

Law Report

LEGAL NEWSLETTER

VOLUME 6, ISSUE 4

SEXUAL FAVORITISM IN THE WORKPLACE

New Court Decision Requires Businesses to Monitor Consensual Romantic Relations Between Supervisors and Subordinates

Last year, we published an article in this newsletter ("Love Contracts in the Workplace," vol. 6, issue 2), detailing the boundaries of a business' ability to control consensual romantic relations between supervisors and subordinates through the growing phenomenon of written "love contracts" in the workplace. Combined with a sensible published policy on the regulation of relationships between managers and junior employees, such "love agreements" establish in advance the foundation for resolving the potentially explosive conflict between a worker's right to privacy and an employer's prerogative in maintaining a productive, distraction-free work environment.

A recent decision from the California Supreme Court – *Miller v. Department of Corrections* – has found an employer can be liable for condoning a pattern of workplace favoritism granted to those employees carrying on consensual romantic relationships with company managers. Employees, whether male or female, who are offended by such favoritism now have potential sexual harassment claims for the adverse effects of such consensual romances. This new development underscores

the importance of strong company policy regulating the unprofessional effects of romance in the workplace.

In 2005, the California Supreme Court decided an employer can be liable for condoning a pattern of workplace favoritism granted to those employees carrying on consensual romantic relationships with company managers

The Employer's Dilemma in Consensual Relationships between Supervisors and Subordinates: Federal and state laws protect workers from sexual harassment in the workplace. Thus, a business can be liable to an employee who establishes that the company condoned a sexually hostile or offensive work environment or who establishes that a supervisor utilized job security or advancement as leverage to obtain sexual favors from

that employee.

Such consequences can make employers understandably nervous about dating between employees. A company's executives may consider they cannot "regulate" intimate, off-hours activities by consenting adults. Yet, a consensual relationship between a supervisor and a subordinate that blossoms in the spring might sour by summer, resulting in the subordinate's allegations that the business should be responsible for the supervisor's supposedly "hostile," "offensive" or otherwise unlawful actions.

An employer can mitigate such potential dynamite by establishing a "love contract" between the consenting partners in the relationship, placing in writing the company ground rules between a supervisor and his/her junior employee before the romantic relationship has any opportunity to sour. Among other things, the terms can include parties' (i) acknowledgment that their relationship is indeed fully consensual and voluntary; (ii) confirmation of their duties to

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MANDATORY SEXUAL HARASSMENT TRAINING IN CALIFORNIA

State Official Advises Larger Employers Who Missed the January 1, 2006 Deadline Should Promptly Arrange for the Training

California continues among the leaders in state regulation of the workplace. Perhaps the most significant 2005 development in California's employment-related laws was the mandatory sexual harassment training required by January 1, 2006 for all supervisors in companies with 50 or more employees or independent contractors. Fair Employment and Housing Act (FEHA), California Government Code section 12950.1.

The California Department of Fair

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The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

LAW OFFICES OF TIMOTHY BOWLES, P.C.

ONE SOUTH FAIR OAKS AVE., SUITE 301, PASADENA, CA 91105 • TELEPHONE: (626) 583-6600 • FAX: (626) 583-6605
tbowles@tbowleslaw.com • www.tbowleslaw.com

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immediately inform management if they decide to call off the relationship; and (iii) agreement that the company has the discretion to take whatever management action it reasonably finds necessary to limit workplace disruption in the event of a break-up. Such action may include transfer of one or both parties to other departments, requested resignation or lay-off. See, *Bowles Law Report*, vol. 6, issue 2, “Love Contracts in the Workplace.”

While an employer should respect the truly private matters of any employee, employees do not and should not expect unrestricted privacy on consensual romantic relations between workers

Sexual Favoritism Toward Some Workers May Constitute Sexual Harassment Against Other Employees: California employers must also now be mindful that such consensual relationships may create sexual harassment claims from those workers not involved in the sexual conduct. In *Miller v. Department of Corrections (2005) 36 California Reports, Fourth Series (Cal.4th) 446*, two female correctional officers, Edna Miller and Frances Mackey, brought a sexual discrimination, harassment and retaliation claim against the California Department of Corrections. Neither Miller nor Mackey complained they had been the targets of unwanted sexual advances. Instead, they cited the behavior of

deputy chief warden Lewis Kuykendall in carrying on consensual romantic relationships with three other women in the workplace, his secretary Kathy Bibb, another subordinate, associate warden Debbie Patrick, and Department employee Cagie Brown.

