



Harassment Update: Recent Cases Highlight Employer Liability for Harassment

By Nichole Chiappini

Two recent court decisions, one from the Court of Appeals for the ninth Circuit and the other from the Supreme Court of California, provide timely reminders to employers about their responsibility to maintain a harassment-free workplace. The Ninth Circuit decision, *Galdamez v. Potter*, reminds employers that they can be held liable if their employees are harassed by customers. The California decision, *Miller v. Department of Corrections*, instructs employers that they can be held liable for harassment if supervisory favoritism towards subordinates with whom supervisors are having consensual relationships is widespread.

Galdamez v. Potter. The plaintiff in *Galdamez* was born in South America and spoke with a discernible accent. She became postmaster of a U.S. Postal Service office in a rural Oregon town in 1993. Upon becoming postmaster, she immediately began making changes that were not popular with Postal Customers (e.g., insisting on timely payment of post office box fees). Customers responded to the unpopular changes by making hostile comments about the plaintiff based on her race, accent and national origin. They also vandalized her car and made repeated threats to her life and safety, including an anonymous letter threatening to “get rid of you foreigner.” When the plaintiff reported the harassment to her supervisors, they responded by telling her that she was in a “redneck town,” that she was “tough” enough to deal with the treatment, and that she should “grin and bear” the racist remarks and harassment. The supervisors later claimed they did not think they had the same duty to investigate claims of racial harassment as they had to investigate claims of sexual harassment.

The plaintiff sued the Postal Service under Title VII, alleging that it discriminated against her based on her race and national origin when it failed to investigate and rectify the harassment she was experiencing. At trial, the district court refused to instruct the jury that the Postal Service had a duty to investigate and remedy harassment by customers. The district court’s refusal was based on its belief that Title VII does not provide a claim for failure to investigate and remedy harassment by customers unless the failure to investigate is itself motivated by discriminatory animus. The Ninth Circuit reversed the district court’s decision, emphasizing its prior decisions that establish that an employer may be held liable for harassment of its employees by third-parties if the employer condones the conduct by failing to investigate and remedy it after learning of it. The Court held that once the Postal Service knew, or reasonably should have known, about what the plaintiff was experiencing, it was required to take reasonable steps within its power to address the problem. The Court noted that the “reasonableness” of the Postal Service’s remedial steps would depend on its ability to stop the harassment and the promptness of the response.

Miller v. Department of Corrections.¹ The plaintiffs in *Miller*, two female correctional employees, claimed that they were subjected to sexual harassment because the warden of the prison they worked at gave favorable treatment to three female employees

¹Although *Miller* is a California decision stemming from California’s anti-harassment law, it is relevant to Washington because California’s anti-harassment law is similar to both the Washington Law Against Discrimination and Title VII, and the Court based much of its reasoning in *Miller* on the EEOC’s interpretation of Title VII.

with whom he was having consensual sexual affairs. The warden's favoritism prevented the plaintiffs from receiving merit-based promotions and caused them to be subjected to repeated harassment by one of the women with whom he was having an affair. The trial court dismissed the plaintiffs' claim, finding that the warden's favoritism did not constitute sexual harassment. Affirming the trial court, the appellate court concluded that a supervisor who grants favorable employment opportunities to a person he or she is having a sexual relationship with, does not commit sexual harassment toward non-favored employees.

The California Supreme Court reversed the appellate court. It concluded that, although an isolated instance of affair-based favoritism generally does not constitute sexual harassment, when such favoritism is widespread it may create a hostile work environment in which the demeaning message is conveyed to employees that they are "sexual playthings" or that the way to get ahead is to have sex with supervisors. In reaching its conclusion, the court relied heavily on an EEOC policy statement that addressed sexual favoritism under Title VII. The policy statement explains that although an isolated instance of supervisory favoritism toward a subordinate lover may be unfair, it does not discriminate against men or women because both are disadvantaged for reasons other than their gender. However, if favoritism based on consensual affairs is widespread in a workplace, both male and female employees who do not welcome the conduct can establish a claim for a hostile environment even if objectionable conduct was never directed toward them. Following the EEOC's guidance, the Court determined that an employee may establish a claim of sexual harassment by demonstrating that widespread sexual favoritism was severe and pervasive enough to alter his or her working conditions and create a hostile work environment.

What *Galamez* and *Miller* Mean to Employers.

- ✓ Employers need to investigate and evaluate all allegations of harassment based on protected status, not just those based on sex.
- ✓ An employer's duty to investigate and take remedial measures is triggered whenever it learns, or reasonably should have learned, about the harassing behavior, regardless of whether the alleged harasser is a co-worker or supervisor of the complainant, or customer/client of the employer.
- ✓ If a supervisor shows favoritism to a subordinate that he or she is having a relationship with, the employer should investigate and take action to end the favoritism. Employers are also encouraged to have a policy that discourages or prohibits supervisors from having relationships with subordinates in the first place.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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