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THE LABORING OAR

How To Navigate Your Way Through Employment Law

We hope the September edition of *The Laboring Oar* is relevant to your business. Please let me know if there are any topics you would like me to address in future issues.

The Latest News on Sexual Harassment Law

By Olivia Goodkin, Esq.

There are two types of sexual harassment: (1) quid pro quo; and (2) hostile environment. "Quid pro quo" occurs when a supervisor demands sexual favors in exchange for employment or a raise, bonus, promotion or other favorable treatment. Sexual harassment based on a theory of "hostile environment" traditionally has meant that words, physical conduct and/or visual slurs have created a workplace hostile to one or the other gender.

Two recently decided cases clarify and somewhat expand the definition of sexual harassment. One case concerns a common scenario of the angry, screaming boss. The other case involves a supervisor engaged in sexual relationships with three different subordinates at work.

Screaming and Foul Language, if Directed Primarily at One Sex and Impacting Primarily One Sex, Constitutes Actionable Sexual Harassment.

I have always told clients that yelling and profanity alone did not constitute sexual harassment. The remedy for an employee who dislikes a screaming boss is to quit.

My advice now needs to be more cautious. In the case of EEOC v. National Education Association, the federal court of appeals for the ninth circuit decided that if hostile remarks and swearing are directed mostly to women, as it appeared to be in the case at hand, it could constitute sexual harassment.

Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the hiring and termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their valuable intellectual property.

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What was the Wrongful Conduct in the National Education Association Case?

The supervisor working for the National Education Association had a history of yelling and swearing at female employees. He also leaned across tables and shook his fists at the female employees. None of his comments included anything sex or gender related. He was just an angry person, although the males at the office were far less often the targets of his anger.

The court found that even if the manager did not intend to harass the female employees or drive them from the workplace, if his conduct had that effect, the company could be liable for his actions.

Consensual Sexual Relationships Can Create a Hostile Work Environment

In another significant case, the California Supreme Court decided that a hostile environment was created when a

supervisor had multiple sexual relationships with women at work, and then treated them favorably. In Edna Miller v. Department of Corrections, the chief deputy warden of a prison had sexual relations with three different subordinates.

Both the warden and the women manipulated the workplace to favor the women engaging in the relationships over the other women working at the prison. For instance, one of the women who had had sexual relations with the warden told another woman that the warden would be forced to give her a promotion, or she would "take him down" with her knowledge of "every scar on his body."

Indeed, the three women in relationships with the warden were promoted over women who were better qualified and had seniority.

Even if Women are Not Subject to Sexual Propositions, a Supervisor's Sexual Relationship with Another Woman May Be Considered Hostile.

The Edna Miller court held that the warden's sexual favoritism was widespread enough to constitute a hostile work environment. Specifically, the warden's conduct conveyed the message that the women were sexual playthings or that the way for women to get ahead was to engage in sexual conduct. Interestingly, the sexual relationships created a hostile work environment even though the female complainants had not themselves been sexually propositioned.

What Should Employers Do?

First, employers need to rid the workplace, as much as possible, of generally hostile behavior. Profanity, yelling, physical closeness or intimidation, even if on its face is not directed to a particular person or group of persons, may have an effect on one gender as opposed to the other. If so, a claim could be made that a hostile work environment exists. Employees that violate a policy against hostile conduct should be disciplined.

Second, how can employers regulate sexual relationships among employees? In short, you can't! However, what you can do is make sure that all employment decisions, such as promotions, raises and lay-offs, are made in an even-handed manner and by someone who is not sexually involved with any of the persons who are the subject of the proposed employment action.

Finally, remember to have regular educational seminars for your entire staff regarding appropriate workplace conduct. California law requires employers to educate their employees regarding harassment laws and, in any event, education may prevent harassment from occurring in the first place.

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