While private romantic relations between consenting adults is normally the personal business of the employee/participants off-hours and off-premises, Miller and Mackey related circumstances that went far beyond a discreet relationship. Among other things, Ms. Bibb and Ms. Brown both bragged of their power over Kuykendall, obtained from their having slept with him. Ms. Brown admitted Kuykendall pulled strings for her promotion to captain. Ms. Brown was chosen over plaintiff Ms. Miller in spite of Miller’s higher seniority, with Mr. Kuykendall sitting on the interview panel. Ms. Brown was later promoted to associate warden on an unusually rapid pace of advancement. Bibb, Brown and Patrick all squabbled and fought over Kuykendall in the workplace. After she protested the favoritism, the Department retaliated against Ms. Miller, including reduction of supervisory duties, additional drudge work, and unjustified criticisms. Ms. Brown publicly demeaned Ms. Mackey and interfered with her duties.

On these circumstances, the California Supreme Court decided for the first time that sexual favoritism can create a sexual harassment claim in the workplace. The Court found 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 sex-

ual 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 by engaging in sexual conduct with their supervisors or the management.”

The Court concluded: “both men and women who find this offensive can establish a violation if the conduct is sufficiently severe or pervasive to alter the conditions of their employment and create an abusive working environment.”

Workplace policy on romantic relations between workers should establish an appropriate balance between the truly private matters of individuals and the legitimate rights of the employer to prevent and curb the creation of a hostile and abusive workplace environment

Employers Need Strong Policy Regulating Workplace Romance and Prohibiting Sexual Favoritism: As outlined in last year’s “Love Contracts in the Workplace” article, there are several federal and California appeals court decisions that provide guidelines for an employer’s internal policy limiting dating between supervisors and their juniors. Among other things, an employer can specify:

● *No Expectation of Absolute Privacy:* While the

company respects the truly private matters of any employee, employees do not and should not expect unrestricted privacy on consensual romantic relations between workers as they can negatively impact company morale, including the creation of misunderstanding, perception of favoritism, or accusation of sexual harassment;

● *Company Ability to Regulate Relations Between a Supervisor and Subordinate:* Thus, if a consensual intimate relationship between a supervisor and any employee within that supervisor’s area of responsibility is desired, the supervisor must immediately bring this to the attention of human resources for any action the company, in its sole discretion, finds appropriate. Such action may include, but is not limited to, transfer, requested resignation or lay-off of one or both of the individuals involved;

● *Company May Prohibit a Potentially Disruptive Relationship Under Correct Circumstances:* If, in its sole discretion, the company concludes that any prospective or actual romantic relationship between unmarried employees is likely to affect negatively – or is affecting negatively – company morale, company may prohibit such relationship as a condition of continuing employment for either or both employees;

● *Company May Require “Love Contract” as a Condition of Condoning a Relationship:* Moreover, in the event the company opts to tolerate a consensual romantic relationship between employees, company, in its sole discretion, may require the participants’ written acknowledgment of the consensual nature of the relationship, of its potential negative impact on company

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morale, and of their respective post-relationship duties if and when they ever decide to call that relationship off; and

● *Company Should Outlaw Sexual Favoritism in the Workplace:* There should be no sexual favoritism in company operations. The common or prevalent granting of employment benefits or advantages to those engaging in consensual romantic relationships, as such circumstances can create an atmosphere offensive to other employees of either gender and detrimental to workplace production.

Conclusion: The California Supreme Court’s 2005 decision in *Mackey v. Department of Corrections* found an employer potentially liable for sexual harassment of third party employees for condoning a supervisor’s string of consensual sexual relationships with – and resulting favoritism toward – other female workers. This decision increases markedly employer responsibility for monitoring and controlling such relationships in the workplace, foremost through strong written policy expressing no tolerance for such favoritism.

Such policy does not absolutely prohibit romantic relations between supervisors and subordinates. Rather, it seeks to establish an appropriate balance between the truly private matters of individuals and the legitimate rights of the employer to prevent and curb the creation of a hostile and abusive workplace environment.

