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THE DEFENSE NEVER RESTS.

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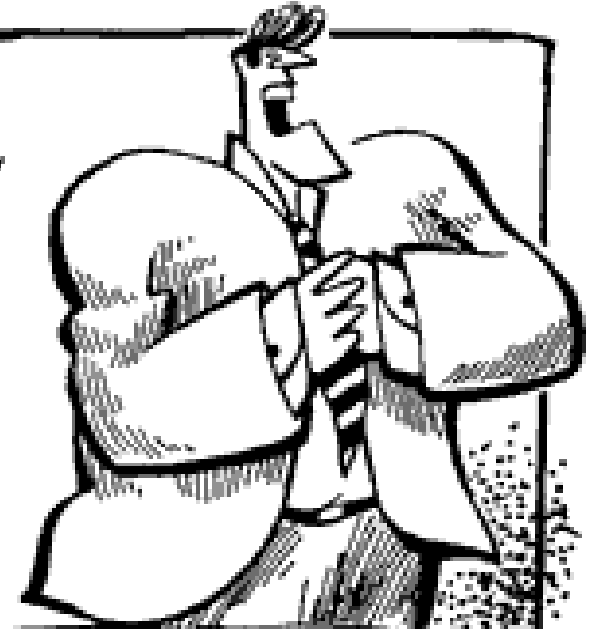
**PLAYING FAVORITES?
NOT YOUR FAVORITE
PLAY.**

Rachel Esposito, Esq.
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As you know, this company frowns on sexual harrassment



Now... everybody together 1...2...3... frown.



Okay, next order of business.



Caro Art-Sanpostino © 2007

Sexual Discrimination – Essential Elements of a Claim

1. Plaintiff belongs to a protected class
2. Plaintiff was qualified for the position; or was performing satisfactorily
3. Despite these qualifications plaintiff was rejected or fired (*i.e.*, some adverse action)
4. Plaintiff was replaced by (or not hired over) someone outside the protected class with similar or inferior qualifications



If 1 - 4 shown then defendant must show a legitimate non-discriminatory reason for adverse employment action

If legitimate non-discriminatory reason is shown plaintiff must show that defendant's asserted reason is a sham or pretext



Sexual Harassment/ Hostile Work Environment

- Unwelcome conduct
- Conduct is based on plaintiff's sex/gender
- Conduct is sufficiently severe or pervasive enough to alter the conditions of employment and create an abusive work environment
- Conduct is imputed to the employer



“Hostile Work Environment” is analyzed under the totality of circumstances NOT isolated instances

▪ EXAMINE:

- Frequency of conduct
 - Severity
 - Physical threat
 - Humiliation
 - Actually interferes with employee’s work performance
- A “Hostile Work Environment” is not created solely by:
- Isolated or stray remarks
 - Teasing
 - Off-hand comments



Retaliation Claims

Essential Elements:

- Protected activity by plaintiff
- Subjected to Adverse Action by Employer
- Causal link between the two

