ASAP™

A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

AUGUST 2005

The California Supreme Court recognizes "sexual favoritism" as a form of unlawful sexual harassment.

California Edition

A Littler Mendelson California-specific Newsletter

Employers Face Greater Risk from Workplace Romance:

California Supreme Court Rules that Office Affairs May Give Rise to Sexual Favoritism Claims

By Stephen C. Tedesco and Jamie M. Harding

Employees in California may now sue their employers for sexual harassment if a sexual affair between a supervisor and a subordinate results in "sexual favoritism" creating a hostile work environment for those employees not involved in the affair. A unanimous California Supreme Court in *Miller v. Department of Corrections* held that consensual sexual affairs may constitute sexual harassment if "sexual favoritism" — giving preference with regard to the terms of employment to a lover to the detriment of other employees — is sufficiently widespread to create an actionable hostile work environment under California's unlawful harassment law.

Background

In *Miller,* the plaintiffs, two former employees at the Valley State Prison for Women, alleged that the warden of the prison gave preferential treatment to other female employees with whom he was having sexual affairs, and that such conduct constituted unlawful sexual harassment. The warden had sexual affairs with three subordinates during a span of five years. These affairs were common knowledge in the workplace, and the employees involved did not attempt to keep the affairs private. The warden and one of the women were seen fondling each other at work functions. Another of the women admitted that she took advantage of her position as his lover, stating that if she did not get a certain promotion, she would "take him down" with her knowledge of "every scar on his body." The three women would also frequently squabble over him at the workplace. In addition, the plaintiffs alleged they were denied benefits given to less-qualified women who had sexual affairs with the warden and alleged they suffered from retaliation after complaining about the unfair treatment. The plaintiffs claimed they were repeatedly denied promotions that were given to the warden's lovers, although the plaintiffs had superior education, more experience, and higher ranks, and the lovers were not qualified for the promotions they received.

The trial court dismissed the plaintiffs' claims, reasoning that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair is not guilty of sexual harassment toward other non-favored employees. The court found that sexual favoritism did not constitute harassment in part because both men and women were denied the favorable treatment that was bestowed upon the supervisor's various sexual partners. The lower court also noted that neither plaintiff claimed they were subjected to unwanted sexual advances or requests for sexual favors.

In reversing the lower court's decision, the California Supreme Court recognized that a hostile work environment can be created even if the plaintiffs are never subjected to sexual advances, so long as the work atmosphere created by these affairs is demeaning to women and conveys the message that the way to get ahead is to sleep with your boss. The California Supreme Court stated that isolated instances of favoritism by a supervisor toward an employee with whom the supervisor is conducting a consensual sexual affair

ordinarily would not constitute sexual harassment. However, "when sexual favoritism in the 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."

Impact of *Miller*

While the facts in *Miller* seem more fit for a soap opera than a modern workplace, the holding in *Miller* will have a broad impact upon all workplaces. The defendants' argued that recognizing sexual favoritism as a form of sexual harassment would improperly interject the courts into private, consensual relationships which occur within a major meeting place for both working men and women — namely the workplace. The Supreme Court rejected the defendants' position, stating that it is not the relationship but its effect on the workplace that is relevant. Moreover, the Supreme Court stated the Fair Employment and Housing Act clearly contemplates some intrusion into personal relationships. Thus, any office romance between a supervisor and subordinate is subject to scrutiny and potential liability.

Liability for all office romances turns on the fine distinction between "isolated" sexual favoritism, which is not actionable, and "widespread" sexual favoritism that creates a hostile work environment. This standard virtually guarantees that any action taken by a supervisor and his or her paramour in the workplace could be subject to scrutiny and that employers will spend an increasing amount of time, energy and money defending against claims of sexual favoritism. This decision opens the way to numerous lawsuits from employees who may challenge any decision of a supervisor who is involved in, or allegedly involved in, an affair or workplace romance with another employee. Although the office affair or romance may be completely consensual, other employees who feel that the paramour received special treatment may sue. Furthermore, as the Supreme Court recognized, both men and women can be injured by sexual favoritism. This raises the specter of an entire department suing because the supervisor repeatedly favored one employee due to a romantic relationship.

Recommendations for Employers

The defendants in *Miller* were correct insofar as they said that the workplace has become a major center of social life for both men and women. It is not uncommon for employees to first meet their significant others in the workplace. Alliances, affairs and romances between employees are a fact of life. However, employers cannot completely prohibit employees from engaging in sexual affairs or romance. California Labor Code section 96(k) prohibits employers from taking any adverse actions against employees for engaging in lawful off-duty conduct by employees, such as sexual relationships, and severely limits an employer's ability to stop office affairs or romances. It is not the affair or romance that is made unlawful, but its potential impact on other employees that may create liability for employers. Thus, all employers can do is prevent the romantic relationship from effecting others in the workplace.

First, employers should treat a claim of sexual favoritism as seriously as a claim of unwanted sexual advances, and perform prompt and thorough investigations as they would for any claim of sexual harassment.

Second, employers should consider adopting appropriate non-fraternization or anti-nepotism policies which discourage office relationships, particularly between managers and subordinates. However, care must be taken as these policies may create more litigation. Requiring employees to disclose any relationship as part of the policy, and taking disciplinary action for violation of the policy, may run afoul of Labor Code section 96(k) and other privacy laws.

Third, employers should consider using consensual relationship agreements, also known as "love contracts," to ensure that if two employees choose to have a romantic relationship, the employees agree to follow certain ground rules. The love contract, pioneered by Littler Mendelson, documents that the employees' relationship is consensual, they are aware of the company's sexual harassment policies and agree to maintain proper, professional office behavior and, if the employees are in a supervisor-subordinate working relationship, both parties agree that one will transfer to another department or work group.

Finally, when conducting anti-harassment training, employers should include a discussion on sexual favoritism consistent with the Supreme Court's decision. Such a discussion is particularly prudent for any manager and supervisor trainings.

The Supreme Court's decision in *Miller* means that employers now face greater risk from workplace romances, and the decision will impact sexual harassment litigation for years to come as both employers and the courts struggle with the definition of sexual favoritism and the difference between isolated and widespread sexual favoritism.

Stephen C. Tedesco is a shareholder, and Jamie M. Harding is an associate, in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, littler@info.com, Mr. Tedesco at stedesco@littler.com or Ms. Harding at jharding@littler.com.