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Sexual Favoritism: A Recent California Supreme Court Ruling May Wake Up Employers

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Did a recent California Supreme Court ruling open the floodgates for sexual harassment lawsuits? The authors argue that it did not, and that, in fact, the opinion actually may help employers.

The California Supreme Court's recent opinion in *Miller v. Department of Corrections*, holding that an employee can state a claim for sexual harassment against his or her employer under the California Fair Employment and Housing Act (FEHA) by alleging widespread "sexual favoritism" in the workplace caught the public's attention and caused a surprisingly dramatic response from the news media. Headlines warned that the Supreme Court has "opened the floodgates" for sexual harassment suits, and "dramatically increased" the potential breadth of sexual harassment law.[1]

But the court's recognition of sexual favoritism as a basis for harassment liability comes as no surprise to those who have been following sexual harassment and discrimination law in the California trial and appellate courts. From a legal standpoint, the *Miller* decision does little more than reaffirm settled principles of state jurisprudence. And from a practical standpoint, the *Miller* decision may end up helping employers rather than hurting them by clarifying how sex discrimination in the workplace should be prevented and rectified.

THE ALLEGED SEXUAL FAVORITISM IN THE MILLER CASE

The two female plaintiffs in *Miller* worked at the Valley State Prison for Women. They alleged that Lewis Kuykendall, the chief deputy prison warden, was having sexual affairs with at least three female employees. The affairs were common knowledge among prison employees, mostly because the women involved with Kuykendall openly squabbled over their relationships and publicly expressed their jealousy. The warden made little or no effort to conceal these relationships and was observed on several occasions flirting, fondling, and groping female employees. Plaintiffs also presented substantial evidence that Kuykendall's paramours received favorable treatment, including fast-track promotions, transfers to better work positions, and virtual immunity from discipline.

Most of plaintiff Miller's allegations concerned the relationship between her co-worker, Cagie Brown, and Kuykendall. When Miller and Brown were both competing for a promotion, Brown bragged to Miller about her affair with the warden, her "power over him," and her intent to use this power to extract benefits from him. She indicated that Kuykendall would have to give her the promotion because she knew "every scar on his body."[2] Brown received the promotion. Miller, as well as other prison employees, attributed Brown's promotion to her sexual relationship with Kuykendall. Later, Brown was elevated to associate warden, and became Miller's direct supervisor.

After Miller complained about the unequal treatment she and other employees were receiving as a result of Kuykendall's affairs with his subordinates, Brown began to undermine Miller's authority, reduce her job responsibilities, and unduly criticize her work. When Miller confronted Brown by telephone, Brown admitted that Miller had suffered from unjust abuse, but remarked that neither she nor Kuykendall would do anything to rectify the situation. Brown later confronted Miller and accused her of recording their telephone conversation. Brown then physically assaulted Miller and falsely imprisoned her in her office.

When Miller complained about the incident to Kuykendall, he failed to investigate the assault or discipline Brown. Over the next several months, Miller endured further verbal harassment from Brown. Only after Miller complained to Kuykendall's superior officer did an investigation begin. As a result of the investigation, Kuykendall retired and Brown resigned with disciplinary proceedings pending.

Plaintiff Mackey observed many of the same events as Miller. When she complained about Brown's sexual affair with Kuykendall, she also suffered harassment and adverse employment actions, including withdrawal of benefits and demotion.

THE DISCRIMINATION LAWSUIT

Miller and Mackey filed suit in 1999, alleging sex discrimination and retaliation in violation of the FEHA. The trial court determined that Kuykendall's display of sexual favoritism did not constitute harassment under the FEHA as a matter of law, and granted summary judgment in favor of the defendants, thereby precluding plaintiffs from presenting their case to a jury. The court of appeal affirmed, and held that "a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, non favored employees." The appellate court concluded that plaintiffs had failed to show that the treatment and retaliation they endured was on the basis of sex because they were neither subjected to sexual advances nor treated any differently than male employees.[3]

Plaintiffs' appeal to the California Supreme Court presented a narrow question of law: Whether plaintiffs could pursue a harassment action

based on their claims of rampant sexual favoritism, even though they were never the direct victims of sexual advances by Kuykendall. The Supreme Court's answer was a decisive yes. And despite the media's apparent shock, the court arrived at its decision by following and applying well-established sex discrimination case law – not by expanding it.

THE FOCUS OF A HOSTILE WORK ENVIRONMENT IS THE ENVIRONMENT ITSELF

The FEHA expressly prohibits sexual harassment in the workplace. It is an unlawful employment practice for "an employer … because of … sex … to harass an employee…."[4] Past California (and federal) decisions have established that this prohibition on sexual harassment includes protection from a broad range of conduct.

