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No-Spouse Rules in the Workplace Under Illinois and Federal Law

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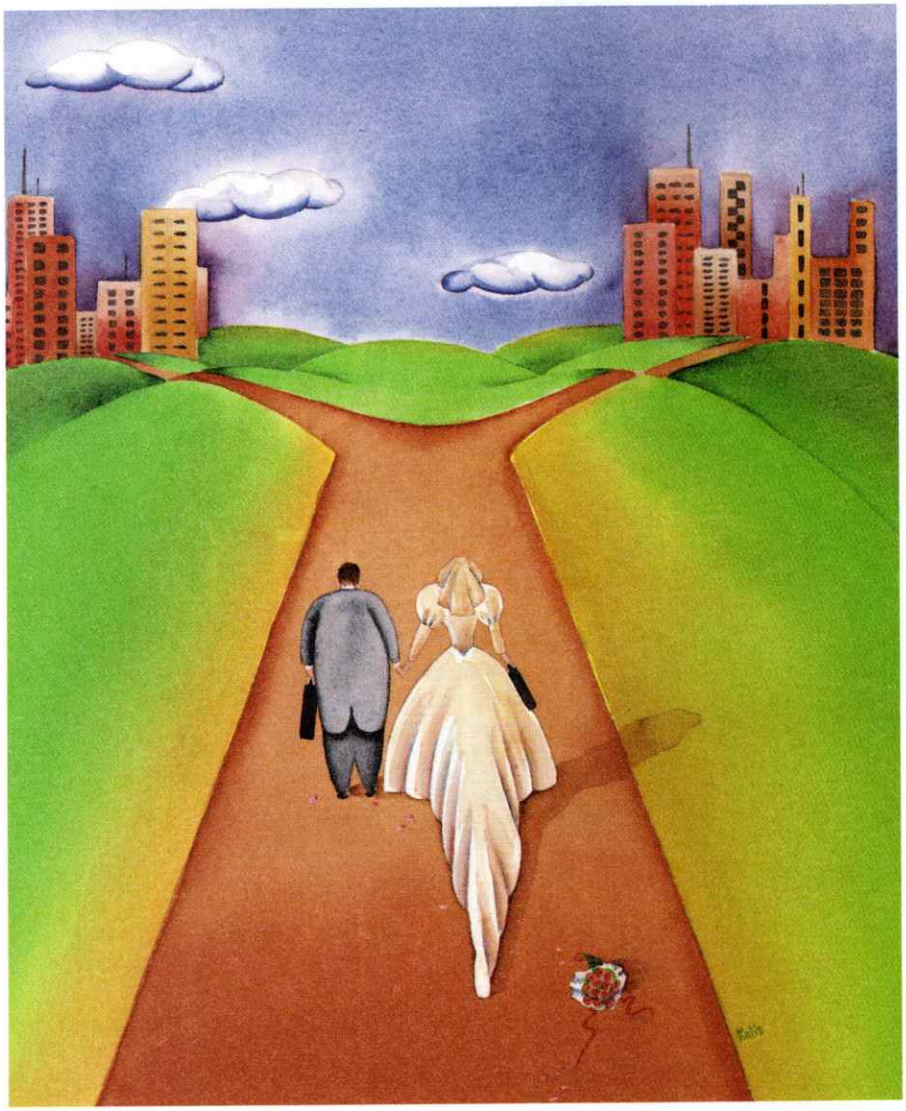
No-Spouse Rules in the Workplace under Illinois and Federal Law

By Kim L. Kirn

This article discusses a recent Illinois court decision holding that an employer's no-spouse policy violated the Illinois Human Rights Act. It also addresses federal law and suggests alternatives to strict antinepotism policies.



I. Introduction

Nepotism is defined as favoritism to a relative, and antinepotism rules vary from refusing employment to more than one family member to disallowing supervision of one family member by another.[1] One survey indicated that 67 percent of American companies had formal or informal antinepotism policies.[2] Traditionally, antinepotism rules were adopted to prevent the hiring of incompetent employee relatives.[3] The rules were developed before the influx of women into the workplace during the last three decades.[4]

As the workplace has evolved, antinepotism rules have been applied to married women at their husbands'

1. *Websters's Ninth New Collegiate Dictionary*, (Merriam-Webster Inc., 1985). The term "nepotism," derived from the Latin for nephew, was coined six centuries ago when Pope Callistus III appointed his nephews as cardinals. Karen Brandon, *When work's in the family*, Chicago Tribune at 5 (September 27, 1992) ("*Brandon*"). See also Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 Boston U L R 75, 75-76 (1982) ("*Wexler*").
2. *Brandon* at 5 (cited in note 1).
3. Id.
4. The proportion of women 20 and older working or looking for work rose from about 38 percent in 1960 to nearly 60 percent in 1990. *Working Women: A Chartbook*, U. S. Bureau of Labor Statistics, Division of Labor Force Statistics, Bulletin 2385 (Aug 1991).

workplace. Some have unintentionally denied qualified women jobs or promotions,[5] while others apply expressly to hiring or supervision of spouses; the latter are called no-spouse rules.

