

LABOR AND EMPLOYMENT ALERT

RECENT EMPLOYMENT LAW DECISIONS WILL IMPACT CALIFORNIA EMPLOYERS



Three recent decisions – two by the California Supreme Court and one by the 9th Circuit Court of Appeals – set forth expansive interpretations of California and federal discrimination laws, thus broadening the bases for employer liability in California. The decisions are discussed in detail below.

Miller v. Department of Corrections

In *Miller*, the California Supreme Court allowed a hostile work environment claim to proceed based on evidence of widespread sexual favoritism arising from consensual affairs between a supervisor and several subordinates. This case marks the first time a California court has recognized a cause of action for sexual harassment based solely on favoritism to consensual sexual partners.

The plaintiffs were employees of the Department of Corrections. Their supervisor, the prison warden, was having simultaneous affairs with three other female subordinates who were co-workers of the plaintiffs. These affairs were well-known at the prison, and the warden and his “paramours” made little attempt at discretion. In fact, the warden and one of his paramours were witnessed fondling each other at social events, and the paramours squabbled over the warden in “emotional scenes” in the presence of other employees. They also bragged about their ability to use their sexual relationships with the warden to extract benefits from him.

The favoritism received by the warden’s sexual partners was well-documented and included transfers (to the same prison to which the warden had been transferred) and numerous promotions. On one occasion, the warden pressured one of the plaintiffs and other members of a personnel selection committee to set aside their professional judgment and grant one of his paramours a transfer and promotion, despite the committee’s conclusion that the individual was neither eligible nor qualified. On another occasion, the warden helped secure a promotion for a different paramour over one of the plaintiffs, despite the plaintiff’s higher rank, superior education and greater experience. Indeed, the paramour had previously told the plaintiff that

the warden would be forced to give her the promotion or she would “take him down” with her knowledge of “every scar on his body.”

The warden also refused to stop harassment by one of his paramours against the plaintiffs. The harassment included denial of certain benefits, verbal abuse, assault and false imprisonment. The warden admitted that he could take no action because of his sexual relationship with the harasser.

The plaintiffs sued the Department of Corrections, asserting that the warden’s favoritism toward his sexual partners constituted unlawful harassment. The Sacramento Superior Court granted summary judgment in favor of the defendants, and the Court of Appeal affirmed.

The Supreme Court reversed. Relying in part on a 1990 EEOC Policy Statement on the subject of sexual favoritism, the Court held that the plaintiffs had established a *prima facie* case of harassment, even though they had never been subjected to any sexual conduct or advances themselves. The Court found that the evidence was sufficient to show that the work environment was “demeaning to women,” with management sending the implicit message that women were “sexual playthings” and that the way for them to get ahead in the workplace was to engage in sexual conduct. The Court emphasized that the “widespread” sexual favoritism in this case was far more than “a supervisor engag[ing] in an isolated workplace sexual affair and accord[ing] special benefits to a sexual partner.” Indeed, the Court pointed out that an isolated instance of sexual favoritism ordinarily would *not* constitute harassment.

While the conduct in *Miller* was obviously extreme and would not be tolerated by most employers, the decision may be problematic for employers nonetheless. The Court did not clearly define the boundary between “isolated” and “widespread” sexual favoritism or the degree to which the underlying sexual affairs must be known publicly. These factors, which are now crucial to the determination of whether actionable harassment has occurred, are, by nature, fact-specific and therefore malleable. Accordingly, employers should expect that *Miller* could apply to less egregious facts, thus inviting litigation and narrowing the circumstances under which summary judgment is proper. More so than ever, therefore, employers should carefully consider their policies regarding relationships between supervisors and their subordinates.

Yanowitz v. L’Oreal

The California Supreme Court’s decision in *Yanowitz* clarifies the bounds of prohibited retaliation under the California Fair Employment and Housing Act (FEHA). FEHA prohibits an employer from discriminating against an employee because he or she opposed a forbidden practice, such as sex harassment, or participated in a proceeding regarding such a practice. In *Yanowitz*, the court addressed several important issues related to FEHA’s whistleblowing provision and, in so doing, made it easier for plaintiffs to reach juries in retaliation cases.