On one end of the spectrum is so-called quid pro quo harassment, in which a supervisor conditions employment benefits on a subordinate's submission to sexual advances or threatens adverse employment action if a subordinate refuses to submit. Relatively overt, quid pro quo harassment is easy to recognize.

On the other end of the spectrum is "hostile work environment" harassment, through which employers can be liable for allowing a work environment that is hostile or abusive based on sex.[5] The harassment created by a hostile work environment often is indirect, and therefore is harder to define and recognize than quid pro quo harassment. In order to prevail on a sexual harassment claim based on a hostile work environment, an employee must demonstrate that his or her workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment," resulting in a work environment that is hostile or abusive to employees because of their sex.[6]

In determining whether a work environment is hostile to a particular sex, the workplace must be evaluated in light of the totality of the circumstances (such as the frequency, type, and severity of the discriminatory conduct).[7] In order to be actionable, a sexually objectionable environment must be both objectively and subjectively offensive—one that a reasonable person in the same position would find hostile, *and* one that the victim in fact perceived to be so.[8]

AN EMPLOYEE'S WORK ENVIRONMENT INCLUDES THE INTERACTIONS AND CONDUCT OF CO-WORKERS

A woman's perception that her work environment is hostile to women obviously will be reinforced if she witnesses the harassment of other female workers. For nearly 20 years, California courts have emphasized this point. For example, in *Fisher v. San Pedro Peninsula Hotel*, the California court of appeal articulated that evidence of the "general work atmosphere, involving employees other than the plaintiff," is relevant to the issue of whether a hostile work environment existed.[9]

While state courts initially limited this proposition to remarks or incidents that the plaintiff personally witnessed, in 1998, the court of appeal held that a plaintiff also can rely on evidence of harassment directed against other employees as long as the plaintiff was *aware* of the harassment, even if the plaintiff may not have *witnessed* the harassment directly.[10] The *Beyda* court reasoned that "a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct."[11]

A SINGLE INSTANCE OF SEXUAL FAVORITISM IS DIFFERENT THAN A PATTERN OR PRACTICE OF SEXUAL FAVORITISM

The media's apparent surprise at the outcome of *Miller* may be explained by a 1996 decision by the court of appeal. In *Proskel v. Gattis*, the court of appeal rejected a claim based upon a supervisor's preferential treatment of an employee with whom he was romantically involved.[12] The affair in *Proskel* was consensual and discrete. Although unfair to other employees, the court of appeal noted that the preferential treatment in *Proskel* was equally unfair to everyone in the office—men *and* women – other than the supervisor's paramour. The court concluded that where "there is no conduct other than favoritism toward a paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists."[13] Accordingly, the court held that a romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim under the FEHA.[14]

In *Miller,* the California Supreme Court affirms the reasoning in *Proskel* by acknowledging that isolated preferential treatment of a sexual partner, standing alone, does *not* constitute sexual discrimination.[15] But the *Miller* court makes a critical distinction between the situation in *Proskel* and the facts in *Miller.* Whereas *Proskel* involved a single employee receiving favorable treatment by a supervisor – a situation that equally disadvantaged all employees, *Miller* involved a supervisor that was simultaneously having sexual relations with *three* female subordinates. As the court put it, Miller and Mackey "alleged far more than that a supervisor was engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner. … They proffered evidence demonstrating the effect of widespread favoritism on the work environment, namely the creation of an atmosphere that was demeaning to women."[16] The court recognized that Kuykendall's concerted pattern of favoring those female employees with whom he had sexual affairs broadcast an entirely different message into the workplace than if he had been having an affair with one person.

Moreover, unlike the discrete sexual favoritism that took place in *Proskel*, Kuykendall's sexual affairs were out in the open and were even flaunted. Kuykendall would touch and grab his paramours in front of other employees, his paramours would brag about their sexual affairs with Kuykendall, and Kuykendall openly requested favorable treatment for his sexual partners.

The fact that Kuykendall's conduct was both repetitive *and* indiscrete appears to have institutionalized the sexual favoritism in a way that was absent from the facts in *Proskel*. Considering the "totality of the circumstances" from the perspective of a reasonable person in plaintiffs' positions, the Supreme Court concluded that there was at least a triable issue of fact on the question of whether Kuykendall's sexual favoritism was widespread and severe enough to create a hostile work environment in which the message was conveyed to employees that "managers view women as sexual playthings" or that "the way for women to get ahead in the workplace is by engaging in sexual conduct."[17] This overt pattern of sexual favoritism creates "an atmosphere that is demeaning to women."[18] As such, it made no difference to the court's analysis that the sexual relationships were consensual rather than coercive. The effect that these relationships had on Miller and Mackey clearly was not welcomed.

