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Privacy Rights of Employees in Harassment or Discrimination Suits

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In *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 ("*Miller*"), the California Supreme Court broadened the scope of what factual circumstances give rise to sexual discrimination and harassment claims under the California Fair Employment and Housing Act ("FEHA"). The *Miller* decision provides a theory beyond the standard harasser/harassee paradigm usually seen in sexual harassment suits, holding that an employee may sustain a cause of action if he or she is not the direct target of sexual advances or remarks by a supervisor, but a hostile work environment nonetheless exists in the workplace. *Id*. at 466. The impact of the *Miller* decision on employment cases was discussed in detail in the ***Trial Bar News*** last fall. *See*, "Sexual Favoritism = Sexual Harassment" by Jeff Geraci, ***Trial Bar News,*** October 2005 at p. 11.

In *Miller, supra,* the Supreme Court did not discuss the effect sexual harassment suits, based on facts like those in *Miller*, have on the privacy rights of other employees who are not direct parties to the action. In *Miller,* a female employee filed suit under FEHA on the grounds that other female employees were unfairly receiving favorable treatment, not based on merit, but as a direct result of sexual affairs with a male supervisor for approximately seven years. *Miller, supra,* at 466. The female employees admitted to the affairs, and one employee bragged about her intention to use her power over her philandering supervisor as a means to extract additional employment benefits from him. *Id*. at 453. One benefit granted to the women was the ability to retaliate, both physically and professionally, against any other employees (including plaintiffs) who complained about the affairs. Moreover, the supervisor himself retaliated by withdrawing previously granted accommodations to another employee with a disability who had complained about the affairs. *Id.* at 457.

Noting that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," the *Miller* Court determined that the offending supervisor's conduct "not only blocked the way to merit-based advancement for plaintiffs" but also caused them to be subjected to harassment at the hands of the three women with whom the supervisor was involved whose behavior the supervisor "refused or failed to control even after it escalated to physical assault." *Id.* at 467. As the Court

noted: "[t]his harassment, apparently retaliatory, included . . . demeaning comments in the presence of other employees, . . . and physical assault and false imprisonment." *Id.* at 467-68.

Attorneys representing employees who are parties or witnesses in sexual harassment or favoritism suits have special duties to protect their sexual privacy rights. For instance, assume Jane sues her employer and her supervisor, John, for sexual discrimination and harassment. Jane sues on the grounds that John has given preferential treatment to employee Nancy because Nancy is having a romantic affair with John. In order to prove her case, Jane's attorney requests production of the employee files for both Nancy and John and notices their depositions. Additionally, interrogatories and deposition questions seek information regarding whether a romantic relationship exists between Nancy and John, and if so, seek many details regarding this amorous relationship. Obviously, the subject matter of this questioning significantly invades the sexual privacy rights of both Nancy and John. Nancy is not even a party to the suit. What rights does she have?

The constitutional right of privacy protects against the unwarranted, compelled disclosure of various private or sensitive information regarding one's personal life, including sexual relationships and confidential employment personnel information. *Hooser v. Sup. Ct.* (2000) 84 Cal.App.4th 997, 1004. Even highly relevant, nonprivileged information may still be shielded from discovery if its disclosure would impair a person's inalienable right to privacy under the California Constitution, Article 1, § 1. *Britt v. Sup. Ct.* (1978) 20 Cal.3d 844, 852-864. A plaintiff's need for information will not easily override a third party's privacy rights. *Olympic Club v. Sup. Ct.* (1991) 229 Cal.App.3d 358, 363. Even when discovery of private information is found to be directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy." *Leland Stanford v. Sup. Ct.* (1981) 119 Cal.App.3d 516, 525.

The more sensitive the information, the greater the need for discovery that must be shown in order to compel private information. *Hofmann Corp. v. Sup.Ct.* (1985) 172 Cal.App.3d 357, 362. For example, a plaintiff may not discover information about the alleged harasser's past sexual conduct with other employees. *Boler v. Sup.Ct.* (1987) 201 Cal.App.3d 467, 474. A discovery request covering sexual conduct with unknown parties at unknown times is too broad and will not be compelled, especially since it could encompass voluntary conduct rather than instances of workplace harassment. *Id.*

Attorneys representing employees such as Nancy and John in the above scenario should **always assert privacy objections** to discovery regarding any alleged amorous relationship. In John's case, information regarding an alleged harasser's past sexual relationships may not be obtained through discovery because it inevitably delves into the supervisory employee's private affairs outside of the workplace. With respect to Nancy, the right to sexual privacy is of greater concern in that she is neither the "harasser" nor the "harassee," but merely another employee in the workplace. Therefore, attorneys for a defendant employer, and/or employees such as Nancy, should always object to discovery seeking information regarding romantic or sexual relationships amongst employees.

Attorneys should be especially vigilant in asserting and defending the privacy rights of employees when the suits involve facts that do not rise to the level of those in *Miller*, especially if there have been no admissions regarding the romantic affairs by the parties allegedly involved. The *Miller* case involved rather egregious facts. The three female employees had very public affairs with a male supervisor over the span of many years, during which demonstrable widespread favoritism was given to those three employees. The "favorite" women flaunted their relationships by harassing other employees, apparently to the point of physical assault. The *Miller* Court specifically held that the "mere presence of office gossip" is insufficient to establish the presence of widespread sexual favoritism. *Miller, supra,* at 471.

Attorneys representing non-party employees allegedly engaging in sexual favoritism should be particularly conscientious about asserting privacy objections. Prior to invading the sexual privacy rights of other third parties, a plaintiff should be required to establish with admissible evidence that a purported romantic affair between other employees is indeed **directly relevant** to plaintiff's claims of favoritism and discrimination. Invasion of a person's privacy rights can result in considerable harm, including emotional damage and even damage to that person's family and other personal relationships. When the person whose privacy is being invaded is not even a party to the lawsuit, make sure the invasion is absolutely required and that the judge carefully balances the rights of the party seeking the information against the privacy rights of your client before compelling the information be disclosed.