Illinois, like 21 other states,[6] has a Human Rights Act ("Act") which prohibits discrimination based on marital status.[7] This article will discuss a recent Illinois appellate court decision holding that an employer's policy of disallowing one spouse from supervising another constituted illegal marital status-based discrimination. It will also address the statutory basis for marital status protection in Illinois and other states, review federal and state caselaw on marital status, and suggest alternatives to antinepotism and no-spouse policies.

II. Recent Case law and Administrative Background

A. River Bend Community Unit School District No. 2 v The Human Rights Commission

In 1992, Illinois became the eighth state to decide this issue when the appellate court decided *River Bend Community Unit School District No. 2 v The Human Rights Commission*.[8] In 1981, the River Bend school district adopted a policy prohibiting employee transfers to positions where one spouse would be under the direct supervision of the other. In 1984, long time employee Virginia Ray requested a transfer to Fulton Elementary School, within the River Bend school district.

The school district denied the request based on its no-spouse rule because Virginia's husband, Ben, was the principal at Fulton Elementary School. Virginia filed a complaint with the Illinois Department of Human Rights ("Department") alleging that she had suffered illegal discrimination based on marital status. The Human Rights Commission ("Commission") agreed that the school district policy violated the Act.[9]

The third district appellate court affirmed the Human Rights Commission's decision ruling that the Act prohibits marital status discrimination based not only on whether the employee is single, married, divorced, or legally separated, but also on the identity of the employee's spouse. The court held Virginia Ray was denied the transfer not because she was married, but because of to whom she was married.

In making this determination, the court relied on the Commission's long-held position that marital status should be defined broadly, not narrowly.[10] Additionally, the court considered the legislative intent behind the Act. The Act's introductory section declares the state's public policy is "[t]o secure for all individuals within Illinois the freedom from discrimination because of...marital status...in connection with employment...."[11] Moreover, the court pointed out, the Illinois Supreme Court had ruled that the Act, as remedial legislation, should be liberally construed.[12]

The school district argued that even if "marital status" encompassed the identity of the spouse, the district could refuse to allow one spouse to supervise another under the bona fide occupational qualification ("BFOQ") exception to the Act.[13] Employers can use a BFOQ exception if they show that the BFOQ is reasonably related to essential job performance and if there is a factual basis for concluding that all or substantially all persons in a given class could not properly perform the job.

Again reasoning that the Act should be liberally construed to effect its purposes, the court held that exemptions must be construed narrowly. Although the school district presented expert testimony on the myriad problems posed by one spouse supervising another, Virginia Ray presented undisputed evidence that from 1966 to 1970 she worked under her husband's supervision in the district and no problems arose. The court concluded that the district could not rely upon the BFOQ exemption.[14]

Moreover, the court believed that the no-spouse policy did not address the problems that could arise in other close personal relationships, including cohabitation and friendships. The court noted that the school's policy was inconsistent in allowing a supervisor to marry a supervisee but forbidding the transfer of one spouse to a position supervised by the other.[15]

The *River Bend* decision is notable for two reasons: it clearly established that no-spouse policies are invalid under the Illinois Human Rights Act, and it directly addressed whether one spouse supervising the other is an exception to the Act. Consequently, Illinois employers with no-spouse or antinepotism rules should re-evaluate their need for them. Employers who opt to keep such rules should be prepared to demonstrate that serious problems will necessarily result from spouses working together.

