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**“SEXUAL HARASSMENT – THE CALIFORNIA COURT
REMINDS US THAT YOU CANNOT IGNORE THE
CONTEXT IN WHICH SEXUAL CONDUCT AT THE
WORKPLACE OCCURS”**

If you just read the highlights of the California Supreme Court’s recent ruling *Lyle v. Warner Brothers Television Prod.*, 042006 CASC, S125171 (April 2006), you might think that sexual harassment principles have taken a leap backwards. In *Lyle*, the Court upheld the lower Court’s finding that the Plaintiff, Amaani Lyle, was not the victim of sexual harassment, despite working in an environment where sex was routinely discussed and sexually vulgar language was present. For many, a zero-tolerance sexual harassment policy has become associated with complete avoidance of sexual discussions and vulgar language. And, while most workplace environments are best served by that practice, the high court reminds us that you cannot ignore the context in which the conduct occurs. As the *Lyle* Court explains, the essence of a sexual harassment claim is “the disparate treatment of an employee on the basis of sex – not the mere discussion of sex or use of vulgar language at the workplace.”

But before loosening the reigns on workplace conduct, it is important to take a closer look at the *Lyle* ruling because the rules have actually not changed. The outcome in *Lyle* is based primarily on the unique context in which the sexual conduct took place. Plaintiff was employed by Warner Brothers Television Production as a writer’s assistant for the writers of the television show *Friends*, a popular adult-oriented television show. At the time of her interview, she was told that the show she would be working on “dealt with sexual matters and, as a result, the writers told sexual jokes and engaged in discussions about sex.” Plaintiff responded that sexual discussions and jokes did not make her uncomfortable. She accepted the job and continued to work in that position for approximately four months. She testified that no one ever said anything sexually offensive about her directly, no one ever asked her out on a date or sexually propositioned her, and no one ever demanded sexual favors of her or physically threatened her.

Instead, the gist of her sexual harassment claim was that a number of offensive discussions and actions occurred in the writers’ meetings she was required to attend and

on occasion, in the break room and hallways. The evidence showed that the writers engaged in graphic discussions about their personal sexual experiences, sexual preferences, and preferences in women, engaged in bragging about their personal sexual exploits with girlfriends and wives and engaged in the use of sexual antics and drawings. They also included the writers talking about what they would like to do sexually to different female cast members on *Friends*.

The Court was persuaded that the record reflected “a workplace where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes. In this context, the defendant writers’ non-directed sexual antics and sexual talk did not contribute to an environment in which women and men were treated disparately. Moreover, there was nothing to suggest the defendants engaged in this particular behavior to make plaintiff uncomfortable or self-conscious, or to intimidate, ridicule, or insult her. . . .”

The Court was persuaded by the evidence that the instances of sexual antics and discussions were not aimed at plaintiff or any other female. It was further persuaded by the evidence that the conduct occurred in group sessions with both male and female participants present, and that female writers on the *Friends* production also discussed their own sexual experiences to generate material for the show. The Court gave significance to Plaintiff’s testimony that she was told during her interview that “the humor could get a little lowbrow in the writers’ room.”

Of course, a work environment where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes, does not describe most work environments. So, arguably, the reach of the *Lyle* ruling is quite limited. As stated, the rules of sexual harassment have actually not been altered by this recent ruling. For example, it is not new law that to be actionable, “a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” (*Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998).) As the *Lyle* Court explains,

That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . .if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.

It is also not new law that the inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. (*Oncale v.*

Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).) In *Oncale*, the United States Supreme Court explained,

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discriminat[ion] . . . because of . . . sex.’ . . . “workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations. . . .The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. (*Oncale*, 523 U.S. at 81.)

Similarly, under the California Fair Employment and Housing Act, hostile work environment sexual harassment claims require a Plaintiff to show that gender is a substantial factor in the discrimination, and that if the plaintiff “had been a man, she would not have been treated in the same manner.” (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 348.)

The *Lyle* Court simply repeats these principles when it states “it 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.” The *Lyle* Court further pointed out that the same type of conduct is actionable in a different environment, distinguishing, as an example, the case of *Ocheltree v. Scollon Productions, Inc.* (4th Cir. 2003) 335 F.3d, 325. In *Ocheltree*, a woman working at a costume production shop was exposed to a daily stream of sexually explicit discussions and conduct, including talk of sexual exploits with their wives and girlfriends, the use of a female-form mannequin to demonstrate sexual techniques, the singing of a vulgar song and the presence of a magazine containing graphic photographs of naked men. In that case, the Court had found that “a reasonable jury would find that much of the sex-laden and sexist talk and conduct in the production shop was aimed at [the plaintiff] because of sex – specifically, that the men behaved as they did to make her uncomfortable and self-conscious as the only woman in the workplace. (*Ocheltree*, 335 F.3d at p. 333.)

Whether or not you agree with the *Lyle* Court’s ruling, it nonetheless provides a vivid illustration of a context where sexual conduct did not result in liability for sexual harassment. While it is instructive to remember that more than just sexual conduct is required to create sexual harassment, the reality may be that very few environments contain the necessary context to render such conduct permissible. And, in the end, the first time an employer may know for sure will be when the judge or jury makes its decision in connection with a litigated sexual harassment claim.

Our advice after *Lyle*, continue to behave.