Alert

Wide Range Of Conduct Leads To Harassment Claims

By M. Carol Stevens and Alison A. Moller

California employers are questioning their harassment policies and reexamining workplace conduct following two recent court decisions that address harassment. *Miller v. Department of Corrections* expands the scope of sexual harassment to include cases arising from certain consensual workplace romances. *El-Hakem v. BJY, Inc.* widens racial harassment to include epithets that do not directly reference an individual’s race or color.

**THE CASES**

In *Miller v. Department of Corrections*, the California Supreme Court held that consensual sexual relationships in the workplace may be sexual harassment if “sexual favoritism” is pervasive enough to create a hostile work environment under existing harassment law. “Sexual favoritism” means giving preferential treatment in employment terms to a lover, to the detriment of other employees.

In *Miller*, two former employees complained that the warden of the prison where they worked gave preferential treatment to other female employees with whom he was having sexual relations. The warden had sexual relationships with three subordinates during five years. The warden did not attempt to keep the relationships private. The two employees claimed that the warden created a hostile work environment through his behavior, and also claimed that they were denied promotions and other job benefits given to other, less-qualified employees who had sexual relations with the warden.

The Court agreed that the women had suffered sexual harassment. It held that a hostile work environment can be created even if the plaintiff is not subjected to sexual advances if the work atmosphere created by the sexual conduct is demeaning to women and conveys the message that the way to advance in the workplace is to engage in sexual relations with your supervisor. The Court distinguished between isolated sexual favoritism, which does not create liability, and widespread sexual favoritism that creates a hostile work environment.

In *El-Hakem v. BJY, Inc.*, the Ninth Circuit Court of Appeals found that an employer could be liable for a supervisor’s racial discrimination based on a racially-motivated nickname, even if the epithet contains no direct reference to skin color or physical traits.®
Employee Mamdouh El-Hakem, of Arabic descent, sued his employer for racial discrimination based on his supervisor’s repeated references to him as “Manny.” El-Hakem objected to the references, but the supervisor insisted on using the non-Arabic name because he believed a “Western” name would increase El-Hakem’s chances for success and would be more acceptable to the employer’s clients. El-Hakem sued for racial harassment. The employer argued that it could not be liable for racial harassment because the conduct was not race-based. The employer claimed that racial harassment must be based on physical or genetically determined characteristics such as skin color. The court disagreed, finding that discrimination based on ethnic characteristics was actionable. A group’s ethnic characteristics include more than skin color and physical traits, and names were often a “proxy” for race and ethnicity. The court pointed out that, to be actionable, the name-calling must be sufficiently pervasive to alter the conditions of employment and create a work environment that is racially hostile to a reasonable Arab. In this case, the supervisor continued to use the nickname “Manny” after El-Hakem told him to stop, and called him by his nickname once a week in meetings for two months, and then frequently in e-mail messages. The conduct continued for almost a year.

Employers are responding to the Miller and El-Hakem decisions with many questions. Should they institute anti-nepotism policies in light of Miller’s finding that workplace romances can lead to harassment? Are previously tolerated workplace jokes and horseplay actionable harassment?

QUESTIONs AND PRACTICAL ADVICE

When Does Harassment Violate The Law?

Harassment violates state and federal law if it involves discriminatory treatment based on race, color, sex, religion, national origin, age, or disability, or if it involves retaliation for complaining about harassment or participating in a harassment investigation. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a tangible employment action such as hiring, firing, promotion, or demotion.

In the Miller case cited above, for example, the two plaintiffs claimed that they suffered a tangible employment action because they were denied promotions. They also claimed that the supervisor’s frequent displays of affection toward his paramours created a hostile work environment. The El-Hakem case was mainly a hostile work environment claim based on the frequent name-calling.

In Light Of The Miller Decision, Should An Employer Institute An Anti-Nepotism Policy?

Legal non-fraternization or anti-nepotism policies discourage office relationships between supervisors and subordinates only when such conduct affects the workplace. An employer cannot completely prohibit coworkers from engaging in sexual relationships. California Labor Code Section 96(k) prohibits employers from taking any adverse actions against employees for engaging in lawful off-duty conduct, such as sexual relationships. A non-fraternization or anti-nepotism policy may help limit liability for the type of “paramour” claims presented in Miller, but given the Labor Code protection of employees’ off-duty conduct, employers should seek legal counsel before instituting such a policy.

When Is An Employer Responsible For A Supervisor’s Harassment?

An employer is always responsible for a supervisor’s harassment if it ends in a tangible employment action. If the harassment did not result in a tangible employment action, the employer is not liable if it proves that it exercised reasonable care to prevent and promptly correct any harassment, and the employee unreasonably failed to complain to management or otherwise avoid harm.
Neither the *Miller* nor the *El-Hakem* cases reached this question. They addressed only the issue of whether the plaintiffs in those cases had made a sufficient harassment showing to proceed with their cases.

**What Should An Employer Do Once It Learns Of Possible Harassment?**

An employer should conduct a prompt and thorough investigation of harassment complaints. The employer may need to take interim measures before the investigation is completed. For example, the victim may need to be separated from the alleged harasser until the investigation is complete. This separation must not adversely affect the complaining employee. If an employer decides that harassment has occurred, it must take immediate measures to stop the harassment and make sure it does not reoccur.

**What Can Employers Do To Avoid Liability For Harassment?**

There are several steps an employer can take to reduce the likelihood and liability associated with prohibited harassment:

- **Adopt a harassment policy or policies that covers both sexual harassment and other forms of illegal harassment.**
  
  At a minimum, the policy must:
  
  - define prohibited harassment;
  - state that the employer will not permit harassment;
  - contain a procedure for complaining about harassment;
  - state that the employer will promptly investigate reported harassment and punish the wrongdoer if necessary; and
  - state that the employer will not tolerate retaliation for complaining about harassment.

- **Review the harassment training previously provided to supervisors and employees, and provide additional training if necessary.**

  Effective January 2006, all California employers with 50 or more employees must provide certain sexual harassment training. By January 2006, covered employers must provide two hours of sexual harassment training to supervisory employees who are employed as of July 1, 2005. Employers that already provided sexual harassment training to a supervisory employee after 2003 are exempt from the initial training requirement. After January 1, 2006, employers must provide training to supervisory employees once every two years.

- **Conduct a prompt and thorough investigation of all harassment complaints.**

In light of the *Miller* case, employers should treat sexual favoritism claims as seriously as claims involving unwanted sexual advances.

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## Important Dates

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<tr>
<td>November 14, 2005</td>
<td>CALPELRA Labor Relations Academy II</td>
<td>Portola Plaza Hotel, Monterey, California</td>
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<td>The Arbitration Process</td>
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<td>November 15, 2005</td>
<td>CALPELRA Labor Relations Academy III</td>
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<td>The Negotiations Process</td>
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<td>November 16-18, 2005</td>
<td>CALPELRA 30th Anniversary Training Conference</td>
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<td>Early 2006</td>
<td>CALPELRA Advanced Labor Relations Academy V</td>
<td>Cerritos Public Library, Cerritos, California</td>
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For further information contact: CALPELRA c/o Kay & Stevens  
545 Middlefield Road, Suite 180, Menlo Park, California 94025; (650) 327-2672  
calpera@calpera.org; http://www.calpera.org

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