First, the court held that employee complaints need not be specific and unambiguous in order to be protected under FEHA. The plaintiff employee in *Yanowitz* did not specifically complain of discrimination. Rather, when asked by a supervisor to fire a productive female employee and replace her with someone more physically attractive, the plaintiff refused, insisting that she be provided with “adequate justification” for the dismissal. In finding that this conduct could be protected, even though the employee never once overtly complained of discrimination, the court explained

that it is enough that the employee “sufficiently convey[ed] [her] reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.” By focusing the inquiry on the employer’s state of mind, the court has made obtaining summary judgment more difficult. It also has raised the prospect of litigation based on employee complaints that, at first glance, appear to be unrelated to discrimination.

Second, the court considered what conduct constitutes “adverse action” sufficient to support a retaliation claim. The court rejected the Court of Appeal’s “deterrence standard,” under which any action reasonably likely to deter employees from engaging in protected whistle-blowing can support a claim. Instead, the court adopted the more narrow “materiality test,” under which the action must materially impact the terms and conditions of one’s employment. Accordingly, relatively trivial conduct that should reasonably do no more than anger or upset an employee is not actionable. The court also explained, however, that individual adverse acts that themselves are not “material” may be actionable *collectively* if they are part of a pattern of systemic retaliation. The court further found that any number of actions that are reasonably likely to affect job performance or opportunity for advancement may be actionable. Accordingly, a series of acts far short of termination or demotion – e.g., negative performance reviews and public reprobation – may suffice.

Third, the court considered the application of the “continuing violation doctrine” in the context of retaliation claims. In discrimination and harassment suits, plaintiffs often avoid statute of limitations defenses by contending that conduct which occurred outside the limitations period is nevertheless actionable because it is part of a continuing pattern of unlawful conduct. This argument is now available with respect to retaliation claims as well. Thus, because an “adverse action” may be comprised of a series of acts, the court reasoned that acts that occurred beyond the limitations period – provided they are part of ongoing retaliation – may be considered in evaluating whether actionable retaliation has occurred. As a result, the utility of the timeliness defense in FEHA retaliation cases has been limited.

EEOC v. Nat’l Educ. Ass’n, Alaska

In this case, the 9th Circuit reversed the district court’s grant of summary judgment in favor of the employer where a male boss had allegedly subjected female workers to gender- and sex-neutral bullying. In permitting the plaintiffs’ Title VII harassment claims to proceed despite the absence of any evidence of sexual animus or sex-based conduct, the court clarified “what constitutes a legally significant difference in the treatment of men and women.”

The plaintiffs are three female employees of NEA-Alaska, a labor union that employs more women than men. They allege that their boss, a man, behaved in a loud and hostile manner towards them, including by shouting, shaking his fists and invading their “personal space.” The plaintiffs testified that their boss’ behavior intimidated them and created a general sense of fear among them. The women did not allege any gender- or sex-specific conduct, however.

NEA-Alaska moved for summary judgment, and the district court granted the motion. The district court held that a reasonable trier of fact could not find that the alleged harassment was “because of sex,” as Title VII requires, because it was neither “of a sexual nature” nor motivated by sexual animus.

The 9th Circuit reversed, holding that a plaintiff may prove sex harassment under Title VII even in the absence of evidence that the harassing conduct was motivated by sexual desire or an intent to discriminate against women. More

specifically, in recognizing a “differential effects” test, the court held that “offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of *qualitative and quantitative* differences in the harassment suffered by female and male employees.”

With respect to both the quantitative and qualitative components of the inquiry, the court’s decision reflects an expansive view of what conduct amounts to actionable harassment. As for the quantitative evaluation of the alleged harassment, the court determined that, even in situations where more women than men are employed, the fact that male employees were harassed as well does not automatically negate a showing of differential treatment.

In examining whether qualitative differences existed in the treatment of men and women, the court looked beyond objective differences, i.e., whether the boss was more abusive to women than to men. The court held that differences in the *subjective effects* of the boss’s sex-neutral treatment are relevant as well: “We hold now that evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific.” Further, for purposes of evaluating such differences, the court applied a *reasonable woman* standard.

As a result of the court’s holding, conduct that is entirely sex-neutral may be actionable if it results in more severe reactions in women than men. Accordingly, this case reaffirms the Golden Rule that *all* abusive behavior in the workplace – even that which is totally unrelated to sex – should be prevented and corrected.

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