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Weekly Employment Brief

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Court Says "Promoting Your Paramours" Not Gender Discrimination

In a surprising decision, California's Third District Court of Appeal (which includes Sacramento) held that California's antidiscrimination statutes do not prohibit supervisors from favoring employees who perform sexual favors for them over employees who do not. In *Mackey v. Department of Corrections,* Edna Miller and Frances Mackey, female corrections officers at Valley State Prison for Women, sued for gender discrimination when other female employees who had had affairs with the warden were given preferential treatment, including promotions for which they were not qualified. The court found that although such preferential treatment might be unfair, it was not unlawful, as the disparate treatment was based not on gender, but on the existence (or not) of a sexual relationship between the supervisor and the employees. Since Miller and Mackey were not subjected to sexual advances themselves, and were not treated any differently from their male coworkers, the court held there was no evidentiary basis for a discrimination suit. The court's reasoning seems inconsistent with the protective goals of anti-harassment laws and likely will be challenged on that basis.

Age Based Comments Provide Grounds For Discrimination Claim Even When Made By Another In The Same Age Group

The U.S. Court of Appeals for the Sixth Circuit (which includes Ohio), recently held that age-based comments can form the basis for an age discrimination suit, even when they are made by a person in the same age group as the plaintiff. In *Wexler v. White's Fine Furniture, Inc.,* Donald Wexler, a 59-year-old furniture store manager, was demoted, allegedly for a decline in the store's overall sales. However, during the meeting at which Wexler was informed of his demotion, two senior corporate executives made several adverse references to Wexler's age. Wexler's age was again referenced when the company's president announced the demotion to the store's employees, and the youth of Wexler's successor was emphasized. Wexler sued, claiming that the decline in the store's sales was related to decreased advertising and an overall national decline in furniture sales, and that the company's proffered reason for his demotion was a pretext for discrimination. The lower court granted summary judgment to the company, in part because the individuals who had made the age-based remarks were as old or older than Wexler. On appeal, the Sixth Circuit rejected the lower court's reasoning, holding that while it is permissible to draw an inference that it is less likely that an individual will discriminate against another in the same age group, that inference is insufficient to support summary judgment when there are otherwise genuine issues of material fact. This holding, like other recent holdings in "common actor" cases, reminds employers that there is no legal presumption that a "similarly situated" individual will not discriminate against another in his or her protected class.

Harassment Bill Introduced To Protect Workers Against Harassment By Clients And Customers

Last year, a California Court of Appeal in *Salazar v. Diversified Paratransit Inc.,* held that an employer was not liable for sexual harassment committed against an employee by a client. Raquel Salazar, a driver for a company that transported developmentally disabled adults, sued her employer after she was sexually assaulted by one of the company's adult clients. Despite Salazar's claim that the California Fair Employment and Housing Act ("FEHA") imposes employer liability when employees are sexually harassed by customers, the court held that FEHA does not provide for employer liability for harassment committed by customers. To combat this surprising ruling, East Bay Assemblywoman Ellen Corbett has introduced AB 76, which would make it clear that the FEHA requires employers to protect workers from harassment by clients and customers. Although Assemblywoman Corbett expects bipartisan support for the bill, a similar reform to the law died in the Senate in 1984.

DID YOU KNOW?

Workers filed **79** federal class action lawsuits seeking overtime pay in 2001, surpassing for the first time the number of class-action suits against employers for job discrimination, according to the American Bar Association.