

K&LNG Alert

JULY 2005

California Employment Law

California Supreme Court Permits Sexual Harassment Claims Based on Favoritism Resulting from Workplace Affairs

On July 18, 2005, the California Supreme Court unanimously held that employees, who themselves have not been subjected to sexual advances, may nevertheless maintain a sexual harassment claim based on favoritism resulting from consensual affairs between their supervisor and co-workers.¹

The California Fair Employment and Housing Act (“FEHA”) prohibits sexual harassment in the workplace. California courts have previously held that a supervisor’s preferential treatment of a paramour in a consensual workplace affair does not constitute unlawful discrimination or sexual harassment with respect to other employees. Accordingly, the trial court in *Miller* granted summary judgment against the two plaintiff employees who had filed a claim for sexual harassment and the Court of Appeal affirmed the judgment.

However, the California Supreme Court, in a groundbreaking decision, reversed and held that “although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.”

Most other courts throughout the country that have previously addressed this issue have rejected this type of claim.

THE DECISION

In *Miller*, female plaintiffs Edna Miller and Frances Mackey, former employees of the California Department of Corrections, alleged that Lewis Kuykendall, their then-supervisor and warden of the prison at which the plaintiffs worked, was concurrently involved in consensual sexual relationships with three of his subordinate female employees from 1991 until 1998. As a result of these relationships, the warden “promised and granted unwarranted and unfair employment benefits to the three women” to the detriment of the plaintiffs as well as other non-favored employees.

Evidence of widespread sexual favoritism in the instant case included admissions by Kuykendall and his sexual partners concerning the nature of their relationships, boasting and jealous fights by and between the favored women, incidents of public fondling in the presence of co-workers, rapid and repeated unwarranted promotions, and Kuykendall’s admission that he did not have control over one of the favored women due to their sexual relationship. In addition, the plaintiffs presented evidence that their complaints regarding the sexual favoritism resulted in retaliation from their supervisors, as well as from one of the favored women. The retaliation included verbal abuse, threats, physical assault and battery, ostracism, withdrawal of disability accommodations, demotion,

¹ *Miller, et al. v. Department of Corrections, et al.*, 05 C.D.O.S. 6268 (July 18, 2005).

reduced pay, and deprivation of eligibility for promotion. The plaintiffs' co-workers were aware of the sexual favoritism and the retaliation suffered by the employees who had complained about the conduct.

The California Supreme Court reviewed an Equal Employment Opportunity Commission policy statement examining sexual favoritism² and the broad standards for sexual harassment adopted in earlier California cases. The Court concluded that both male and female employees may establish a claim of sexual harassment under the FEHA "by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." The Court further concluded that, given the facts of the instant case, "a hostile work environment was shown to have been created by widespread favoritism" which resulted in "an atmosphere that was demeaning to women." The Court also stated that "an atmosphere that is sufficiently demeaning to women may be actionable by both men and women."

IMPACT ON EMPLOYERS

The Court noted that "the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism." Furthermore, a supervisor's isolated preferential treatment of his or her consensual sexual partner is unlikely to give rise to a claim of sexual harassment. In *Miller*, the evidence of sexual favoritism and its detrimental effect on non-favored employees was considerable. Nevertheless, employers should consider taking steps to minimize the risk of such claims by carefully reviewing their harassment and fraternization policies. Employers may also consider instituting policies specifically prohibiting favoritism or perceived favoritism based on sexual relationships and promptly investigating any complaints of sexual favoritism. Please contact any K&LNG Employment lawyer if you would like additional information or advice on this issue.

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² Office of Legal Counsel, Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism (Jan. 12, 1990) No. N-915-048.

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