If you would like any further information regarding implementation of such a policy or accompanying agreements between individual employees, please contact our office. ■

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Employment and Housing (DFEH) enforces FEHA. The Department does not yet impose any particular fine or other penalty for missing the deadline. However, Janie Siess, the DFEH’s Assistant Deputy Director for Program and Policy Development, observes it is unlawful for any California employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

Government Code section 12940(j), (k). Thus, Ms. Siess confirms that in the event of a *future* sexual harassment claim, an employer’s missing the January 1, 2006 deadline for the required training could result in increased liability, including possible punitive damages, since that training is by definition a reasonable preventative step against discrimination and harassment. This is particularly true for an employer who chooses to ignore the requirement and takes no prompt action to remedy the error. It thus behooves every covered employer that missed the deadline to arrange for the required training as soon as possible.

Periodic Required Training in Sexual Harassment Prevention and Handling: FEHA requires covered companies to provide a minimum two hours of such training for supervisors employed as of July 1, 2005. For any person hired as or promoted to supervisor after July 1, the employer must provide training within six months of the hire or promotion. Upon any initial training, the law requires recurring training of each supervisor every other year. As the training must include information and practical guidance on the applicable federal and state statutory laws and case decisions, it should



"Miss Dugan, will you send someone in here who can distinguish right from wrong?"

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be conducted by a qualified legal professional.

Nature of the Required Training: Government Code section 12950.1 specifies the required training is “at least two hours of classroom or other effective interactive training and education regarding sexual harassment ... The training and education required by this section shall include information and practical guidance regarding the federal and state statutory

The Department of Fair Employment and Housing (DFEH) warns it is unlawful for any California employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring

provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination,

and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

Definition of “Supervisor” Under the Law: FEHA defines “supervisor” as any individual entrusted with authority and independent judgment: (i) “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees”; (ii) to direct employees or to adjust their grievances; or (iii) to effectively recommend any action in (i) or (ii) above. Government Code section 12926(r). Thus, administrative assistants, with the ability to make recommendations to their managers, must receive such training.

Employers Covered by the New Law: For this new training requirement only, FEHA curiously defines “employer” as meaning any person “regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract.” Government Code section 12950.1(c). Thus, as currently written, the law directs that an employer with fewer than 50 employees but with more than 50 independent contractors providing its services (for example, a general

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LAW OFFICES OF TIMOTHY BOWLES, P.C.

ONE SOUTH FAIR OAKS AVE., SUITE 301
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building contractor regularly hiring 50 or more independently licensed subcontractors) would still have to provide the required harassment training for its employed supervisors.

Consequences for Non-Compliance: The new law does not provide any particular penalty for non-compliance. However, if the California Fair Employment and Housing Commission finds an employer in violation, it is required to “issue an order requiring the employer to comply with these requirements.” Government Code section 12950.1(e).

FEHA makes it unlawful for any employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

Government Code section 12940(j), (k). However, while failure to provide the harassment training required by Government Code section 12950.1 could contribute to a finding that the employer failed to take all reasonable steps necessary to prevent FEHA discrimination or harassment, such failure “shall not in and of itself result in the liability of any employer ... [for] sexual harassment.” Government Code section 12950.1(d). On the other hand, an employer’s provision of such training does not insulate that employer from sexual harassment liability. *Id.*

Even if an employer missed the January 1, 2006 deadline, it would be foolish for the company to ignore these training requirements on the assumption there are no immediate consequences for a violation. The new law

also specifies that the required training and education “is intended to establish a *minimum threshold* and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.” Government Code section 12950.1(f) (emphasis supplied). Thus, an employer’s program to ensure that its supervisors receive appreciably more training than this new statutory minimum is the best policy to reduce to near zero the potential for allegations the company failed to take its expected steps to prevent workplace discrimination and harassment.

Employers That Missed the Deadline Should Promptly Arrange for the Required Training: As the DFEH’s Janie Siess observes, an employer that missed the January 1, 2006 deadline for this mandatory training should promptly arrange to correct this mistake. Otherwise, in event of a later sexual harassment claim, the company is in danger of a finding that it intentionally ignored a plainly stated legal requirement to take this reasonable step to prevent an abusive, unlawful environment in its workplace. This could create significant punitive damages liability.

We have delivered 30 such seminars over the past three months, each of them informative, entertaining, and well-praised. If you would like any further information regarding our provision of this required training, please contact our office. ■