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California Supreme Court Holds Employees Can Sue for Sexual Harassment Based on Extreme Sexual Favoritism

On July 18, 2005, the California Supreme Court permitted two female prison employees to maintain a sexual harassment suit alleging that the prison warden created a hostile environment by giving unwarranted favoritism to his female lovers. *Miller v. Department of Corrections*, No. S114097, 2005 WL 1661190 (Cal. 2005). The striking feature of this case is that the plaintiffs have viable sexual harassment claims even though no one made a sexual advance to them or directed any harassment at them. The *Miller* decision holds that an actionable sexually hostile workplace environment arises where pervasive sexual favoritism conveys the message that women are viewed as "sexual playthings" or that the way to get ahead is to have sex with the boss.

Facts

Edna Miller and Frances Mackey, employees of the California Department of Corrections, worked at a prison where the warden was having sexual affairs with three female prison employees. When one of his lovers, seeking a promotion, was interviewed by Miller, Miller got the message that the warden wanted his lover to get the promotion. The warden's other two lovers received special favors such as promotions and the privilege of reporting directly to him instead of their immediate superiors. Eventually, Miller competed with one of the lovers for a promotion. The warden was on the interviewing panel. Miller, despite her greater qualifications, lost the promotion to the warden's lover, who soon went on to become an associate warden.

The warden's sexual affairs were obvious to employees, as was his favoritism toward his lovers. Things went from bad to worse when a new female prison employee became friends with one of the warden's lovers and began interfering with Miller's job. Miller believed that the warden would not discipline this bothersome woman because of her friendship with the warden's lover. Finally, when Miller complained about the sexual favoritism to a

regional administrator, she suffered retaliation for complaining and for cooperating in the investigation. Under increased stress, she quit and sued.

Joining Miller in the suit was Frances Mackey, who also worked under the warden and knew about his affairs and sexual favoritism. She too quit after being retaliated against for participating in an investigation into his wrongdoing. She and Miller sued for retaliation and for sexual harassment forbidden by the California Fair Employment and Housing Act (FEHA).

The Court's Decision

The Court of Appeals affirmed a summary judgment for the employer, because sexual favoritism is not actionable as sexual harassment. The court's reasoning was straightforward: the female plaintiffs were in the same position as male employees who likewise had failed to receive the special treatment that the warden lavished on his lovers. While the plaintiffs may have shown unfair conduct, they could not demonstrate a hostile environment created by a pattern of harassment based on the plaintiffs' gender.

The Supreme Court of California reversed the decision, ruling, 6-0, that pervasive sexual favoritism can support a hostile workplace claim. The court relied on the EEOC's policy statement on sexual favoritism. That policy statement recognizes that "an isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their gender." The policy statement goes on to opine, however, that "if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment ... regardless of whether any objectionable conduct is directed at them."

The *Miller* court adopted the EEOC's reasoning, permitting California plaintiffs to establish employer liability wherever sexual favoritism is so widespread that it sends the "demeaning message" that management views them as "sexual playthings," or that "the way required" for women to advance in the organization is to engage in sexual conduct with their supervisors. As to the record before it, the court held that the two plaintiffs had created a triable issue whether their workplace had been sufficiently hostile.

The court brushed aside the employer's concern that regulating private, consensual relationships in the workplace contravenes a social policy favoring those relationships and forgets the fact that employment discrimination laws are not intended to create a workplace civility code. The court defended its decision by saying that it was addressing the impact of the personal relationships, not the relationships themselves, and that "the FEHA already clearly contemplates some intrusion into personal relationships," as in the example of the prohibition against *quid pro quo* harassment.

What This Means For Employers

The bad facts in *Miller* have resulted in some far-reaching law. The *Miller* decision reinforces our long-standing advice that romantic relationships between supervisors and subordinates are fraught with potential legal problems. Some employers prohibit these relationships, or at least require the supervisor to notify management to permit appropriate monitoring to prevent unfair treatment and to guard against the perception of unfairness. Employers must be cautious, however, about invading personal privacy and avoiding adverse actions based on an employee's lawful off-premises, off-duty activity.

Miller also reinforces the advice to take seriously any employee complaint of paramour favoritism. At issue now is not only the immediate effect of the individual passed over for promotion or other favorable decision, but the effect generally on employees perceiving the "demeaning message" that management treats employees as "sexual playthings." California employers thus must investigate complaints of sexual favoritism as vigorously as any claim of sexual harassment, without taking any comfort in the fact that, logically, the complainant is not really being discriminated against on the basis of his or her gender. Here, as in analogous cases of more traditional sexual harassment, employers must take appropriate remedial steps (such as transferring one of the romantically involved employees) to remediate the hostile environment.

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