Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism

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Sexual favoritism is the preferential treatment of an employee because that employee granted sexual favors to the employer. In this article, Professor Van Tol notes that the legal, feminist and organizational perspectives on sexual harassment all share the concept of power as a defining factor, and that this concept also defines sexual favoritism. She analyzes court treatment of sexual favoritism claims, both before and after Meritor Savings Bank v. Vinson, the landmark Supreme Court case on sexual harassment. She argues that revised EEOC Guidelines restricting sexual harassment causes of action to quid pro quo and hostile environment claims are wrong and not mandated by Meritor. Finally, the author argues that sexual favoritism should be recognized as a distinct form of sexual harassment under Title VII.

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INTRODUCTION

In her pioneering¹ work on sexual harassment, Professor Catherine

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¹ The term "pioneering work" has become trite when used to describe Professor Catherine A. MacKinnon's book, The Sexual Harassment of Working Women (1979); however, no other word describes both the impact and value of this well-worn book. Her instructive and thought-provoking work certainly "prepared the way" for my own research in this area of the law. Therefore, I use the term with apologies to those who find its use unimaginative.

MacKinnon described the concept that an employer could be liable for discrimination because of sexual favoritism as "probably beyond the currently imaginable reach of most courts." A year later, the Equal Employment Opportunity Guidelines were amended to recognize sexual favoritism as a form of unlawful sex discrimination. In 1983, one federal court recognized sexual favoritism as an actionable form of sexual harassment. Soon thereafter, two other district courts and the Court of Appeals for the District of Columbia also

2. Sexual favoritism claims typically involve allegations by the plaintiff that a co-worker received preferential treatment in exchange for granting sexual favors to the defendant employer. The essence of these claims is that the employer discriminated against the plaintiff, an otherwise qualified individual, by granting the employment benefit or opportunity in question to a co-worker who submitted to the employer's sexual advances or requests. EEOC Policy Guidance on Employer Liability for Sexual Favoritism, DAILY LABOR REPORT (BNA) No. 32, at D-1 (Feb. 15, 1990).

These claims are also known as "paramour cases" or third party sexual harassment claims. See, e.g., Cairo v. OH Material Corp., 710 F. Supp. 1069, 1072 (M.D. La. 1989) (court's reference to the "so-called paramour cases"); Women in the Workforce: Supreme Court Issues: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 99th Cong., 2d Sess. 114 (1986) (testimony of Sarah E. Burns, Assistant Director, Georgetown University Law Center Sex Discrimination Clinic summarizing prepared statement of Lorence Kessler, Attorney, McGuinness & Williams) [hereinafter Women in the Workforce Hearings].

One commentator has declined to use this characterization of the cases "because the word 'paramour' implies an illicit sexual partner of a married man or woman" and "[t]he alleged sexual relationships at issue in the cases . . . are not always illicit in that sense." Mary C. Manemann, The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?, 83 NW. U. L. REV. 612, 612 n.3 (1989). See also Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 845 (1988) ("[t]his species of sexual encounter has not yet been given a name that captures all of its dimensions").

3. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 197 (1979). In a 1979 U.S. Department of Commerce memorandum, for example, it was recognized that "a form of sexual harassment which may be harder for employees to cope with occurs when people use [the] power of their office or position to control, influence or affect the career, salary, or job of another employee (or prospective employee) in exchange for sexual favors." Sexual Harassment in the Federal Government: Hearings before Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 174 (1979) [hereinafter Sexual Harassment Hearings].

In fact, when Professor MacKinnon described this theory of discrimination a split of authority existed over whether sexual harassment was even actionable under Title VII; the theory of sexual harassment as sex discrimination was in its infancy. See, e.g., Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), rev'd on other grounds, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded on other grounds, 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), rev'd sub nom. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

Thus, in this context, the allusion to the outermost reach of the theory of sexual harassment was probably more chimerical than prophetic. See, e.g., Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) ("[i]t is clear that such a claim [of sexual favoritism] is simply without the scope of the Act"), rev'd and remanded, 568 F.2d 1044 (3rd Cir. 1977).

