Unprotected Sex: When Sexual Misconduct Does Not Constitute Sexual Harassment*

By Daniel E. Gardenswartz

Introduction

One of the most vexing questions in the continuing evolution of sexual discrimination and harassment claims is whether a given behavior, activity or decision is based on the sex of the plaintiff employee. It is axiomatic that the "because of sex" requirement is an essential element to any cause of action for sexual harassment, or for other forms of gender discrimination.[1] Yet courts often have to grapple with the line between the act of having sex connected to the workplace — and its natural ramifications — on the one hand, and the decision to treat a woman (or a man) disparately because of gender, on the other. The United States Supreme court in *Oncale v. Sundowner Offshore Services, Inc.*[2] famously observed that general civility is not legally required. Thus, conduct "tinged with offensive sexual connotations" alone does not constitute unlawful behavior.[3] California's Supreme Court has likewise determined that the use of sexually charged language in the workplace by itself is insufficient: "[I]t is the disparate treatment of an employee on the basis of sex — not the mere discussion of sex or use of vulgar language — that is the essence of a sexual harassment claim."[4]

Yet determining whether disparate treatment of a given employee is based on his or her sex has proved to be slippery when it involves an actual or perceived attraction between individual employees. At first blush, one would think that the decision to favor an employee for engaging in a romantic relationship, or to punish an employee for refusing to do so, would fall directly within the *quid pro quo* "because of sex" framework of sexual harassment claims. But spiteful action taken against an employee because of his or her refusal to *continue* to have sex, favoritism towards an employee for having sex, and other adverse action taken against an employee for suspected sex, is frequently not protected under Title VII[5] or other state laws that prohibit discrimination or retaliation "because of sex."

Jilted Love

One of the earliest cases to focus on these distinctions was the Seventh Circuit's decision in *Huebschen v. Department of Health and Social Services.*[6] The jury awarded plaintiff compensatory and punitive damages after the male plaintiff ended a romance with his female supervisor, and the female supervisor thereafter took adverse and retaliatory action against him. The jury determined that the plaintiff's refusal to submit to his supervisor's sexual demands was a motivating factor in the supervisor's adverse decision. But without disturbing this finding of fact, the court in *Huebschen* reversed, holding that the spite held by the supervisor towards her subordinate was not because the plaintiff was male, "but that he was a former lover who had jilted her."[7] In this respect, the court found that plaintiff's gender was "merely coincidental" to his supervisor's reaction, and that there was no evidence that the supervisor had treated other men differently in the office.[8]

In other words, the disparate treatment was directed at only this particular man because he ended the sexual liaison, not men in general. In reaching this conclusion, the court distinguished *Woerner v. Brzeczek*[9] where belittling remarks and sexual advances made towards a particular female employee were held to constitute unlawful harassment. The *Huebschen* Court believed that case presented a "classic case of sexual harassment" because the harassment was "obviously" directed "solely at the plaintiff because she was a woman."[10]

A majority of courts, including at least one in California, have followed *Huebschen*, holding that disparate treatment due to an ill-fated relationship will not support a sex discrimination or harassment claim, because such treatment was not due to the plaintiff's gender. In *Lial v.*

---

* Reprinted from Bender's California Labor and Employment Bulletin, 2012 Bender's Calif. Lab. & Empl. Bull. 329 (October 2012).

[1] *See* 42 U.S.C. § 2000e-2; Cal. Gov't Code § 12940(a), (j). Likewise, California Government Code section 12940(h) prohibits discharge or discrimination "because" a person has opposed any of these practices.

[2] 523 U.S. 75, 81 (1998).

[3] 523 U.S. at 81.

[4] Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264, 280 (2006).

[5] 42 U.S.C. § 2000e et seq.

[6] 716 F.2d 1167 (1983).

[7] 716 F.2d at 1172.

[8] 716 F.2d at 1172.

[9] 519 F. Supp. 517, 518 (E.D. Ill. 1981).

[10] *Huebschen*, 716 F.2d at 1172.

County of Stanislaus,[11] for example, the plaintiff's discrimination and harassment claims were premised upon alleged retaliation due to two failed romantic relationships. Specifically, the plaintiff alleged that there were "problems in [her supervisor's] marriage" caused by plaintiff's prior relationship with that supervisor, which resulted in the supervisor's harassment and discrimination against her "based on her sex."[12] The plaintiff in *Lial* further alleged that after she ended a second romantic relationship with a co-worker, the person in question retaliated against the plaintiff by "ignoring her," "belittling her in front of others," and, after becoming her supervisor, constantly criticizing plaintiff and "issuing her several letters of reprimand and two suspensions without pay."[13] In granting summary judgment for the defendants, the court cited *Huebschen* for the proposition that the alleged harassment of the plaintiff "was not the result of [p]laintiff's gender 'but of responses to an individual because of her former intimate place in [that individual's] life.' "[14]

According to these courts, where the evidence shows that the retaliation towards a particular man or woman arose out of an emotional connection and then rejection, such a response is not "because of" the plaintiff's sex.