B. The Illinois Human Rights Commission Decision on Marital Status

Until *River Bend*, it was uncertain in Illinois if no-spouse rules were lawful. The Commission had rendered a decision in 1984, but because the issue is

5. *Brandon* at 5 (cited in note 1).
6. See note 25 for a list of states with Human Rights Acts or similar anti-discrimination employment laws that include marital status as a protected category.
7. 775 ILCS 5/1-102(A) (1992).
8. 597 NE2d 842, 232 Ill App 3d 838, cert denied, 606 NE2d 1235, 147 Ill 2d 637 (1992).
9. An administrative law judge had ruled that Ray presented a prima facie case of marital status discrimination, but that the school district properly relied upon a bona fide occupational qualification ("BFOQ"). A three member panel of the Commission disagreed that the BFOQ was proper. The full Commission affirmed the panel's decision and issued a complaint of civil rights violation relying on its earlier decision in *In re Burton v Allied Chemical Corp.*, 13 Ill HRC Rep 246 (1984). *River Bend*, 597 NE2d at 844.
10. The court noted that an agency's long-term adherence to an interpretation of a statute does not require judicial deference but adds weight to the validity of the agency's construction. Id, 597 NE2d 845; see *Yu v Clayton*, 147 Ill App 3d 350, 497 NE2d 1278 (1st D 1986).
11. 775 ILCS 5/1-102(A) (1992).
12. *River Bend*, 597 NE2d at 845; see *Board of Trustees of Community College District No. 508 v Human Rights Commission*, 88 Ill 2d 22, 429 NE2d 1207 (1981).
13. 775 ILCS 5/2-104(A)(1) (1992).
14. *River Bend*, 597 NE2d at 846, 232 Ill App 3d at 844-845.
15. Id.

ABOUT THE AUTHOR

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controversial and states are split, it was not clear if the Illinois courts would uphold the Commission's interpretation. In *In re Burton v Allied Chemical Corp.*,[16] plaintiff Rose Burton was employed by defendant, Allied Chemical Corporation. While employed, she married her immediate supervisor. After the marriage, defendant discharged plaintiff for refusing to accept a reassignment pursuant to its policy prohibiting an employee from directly supervising his or her spouse. She filed a discrimination claim with the Department on grounds of illegal discharge based on marital status.

The case proceeded to the Commission, which concluded that liberal construction and a broad definition of marital status were consistent with the legislative purpose underlying the Act.[17] The Commission found that the Act was aimed at eradicating discrimination based on stereotypes and that an antinepotism policy applied to spouses was an evil the legislature intended to prohibit by the Act.[18]

Though the defendant raised concerns about disciplinary problems, low morale, and conflicts of interest resulting from employment of spouses, the Commission concluded that these concerns were apparently based on stereotypes of spousal behavior. The defendant offered no reason why the problems could not be dealt with on a case-by-case basis without a blanket antinepotism rule; the fact that a particular employee may not be able to supervise his or her spouse does not mean that no employee can.[19]

The defendant also argued that its action was allowed by the business necessity or BFOQ exception. The Commission held that the business necessity exception was limited to disparate impact cases and thus inapplicable. Additionally, the Commission rejected the BFOQ exemption, stating that a BFOQ "must not be a 'convenient' characteristic, it must be essential for the proper operation of the employer's business."[20] The Commission focused on whether the spousal relationship inevitably causes conflict of interest, favoritism, and bias and concluded that the no-spouse rule was not essential to eliminating the business problems suggested by defendant.[21]

III. Statutory Basis for Claims of Marital Status Discrimination

A. The History of "Marital Status" in the Illinois Human Rights Act

Illinois passed the Act[22] in 1980 as PA 81-1216, and it included marital status as a protected category when it became law. The term marital status was defined as "the legal status of being married, single, separated, divorced or widowed."[23] Many parts of the controversial bill were challenged during the legislative process, but marital status was discussed only once, and the floor debate centered on homosexual couples and did not mention antinepotism rules.[24]

Based on the dearth of relevant legislative debate in Illinois, it is not clear how the General Assembly intended marital status to be defined beyond the express statutory language. However, the legislative purpose stated in the Act, as recited by the court in *River Bend*, indicates that the General Assembly acted broadly to eradicate all workplace discrimination for employees falling within the protected categories set forth in the legislation.

B. Other State Statutes Dealing with Marital Status

Twenty-one other states have human rights acts or other anti-discrimination statutes prohibiting employment discrimination based on marital status.[25] Of these states, only seven had ruled on whether an employer's policy against employing spouses violates the anti-discrimination law; four have construed the term broadly, three narrowly.