4. 45 Fed. Reg. 74676, 74677 (1980) (to be codified at 29 C.F.R. § 1604.11(g)). These guidelines provided that:

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.


recognized sexual favoritism claims as a form of sexual harassment under Title VII. Against the backdrop of the fairly rapid development of this once unimaginable cause of action, the recent issuance of new policy guidance from the EEOC signals an intention to narrow the scope of an employer’s liability for sexual favoritism.

This article, which traces the development (and decline) of this new cause of action, begins with a brief analysis of the divergent perspectives on sexual harassment. This analysis is provided as a backdrop against


8. See infra text accompanying notes 140-44.
which I argue that regardless of the perspective from which one views it, the theoretical bases for sexual favoritism and sexual harassment claims are so similar that preferential treatment in the workplace based on sexual favoritism should be actionable under Title VII as a form of employment discrimination. After a review of Title VII sexual favoritism cases both before and after the *Meritor* case, I conclude that the EEOC has erred in narrowing the scope of an employer's liability for workplace sexual favoritism. Instead, I propose that sexual favoritism be recognized for what it is: a distinct type of sexual harassment actionable under Title VII.

I

**SEXUAL HARASSMENT: DEFINITIONS AND THEORIES**

More than a decade after its first use in common legal parlance, the term sexual harassment remains a "legal term of art,"9 which is widely and variously defined. One commentator has concluded that:

an operational and justiciable definition of sexual harassment has proven elusive because definition is inextricably tied to the issue of perception. The definition of sexual harassment - behaviorally, situationally and legally - bears directly on the resolution of all attendant issues. It affects social science measurement and legal rule-making equally. How we measure sexual harassment depends on what behaviors we say constitute it.10

How one defines sexual harassment in the workplace depends on the perspective from which certain workplace behaviors are viewed. There are three recognized perspectives on sexuality in the workplace: the feminist perspective, the organizational perspective, and the legal perspective.11

From a feminist perspective, sexual harassment in the workplace is a "logical consequence" of a sexist society in which women are exploited because they are considered to be inferior.12 The sexual harassment of women helps maintain the gender stratification by reinforcing women's status as sex objects.13 Many of those who view sexual harassment from

11. GUTEK, supra note 7, at 8. Professor Gutek presents these perspectives in their "purest and strongest form" and acknowledges that they are oversimplified and neither independent nor mutually exclusive. *Id.* at 10.
12. *Id.*
13. *Id.* See also Hoffmann, supra note 7. Hoffmann asserts that sexual harassment "reflects structural inequalities between men and women in occupational hierarchies, sexual objectification of women, and the relative absence—at least until the past decade—of an ideological framework in which seemingly private and personal interactions are placed in a political context." *Id.* at 116. She further argues that sexual harassment is the "manifestation and a cause of subordination of women." *Id.*
the feminist perspective believe that the definition of sexual harassment should reflect and be shaped by the victim's perspective. Women's experiences "should begin to provide a starting point and context out of which is constructed narrower forms of abuse that will be made illegal on their behalf."

The feminist perspective informs the following definitions of sexual harassment:

- the unwanted imposition of sexual requirements in the context of a relationship of unequal power;
- the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person;
- any attention of a sexual nature in the context of the work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work or interfering with her employment opportunities. It can be manifested by looks, touches, jokes, innuendoes, gestures, epithets or direct propositions. At one extreme, it is the direct demand for sexual compliance coupled with the threat of firing if a woman refuses. At the other, it is being forced to work in an environment in which, through various means, such as sexual slurs and/or the public display of derogatory images of women or the requirement that she dress in sexually revealing clothing, a woman is subjected to stress or made to feel humiliated because of her sex. Sexual harassment is behavior which becomes coercive because it occurs in the employment context, thus threatening both a woman's job satisfaction and security.


Professor MacKinnon describes the impact of sexual harassment on women in terms of their autonomy:

Sexual harassment on the job undercuts a woman's autonomy outside the home by sexualizing her role in exactly the same way as within the family: sexual imposition combined with a definition of her work in terms of tasks which serve the man, sanctioned by her practical inability to create the material conditions of life on her own.

