



LABOR AND EMPLOYMENT

**New Trends in Sexual Harassment
and Retaliation Law**

BY SASKIA T. ASAMURA

2005 has been a busy year for California State and federal courts in the area of sexual harassment and retaliation. One prominent issue is what type of conduct amounts to actionable sexual harassment. The concept of *quid pro quo* (sexual favors in return for job benefits) is well established, but the more complex area of “hostile work environment” has generated considerable discussion. Two cases of note are: *EEOC (Christopher) v. Nat’l Education Assoc.*, 422 F.3d 840 (9th Cir. 2005), and *Miller v. Dept. of Corrections*, 36 Cal.4th 446 (2005).

Another hot debate in retaliation claims is what constitutes “adverse employment action” (“AEA”). It is well settled that being fired or demoted is an AEA. But what about negative evaluations? Unwarranted criticism? Implied threat of termination? The long-awaited decision of the California Supreme Court in *Yanowitz v. L’Oreal*, 36 Cal.4th 1028 (2005), addresses this question.

**CASE 1: EQUAL OPPORTUNITY ABUSIVE BOSS
MAY BE A SEXUAL HARASSER**

While touching or groping may not be required to establish sexual harassment, at least the conduct must have a sexual or gender-based component, right? Wrong! Under *Christopher*, the abusive or “bully” supervisor who berates both males and females alike, without any sexual overtones or overtures, can now expose the employer to sexual harassment charges.

The facts: The plaintiffs were three female employees who sued, contending their supervisor, Harvey, created a hostile work environment. Harvey was an abusive boss. He engaged in “shouting in a loud and hostile manner at female employees” which was “frequent, profane and often public,” with “little or no provocation.” At times, his abusive tirades had a physical component, such as grabbing a female employee’s shoulders from behind (in a non-sexual manner) and yelling “get back to your office.” One male employee said Harvey “scared the hell out of him” because Harvey came within three inches of the employee’s face, was very loud, spat in his face and accused the employee of being insubordinate. In a nutshell, Harvey was a supervisor who was “rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant.” He offended both men and women but he offended women more.

The Court ruled: Offensive conduct that is not sex-specific could violate Title VII if there is sufficient evidence of “qualitative and quantitative differences” in the harassment suffered by female and male employees. This decision teaches us that “hostile working environment” sexual harassment can be established where the supervisor:

- Is abusive, rude or intimidating to both male and female employees;
- Does not engage in any sexual or gender-based conduct;
- Has no desire or intent to harass on the basis of sex or gender;
- Is not aware that he/she is engaging in harassing conduct, and
- Men and women have different subjective reactions to the abuse.





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CASE 2: SEXUAL FAVORITISM CAN BE SEXUAL HARASSMENT

Female employees who are not personally harassed or favored may sue for sexual harassment based on sexual favoritism by a supervisor towards their co-workers with whom he is having consensual affairs. The California Supreme Court in *Miller* said this may create a hostile work environment because the sexual favoritism conveys a demeaning message to female employees that the way to get ahead is to have sexual relations with their supervisor.

The Facts: The plaintiffs were two former female employees of a correctional facility. They alleged that the chief deputy warden granted favors to three female subordinates with whom he was having consensual affairs: they got promotions for which they were not qualified or were less qualified than plaintiffs, enjoyed unusual privileges, and bragged about their power over the warden. Plaintiffs complained and an Internal Affairs investigation was conducted. After this, plaintiffs alleged that they were threatened (in one instance, physically assaulted by one of the three women, who went unpunished), ostracized, criticized, deprived of supervisory responsibility, and their work life became miserable. Both went out on stress leave and later resigned.

The Court ruled: The lower courts rejected plaintiffs' claims because they themselves were not subjected to sexual advances, were not treated any differently than male employees, and because there was no claim that sexual favors were coerced. The California Supreme Court disagreed, relying on an EEOC policy statement about sexual favoritism that identified three types:

- Isolated favoritism (not actionable);
- Favoritism when sexual favors are coerced; and
- Widespread favoring of consensual sexual partners.

Focusing on the last type, the Court agreed with the EEOC that, if widespread favoritism is bestowed upon consensual sexual partners, a message is implicitly conveyed that the managers view women as “sexual playthings,” thereby creating an atmosphere that is demeaning to women. Based upon the extensive evidence offered to show “widespread favoritism” of the three women with whom the warden had consensual affairs, plaintiffs were entitled to have a jury decide their claims.

CASE 3: LATEST WORD ON ADVERSE EMPLOYMENT ACTION

An employee who engaged in “protected activity” by refusing to fire an associate who was not “attractive” enough in the eyes of management can sue for retaliation by showing retaliatory acts which, when viewed under the totality of circumstances, materially affected the terms and conditions of her employment.

The Facts: Plaintiff was a long-time employee of L’Oreal who had an outstanding career, rising through the ranks to regional sales manager. She consistently received excellent evaluations, was named “regional sales manager of the year” in 1996, and received the highest bonuses ever paid two years in a row. All that changed in 1997 after a merger. The new general manager told plaintiff to fire a dark-skinned female salesperson because he did not find her attractive enough, expressing a preference for fair-skinned blondes. He told





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plaintiff: “Get me somebody hot,” and on seeing a “young attractive blond girl,” he told her: “Get me one that looks like that.” The targeted salesperson was among the top sellers and plaintiff refused to replace her. Within months, her supervisors repeatedly solicited negative information about plaintiff, criticized her, screamed at her in public, wrote critical memos to Human Resources about her, and imposed changes on her work schedule. Plaintiff went out on stress leave and resigned soon thereafter.

The Court ruled: To establish AEA, a retaliation plaintiff must show conduct that “materially affects the terms, conditions, or privileges of employment.” AEA is not limited to conduct that causes economic loss or tangible psychological injury; it is conduct that is “reasonably likely to impair performance or prospects for advancement.” However, it does not include minor or trivial conduct that merely angers or upsets the employee.

■ **Materiality Test:** Neither Title VII nor FEHA contain the term “adverse employment action” but it has long been held to be an essential element of a retaliation claim. The courts have variously interpreted AEA: the Ninth Circuit defines AEA as conduct “reasonably likely to deter employees from engaging in protected activities” whereas, on the other end of the spectrum, other courts limit AEA to firing, demotion, or other “ultimate employment decisions.” In opting for the intermediate Materiality Test, the Court said plaintiffs need not show they were fired or demoted, or suffered financial loss. Rather, a pattern of continuous retaliatory non-trivial conduct may

establish the required AEA even if each separate act may not be actionable by itself, and some acts may be outside the statute of limitations period.

■ **Totality of the Circumstances:** So how to decide what kind of conduct “materially affects” the terms, conditions or privileges of employment? By looking at the overall pattern of conduct viewed in the “totality of the circumstances.” The analysis should take into account the unique circumstances of the affected employee and the workplace context of her claim. As the *Yanowitz* Court said: “There is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries.” The conduct of L’Oreal’s managers (e.g. soliciting negative information about her, verbal and written criticism, public humiliation and implied threat of termination) was enough, by these standards, to allow plaintiff to take her case to the jury.

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