Some of these states have not left the definition of marital status to chance interpretation by the courts. The Minnesota Human Rights Act, for instance, defines marital status as "whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."[26]

Oregon also has specific statutory language prohibiting an employer from refusing to hire, firing, or discriminating in the terms of employment against an employee solely because another member of the employee's family works or has worked for the employer.[27] California and Washington have regulations under their state fair employment laws that restrict no-spouse employment policies, with exceptions for compelling business interests and supervisory relationships between spouses.[28]

C. Caselaw Construing Marital Status Broadly

Illinois joins four other states that have definitively ruled that the marital status protection given to employees in an anti-discrimination statute includes a spouse's identity.[29] In 1978, the Washington Supreme Court became the first court in the nation to

16. 13 Ill HRC Rep 246 (1984).
17. Burton received a hearing before an administrative law judge, who ruled that she had been discriminated against on the basis of marital status. In a case of first impression by the Illinois Human Rights Commission, the Commission affirmed the administrative law judge's decision. Id at 250-252.
18. Id at 252.
19. Id.
20. Id at 258.
21. Id.
22. 775 ILCS 5/1-101 et seq (1992).
23. 775 ILCS 5/1-103(J) (1992).
24. State of Illinois, 81st General Assembly, House of Representatives, Floor Debate, Senate Bill 1377 (June 25, 1979).
25. They are Alaska, Alaska Stat Section 18.80.220(1) (1992); California, Cal Gov Code Ann Section 12940(a) (West 1992); Connecticut, Gen Stat Conn Ann Section 46a-60(a)(1) (1993); Delaware, Title 19 Del Code Ann Sec 711 (1985); District of Columbia, DC Code Section 1-2512 (1981); Florida, Fla Stat Ann Section 760.10 (1986); Hawaii, Hawaii Rev Stat Section 378-2(1)(1985); Maryland, Md Ann Code art 49B, Section 16 (1991); Massachusetts, Mass Gen Laws Ann ch 151B, Section 3 (Supp 1993);
Michigan, Mich Comp Laws Ann Section 37.2202 (1985); Minnesota, Minn Stat Ann Section 363.03 (1991); Montana, Mont Code Ann Section 49-2-303(1)(a) (1993); Nebraska, Neb Rev Stat Section 48-1104(1) (1988); New Hampshire, NH Rev Stat Ann Section 354-A:8(I) (Equity 1984); New Jersey, NJ Rev Stat Ann Section 10:5-12(a) (1993); New York, NY Exec Law Section 296(1)(a) (McKinney 1993); North Dakota, ND Cent Code Ann Section 14-02.4-03 (1981); Oregon, Ore Rev Stat Ann Section 659.030 (1989); Virginia, Va Code Sec 2.1-716 (1993 Supp); Washington, Wash Rev Code Ann Section 49.60.180 (1990); Wisconsin, Wisc Stat Ann Section 111.321, 111.322 (1988).
26. Minnesota, Minn Human Rights Act, Section 363.01 (1991).
27. Oregon's statute affects all antinepotism rules, not just no-spouse rules. However, the statute permits as an exception to its general ban on employment rules disallowing one family member from supervising another.
28. Cal Admin Code, Title 2, R 80 Section 7292 (1980) and Wash Admin Code Section 162-16-150 (1980).
29. Washington, Minnesota, Montana, and Hawaii interpreted their marital status protection broadly prior to the *River Bend* decision. Maryland also issued a ruling dealing with an antinepotism policy, but the case was decided on other grounds. *Maryland Commission on Human Relations v Baltimore Gas and Electric Company*, 296 Md 46, 459 A2d 205 (Ct App 1983).

define marital status broadly,[30] followed by the Minnesota Supreme Court in 1979.[31] The Montana[32] and Hawaii[33] Supreme Courts also adopted expansive definitions of marital status.

D. Caselaw Construing Marital Status Narrowly

At least three states have narrowly construed the term "marital status" in their anti-discrimination laws. In 1977 the New Jersey appellate court, in *Thomson v Sanborn's Motor Express*,[33] considered a situation in which plaintiff worked in the same terminal as her husband for 10 months without incident before being terminated because the arrangement violated defendant's antinepotism rule.[35] Plaintiff argued that the defendant had previously made many exceptions to its antinepotism policy, but the court concluded that it did not matter that the defendant may have made exceptions for particular cases.

In 1980 the Court of Appeals of New York similarly decided *Manhattan Pizza Hut, Inc. v New York State Human Rights Appeal Board*.[36] The Michigan Supreme Court ruled on this issue in *Miller v C.A. Muer Corp./Lowry v Sinai Hospital of Detroit*[37] and reaffirmed its ruling in *Whirlpool v Michigan Civil Rights Commission*.[38] The Michigan court has repeatedly ruled that the identity, occupation, and place of employment of one's spouse are not part of the definition of marital status based upon the legislative intent of the Civil Rights Act.[39] The Michigan Act was aimed at stereotypes; the reasons given by defendants for antinepotism policies, including collusion and favoritism, did not reflect offensive or demeaning stereotypes or biases.

