

By Larry A. Reback, Esq.

Workplace romance is a common occurrence. As people continue to spend more of their waking hours at work, it is no surprise that the line between on-duty and off-duty activity sometimes gets blurred. According to a recent survey, close to 60% workers have admitted to dating a colleague, with another 11% willing to do so. While many employers have a relaxed attitude toward dating among the staff, a recent California Supreme Court decision should encourage employers nationwide to pay closer attention to this issue.

The Case

In *Miller v. Department of Corrections*, 36 Cal.4th 446 (2005), the warden of a correctional facility had affairs with three of his female subordinates. The affairs were indiscreet and common knowledge among the staff, with one of the women even boasting that she would get promoted because she “knew every scar on [the warden’s] body.” When the paramours received promotions and other benefits over more qualified female employees, a sexual harassment lawsuit was filed. Defendants moved for summary judgment arguing that, while unfair, the warden’s conduct did not amount to sexual harassment toward the non-favored employees, who were not directly harassed and were treated no differently from the male employees.

The Supreme Court disagreed. It held that sexual favoritism arising from workplace romance may create a hostile work environment for non-favored employees. While it noted that “isolated” instances of sexual favoritism would not generally support a sexual harassment claim, the court held that “widespread” sexual favoritism can alter the working conditions and create a hostile work environment.

What exactly is meant by “widespread” sexual favoritism? The warden in *Miller* had relationships with three employees but there is nothing notable about this number. As the court pointed out, the analysis focuses not on the relationship itself, which is private, but rather on the relationship’s “effect on the workplace.” Thus, what constitutes “widespread” sexual favoritism will depend on the specific facts and circumstances presented. The facts in *Miller* were blatant; it was common knowledge that the women who became involved with the warden received undeserved promotions and benefits. The other employees could reasonably believe that sexual activity was a requirement for advancement.

What does this mean for employers?

Miller expands the scope of sexual harassment law by increasing the pool of potential claimants who may now bring a sexual harassment lawsuit. Employers should therefore pay attention to the existence of office relationships, particularly between supervisory and subordinate employees,

and be alert to any evidence of sexual favoritism. While *Miller* is a California case, its reasoning may be adopted by other jurisdictions because the court relied heavily on federal EEOC guidelines. These guidelines consider widespread sexual favoritism a potential violation of Title VII anti-discrimination rules. Thus, other state courts may similarly allow sexual harassment claims to be based on widespread sexual favoritism.

Employers, wherever located, should react quickly to evidence of sexual favoritism even if such favoritism is not "widespread." Sexual favoritism is not conducive to a harassment-free environment, even if it does not result in a sexual harassment claim. Sexual favoritism hurts employee morale and reduces productivity. It can also lead to pressure on a supervisor, who believed he/she was in a consensual relationship, to award favors to the former paramour to avoid exposure and discipline.

To reduce liability from this new class of sexual harassment claims and promote a harassment-free workplace, employers should consider the following:

Review of Company Harassment Policy. Most companies have a written policy prohibiting sexual harassment and a procedure to handle complaints. These policies should be reviewed in light of *Miller* to ensure they include a policy on employee dating.

- An outright ban on office relationships may be impractical and unreasonable, with the potential to invade employee privacy rights. Some states also preclude adverse actions against employees who engage in lawful off-duty behavior. However, a Human Resources policy that discourages inappropriate involvement between managers and direct reports should seriously be considered.
- If a relationship develops between supervisory and subordinate employees, the parties should be counseled on the company's sexual harassment policy, the need for discretion, and the harassment complaint procedure, which should be confidential and retaliation free.

Training. Employees should be instructed on company sexual harassment policy and complaint procedure. Specific training for managers and supervisors should also be provided, with a component on identifying and reporting evidence of sexual favoritism.

Review of Employment Practices Liability (EPL) Policy. EPL policies provide coverage for sexual harassment claims; however, employers and their

brokers should review the policy terms to ensure that “sexual harassment” is broadly defined and there are no relevant exclusions.

Review of HR/Legal/Risk Management Communication Protocols. Protocols to communicate employee claims, or circumstances that may lead to a claim, should be established so that risk management can ensure timely notification to the carrier. EPL insurance policies are written on a claims-made basis, which requires notification during the policy period to trigger coverage. The policies typically contain a broad definition of “claim” that is not limited to a lawsuit or administrative complaint.

In addition, many policies allow for notice of *potential* claims. If a circumstance is noticed during the policy period, the policy will respond even if the actual claim arises at a later date. This feature has the advantage of protecting current limits, as well as accessing an earlier policy that may have a lower retention. Employers should therefore promptly review suspected incidents of sexual favoritism for potential submission to the carrier.

Conclusion

Employers in California and elsewhere should be aware that workplace romances, especially between supervisors and subordinates, can provoke claims of sexual harassment from other employees. Employers should review policies on employee dating and ensure that all employees are instructed regarding company policy and harassment complaint procedures. Managerial employees should be alert to evidence of sexual favoritism and be prepared to deal effectively with any claims that may arise.

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