Sexual Favoritism Claims Given New Life

While the office romance has been a longstanding source of legal concern for employers, the focus has typically been limited to those employees actually engaged in the relationship. Recently, however, the California Supreme Court expanded employers' potential liability under California's Fair Employment and Housing Act (FEHA) (in a case that may influence state courts in other jurisdictions as well) by holding that office romance can, under certain circumstances, lead to claims by non-participating employees that they have been subjected to "hostile work environment sexual harassment."

In *Miller v. Department of Corrections*, 115 P.3d 77 (Cal. 2005), the plaintiffs, two female employees of the California Department of Corrections, brought claims for sexual harassment, alleging that their supervising warden created a hostile work environment by engaging in sexual relationships with three other female co-workers. The plaintiffs alleged that, as a result of these affairs, they were passed over for promotions in favor of the warden's paramours (despite the paramours' inferior qualifications), and were given unpleasant work assignments, denied valuable work experience, and even verbally and physically assaulted by one of the paramours after they complained about the warden's obvious favoritism. The plaintiffs further alleged that they were forced to witness arguments at work between the warden and his paramours about their relationships, as well as incidents of public fondling between them. As a result of this allegedly intolerable work environment, the plaintiffs resigned from their positions after working for the Department for more than 15 and 25 years, respectively, and filed suit against the employer for hostile work environment sexual harassment under the FEHA.

Although two lower courts concluded that the plaintiffs had not made legally sufficient claims because the warden had not made sexual advances toward the plaintiffs themselves and did not treat them differently from male employees at the prison, the California Supreme Court reversed. In so doing, the Court looked to the Equal Employment Opportunity Commission's policy statement on the subject of sexual favoritism under Title VII. The Court held that:

> [A]lthough an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual 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 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.

While the *Miller* holding appears to expose employers in California to a greater range of liability for sexual harassment, there are limitations to its applicability. Specifically, the court noted that "mere office gossip" is not sufficient to subject employers to liability, just as an "isolated instance of favoritism" by a supervisor extended to his or her paramour will not ordinarily give rise to employer liability.

Furthermore, although employers in California are arguably more vulnerable to discrimination liability in the wake of the *Miller* decision, it is not clear that other courts will necessarily follow suit. In fact, as recently as August 12, 2005, the Fifth Circuit ruled that paramour favoritism does not run afoul of Title VII, the federal statute prohibiting sexual harassment. In *Wilson v. Delta State University*, No. 04-60759, *unpublished opinion* (5th Cir. 2005), the plaintiff, a male university employee, brought suit against his employer claiming unlawful retaliation for complaining that a female co-worker had received preferential treatment because of her affair with a university administrator. In rejecting this claim, the Fifth Circuit reasoned that, "When an employer discriminates in favor of a paramour, such an action is not sex-based discrimi-

nation, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender." While the *Wilson* holding may appear at first glance to contradict the *Miller* decision, it is important to note that, unlike the plaintiffs in *Miller*, who claimed that sexual favoritism was so widespread and pervasive as to create a hostile work environment, the plaintiff in *Wilson* alleged only an isolated instance of favoritism, which, even under the reasoning of *Miller*, would likely have been insufficient to state a viable claim of sexual harassment.

Therefore, although the overall trend in the law on this issue remains unsettled, it is apparent that, at the very least, non-participating employees may now have a judicially recognized basis on which to assert hostile work environment sexual harassment claims in this not uncommon circumstance. In light of this development, employers are well advised to consider implementing anti-fraternization and anti-nepotism policies, prohibiting romantic relationships between supervisors and subordinates. Employers should even consider regulating consensual romance between employees *not* in a supervisor-supervisee relationship, where the romantic link could lead to sexual favoritism, or the appearance of it. In addition, employers should take appropriate and consistent action to enforce such policies, and should consider addressing the problem of sexual favoritism in their sexual harassment trainings.

Contact Information

For questions about this issue, or any other labor and employment concerns, please contact any member of Ropes & Gray's Labor & Employment Group.