IV. Challenges to Antinepotism Policies Under Federal Law

Antinepotism policies have been challenged under federal law pursuant to Title VII, the constitutional protection of the fundamental right to marry, and federal labor law.

A. Title VII Implications for Marital Status Discrimination

Title VII forbids gender-based employment discrimination but is silent on marital status.[40] Nevertheless, antinepotism and no-spouse rules have been challenged under Title VII using disparate treatment or disparate impact theories. In the disparate treatment cases an employer treated a married male employee differently than a married female employee, and courts have easily found a violation of Title VII.[41]

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However, most antinepotism rules apply to both male and female employees. Plaintiffs have challenged facially neutral antinepotism rules using the disparate impact theory. This approach attacks an employment policy by demonstrating, usually by statistical proof, that the policy has a disparate impact on a protected class.[42] The United States Supreme Court expounded upon this theory in *Griggs v Duke Power Co.*[43] and *Dothard v Rawlinson*.[44] The cases usually focus on an antinepotism policy that has a negative disparate impact on women working or seeking a job with a company where their husbands already work.

This challenge was successfully made in *EEOC v Rath Packing Company*.[45] In *Rath Packing*, the eighth circuit held that defendant's no-spouse rule had a disparate impact on women and therefore violated Title VII. Plaintiffs established that from January 1, 1973, to February 15, 1978, only seven of 95 female applicants were hired by the defendant and that 26 additional female applicants were denied employment because their husbands were current employees.[46]

The court concluded that defendant failed to prove its defense of business necessity in response to plaintiff's prima facie case of disparate impact discrimination.[47] The problems cited by the defendant "must be concrete and demonstrable, not just 'perceived'; and the no-spouse rule must be essential to eliminating the problem, not simply reasonable or designed to improve conditions."[48]

Rath Packing 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.[49] There are Title VII cases contrary to *Rath Packing*, the most prominent of which is the Illinois-based *Yuhas v Libbey-Owens*

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30. *Washington Water Power Company v Washington State Human Rights Commission*, 586 P2d 1149 (Wash 1978).
31. *Kraft Inc. v State of Minnesota*, 284 NW2d 386 (Minn 1979). This case was decided before Minnesota amended its Human Rights Act to define marital status to include the identity of the spouse.
32. *Thompson v Board of Trustees, School District No. 12*, 627 P2d 1229 (Mont 1981).
33. *Ross v Stouffer Hotel Co.*, 816 P2d 302 (Hawaii 1991). But see *Moore v Honeywell Information Systems, Inc.*, 558 F Supp 1229 (D Hawaii 1983).
34. 382 A2d 53 (NJ App 1977).
35. The antinepotism rule prohibited relatives from working in the same department or terminal. Id at 54.
36. 434 NYS2d 961 (NY 1980).
37. 362 NW2d 650 (1984).
38. 390 NW2d 625 (1986).
39. *Miller*, 362 NW2d at 654.
40. 42 USC Section 2000e-2 (1991).
41. EEOC Dec No 71-2048 (1971), EEOC Dec ¶ 6244 (CCH). The Equal Employment Opportunity Commission held that the company's policy of hiring qualified females as truck drivers unless they were married and their husbands were also employed by defendant, but hiring males without these restrictions violated Title VII.
42. *Griggs v Duke Power Co.*, 401 US 424, 432, 91 SCt 849, 28 LEd2d 158 (1971).
43. Id.
44. 433 US 321, 97 S Ct 2720, 53 LEd2d 786 (1977).
45. 787 F2d 318 (8th Cir), cert denied, 479 US 910, 107 SCt 307, 93 LEd2d 282 (1986).
46. In 1973, defendant prospectively implemented a no-spouse rule allowing seven married couples to continue to work in the plant. At defendant's plant, 50 percent of employees were related to one another, and 95 percent were male. Defendant argued that its no-spouse rule addressed problems of absenteeism, scheduling difficulties, decreased worker morale, spouses supervising one another, and spousal pressure to hire the other spouse. Id at 322.
47. For business necessity the "employer must meet 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question.' *Dothard v Rawlinson*, 433 US at 329, 97 S Ct at 2727, 53 LEd2d at 797, citing *Griggs v Duke Power Co.*, 401 US 424, 432, 91 S Ct 849, 28 LEd2d 158 (1971).'" Id at 331-333.
48. Id at 332.