Catherine MacKinnon, supra note 3, at 216-17.

Wendy Pollack cautions that viewing the issue solely from the woman's perspective can result in the treatment of sexual harassment as an "isolated, personal, and trivial experience." Pollack, supra note 7, at 82.

15. I acknowledge that men can also be the victims of sexual harassment; in fact, the recognition of sexual favoritism as a form of sexual harassment may well increase the number of sexual harassment plaintiffs who are male. I have chosen, however, to refer to the victims of sexual harassment as female both because most sexual harassment victims are female and because it is less cumbersome to do so.


17. Id. at 1.


There are two organizational, or management, perspectives on sexual harassment in the workplace; both focus on the behavior of the workers, rather than on society. The older organizational view is that sexual harassment is an interpersonal problem involving misperceptions or misunderstandings of a person’s intentions. Because sexual harassment is personal, and therefore not the organization’s business, allegations of sexual harassment are usually handled informally, if at all. This perspective defines sexual harassment quite narrowly and would include only “such extreme abuse as pressing repeated physical advances on an employee or firing her for refusing to submit to such advances.”

The newer management point of view is that while sexual harassment is an interpersonal phenomenon, it is aberrant and unprofessional behavior that must be addressed by the organization. Sexual harassment from this perspective is defined as:

a form of employee misconduct which undermines the integrity of the employment relationship. Sexual harassment is a prohibited personnel practice when it results in discrimination for or against an employee on the basis of conduct not related to performance, such as the taking or refusal to take a personnel action, including promotion of employees who submit to sexual advances or refusal to promote employees who resist or protest sexual overtures.

The legal perspective on sexual harassment focuses on both the work environment and the effects of sexual harassment; the societal

20. GUTEK, supra note 7, at 11-12. Professor Gutek reports that “under this point of view, protecting the reputation of the high-status person—almost always a man—from unwarranted accusations that could damage his career may be the organization’s prime responsibility.” Id. But see MACKINNON, supra note 3, at 199 (“It is exactly because men feel that their acts spring from sexual attraction to an individual woman that they can feel justified in abusing their power as employers in the service of their sexual gratification as men.”); Bratton, supra note 10, at 100 (“A view that sees some forms of sexual harassment as normal, harmless, or humorous, necessarily rests on a theory of the world and a theory of the state in which males are dominant, i.e., that it is natural and expected that they be sexual aggressors, and in which females are subordinate, either secretly flattered by attention, or ‘asking for it.’”).

Some social scientists who have studied sexual harassment in the workplace have labelled this assumption the “natural-biological model.” See Sandra S. Tangri, Martha B. Burt & Leanor B. Johnson, Sexual Harassment at Work: Three Explanatory Models, 38 J. Soc. Issues (No. 4) 33, 34 (1982). There are two versions of the “natural-biological model”: both assume there is no intent to harass. The first version is premised on the assumption that the male sex drive is stronger than the female sex drive. The second version makes no assumption about men and women's sex drives. Id. at 25. Little empirical evidence was found to support either version of this model of sexual harassment. Id. at 51. See also GUTEK, supra note 7, at 13.

21. Note, supra note 18, at 1452. Moreover, “[b]ecause the theory aims only to proscribe obviously offensive behavior, the viewpoint for assessing the wrongfulness of the putative harasser’s conduct would be that of the reasonable defendant.” Id.

22. GUTEK, supra note 7, at 12. The interpersonal behavior becomes the organization’s business because “[o]ne person misuses the power associated with his or her organizational position.” Id.

causes of sexual harassment and the impact of sexuality in the workplace do not figure prominently in this perspective.\textsuperscript{24} From a legal perspective, sexual harassment is typically defined in terms of the impact or effect that certain behavior has on the conditions in the workplace. For example, the Equal Employment Opportunity Commission guidelines provide that:

[unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\textsuperscript{25}]