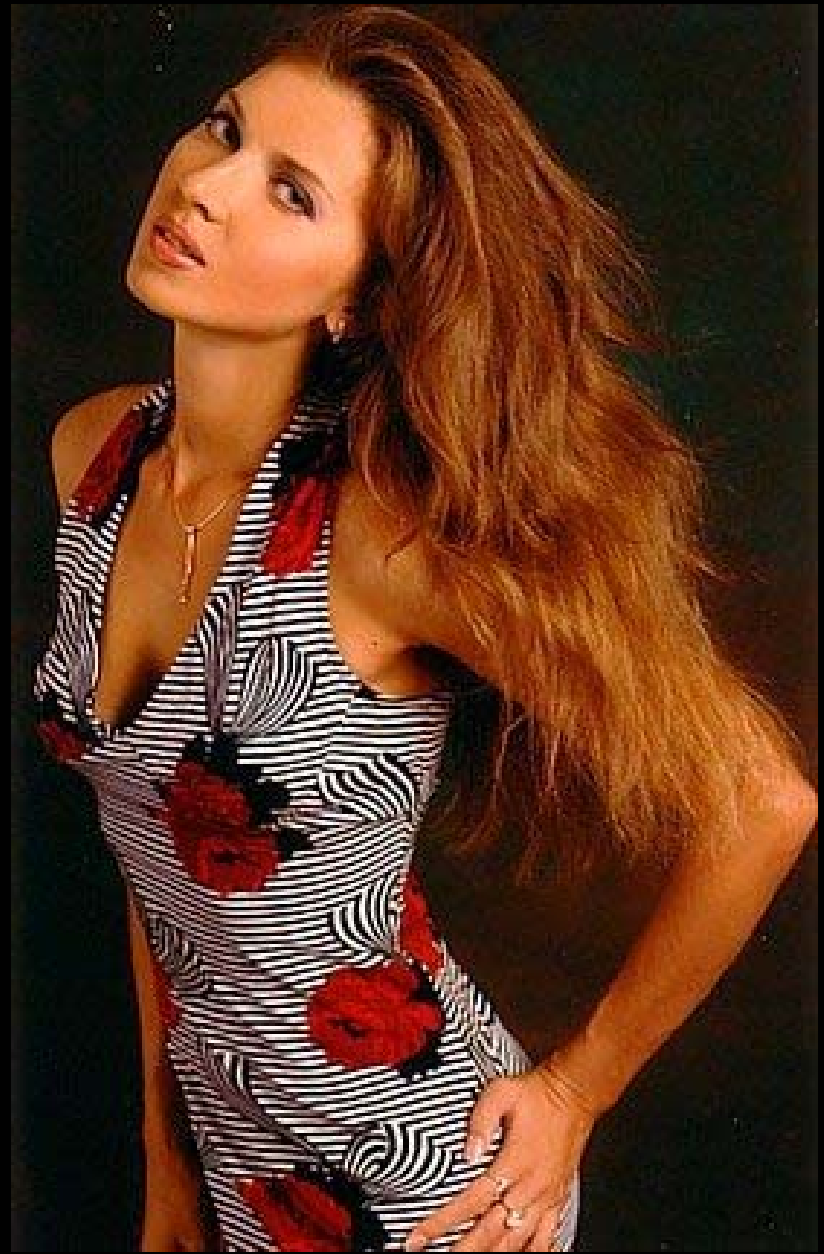


Yanowitz v. L'Oreal USA, Inc., (Cal. Supreme Ct. 2005)

- Facts:
 - Stellar sales manager told by boss to fire sales rep
 - Not good looking enough
 - Sales Manager refused



Get me someone
HOT!



Refusal of Direct Order =

Protected activity and notification to
Employer

Conclusion: Yanowitz goes to trial



Miller v. California Department of Corrections (Sup. Ct. Cal. 2005)

- Facts:
 - Corrections officer
 - Boss who allegedly had affairs with multiple subordinate employees
 - Reports ignored; confidentiality broken
- Court held:
 - “On basis of sex” more than just gender
 - Sexual favoritism so pervasive and widespread that it created actionable hostile work environment





*"If I asked you out to dinner, Miss Smythe,
would you sue me?"*

N.C. and Fourth Circuit

- “On the basis of sex” = because of gender
- Sexual favoritism not fair, but no basis for Title VII claim



Murray v. Winston-Salem

(M.D.N.C. 2002)

- Facts:

- Plaintiff claimed supervisor's poor treatment of her and favoritism of paramour amounted to sexual harassment, discrimination, retaliation, and hostile environment
 - Favoritism amounted to isolated incidents and not widespread preferential environment
 - Supervisor in question reviewed plaintiff more favorably than 2 other supervisors
 - Transfer to new department was not an adverse employment action





“You are harassing all the other women in the office, except me?! So I’m suing you for discrimination.”

Becerra v. Dalton

(4th Cir. 1999)

Facts:

- Becerra passed over for promotion that...
- Went to woman allegedly trading sexual favors.



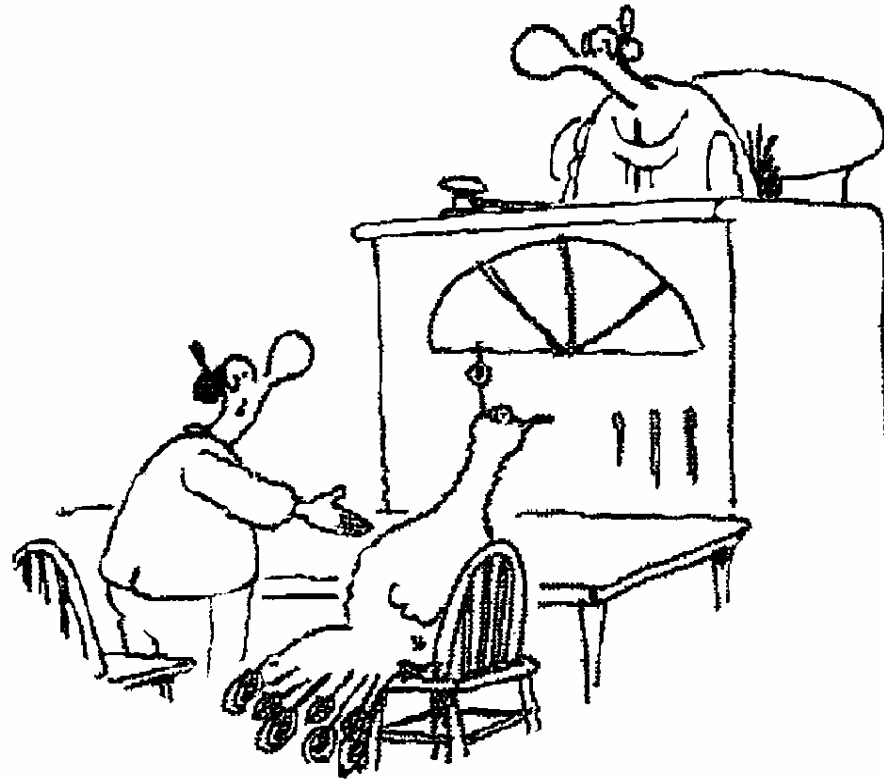
Becerra v. Dalton

(continued)

Holding:

- Court held that promotion of paramour (while unfair) is not a violation under Title VII.
- Not discriminated against because of status as a male
- All other applicants in the same boat.

- Title VII is NOT a general civility code
 - NO guarantee of sophistication or refinement
 - NOT a remedy for every act of verbal or physical harassment



“Fanning one’s plumage hardly constitutes harassment, your honor.”

Wall Street Journal 7-26-06

What Can You Do?

- Review anti-harassment and anti-retaliation policies
- Enforce them
- Training for employees and management
- Pay attention
- Set the best example





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