Ford Co.[50] The plaintiff, Dorothy Yuhas, was not hired by the defendant, Libbey-Owens Ford, because her husband worked as an hourly employee at defendant's plant in Ottawa.[51] The plaintiff won in the district court by proving that since inception of the rule, 71 women — as compared to 3 men — had been denied employment by the defendant under defendant's enforcement of the rule.[52]

On appeal to the seventh circuit, the defendant emphasized that the practice of hiring spouses led to problems in scheduling vacations and work assignments and undermined employee morale and efficiency because the marital relationship interfered with ordinary relationships between workers and supervisors. The seventh circuit agreed, reversed the district court, and opined that the discriminatory impact felt by women resulting from defendant's hiring practice was different from the *Griggs* or *Dothard* cases because it was the result of the historical fact that in the past far more men than women chose to work in defendant's plants.[53]

Some legal commentators have criticized the *Yuhas* decision because it essentially changed the plaintiff's burden in disparate impact cases to a proof of intentional discrimination despite *Griggs* and other supreme court cases.[54] Interestingly, an earlier case from the eighth circuit, *Harper v Trans World Airlines, Inc.*,[55] reached a similar conclusion, despite statistics indicating the unequal impact of the antinepotism policy upon women.[56]

B. Do No-Spouse Rules Infringe upon the Fundamental Right to Marry?

In *Loving v Virginia*[57] and earlier caselaw,[58] the United States Supreme Court upheld the constitutional right of persons to marry freely based upon the First, Fifth, Ninth, and Fourteenth Amendments to the U.S Constitution. Several employees have argued that their employers' no-spouse rules violate their basic constitutional right to marry.[59] In all but one case this challenge has been unsuccessful.[60]

C. Application of Federal Labor Laws

Antinepotism policies may also be subject to litigation under the National Labor Relations Act ("NLRA") as illegally discriminating against employees based on their union affiliation. In *Spencer Foods, Inc.*,[61] a company in a small town closed and later reopened with a new owner. The new owner implemented an antinepotism policy for all employees in the local plant. Under the management of the former owner, the company had hired many family members, and about one-half of all the employees were family members. The National Labor Relations Board held that the new owner's antinepotism policy violated the NLRA because it was used with the design of discriminating against employees because of their union affiliation.[62]

"Employers may use several devices to minimize [nepotism] problems. First, the supervising spouse could be required to [withdraw] from all evaluations and salary reviews of the other spouse.... Second... employer[s] should swiftly discipline spouses for any improper behavior at work."

Additionally, collective bargaining agreements could address an employer's antinepotism policy, but very few agreements today specifically address antinepotism or no-spouse policies.[63] Without specific language to the contrary, the broad "management rights" usually found in the agreements give employers discretion to impose an antinepotism clause.[64] Most collective bargaining agreements also provide for equal treatment of all employees under the contract and an employee could rely upon this provision to confront the unfair or inconsistent application of an antinepotism policy.

V. Analysis of Antinepotism and No-Spouse Policies

This section outlines the reasons given for and against spouses working together and makes suggestions for Illinois employers' compliance with *River Bend.*

A. Employers' Reasons Why Spouses Should Not Work Together

The reasons proffered by employers in support of no-spouse policies

49. Note, *Marital Status Discrimination: A Survey of Federal Caselaw*, 85 W Va L Rev 347 (1983) ("*Survey*"); and Note, *Beyond the Prima Facie Case in Employment Law: Statistical Proof and Rebuttal*, 89 Harv L Rev 387 (1975-76). Although not a Title VII case, *Sanbonmatsu v Boyer*, 357 NYS2d 245, appeal dismissed, 370 NYS2d 926, motion denied by 374 NYS2d 623, appeal denied 374 NYS2d 1026, also statistically demonstrated the dramatic effect of a university antinepotism rule upon women professors. The plaintiff presented evidence that there were 27 instances involving husband and wife employment at the university and in every instance the husband received a term appointment leading to tenure. The wife was either required to accept temporary appointment or, occasionally, the university waived its antinepotism rule to attract a "star" male candidate.

50. 562 F2d 496 (7th Cir), cert denied 435 US 934, 98 SCt 1510, 55 LEd2d 531 (1978).

51. However, the no-spouse rule did not require the discharge of married couples already working for defendant on the effective date of the no-spouse rule, or of an employee who married a fellow employee. Id at 497, 500.