THE *MILLER* COURT FOLLOWS A PATH ALREADY PAVED BY THE LOWER COURTS

The California Supreme Court has done little more in the *Miller* decision than reiterate prior case law forged by the appellate courts. "[T]he concept of conduct that gives rise to a hostile work environment by creating a work *atmosphere* that is demeaning to women is not new."[19] In its opinion, the Supreme Court reminds readers that California law already provides that plaintiffs may establish the existence of a hostile work environment even when they themselves have not been sexually propositioned.[20]

Rather than breaking new ground or opening any floodgates, the *Miller* court stays the course mapped by cases like *Fisher* and *Beyda*. The only distinction is that unlike *Fisher* and *Beyda* (where plaintiff's hostile

work environment contained a mixture of conduct directly involving plaintiff *and* conduct involving co-workers), the hostile work environment in *Miller* only involved conduct between the plaintiff's supervisor and other employees. But the Supreme Court is careful—even repetitive—in pointing out that its decision is based on a classic analysis of the circumstances and environment in which the plaintiffs worked.

For example, the Supreme Court emphasizes Miller's contentions about the demeaning conduct towards women that she was *aware* of in her work environment. The court also underscores that Miller *personally witnessed* Kuykendall fondle and put his arms around co-workers, and emphasizes that Miller and Mackey were *aware* of Kuykendall's sexual escapades with co-workers and his subsequent favorable treatment of those same employees.[21]

Despite the media attention, one can hardly be surprised that the Supreme Court found the facts alleged in *Miller* worthy of a jury trial. Federal and state courts have long recognized that a workplace permeated with pornographic postings, sexually explicit magazines, or offensive workplace chatter can form the basis for a hostile work environment.[22] Here, instead of being inundated with sexually explicit posters, the *Miller* workplace was filled with tales of actual sexual escapades, unfolding like a soap opera before the eyes of every employee. In response, the Supreme Court is giving Miller and Mackey an opportunity to convince a jury that the condition of their work environment was sufficiently severe and pervasive to constitute a hostile work environment to women.

THE EFFECT OF *MILLER* ON CALIFORNIA EMPLOYERS

From a legal perspective, the *Miller* decision does not tell California employers (or their lawyers) much of anything they shouldn't already know. Before Miller, a reasonable employer obviously would have sought to prevent its supervisors from openly engaging in multiple sexual affairs with subordinates. Aside from the real possibility of claims by the subordinates themselves, the appearance of conflict and impropriety created by such a situation is hard to ignore.

On the other hand, Miller does provide helpful insight into how the California Supreme Court—and the trial courts—will approach and analyze hostile work environment cases in the modern workplace. Understanding the court's renewed emphasis on workplace *environments* and *atmospheres*, and its focus on how employees perceive their workplace, is immensely instructive when it comes to measures that employers can take to prevent situations like the one in *Miller*. Drawing from the lessons in *Miller*, here are four steps that employers can take as preventative measures:

Step One: Get Feedback

The best way to know how employees perceive their work atmosphere is to ask them. Rather than waiting for complaints to be filed, employers should actively solicit employee opinions on the workplace so that problems can be identified before they rise to the level of a hostile work environment. For example, employers can conduct yearly interviews or group discussions about how employees perceive the atmosphere at work. Alternatively, employers can use surveys or anonymous questionnaires to illicit feedback. General questions about employee confidence in management or human resource personnel will quickly highlight potential issues.

Step Two: Get To Know the Work Environment

More often than not, upper-management inhabits a different realm than do lower level employees. Executives and decision-makers typically do not interact and converse with subordinates about non-work matters, vice presidents usually do not eat lunch in the employee break room, and supervisors often are excluded from water-cooler gossip. This is especially true in larger organizations, making it is difficult for management to effectively monitor the work atmosphere.

In order to stay tuned with how employees perceive their environment, management must understand the environment itself. Such understanding can be achieved through various common sense policies. For example, human resource directors or other members of upper management can do walk-throughs or "job trading" to see what line employees see every day. Are there offensive materials in public areas? Do employees appear to avoid a particular manager? Do some employees interact in unusual ways? There is a difference between invading employee privacy and learning what's going on in the workplace. If two employees have been romantically involved for over a year, and it is common knowledge among their co-workers, then shouldn't members of the company's management also be aware of the relationship?

Step Three: Implement Rational Conflict of Interest Policies

Dating policies that outright forbid workplace romance often are ineffective because employees simply disregard them as unrealistic, particularly if the workforce is large. As people spend more and more time at the office, attempts to bar employees from falling in love can be unreasonable and authoritarian. Such policies also may be illegal to the extent they seek to regulate legal "off duty" conduct.23

Conflict of interest policies that have a rational basis, however, will be more palatable to employees. For example, a policy might encourage the reporting of workplace relationships between co-workers, while forbidding romantic relationships that create actual or perceived conflicts of interest, such as those between supervisors and subordinates or anyone else whose terms or conditions of employment the supervisors may control. Most employees understand why romantic relationships between supervisors and subordinates are rife with potential problems.

