July 2005

CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
Suite 420
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037-1175
202.861.0900

EBGLAW.COM

THE CALIFORNIA SUPREME COURT HOLDS THAT "FAVORITISM" SUPPORTS CLAIM FOR SEXUAL HARASSMENT

On July 18, 2005, the California Supreme Court held that evidence of widespread sexual favoritism by a supervisor toward his paramours can be used to support a claim for "hostile environment" sexual harassment by male and female employees who were not themselves subjected to sexual advances, and who did not have sexual relationships with the manager.

In *Miller v. Department of Corrections, et al.*, the Court reversed a summary judgment granted in favor of the employer and found that a triable issue of fact existed as to whether the supervisor's inappropriate behavior, as well as the improper behavior of his sexual partners, was severe and pervasive enough to interfere with the ability of other employees to perform their jobs.

The plaintiffs, Edna Miller and Frances Mackey, were Department of Corrections employees last employed at the Valley State Prison for Women. They alleged in their complaint that they were sexually harassed, discriminated against because of their sex, and retaliated against for complaining about the harassment and discrimination. Miller and Mackey alleged that the prison warden, Lewis Kuykendall, had consensual relationships with three female prison employees simultaneously, and that Kuykendall provided these employees with work-related benefits and privileges that he did not provide to other employees.

Miller alleged that (1) on two occasions, she was passed over for promotion in favor of one of Kuykendall's girlfriends; (2) Kuykendall pressured her to agree to transfer and promote one of his girlfriends; (3) Kuykendall condoned harassment and retaliatory conduct by one of his girlfriends against Miller because Miller complained about Kuykendall's improper behavior; (4) Kuykendall and one of his girlfriends publicly fondled one another at work-related gatherings; (5) Kuykendall refused to stop his paramours from bragging about their relationships with him and refused to address the "jealous scenes" between his sexual partners at work; and (6) Kuykendall failed to take action when one of his girlfriends physically assaulted Miller. Mackey's allegations consisted primarily of

claims that Kuykendall and his sexual partners retaliated against her because she complained about unfair and demeaning treatment.

In *Miller*, the Court reaffirmed the basic principle that isolated instances of, and office gossip regarding, favoritism by a manager toward an employee with whom the manager is having a consensual relationship do not constitute sexual harassment. However, the Court concluded that favoritism that is so widespread and well-known among the employees can constitute actionable hostile environment harassment where the demeaning message to female employees is that they are viewed as "sexual playthings" by management, or that the way for women to advance their careers is by engaging in sexual conduct with their supervisors.

In overruling the appellate court's decision, the Supreme Court relied on the Equal Employment Opportunity Commission's ("EEOC") 1990 "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism." (A copy of the Policy Guidance is available at ***www.eeoc.gov/policy/docs/sexualfavor.html***). In the Policy Guidance, the EEOC concluded that an isolated incident of favoritism by a supervisor towards a sexual partner does not constitute unlawful discrimination or harassment under Title VII.

However, the EEOC concluded, and the *Miller* Court agreed, that: "[i]f favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them . . . In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women. 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."' The *Miller* Court also concluded that the EEOC Policy Guidance is consistent with California judicial precedent on the issue of sexual favoritism.

While the decision in *Miller* is, arguably, a case of "bad facts making bad law," employers should take heed of the Court's ruling in this case because it implicitly encourages sexual harassment claims by employees who were not themselves subject to improper conduct, but who find the sexual relationships of others create a work environment that is demeaning to women.

Further, while the Court was careful to avoid holding that intimate relationships that are consensual and private between managers and employees could create a cause of action for sexual harassment by other employees, the Court stated that "it is not the relationship [between the manager and the employee], but its effect on the workplace, that is relevant under the applicable legal standard." Unfortunately, this *dicta* by the Court could open the door for harassment claims by employees who simply feel that any consensual relationship between a supervisor and a subordinate adversely affects their work environment; even if such a relationship is not on "public display" as were the relationships Kuykendall had with his subordinates.

In order to avoid problems caused by personal relationships between managers and employees, Companies should ensure that their sexual and unlawful harassment policies cover unlawful favoritism, and that they have established internal guidelines and/or policies for dealing with such personal relationships. In addition, employers should conduct harassment training for their managers and supervisors (especially if the

employer is covered by the mandatory training requirements of California *Government Code* Section 12950, et seq.) to ensure that all supervisory personnel understand their obligations under the law and under the employer's policies.

* * *

If you have any questions about the proposed California meal period regulation, please contact **Betsy Johnson** in our **Los Angeles** office at 310/556-8861 or at **ejohnson@ebglaw.com**, or contact **Steven Blackburn** in our **San Francisco** office at 415/398-3500 or **sblackburn@ebglaw.com.**

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.