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Recent California Case May Signal Expansion of Harassment Protections

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Fashion trends and cultural fads often get their start in California. If the same is true for employment law trends, that might not be such a good thing for employers.

In what may be a sign of things to come beyond California, on July 18, 2005, the California Supreme Court held for the first time that an employer may be liable for "sexual favoritism," even where the plaintiff is not the target of the sexual conduct.

In *Miller v. Department of Corrections*, 115 P.3d 77 (2005), Edna Miller sued the California Department of Corrections (Department) claiming violations of state discrimination law. Miller began working for the Department as a correctional officer in 1983. In 1994, while she was employed at the Central California Women's Facility (CCWF), she heard from other employees of the Department that chief deputy warden Lewis Kuykendall was having sexual affairs with his secretary, Kathy Bibb, and with another subordinate, associate warden Debbie Patrick. Miller alleged that she often heard Kuykendall at work arguing with Patrick concerning his relationship with Bibb. Another Department employee at CCWF, Cagie Brown, told Miller that she, too, was having an affair with Kuykendall. In 1994, Miller complained to Kuykendall's superior officer about what she considered the "inappropriate situation" created by Kuykendall's relationships with the three female coworkers. Miller was simply told that the issue had been addressed.

The Department subsequently transferred Miller to the Valley State Prison for Women (VSPW), where Kuykendall now served as warden. In May 1995, Miller served on an interview committee that evaluated Bibb's application for a promotion to the position of correctional counselor, a position that would entail a transfer to VSPW. When the interviewing panel did not select Bibb, Miller and other members of the panel were informed by an associate warden that Kuykendall wanted them to "make it happen." Miller claimed that "[t]his was ... the first of many incidents which caused me to lose faith in the system . . . and to feel somewhat powerless because of Kuykendall and his sexual relations with subordinates." Miller alleged that she was subsequently denied a promotion that went to Brown, despite Miller's higher rank, superior education and greater experience. In addition,

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Miller claimed that she observed Kuykendall and Bibb fondling each other at work-related gatherings. The evidence further showed that Department "employees were saying things like, what do I have to do, 'F' my way to the top?"

Miller and another female coworker brought suit alleging, among other things, that Kuykendall's sexual favoritism created a hostile work environment for them. The trial court determined that the alleged "sexual favoritism" did not constitute unlawful discrimination or harassment and dismissed these claims. This dismissal was affirmed by a California intermediate appellate court, and the matter was then appealed to the California Supreme Court.

On appeal, the California Supreme Court reversed the lower courts and held for the first time that "an employee may establish an actionable claim of sexual harassment . . . by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." According to the Court, a jury should decide whether Kuykendall's conduct created an environment in which the "message [was] implicitly conveyed that the managers view women as 'sexual playthings'" or that "the way for women to get ahead in the workplace is by engaging in sexual conduct" thereby "creating an atmosphere that is demeaning to women."

LESSON:

Although the *Miller* decision has garnered a lot of national and international attention, some commentators contend that it is a rather unique set of facts and limited to California. However, it is important to note that the California Supreme Court in *Miller* relied upon a policy statement issued in 1990 by the federal Equal Employment Opportunity Commission.

The EEOC's "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism" (Jan. 12, 1990) covers three topics: (1) isolated favoritism, (2) favoritism when sexual favors have been coerced, and (3) widespread favoring of consensual sexual partners. The policy statement begins with an explanation that "[a]n *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 genders."

The policy statement next explains the EEOC's position with respect to *coerced* sexual activity, including the situation in which the coercion results in employment benefits for a victim who is not complaining.

Finally, the EEOC policy statement discusses sexual favoritism that is more than isolated and that is based upon consensual affairs: "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 in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is 'sufficiently severe or pervasive "to alter the conditions of [their] employment and create an abusive working environment." ' An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them."

According to the EEOC policy statement, "[m]anagers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit 'quid pro quo' harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive."

It is important to note that this EEOC policy statement sought to interpret federal Title VII and was approved by Clarence Thomas–then the Chairperson of the federal EEOC and now a justice on the U.S. Supreme Court.

The *Miller* decision is a signal to employers throughout the United States to re-examine their harassment policies to ensure that they contain effective complaint procedures, and to determine whether it may be prudent to adopt a workplace policy that addresses even consensual relations between employees. Perhaps most importantly, employers should implement regular supervisory training so as to help ensure that work environments such as the one found in *Miller* are never allowed to exist.

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