



talking dirty: court of appeal rejects harassment claim based on vulgar speech

MSK Client Alert

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In the recent decision *Kelley v. The Conco Companies*, a California Court of Appeal held that a supervisor's graphic and demeaning sexual comments did **not** support a claim for same-sex harassment because they were not based on, or made **"because of,"** the plaintiff employee's sex.¹ [Please note that this article contains language that readers may find offensive]

In so holding, the *Kelley* court relied on the 2006 decision in *Lyle v. Warner Brothers Television Productions*, in which the California Supreme Court emphasized that the context of sexual speech or conduct must be considered when determining whether it qualifies as actionable sexual harassment.² The *Lyle* case was handled by a team of MSK lawyers led by Labor and Employment Department partner Adam Levin.

The plaintiff in *Kelley* was an ironworker with a large concrete construction company. While working at a job site, Kelley went to move some pieces of steel of different sizes, and his supervisor told him not to mix up the sizes. As Kelley moved the steel, the sizes got mixed up, and Kelley tried to sort the piles using his foot. The supervisor yelled at Kelley to "fucking quit using [your] goddamn fucking foot; bend the fuck over and pick that shit up. Pick that shit up, bitch."³

When Kelley bent over to pick up the steel pieces, the supervisor called him a "bitch" and a "fucking punk," and then took his language up a notch (actually, several notches). The supervisor told Kelley that he had a "nice ass," that Kelley's pants "made [his] ass look good," that he would "fuck [Kelley] better than [Kelley's] old lady," that Kelley would "look good in little girl's clothes," and made additional similarly offensive sexual remarks. When Kelley got on his knees to complete another task, the supervisor continued his rant, telling Kelley "[t]hat's where you belong, on your knees." Kelley confronted the supervisor and asked

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if he was "fucking gay," and the supervisor responded angrily and told Kelley he was going to "kick [Kelley's] ass."⁴

Although the supervisor's language was sexually explicit, and the language expressed sexual interest and solicited sexual activity, there was no evidence that the harassment was motivated by sexual desire or intent by the supervisor. Indeed, Kelley did not contend that the supervisor's statements were intended to be taken literally.⁵ The court found that the context of the comments and the atmosphere of Kelley's workplace supported the conclusion that the comments were not meant literally: "It appears undisputed that in the environment in which this incident took place, sexually taunting comments by supervisors and employees were commonplace, including gay innuendo, profanity, and rude, crude and insulting behavior. Such comments were made both jokingly and in anger."⁶

Relying on *Lyle*, the *Kelley* court explained that the mere fact that words have sexual content or connotation does not mean that they are "because of" sex as required to establish sexual harassment.⁷ The court emphasized that "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."⁸

ASK MSK - Q&A Section

Q: What does the *Kelley* decision mean for sexual harassment litigation?

A: *Kelley* illustrates the requirement articulated in *Lyle* that sexual comments - no matter how vulgar and offensive - must have been made "because of" the employee's sex in order to support a claim for unlawful harassment. An employee can show comments were made "because of" his or her sex in a variety of different ways, as explained by the United States Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). However, if the sexual banter is part of a creative process (like in *Lyle*), or commonly used as an expression of anger (like in *Kelley*), an employee may be unable to establish that comments were made "because of" his or her sex.

Q: Should companies relax their anti-harassment policies based on the *Kelley* decision?

A: No! While *Kelley* is certainly a good holding for companies with the occasional errant foul-mouthed supervisor, companies should continue to take all steps necessary to eliminate from the workplace the type of hostile behavior exhibited in *Kelley*. As the California Supreme Court explained in *Lyle*: "[W]e do not suggest the use of sexually coarse and vulgar language in the workplace can never constitute harassment because of sex; indeed, language similar to that at issue here might well establish actionable harassment depending on the circumstances. Nor do we imply that employees generally should be free, without employer restriction, to engage in sexually coarse and vulgar language or conduct at the workplace. We simply recognize that... [California anti-harassment law] is not a civility code and is not designed to rid the workplace of vulgarity."⁹

1. The complete text of the court's opinion in *Kelley v. The Conco Companies* can be found at 2011 WL 2177235 (Cal. App. 1 Dist., 2011).



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2. 38 Cal. 4th 264 (2006).
3. *Kelley* at *1.
4. *Kelley* at *1-2.
5. *Kelley* at *6.
6. *Id.*
7. *Kelley* at *5-6.
8. *Kelley* at *5 (quoting *Lyle*).
9. *Lyle* at 295 (internal quotation marks and citations omitted).