This definition explicitly recognizes the hostile work environment that can result from sexual harassment, as well as the unequal power relationship that allows the use of sex as a term or condition of employment or continued favorable review—concerns that are paramount from the legal perspective. This perspective has also influenced judicial definitions of sexual harassment.\textsuperscript{26}

Although these divergent perspectives produce somewhat different definitions of sexual harassment, one factor remains constant in the defi-

\textsuperscript{24} GUTEK, \textit{supra} note 7, at 11. Although the legal perspective is beginning to draw increasingly from the feminist perspective over the organizational-management perspective, vestiges of the old organizational-management perspective remain. See Jew v. University of Iowa, 749 F. Supp. 946, 958 (S.D. Iowa 1990); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441-42 (D.W. Va. 1985).

\textsuperscript{25} 29 C.F.R. § 1604.11(a) (1990).

\textsuperscript{26} See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). The Court in \textit{Meritor} recognized two types of sexual harassment claims under Title VII: "quid pro quo" claims and hostile work environment claims. \textit{Id.} at 65.

A quid pro quo claim typically involves the worker's allegation that she submitted to the employer's sexual advances in order to retain or obtain employment or a benefit of employment. See 29 C.F.R. § 1604.11(a)(2) (1990). See, e.g., Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

Hostile work environment claims, on the other hand, are more subtle. These claims usually involve allegations of a work environment in which sexually demeaning or offensive behavior is so severe or pervasive that the conditions of work are altered and an abusive work environment is created. Meritor Savings Bank v. Vinson, 477 U.S. at 66. See also 29 C.F.R. § 1604.11(a)(3) (1990) ("[S]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

The type of sexual harassment involved in hostile work environment claims includes, for example, sexual epithets, offensive touching, repeated requests for dates or sexual activity, and sexually demeaning jokes or photographs. Henken, \textit{supra} note 7, at 1246.

One of the primary differences between quid pro quo and hostile work environment claims is that in a hostile work environment claim, the worker's job status is not conditioned on submission to the employer's sexual advances. Meritor Savings Bank v. Vinson, 477 U.S. at 64-65.
nitions—the concept of power.27

[S]exual harassment is not about sex, it is about power. . . . It supports and perpetuates a system in which one class of persons is systematically disempowered. Sexual harassment is not only a product of gender-based dominance; it plays an important role in maintaining that dominance and perpetuating circumstances in which domination-based views become cultural norms.28

27. Maypole & Skaine, supra note 7, at 385 ("review of the literature revealed that all definitions of sexual harassment include the word 'unwanted' and almost all include the concept of power").

Moreover, sexual harassment is almost uniformly defined as unwelcome sexual attention. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. at 64-65. In one of the more controversial and criticized aspects of the Meritor decision, Justice Rehnquist attempted to establish a standard for determining whether sexual advances were unwelcome. In his words: "[w]hile 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that the complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." Id. at 69.

It is generally accepted that "[a]n uncoerced, consensual intimate relationship is not sexual harassment." See Phyllis L. Crocker & Anne E. Simon, Sexual Harassment in Education, 10 CAP. U. L. REV. 541, 544 n.12 (1981). When does a relationship become coercive? Who is entitled to define the nature of the relationship and the type of advances: the alleged harasser or the alleged victim? Catherine MacKinnon describes a "murky area where power and caring converge." MacKinnon, supra note 3, at 54. Although a detailed analysis of these issues is beyond the scope of this article, I take the position that any sexual attention given in the context of an unequal power relationship should be presumed to be unwanted or unwelcomed, that any intimate relationship formed in the workplace where there is a power imbalance between the parties to the relationship is inherently coercive, and that the "consent" of the unequal party to such relationships should be considered to be invalid.

At least one commentator has noted a shift towards the feminist perspective on the issue of consent in sex cases. Professor Chamallas describes the impact that feminist critique has had on the concept of consent:

Under the refurbished version of consent, consent is not considered freely given if it is secured through physical force, economic pressure, or deception. Consent secured by these inducements is no longer routinely treated as true consent—even if the woman conceivably could have avoided the sexual encounter by resisting.

