Law Trends

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Sexual Favoritism Revisited

Can an Office Romance Create a Hostile Environment for Co-Workers not Involved in the Romance?

By James B. Yates and A. Brooke Phelps

YES, at least in the State of California. On July 18, 2005, in a controversial decision, the California Supreme Court ruled that widespread sexual favoritism, if severe and pervasive enough, can create a hostile work environment for employees who do not benefit from the sexual favoritism and who are not even involved in the intra-office relationship. In *Miller v. Dept. of Corrections*, two female employees of a women's prison filed a claim alleging that the warden of the prison gave favorable treatment to three female employees with whom the warden was having sexual affairs. The plaintiffs were not involved in a relationship with the warden. Instead, the plaintiffs claimed that the three employees who engaged in sexual affairs with the warden were given unfair promotions over the plaintiffs, scheduling preference, reduced accountability and general favoritism. This, they claimed, created a hostile work environment that was actionable.

The California Supreme Court agreed that the plaintiffs' claims could go forward, stating:

"Although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual 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 . . . ."

Human resource professionals are familiar with the scorned lover sexual harassment scenario where a workplace romance gone bad results in complaints of sexual harassment. Employers, for the most part, have dealt with this issue with fraternization prohibitions or restrictions, transfers of affected employees, frank discussions with supervisors and training. However, most employers do not anticipate having to defend sexual harassment claims brought by co-workers who were never a party to the office romance itself.

Before *Miller*, most courts had rejected the notion that co-workers are entitled to sue for hostile work environment sexual harassment based upon a co-worker's relationship with a supervisor. Those courts reasoned that, under Title VII, a plaintiff has to establish that discrimination occurred because of gender, and if the co-employees alleged they were discriminated against because of the supervisor's preference for the employee with whom he or she was having a workplace romance, a violation of Title VII was not established. In other words, the supervisor's preference for the person (whether male or female) is what caused the favoritism, not the gender itself.

December 2005

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Although the *Miller* case seemingly opens the door to claims based on sexual favoritism, the facts in *Miller* are extreme. In *Miller*, the warden was engaged in affairs with three of his five subordinates, and the knowledge of these affairs was widespread among other employees. Furthermore, the frequency and severity of the favoritism shown to the employees with whom the warden was having sexual relationships was alleged to be extreme.

Presumably, under the Court's rationale in *Miller*, a disgruntled male co-worker would also be able to sue under the same theory.

What does this decision mean for employers outside of California?

California state and federal court decisions expanding employee rights are often harbingers for expanding claims of employer liability throughout the country. Also, the California Supreme Court found support for its decision in a 1990 federal EEOC policy statement. The fact that the California Supreme Court relied on the EEOC policy for support could lead other state and federal courts down the path to reaching similar decisions.

Moreover, the California chapter of the National Employment Lawyers Association (NELA) filed briefs in support of the plaintiffs' position in the *Miller* case. NELA is an association which advocates for employee rights and has 67 state and local affiliates with over 3,000 members. Therefore, plaintiff employment lawyers in all states will likely be including these types of claims in future cases.

What steps can an employer take to help prevent hostile environment claims based on sexual favoritism?

In a 2002 MSNBC and Elle magazine poll of 31,000 men and women, 62% admitted to having had at least one office romance during their career. Furthermore, 42% acknowledged they had sex while on the job — 16% in the boss's office. (Seven percent said they were caught.)

In light of the frequency of office romances and in the wake of *Miller*, employers should revisit policies addressing workplace fraternization. Such policies can range from a complete ban on fraternization with co-workers (probably not practical and fraught with enforcement issues) to a requirement that employees report their relationships with each other to members of management so that appropriate steps can be taken to eliminate the potential for sexual favoritism. For example, if a supervisor begins dating a subordinate and the relationship is reported to the employer, immediate steps should be taken to eliminate the supervisor's role in making employment decisions regarding the subordinate with whom he or she is having the relationship. Given the potential liability in this area, the issue of sexual favoritism should be addressed in supervisor training. Additionally, co-worker complaints regarding workplace relationships involving other employees should be addressed as harassment complaints.

Employers who wish to implement policies regulating workplace fraternization or discuss this recent legal development may contact either Mr. Yates or Ms. Phelps by calling 419-241-6000. Mr. Yates is a member of the Firm. He has been named to the 2006 Ohio Super Lawyers. Ms. Phelps is an associate of the Firm. Both practice in the Employment Section.