



CONSENSUAL AFFAIR WITH BOSS Brings Sex Harrassment Rulings



Chip Storey
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third parties of "widespread
sexual favoritism."

In reportedly the first case of its type in the U.S., the California Supreme Court has interpreted California's state law to allow unaffected employees to sue for hostile environment sex harassment when the boss has a consensual affair with another worker. Miller v. Department of Corrections, 97 FEP Cases 258 (7/18/05). The case involved consensual affairs by a prison warden with subordinates, and the three women involved argued about the warden and bragged about their power to

extort benefits from him. The California court ruled that such a case of pervasive sexual favoritism rises to a level of sexual harassment because it creates an 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 work place is by engaging in sexual conduct with their supervisors or the management."

The California Supreme Court is apparently the only appeals court that adopts an old EEOC policy, that widespread sexual favoritism may constitute hostile environment harassment. Management has always been concerned about workplace affairs between supervisors and subordinates, fearing that claims could later be made that the conduct constituted unwelcome harassment. In an effort to overcome this particular problem, many employers require disclosure of consensual relationships, and some employers have resorted to drafting "love contracts" that, among other things, acknowledge

the relationship, and obtain both parties' agreement to comply with the company's sexual harassment policy. But the California case creates a new problem, because even if it is a welcomed relationship between a manager and a subordinate it is not a defense to a claim by third parties of "widespread sexual favoritism."

Various surveys show that around 58 percent of employees have dated someone at work. Surveys also have found that 14 percent had dated a boss or a superior while 19 percent had dated a subordinate. Further, an overwhelming majority of employees (75 percent) apparently believe they should be able to date anyone they wish at work, and 46 percent prefer to keep their relationship secret.

Compounding the problem is that it is difficult, if not impossible, to prevent such relationships as employees work long hours together and socialize after work. They drive and eat meals together, take trips, etc., and of course under the equal employment opportunity laws, there is no way to avoid such interaction.

Although the EEOC has endorsed the concept in the recent ruling, other state and federal courts generally follow rulings such as that in Schobert v. Illinois Department of Transportation, 304 F. 3d 725 (C.A. 7, 2002). In that case, the Seventh Circuit rejected the plaintiff's argument that the employer's favoring the paramour over other employees discriminated against them. "Title VII does not prevent any employers from favoring employees because of personal relationships," the

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KNOW YOUR ATTORNEY

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court stated. "Whether the employer grants the employment perks to an employee because she is a protege, an old friend, a close relative, or a love interest, that special treatment is permissible so long as it is not based on an impermissible classification."

Editors Note - This case will place additional pressure on employers to institute bans on dating and perhaps other fraternizing between supervisors and their subordinates. Whether such bans are required by law or not, they are advisable not only because of legal implications, but because undue fraternization between supervisors and subordinates can destroy the respect necessary for their relationship, and create perceptions of favoritism on the part of others. Such perceptions can cause morale problems, as well as occasional legal claims if the subordinate claims that the relationship was not really welcome, or the relationship goes sour creating all sorts of interpersonal problems.

SEEMINGLY HARMLESS NICKNAME CREATES Harassment Issue



Mark Travis
... employer was found to have committed racial harassment by referring to an employee of Arabic heritage, ... by using a nickname ...

The harassment laws have now become sensitive to the use of nicknames. In one recent case, the employer was found to have committed racial harassment by referring to an employee of Arabic heritage, whose first name was Mamdouh, by using a nickname,

"Manny." Lel-Hakem v. BJY, Inc., 96 FEP Cases 84 (C.A. 9, 2005).

There was evidence that the employer's manager continued to use the name "Manny" over plaintiff Lel-Hakem's repeated objections. Despite Lel-Hakem's objection, the manager insisted on calling him "Manny" in a subsequent telephone conversation and

e-mail. Approximately one month later, Lel-Hakem proposed in an e-mail that the manager use Hakem, his last name, if he found Mamdouh difficult to pronounce. Rather than call him Hakem, the manager suggested in his reply e-mail that Lel-Hakem be called "Hank." In the manager's expressed view, a "western" name would increase Lel-Hakem's chances for success and would be more acceptable to the clientele. The manager persisted in calling Lel-Hakem "Manny" once a week in the Monday marketing meetings, and in e-mails at least twice a month thereafter.