In the view of some feminists, legal reforms that only refurbish, but do not displace, the concept of consent as a central feature of the law of sex may not be deep enough to effect substantial change. This radical critique of consent asserts that the social meaning of 'consent' is inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to initiatives.

Chamallas, supra note 2, at 814 (footnotes omitted).

Similarly, Professor Hemming notes that:

Consent to sexual activity with the initial harasser or other male may be given in hopes of eliciting protection from the male to the female. If protection is received, the female may feel gratitude. Protection and cessation of harasser aggression is highly rewarding and may result in passionate love. However, the male's protection will only be effective in his sphere of influence and will, at the same time, preclude useful working relationships with other people.

Hemming, supra note 7, at 74.

See also Phyllis Coleman, Sex in Power Dependency Relationships: Taking Advantage of the "Fair" Sex, 53 ALB. L. REV. 95 (1988). Coleman asserts "that 'consent' to sexual relationship obtained in power dependency relationship is inherently suspect." Id. at 96. Professor Coleman argues that "an employee states a prima facie case when she alleges a sexual relationship commenced during an employer-employee relationship." Id. at 137.

28. Bratton, supra note 10, at 98. See also Mary Bularzik, Sexual Harassment at the Work-
This expression of power undermines the integrity of the workplace by devaluing an employee's skills and work habits and valuing the employee's sexual characteristics and sexual activities. Victims of sexual harassment are told that "their value is not in their job performance but in their use as sexual objects." Sexual harassment is sex discrimination because the expression of power is, for no legitimate reason, based on sex. Sex discrimination occurs when "sex is for no legitimate reason a substantial factor in the discrimination."

In the following sections of this article, I argue that sexual favorit-
ism is another form of sexual harassment because it, too, involves the expression of power based on sex as a factor in an employment decision. Preferential treatment of sexually compliant workers undermines the integrity of the workplace through the imposition of a sexual standard. Sexual favoritism is sex discrimination when the preferential treatment of a sexually compliant worker disadvantages those otherwise qualified workers who refuse to "trade in sexual currency." 

II

THE DISCRIMINATORY EFFECTS OF SEXUAL FAVORITISM

In simple terms, sexual favoritism is the preferential treatment of an employee because that employee granted sexual favors to the employer. Sexual favoritism can be a factor in the initial hiring decision, it can influence a promotion decision, or it can dictate work assignments. Most claims of sexual favoritism are based on the existence of a "consensual" sexual and/or romantic relationship between a co-worker and a mutual supervisor. The underlying relationships are most often between men who hold supervisory positions and women in subordinate positions.

These office relationships remain widespread and can be used as an index of both attitudes toward sexual favoritism and the detrimental effects that follow from it. A survey of white collar workers confirmed that "office romances" are prevalent in the modern workplace. Approxim-
mately 64% of the respondents reported that they knew of at least one romantic relationship between co-workers.\footnote{41}

Participants in the survey were asked to describe how they perceived the motives and characteristics of co-workers who were engaged in office romances. While their responses varied, a detailed analysis of the responses revealed three types of perceived motives: job, ego, and love.\footnote{42}

More specifically:

People with job motives are perceived as being after advancement, job security, increased power, financial rewards, and other organizational payoffs. . . . People with ego motives were perceived to be after such personal rewards as excitement, ego satisfaction, adventure, and sexual experience. The people who were perceived as having sincere motives were described as being sincerely in love, and seeking companionship or a spouse.\footnote{43}

The job motive was rarely attributed to males.\footnote{44}

In addition, survey participants were asked to note behavioral changes in persons engaged in office romances. The perceived behavioral changes were then categorized as: competence behavior change, power behavior change and positive behavior change.\footnote{45} Competence behavior change refers to changes in the performance of assigned duties at work.\footnote{46}

American Society for Personnel Administrators agreed that "it is common to see professional interest turn into romantic attraction." Quinn, \textit{supra} note 39, at 44.\footnote{41}

The respondents reported that approximately two-thirds of the participants in office romances initially tried to keep their relationship a secret because there were rules against such relationships, because one of participants in the relationship was married, or because of general disapproval from co-workers. \textit{Id.} at 44.\footnote{42}

