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Suite 100
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Ruling expands field of sexual harassment victims

Guest comment
Jeffrey Snyder

In its most important sexual harassment decision this term, the California Supreme Court has ruled that favoritism by the boss toward paramours can open up company liability to the "passed over" employees.

This is a precedent-setting case. Previous cases have rejected this theory as a basis for a claim under California sexual harassment and discrimination law. The court's decision is also important for how much it says about "hostile" working environments being created by the flaunting of sexual affairs at work.

The case (Miller v. Department of Corrections, decided July 18) was brought by two ex-employees of the state Department of Corrections. Their boss, prison warden Lewis Kuykendall, had engaged in romantic affairs with his secretary and two female associate wardens. The two women who sued claimed they were subjected to sexual discrimination and a hostile work environment because they were passed up for promotions, which went instead to Mr. Kuykendall's less-experienced paramours. The plaintiffs were also mistreated and retaliated against in other ways, allegedly because of these affairs.

The issue before the court was whether the two women who were passed over had valid sexual harassment claims despite the fact they were neither personally involved in, nor coerced into having, any relationship with Mr. Kuykendall (i.e., the traditional "quid pro quo" type of harassment). Indeed, the trial judge dismissed their lawsuit and the District Court of Appeal affirmed that dismissal, ruling that while there was evidence of favoritism, there was no recognizable legal claim for harassment or discrimination based on sex or gender. The two lower courts reasoned that all women and men who didn't sleep with the warden were treated equally, and that plaintiffs' complaint was not about sexual harassment, but unfairness, which is not protected activity under California's sexual harassment law.

The Supreme Court, however, by unanimous decision of all seven justices, held that the lower courts got it wrong. California's protections against sexual harassment are not limited to quid pro quo but range from "expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances to the creation of a work environment that is hostile or abusive on the basis of sex."

Here, the widespread favoritism shown by Warden Kuykendall and the employer was persuasive to the court.

The plaintiffs in this case alleged far more than an isolated workplace affair between the boss and a subordinate worker. Over a seven-year period, Mr. Kuykendall had simultaneous affairs with three subordinate employees, at two different prisons. He promised and granted unwarranted and unfair employment benefits to the three paramours. One of these benefits was the power to abuse other employees who complained about the affairs. When plaintiffs complained, they suffered retaliation. Mr. Kuykendall not only refused to intervene but also himself retaliated by withdrawing previously granted accommodations for one of the plaintiffs' disabilities after she cooperated with the internal affairs investigation.

There was additional evidence that advancement for women was based upon sexual favors, not merit. Mr. Kuykendall exerted his influence over the personnel selection committee, allegedly having them set aside their professional judgment to promote certain women over others, telling the committee to "make it happen." According to the court, "widespread favoritism based upon consensual sexual affairs may imbue the workplace with an atmosphere that is demeaning to women because a message is conveyed that managers view women as 'sexual playthings' or that the way required to secure advancement is to engage in sexual conduct with managers.

This is a precedent-setting case in California and will require employers to more closely monitor office relationships. According to the state attorney general's representative, "it is no longer enough to have an anti-nepotism policy. [Employers] must do more to make sure that a hostile work environment is not created in the workplace by virtue of consensual sexual relationships amongst employees."

Employers are hesitant to establish "civility" codes and no-dating policies but any office policies in this regard should require the involved employees to understand that romantic relationships are private and not to be discussed or "displayed" in the workplace. Most importantly, any supervisor-subordinate relationship needs to be watched with an objective eye kept on the fairness to all employees who may be adversely affected.

JEFFREY A. SNYDER is with Thoits, Love, Hershberger & McLean in Palo Alto. Reach him at (650) 327-4200 or via e-mail at jsnyder@thoits.com