Editor's Note - It has long been the view of the courts that the use of racial terminology in the workplace in referring to other workers is strong, if not direct, evidence of discrimination or harassment. Sometimes the use of "proxy" words for racial terms have even been held to constitute evidence of discrimination or harassment. This case goes a step further however. Even though the nickname did not have racial implications, the court found that the manager used the nickname with the intent or effect to discriminate against the plaintiff's Arabic name in favor of a non-Arabic name.

UNCONTROLLED DIABETES FOUND TO BE Direct Threat to Plant Safety



Bill Seale
A physician testified that fluctuations in blood sugar levels from uncontrolled diabetes can cause unconsciousness, confusion, and impaired judgment, ...

A federal appeals court upholds a lower court ruling that an applicant for a position in a manufacturing plant who failed to control his diabetes posed a direct threat to workplace safety.

Darnell v. Thermafiber, Inc., 16 AD Cases 1709 (C.A. 7, 2005).

The court found that the plaintiff's failure to monitor his diabetes and to seek proper medical treatment increased the risk of workplace injury. A physician testified that fluctuations in blood sugar levels from uncontrolled diabetes can cause unconsciousness, confusion, and impaired judgment, and that experiencing such symptoms at the plant could result in serious injury

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NEW UNEMPLOYMENT BENEFIT RULES MORE Strict



The Department of Labor is proposing to codify an interpretation of federal requirements of unemployment compensation that limit a state's payment of benefits only to individuals who are able and available to work.

Celeste Watson
 "If the services offered by an individual are so restricted that there is no labor market for those services, then that individual is not able and available and is not unemployed due to a lack of suitable work."

70 Fed. Reg. 42, 473. The proposed rule provides that a state may pay unemployment compensation only to an individual who is unemployed due to a lack of suitable work in the week for which compensation is claimed.

In order for an individual to be considered available and able to

work, the state must determine that he is offering services for which a labor market exists. "If the services offered by an individual are so restricted that there is no labor market for those services, then that individual is not able and available and is not unemployed due to a lack of suitable work." The DOL noted that unacceptable restrictions could include limits on hours of availability, how far an individual will commute or what types of jobs the individual is willing to accept. The individuals may not impose restrictions that effectively remove them from the labor market.

The authority of states to impose disqualifications related to separation from prior employers is not addressed in the proposed rule. The proposed rule also states that aliens must meet the available and able requirement and be legally authorized to work in the U.S., to be eligible for unemployment compensation. "An alien not legally authorized to work is not available for work; thus the regulations would require a state to deny an alien benefits for any week the alien was not legally authorized to work."

UNCONTROLLED DIABETES FOUND TO BE DIRECT THREAT TO PLANT SAFETY

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given the job requirements of climbing ladders and operating dangerous machinery. The court rejected the plaintiff's argument that the fact the plaintiff had worked ten months at the plant as a temporary employee without experiencing an episode does not mean that an episode would not occur.

Editor's Note - This case is helpful to employers because it finds a "direct threat" defense even though the plaintiff had worked in the plant ten months without experiencing a diabetic episode. The court was apparently impressed with the medical testimony of the potential for injury given the relatively dangerous working conditions.

NEW OVERTIME REGULATIONS RESULT IN an Increase in Lawsuits



On August 23, 2004 the FairPay Act became effective, implementing significant changes to federal overtime regulations in the Fair Labor

Ron Daves
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Standards Act (FLSA). Under the new rules, overtime eligibility for employees depends upon their salary and actual job duties. These new regulations identify employees as either exempt or nonexempt from overtime rules

and allow claimants to seek attorneys' fees and liquidated damages when the employer's conduct is willful. 29 U.S.C. § 201 et seq.; 29 C.F.R. § 541.

