California’s most talked-about EPL case

By Louis H. Castoria

When California Supreme Court Chief Justice Ronald George was recently asked what he thought to be the 12 most important decisions he has written throughout his 10 years as the head of the state’s judicial system, he listed one employment practices liability case among them: *Miller v. Department of Corrections*, decided 18 months ago. Perhaps he had the *Miller* case in mind when he told the interviewer, “So to a certain extent, a judge will engage in rulings that by their very nature are going to be controversial because they are plowing new ground, even if it’s just applying established principles in a new context.” (29 *Los Angeles Lawyer* 24, p. 28.)

*Miller* is one of those EPL decisions that puts a new twist on the all-too-familiar story of sexual relations in the workplace between people of unequal power, leading to litigation. In the archetypical EPL suit, the supervisory person uses his/her position to coerce sexual favors from a subordinate (a *quid pro quo* demand), or makes the workplace so intolerable through such coercion that the subordinate must leave. That, at least, is the scenario played out before juries throughout the country every day, though some EPL cases prove to be no more than litigation blackmail, fueled by statutes that can grant a prevailing plaintiff his/her attorney’s fees in amounts that can bear no rational relation to the damages awarded.

But in *Miller*, there was no *quid* demanded from the plaintiffs, and no *quo* received from them. The scoundrel in the piece, the warden of a state penitentiary, had, indeed, had several sexual relationships with other women prison officials, but not with either of the plaintiffs, nor did he approach them for such relationships. Plaintiffs’ claim, brought under California’s Fair Employment and Housing Act (“FEHA,” Cal. Govt. Code §12900 et seq.), was that the warden followed through on his promises to his prison paramours, granting them promotions and thus injuring the plaintiffs’ careers and creating a sexually hostile work environment. (Male employees with equal qualifications for promotion were likewise passed over in favor of the warden’s favorites, but there were no male plaintiffs in the case.)

The Sacramento trial judge who heard the defendants’ summary judgment motion held that in the absence of sexual demands or other direct acts of harassment upon the plaintiffs, they had no case. The Court of Appeal, Third District, affirmed, setting the stage for the California Supreme Court to decide whether the California statute protects workers against sexual predators who favor other workers based, at least allegedly, on their having acceded to sexual advances.

Relying in part on a 1990 policy statement by the EEOC, penned by then-Chairman Clarence Thomas, Chief Justice George, writing for a unanimous court, reversed the grant of summary judgment, thus sending the case back to the Sacramento Superior Court for further proceedings:

> [W]e conclude that, although 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 to engage in sexual conduct with their supervisors or the management.


> [W]hether or not a jury or a court ultimately concludes defendants' conduct constituted sexual harassment, employees such as plaintiffs reasonably could believe they are making a claim of sexual harassment in violation of the FEHA when they complain of sexual favoritism in their workplace. Although plaintiffs may not have recited the specific words ‘sexual discrimination’ or ‘sexual harassment,’ the nature of their complaint certainly fell within the general purview of the FEHA, especially when we recall that this case is before us on review of a grant of summary judgment.

*Miller, supra*, 35 Cal.4th 446, 475. The court went on to treat plaintiffs’ claim as one for retaliation because they had complained about the evident sexual favoritism at the prison before filing suit.

When does sexual favoritism become “sufficiently widespread” to trigger a right to sue by disfavored employees? One federal district court in California applied *Miller* in less egregious circumstances. In *Knadler v. Furth*, a Northern District of California trial court considered
whether the Miller decision should be applied in a case where the improper conduct was less pervasive than in Miller. Knadler, an Asian-American paralegal, complained that on two occasions, his supervisor referred to him as “Cheez-Whiz,” which he took as a racial epithet, and that a female lawyer at the firm who had a romantic relationship with the supervisor had used that relationship to make Knadler the scapegoat for her own mistakes at work. The court found this record unpersuasive and granted summary judgment: “There is no dispute that Furth’s relationship with [the female attorney] was a private one although the subject of office gossip. The record is lacking in evidence that would lead a reasonable trier of fact to conclude that women were ‘sexual playthings’ at the Furth Firm, or that the way for them to get ahead at the firm was to engage in sexual conduct with supervisors.”

Perhaps the lesson to be learned from these two cases is that it is easier to obtain summary judgment in a paramour-favoritism case in federal court than in California state courts, and the obvious lesson that workplace romances, consensual or coerced, can lead to claims by parties other than the participants.

The modern office is a microcosm of society, and as such it contains the attitudes, both positive and negative, of all its members. As the Miller case demonstrates, we have not yet learned to check our predilections at the office door before entering. Maybe that is why the case continues to generate much discussion, because it reminds us of the law of unanticipated consequences.


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