Valid policies might also prohibit open displays of affection between employees in the workplace or other on-duty conduct that causes an adverse impact on other workers. Finally, large employers may be able to implement policies that attempt to accommodate disclosed relationships by allowing affected employees to transfer positions or alter responsibilities in a way that removes the reporting relationship.

Step Four: Implement Realistic Anti-Discrimination Training

Although many employers have adopted some form of anti-discrimination training for their workforce, newly enacted amendments to the FEHA require that, as of January 1, 2005, employers of 50 or more employees train and educate their supervisory employees regarding the prevention and correction of sexual harassment.24 Employers should approach this mandated training as an opportunity to avoid future litigation rather than a government-imposed burden. Instead of showing employees a video on workplace discrimination, based on unrealistic dramatizations, employers should use real world examples in their training. Borrowing facts from actual cases that have been tried before California juries is an effective technique. Role playing or group discussions can also be used to educate employees about actual situations that have been held to violate the FEHA. Today's workforce is more savvy and sophisticated than its counterpart of ten years ago when it comes to workplace discrimination. Simply showing employees a 1980's style video with dramatizations of sexual harassment misses the mark. In fact, poor quality sex discrimination training can backfire. Exposing employees to humorous or unrealistic examples of hostile work environments may encourage employees to think of hostile work environments in a humorous or unrealistic way.

In short, employers should see *Miller* less as a legal earthquake and more as a friendly wake-up call. Focusing attention on the workplace environment and the totality of the circumstances analysis will help

employers monitor whether discriminatory messages are being telegraphed in their workplace and, more importantly, will help prevent hostile work environment liability.

NOTES

1. *See, e.g.,* ""Recent Court Ruling Opens Floodgates for Sexual Harassment Suits," *The National Conservative Weekly* (Aug. 10, 2005); "State Supreme Court: Workplace Sex Can Equal Harassment," *The Mercury News* (July 18, 2005); "Can Consensual Workplace Sex Create a Hostile Workplace Environment?" CNN (at *www.cnn.com*) (July 29, 2005).
2. Miller, 30 Cal.Rptr.3d at p. 803-804.
3. *Id.* at p. 815-817.
4. Cal. Gov. Code § 12940(j)(1).
5. Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 607-608 (1989); Miller, 30 Cal.Rptr.3d at p. 810; Mogilefsky v. Superior Court 20 Cal.App.4th 1409, 1414 (1993); Beyda v. City of Los Angeles 65 Cal.App.4th 511, 516 (1998).
6. Beyda v. City Los Angeles, 65 Cal.App.4th, at p. 516, citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) [internal quotations omitted].
7. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
8. Beyda, 65 Cal.App.4th, at pp. 518-519, citing Faragher v. City of Boca Raton, 525 U.S. 775, 118 S.Ct. 2275, 2283 (1998)
9. Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 610 (1989).
10. Beyda, 65 Cal.App.4th, at p.520.
11. *Id.* at p. 519.
12. Proskel v. Gattis, 41 Cal.App.4th 1626 (1996).
13. *Id.* at p. 1630.
14. *Id.* at p. 1631.
15. Miller, 30 Cal.Rptr.3d at p. 809.
16. *Id.* at p. 817.
17. *Id.* at p. 815.
18. *Id.* at p. 812.
19. *Id.* at p. 813.
20. *Id.* at p. 816, citing Beyda, 65 Cal.App.4th at p. 519; Fisher, 21. 4 Cal.App.3d at p. 610-611.
21. Miller, 30 Cal.Rptr.3d at p. 803-804.
22. *See, e.g.,* Baskerville v. Culligan Int'l Co.,50 F.3d 428, 430 (7th Cir.1995) (actionable sexual harassment includes exposure to pornographic pictures); Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chicago, No. 03 C 0885 (N.D.Ill. Nov.1, 2004) WL 2453835, at *2 (denying summary judgment on hostile work environment claim based, in part, on the consistent presence of pornography in the workplace); Figueroa v. City of Chicago, No. 97 C 8861 (N.D.Ill. July 27, 2000) WL 1047316, at *2 (evidence considered by jury included fact that plaintiff "saw a group of coworkers viewing a pornographic magazine").
23. Cal. Labor Code § 98.6 (prohibiting discharge of employees for lawful conduct occurring during nonworking hours away from the employer's premises).
24. Cal. Gov. Code § 12950.1

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