As a result, there has been an increase in lawsuits and claims regarding payment of overtime wages, primarily where the employer has misclassified employees as exempt or where the employer instructs employees to submit inaccurate work hours to avoid overtime regulations. Due to the lack of documentary proof in these cases, defending against these claims can be difficult for employers while the burden on employees in proving the claim is generally light. In addition, claims are analyzed under federal definitions of job classifications with little regard given to industry standards and job titles or job descriptions created by the employer.

Damages for misclassification of employees can impact employers the hardest, since under FLSA damages can go back two years, and up to three years if the violations were willful. Employees are entitled to liquidated damages, and in private lawsuits, they are entitled to attorneys fees. Employers are also subject to civil money penalties assessed by the U.S. Department of Labor.

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WHAT REALLY CAUSED THE AFL-CIO Split?



Gary Wright

... there was "little or no difference in the final positions" between the AFL-CIO and CTW leaders except for two sticking points.

The AFL-CIO split is probably the biggest labor news in our readers' lifetimes. A reasonably objective Labor Union publication describes the "war" of personalities and big ideas that led to the split between the AFL-CIO and Change to Win (CTW). In an internal memo to the staff of the AFL-CIO, Robert Welsh, Executive Assistant to

AFL-CIO President John Sweeney, describes the backroom conversations that were happening in the lead-up to the split. While Welsh may have had political reasons to circulate the memo, it provides a glimpse into the high-level pre-split negotiations.

Welsh wrote that there was "little or no difference in the final positions" between the AFL-CIO and CTW leaders except for two sticking points. The first was Teamsters President James Hoffa's insistence that the per capita dues paid by the Teamsters to the AFL-CIO be cut by no less than half. The second was about who would succeed Sweeney as President of the AFL-CIO. Many do not expect Sweeney, age 71, to finish the full term he was re-elected to, and say that the real fight was over his successor.

Steelworkers President Leo Gerard told a newspaper that the union dues rebate issue would have been resolved if an agreement could have been reached on Sweeney's successor. The AFL-CIO leadership wanted Sweeney's successor to be chosen by the AFL-CIO Executive Counsel, which CTW leaders saw as a maneuver to ensure that Richard Trumka, the current AFL-CIO Secretary-Treasurer, would become the next President. CTW wanted a weighted vote that would give larger unions a greater say.

Members of unions on both sides of the issue

raised legitimate questions about how top leaders handled decision-making about the split as most decisions were made with little or no consultation with rank and file members. In short, there was no democratic procedure at all in determining whether there would be a split or which unions would leave the AFL-CIO and join the CTW.

The reaction of labor leaders and rank-in-file members ranged from concern or anger about the split's dangers to a hope that finally something is going to shake up labor's out-of-touch leadership. Leaders on both sides are clamoring to portray themselves as the voice for change and reform. An example of this is given by the comments of CTW leader Andy Stern, President of the Service Employees (SEIU), who has called the freefall of the heavily unionized airline industry as a "prime example" for the lack of a strategically oriented labor movement. Stern contends that an industry divided among crafts and subdivided among a dozen unions, without a coordinated strategy to deal with employers, is a major factor in the hundreds of millions of dollars of union concessions made since 2001. A former official of the AFL-CIO's Strategic Approaches Committee agrees that a breakdown in industrial focus and unity has factored into labor's decline.

The AFL-CIO has already lifted certain "planks" from the CTW agenda including resolutions and amendments for industry-wide strategies, strategic voluntary union mergers, more organizing and initiatives and a new political program. The political program would move away from bi-annual "get out the vote" and candidate support (in the main for Democrats) to a year-round mobilization effort focused on legislation.

Both sides express concern that the split will cripple Central Labor Councils, state federations and other local and regional union bodies. Another fear is the split will lead to wide-scale raiding across the new divide.