52. Id at 496.

53. The no-spouse rule "does not penalize women on the basis of their environmental or genetic background." Id at 500.

54. Leonard Bierman and Cynthia D. Fisher, *Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints*, 35 Labor L J 634 (Oct 1984) ("*Bierman and Fisher*"); and *Survey* at 355 (cited in note 49).

55. 525 F2d 409 (8th Cir 1975). Defendant enforced its policy proscribing the employment of spouses in the same department. Plaintiff married her co-worker and eventually was fired by defendant because she had less seniority than her husband.

56. Plaintiff cited defendant's employment records showing that in five previous situations where the problem of spouses as co-workers arose, four of the five women left defendant's employ. In upholding the no-spouse rule, the eighth circuit held that statistics gleaned from such a small universe had little predictive value and must be disregarded. Id at 412.

57. *Loving v Virginia*, 388 US 1, 87 SCt 1817, 18 LEd2d 1010 (1967).

58. *Skinner v Oklahoma*, 316 US 535, 62 SCt 1110, 86 LEd2d 1655 (1942), and *Meyer v Nebraska*, 262 US 390, 43 SCt 625, 67 LEd2d 1042 (1923).

59. *Southwestern Community Action Council, Inc. v Community Service Administration*, 462 F Supp 289 (D WVa 1978); and *Keckeisen v Independent School District* 612, 509 F2d 1062 (8th Cir), cert denied 423 US 833, 96 SCt 57, 46 LEd2d 51 (1975).

60. The Nebraska Supreme Court in *Voichahoske v City of Grand Island*, 231 NW2d 124 (Neb 1975), ruled that the employer's no-spouse rule was an unconstitutional intrusion on the fundamental right to marry.

61. 268 NLRB No 231, 1483 (1984), 1983-84, NLRB Dec ¶ 16,108 (CCH).

62. Id, 268 NLRB No 231 at 1486.

63. Irving Kovarsky and Vern Hauck, *The No-Spouse Rule, Title VII, and Arbitration*, 32 Labor L J 366 (June 1981) ("*Kovarsky and Hauck*"). The court in *Rath Packing* urged employers and employees to bargain this issue. *Rath Packing*, 787 F2d at 333.

64. *Bierman and Fisher* at 634 (cited in note 54).

can be distilled as follows:

1. Spouses may bring emotional problems from home into the office which are exacerbated by working together.

2. The job dissatisfaction of one spouse may damage the morale of the other, and the performance of both suffers.

3. Emotional difficulties and resentment may be generated when one spouse supervises the other.

4. Other employees may suspect favoritism and suffer low morale working with spouses, especially if there is a failure to discipline or a reduction in the work force.

5. Scheduling vacations, shift assignments, and emergency leaves may be difficult if both spouses want similar conditions.

6. There may be collusion between the spouses against the employer, including sharing of confidential information.

7. Spouses are likely to use the same car — thus, if one is late or absent, the other will be also.

8. Married workers tend to take care of each other first, so that the safety of other employees or the public could be jeopardized in emergencies.

9. If both spouses are professionally trained in the same curriculum at the same university, they may show less diversity of thought at work.

10. If jobs are scarce, it may seem unfair for one family to have two jobs.

11. If one spouse is employed, he or she may pressure the employer to hire the other unqualified spouse.[65]

Many times an employer can document instances in which one of these problems has occurred. However, most employers cannot produce evidence that these problems are pervasive in the workplace, and thus cannot support a complete ban on spouses working together.[66] Employees may be able to show some of these problems, but employees can usually show instances where spouses have worked together for years without complaint from the spouses or coworkers.[67]

B. Alternatives to Strict Antinepotism and No-Spouse Rules

In light of *River Bend*, employers in Illinois should dismantle no-spouse rules and allow qualified spouses to work together, unless there is a BFOQ. Some legal commentators have noted that there may be advantages to hiring spouses:

1. A spouse may be highly qualified.

2. The employer may experience less turnover because the couple would have to find two new jobs if they moved.

65. *Kovarsky and Hauck* (cited in note 63); *Bierman and Fisher* (cited in note 54); and *Yuhas*, 562 F2d at 499.

66. *Kovarsky and Hauck* at 366 (cited in note 63); and *Bierman and Fisher* at 636 (cited in note 54).

67. In unconverted evidence, plaintiff proved that she worked for four years as a teacher under the supervision of her husband working as principal without any problem. *River Bend*, 597 NE2d at 846.

