



HOWARD RICE ALERT

July 20, 2005

CALIFORNIA SUPREME COURT HOLDS THAT EMPLOYEE MAY ESTABLISH SEXUAL HARASSMENT BASED ON WIDESPREAD SEXUAL FAVORITISM TOWARD OTHERS

In a case that broadens the definition of sexual harassment in the workplace, employees in California can now sue for sexual harassment, even if they have never been sexually accosted, the California Supreme Court ruled on July 18, 2005.

This alert will address:

- [The recent California Supreme Court decision](#)
- [How the decision will impact employers](#)
- [Howard Rice's Interactive Sexual Harassment Prevention Training Program](#)
- [Suggested reading on the topic](#)

RECENT DEVELOPMENTS

The Court in *Miller v. Department of Corrections* held that employees can sue if they allege widespread "sexual favoritism" that creates a hostile work environment for employees not engaged in sexual affairs with supervisors. The Court said employers may be liable under the California Fair Employment and Housing Act if supervisors engage in consensual sexual relations with some employees, if those employees get extra benefits, and if employees not partaking in such relationships feel their careers are harmed. "[W]hen such sexual favoritism in a workplace is sufficiently widespread," a unanimous court said, "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 ON EMPLOYERS

Employers have always had a duty, under the Fair Employment and Housing Act, to prevent sexual harassment. Indeed, new California legislation that took effect on January 1, 2005, now requires most employers to provide two hours of training regarding sexual harassment for all supervisors by January 1, 2006, and thereafter within six months for any new supervisors. The Court's decision in *Miller* arguably expands an employer's duty to prevent sexual harassment. Now, employers must not only protect employees from unwelcome sexual advances by supervisors, they must also protect the *colleagues* of employees who willingly consent to sexual relations with supervisors.

The impact of this decision, however, will likely not be as drastic as it might appear at first blush.

First, *Miller* was a case of egregious sexual favoritism that most employers are unlikely to encounter. In *Miller*, a supervisor conducted concurrent sexual affairs with three female employees. He played blatant favorites, promoting these women over other women who were more qualified, but who were not involved in sexual affairs with the supervisor. When the women complained, they faced retaliation and demotion.

Second, the Court said that "isolated" instances of sexual favoritism may not create legal liability — even if an employee gets special benefits from an affair with a supervisor. The key is whether the favoritism is so prevalent or blatant that it creates a hostile work atmosphere for other employees by creating the atmosphere that to get ahead in the workplace, an employee must engage in sexual conduct with supervisors.

Third, the Court said that private consensual supervisor-employee affairs or mere office gossip create no liability. In *Miller*, the affairs were widely known to employees and conducted in a manner so indiscreet as to create a hostile work environment for others.

Thus, while employers must beware of sexual favoritism and while supervisor-subordinate sexual relations are usually a bad idea, employers should not face liability if they remain vigilant to the effects of consensual relationships on other employees and take appropriate steps to ensure that such relationships do not create a hostile atmosphere for these employees. Providing

training to all supervisors regarding these issues, as is now required under California law, should go a long way toward achieving this goal.

SEXUAL HARASSMENT PREVENTION TRAINING PROGRAM

The Howard Rice employment attorneys have developed interactive sexual harassment prevention training programs to help employers meet their obligations under California law to train all supervisors by January 1, 2006. For those employers who have not scheduled such training, *Miller* provides a timely reminder.

SUGGESTED READING

In reaching its decision in *Miller*, the Court relied heavily on a federal Equal Employment Opportunity Commission policy statement on sexual favoritism, "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism." The statement is available online at <http://www.eeoc.gov/policy/docs/sexualfavor.html>.

For assistance or additional information on these issues, including sexual harassment training programs, please contact **David Reis** (dreis@howardrice.com or 415-434-1600), or your usual Howard Rice attorney.

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