Preferential Treatment

Three years after the Seventh Circuit's decision in *Huebschen*, the Second Circuit in *DeCintio v. Westchester County Medical Center* similarly held that Title VII does not prohibit preferential treatment on the basis of "sexual liaisons" or "sexual attractions."[15] In *DeCintio*, a group of male therapists asserted that an artificial qualification was imposed for eligibility for an open position at a medical center. The only therapist who met the new qualification happened to be the women who was having a romantic relationship with the administrator who imposed the qualification in question. Like *Huebschen*, the *DeCintio* Court reasoned that the disparate treatment was the result of favoring a particular woman, and thus both men and other women suffered a similar disadvantage.[16] To buttress that opinion, the court focused on the word "submission" within the definition of sexual harassment under federal law.[17] The *DeCintio* Court deduced that sexual harassment thus "implies a necessary element of coercion" that was lacking because the favoritism was the result of a private affair, and there was no claim that anyone was "forced to submit to [the supervisor's] sexual advances in order to win promotion."[18] Like the *Huebschen* Court, the *DeCintio* Court focused on whether the female in the relationship with her supervisor initially consented to the sexual relationship.

California's Fourth District Court of Appeal followed this same reasoning in *Proksel v. Gattis*, holding that "by itself preferential treatment of paramours is not actionable by other employees."[19] On the other hand, the *Proksel* opinion did open the bedroom door — allowing evidence of favoritism into the trial where such evidence may be relevant "in particular cases" when considering "a larger claim of sexual harassment."[20]

That raises the question, what kind of "larger" sexual harassment claim is necessary before those employees who are not sleeping with their boss can assert a harassment claim? That question was answered by the California Supreme Court in *Miller v. Department of Corrections*, which held that "widespread sexual favoritism" did convey a sufficiently demeaning message to other female employees.[21] There, three sexual liaisons by a prison warden were enough to show that the warden viewed women as "sexual playthings."[22] The Equal Employment Opportunity Commission ("EEOC") similarly allows for sexual

[11] 2010 U.S. Dist. LEXIS 124331 (E.D. Cal. 2010).

[12] 2010 U.S. Dist. LEXIS 124331, at *3, *34-35.

[13] 2010 U.S. Dist. LEXIS 124331, at *20.

[14] 2010 U.S. Dist. LEXIS 124331, at *34 (quoting Succar v. Dade County School Bd., 60 F. Supp. 2d 1309, 1314-1315 (S.D. Fla. 1999)). *See also* Campbell v. Masten, 955 F. Supp. 526, 529 (1997) (discrimination due to ending a consensual relationship is not based on sex, but on "responses to an individual because of her former intimate place in her employer's life"); Succar v. Dade County School Bd., 229 F.3d 1343 (11th Cir. 2000) (harassment due to contempt for plaintiff after failed relationship not actionable under Title VII).

[15] 807 F.2d 304, 306 (1986).

[16] 807 F.2d at 308.

[17] *See* 29 C.F.R. § 1604.11(g) ("Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.").

[18] *DeCintio*, 807 F.2d at 308.

[19] 41 Cal. App. 4th 1626, 1627 (1996).

[20] 41 Cal. App. 4th at 1627.

[21] 36 Cal. 4th 446, 464 (2005).

[22] 36 Cal. 4th at 464.

harassment claims to be based on a favoritism claim when the promiscuity of the perpetrator is "widespread."[23]

In making this distinction, it appears that the courts are comfortable with sex-based favoritism (that is, favoring a subordinate employee because he or she willingly consents to sex), so long as the sexual relationships are kept to a minimum. But where, as in *Miller*, there are multiple examples of favoritism with those who agree to have sex, and/or adverse action taken against those who refuse, the promiscuity of the supervisor may create a sufficiently demeaning workplace to create a hostile work environment as a whole. As a practical matter, this leaves employers with the difficult task of deciding if and when the employer should intervene to prevent sexual harassment, or not intervene into the protected privacy rights of the employees.[24]

Nepotism and Jealousy

Disparate treatment on the basis of jealousy or nepotism is another category of behavior for which no legal prophylactic exists under the rubric of sex discrimination. For example, in *Platner v. Cash & Thomas Contractors, Inc.*,[25] the Eleventh Circuit was called upon to interpret the "because of sex" requirement under Title VII.[26] The long and the short of *Platner* was that the daughter-in-law of the employer's founder "became extremely jealous of Platner [the plaintiff], and began to suspect that Platner and Steve [the founder's son] were carrying on an affair."[27] It was not clear whether an affair actually occurred, but regardless, the court held that the plaintiff was fired to save his son and daughter-in-law's marriage, which constituted a legitimate, nondiscriminatory basis for the termination under Title VII: "The ultimate basis for Platner's dismissal was not gender but simply favoritism for a close relative. However unseemly and regrettable nepotism may be as a basis for employment decisions in most contexts, it is clear that nepotism as such does not constitute discrimination under Title VII."[28]

Several cases in other jurisdictions have likewise held that the jealous ire of a spouse or other relative arising out of an actual or perceived relationship among co-workers may be "unfair," but is not a basis for an unlawful termination claim by an employee who is a party to the affair.[29] Where the termination or other adverse action is directed at an employee due to the actual or perceived jealousy of another, neither federal nor state law provide protection to the impacted employee.