3. It may be easier for an employer to transfer one spouse if it can offer employment to the other spouse.

4. In recruiting a "star" candidate, the employer can offer employment to the candidate's spouse also. This is especially true for a university in a small college town which may provide the only viable employment for the spouse.

5. The employer may be able to hire two spouses for less money than two unrelated persons.

6. Our social norms encourage people to marry, not to live together or divorce in order to obtain or keep a job.

7. No-spouse policies may have a negative impact on women.[68]

An alternative to completely abandoning antinepotism rules is to allow spouses to work together, but to adopt a strict BFOQ exception for certain positions when necessary. For security or safety reasons an employer could disallow spouses to work in the same area or to supervise one another. The BFOQ exceptions should be carefully thought out, narrowly drawn, and preferably expressed in writing.

For example, in a bank there may be security reasons why one spouse should not supervise the other spouse who makes fund transfers within the bank. If the employer can demonstrate that banking regulations regarding possible fraud require the bank to have independent verification, the bank as the employer would have a much stronger argument for implementation of the no-spouse rule. However, a bank could not justify an office-wide no-spouse practice on the assumption that all spouses will commit fraud.

Employers should follow this course with caution because the language used by the Illinois courts and the Human Rights Commission makes it clear they will not uphold BFOQ exceptions based on stereotypes of spousal behavior. The BFOQ must be reasonably related to the essential operation of the job and must have a factual basis that all or substantially all spouses could not perform the job. Given this strict interpretation, employers will be able to limit few positions to non-spouses. The Human Rights Commission has suggested to employers that they deal with spousal work conflicts on a case-by-case basis.

Employers may use several devices to minimize problems. First, the supervising spouse could be required to recuse himself or herself from all evaluations and salary reviews of the other spouse. This should help develop the perception of fairness to the other employees. Second, an employer should swiftly discipline spouses for any improper behavior at work. If problems cannot be solved after discipline, one or both of the spouses may be discharged as any nonperforming employee would be.

Another alternative to dismantling antinepotism policies is to alter the policies to apply to all family members except spouses. The Illinois Human Rights Act protects employees based on marital status, not familial status. Therefore, an employer may properly refuse to hire a current employee's sister, but not the employee's husband if he is otherwise qualified for the job. The immediate concern with implementing this limited antinepotism policy is that the potential problems — collusion, low morale, sharing confidential information, etc. — still exist between other family members. The employer seems inconsistent in allowing spouses but not other family members to work together.

VI. Conclusion

More women are working now than ever before; in Illinois over the 40-year period from 1950 to 1990, three women entered the labor force for every man.[69] As long as more women than men are entering the work force, antinepotism practices will have a greater impact on women.

If Illinois employers are representative of most employers, many have some form of an antinepotism policy, and in light of the *River Bend* decision these policies should be amended with respect to their application to married employees. Any restrictions on spouses will be reviewed closely by the Human Rights Commission and the Illinois courts.

Undoubtedly there are some spouses who should not work together, but hopefully they will recognize that and pursue separate employment. However, many spouses can and have worked together successfully.[70] Maria Geoppert Mayer and her husband were professors with full academic responsibilities at the University of Chicago. She received no salary because of the University's antinepotism policy and consequently she and her husband sought other employment. When the university learned that they intended to leave, it offered a salary to Ms. Mayer to induce them to stay. They did remain, and in 1963, Maria Geoppert Mayer was awarded the Nobel prize in physics.[71]

68. *Bierman and Fisher* (cited in note 54). A personnel expert for the Illinois Chamber of Commerce commented that he has long advised companies against antinepotism and no-spouse rules because they limit the ability to choose the best person for a job. *Court Decision on Spouses' Hiring Praised*, St. Louis Post Dispatch, 1 (August 12, 1992).

69. *Women and the Labor Force: Developments in Illinois Labor Force Growth, State of Illinois*, Labor Management Information Publication of the Illinois Department of Employment Security (1991). In 1960, 28 percent of married couple families were dual worker couples; in 1990 that number almost doubled to 54 percent. *Working Women: A Chartbook*, U. S. Bureau of Labor Statistics, Division of Labor Force Statistics, Bulletin 2385 (August 1991).

70. 1.8 million couples work together in entrepreneurial positions, an 85 percent increase from 10 years ago. *Married to Your Business Partner: Making it Work*, 82 First for Women (October 1993).

71. *Wexler* at 88, n58 (cited in note 1).