. One commentator has suggested that an employer's reasoning may easily pass muster:

If, as seems likely, courts review narrowly drawn antinepotism rules under a minimum rationality standard, a plaintiff challenging such a rule would have to demonstrate that it is not rationally related to any legitimate government interest. The defendant would assert that the rule avoids problems caused by family favoritism and that it prevents conflicts of interest.¹⁷⁸

Thus, challenging no-spouse policies on a constitutional level will prove futile. However, courts considering other challenges to these policies should not lose sight of the constitutional implications of no-spouse policies.

III. CONCLUSION

Antinepotism and no-spouse policies are indefensible given the

172. *See id.* at 611. The policy did prevent marriage between supervisory employees working in the same department. *See id.* at 612.

173. *Id.* at 614.

174. 388 U.S. 1, 12 (1967) (holding that the choice to marry "resides with the individual and cannot be infringed by the State").

175. 434 U.S. 374, 386 (1978) (reaffirming the fundamental right of marriage and delineating the state's power to regulate it).

176. *See id.* at 386.

177. *See* Wexler, *supra* note 5, at 118.

178. *Id.* at 122 (footnote omitted).

changing trends in today's workforce. With more women entering the job market, antinepotism policies are impeding the efforts of women to find and keep jobs. Furthermore, existing interpretations of marital status do not provide plaintiffs with any ammunition to challenge antinepotism and no-spouse policies. Given the lack of federal remedies available to plaintiffs, courts must begin to interpret the term "marital status" more broadly. An expanded definition of marital status will enable plaintiffs successfully to challenge unduly restrictive and antiquated antinepotism policies.