Conclusion

According to several courts, conflicts due to a personal dislike, grudge or favoritism – even where sex is involved — do not constitute harassment "because of sex."[30] But the logic behind these distinctions can be tenuous. It is not uncommon for a particular woman or man to be singled out by an agent of the employer, based on that agent's specific attraction to that particular employee.

---

[23] *See* EEOC Policy Statement No. N–915–048 ("If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them, and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors").

[24] *See* Cal. Lab. Code § 96(k) (authorizing the Labor Commission to adjudicate "claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises").

[25] 908 F.2d 902 (11th Cir. 1990).

[26] Because of the similarity between the California and federal statutes and the objectives of the two acts, "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment." *Lyle*, 38 Cal. 4th, at 278.

[27] 908 F.2d at 903.

[28] 908 F.2d at 905.

[29] *See, e.g.*, Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 909-10 (8th Cir. 2006) (summary judgment granted where owner's wife insisted on termination of employee who engaged in flirtatious conduct with owner); Barrett v. Kirtland Community College, 245 Mich. App. 306, 321-22 (2001) (alleged harassment based on romantic jealousy is not "discrimination because of sex" under Michigan law because it was not gender-based); Kahn v. Objective Solutions, Int'l., 86 F. Supp. 2d 377, 382 (S.D.N.Y. 2000) (motion to dismiss granted where employee engaged in consensual sex with owner, and owner's wife insisted that employee be terminated); Freeman v. Continental Technical Serv., Inc., 710 F. Supp. 328, 331 (D. Ga. 1988) (motion to dismiss granted on plaintiff's claim that her boss fired her after she became pregnant by him).

[30] *Lial*, 2010 U.S. Dist. LEXIS 124331, at *34; Davis v. Coastal Intern. Sec., Inc., 275 F.3d 1119, 1123 (D.C. Cir. 2002) (sexually explicit harassment between members of the same sex was motivated by a workplace grudge and was therefore not harassment "because of . . . sex"); Marting v. Crawford & Co., 203 F. Supp. 2d 958, 967 (N.D. Ill. 2002) ("The record must demonstrate that the abuse was motivated by [plaintiff's] gender rather than by a personal dislike, grudge, or workplace dispute unrelated to gender.").

While repeated sexual advances, comments or belittling of an employee who ends a consensual sexual relationship may be deemed not to be based on that person's gender, if the same unwelcome conduct is directed towards an employee who never "submitted" to the advances in the first place, then such conduct can, and often does, result in liability for the employer. In either case, the perpetrator is often not trying to harass or discriminate against women in general, but only directs his attention toward a particular woman. Is not her gender, thus, only "coincidental" to the conduct that is more personal in nature? On the other hand, isn't such behavior equally repugnant and unwelcome when directed towards a former lover?

The fundamental question these cases pose is what, exactly, should public policy seek to protect. Discrimination "because of sex" is certainly an evil that unfortunately continues to permeate the workplace in often subtle and damaging ways. While discrimination "because of" romance, spite, jealousy, nepotism and/or betrayal may be equally unfair, it remains "legal," at least for now. As the law of sexual harassment continues to evolve, litigants and the courts will continue to grapple with the fuzzy line between sexual function, friction and physiology.[31]

Daniel Gardenswartz is a partner in the law firm of Solomon Ward Seidenwurm & Smith, LLP, representing corporations and similar business entities in all aspects of public and private employment disputes. Mr. Gardenswartz also serves as an investigator into allegations of unlawful workplace conduct, and frequently gives training seminars to clients and other organizations on a variety of employment related topics. Mr. Gardenswartz received his undergraduate degree in International Affairs from George Washington University's Elliot School of International Affairs, where he graduated with distinction and was admitted into the Phi Beta Kappa National Honor Society. He earned his Juris Doctorate degree, with Highest Distinction, from Emory University School of Law, where he was also admitted into the Order of the Coif. He can be reached at dgardenswartz@swsslaw.com or (619) 238-4822.

[31] On the California Supreme Court docket for the coming year, for example, is the issue of whether liability should attach where an employer terminates a pregnant employee "because of" her pregnancy, but also would have terminated her "because of" poor performance. *See* Harris v. City of Santa Monica, 181 Cal. App. 4th 1094 (2010), *review granted*, No. S181004, 2010 Cal. LEXIS 3853 (Apr. 22, 2010).