Quinn acknowledged that "measuring motives and characteristics of people is a difficult job at best." \textit{Id.} His goal was simply to describe how others perceived the motives and characteristics of those who were involved in these office relationships. This inquiry is particularly relevant to claims of sexual favoritism under Title VII.\footnote{43}

The factors included in this category, along with the frequency of respondents who noted these changes, for males who were involved in workplace relationships were:

\begin{itemize}
  \item lost respect of members [of workplace group] 39
  \item became preoccupied 30
  \item covered mistakes of female 29
  \item began to arrive late, leave early 27
  \item did less work 25
  \item began missing commitments and meetings 17
  \item lower quality work 16
  \item made costly errors 11
  \item became incompetent 10
\end{itemize}

The factors and responses in this same category for females who were involved in workplace relationships were:
Positive behavior change refers to changes in the worker's attitude.\textsuperscript{47} The last category refers to alteration of power.\textsuperscript{48}

The behavioral change noted most frequently, for both males and females involved in office romances, was that one showed favoritism to the other.\textsuperscript{49} The vast majority of those surveyed said that males in workplace relationships showed favoritism to the females with whom they were involved; a slightly lower percentage of the respondents said that females who were engaged in workplace relationships showed favoritism

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<tr>
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<td>did less work</td>
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<tr>
<td>began to arrive late, leave early</td>
<td>28</td>
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<tr>
<td>covered mistake of male</td>
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<tr>
<td>lower quality work</td>
<td>20</td>
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<tr>
<td>ignored complaints about male</td>
<td>19</td>
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<tr>
<td>began missing meetings and commitments</td>
<td>13</td>
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<tr>
<td>made costly errors</td>
<td>11</td>
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<tr>
<td>became incompetent</td>
<td>10</td>
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<tr>
<td>became inaccessible</td>
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\textit{Id.} 47. The factors included in this category, along with the frequency of respondents who noted these changes, for males who were involved in workplace relationships were:

- was easier to get along with 29
- became more productive 19
- changed for the better 15

The factors and responses in this same category for females who were involved in workplace relationships were:

- was easier to get along with 33
- changed for the better 19
- became more productive 17

\textit{Id.} 48. The factors included in this category, along with the frequency of respondents who noted these changes, for males who were involved in workplace relationships were:

- showed favoritism to the female 84
- became eyes and ears of the other 36
- ignored complaints about the female 30
- promoted the other 28
- isolated the female from members 22
- gave female more power 21
- became inaccessible 19
- began to flaunt new power 5

The factors and responses in this same category for females who were involved in workplace relationships were:

- showed favoritism to male 69
- assumed more power in the organization 26
- isolated male from members 21
- began to flaunt new power 16
- gave male more power 8

to the males with whom they were involved.\footnote{50}

The survey also assessed the overall impact of office romances on the workplace. The results were categorized as either positive or negative impacts.\footnote{51} The negative impact responses outnumbered the positive impact responses; that is, the respondents noted the negative impacts of office romances more frequently than they noted positive impacts.\footnote{52} The most frequently noted negative impacts were: gossip, complaints and gripes, hostilities, distorted communication, damage to the image or reputation of the workplace, and redistributed work.\footnote{53} The positive impacts, which were less frequently noted, included increased coordination, lowered tensions and improved teamwork.\footnote{54}

According to the survey, management response to office romances typically falls into one of three categories: take no action, take positive action or take punitive action.\footnote{55} The most frequent management re-

\footnote{50. Quinn, supra note 39, at 46-47.}
\footnote{51. The negative impacts and the frequency of agree responses by percentage were:

\begin{itemize}
  \item caused much gossip 69.8
  \item complaints and gripes 34.2
  \item caused hostilities 33.1
  \item distorted communication 24.6
  \item threatened image or reputation of unit 21.8
  \item redistributed work 21.7
  \item client awareness 21.6
  \item lowered morale 20.8
  \item lowered output or productivity 17.8
  \item slowed decision making 14.9
\end{itemize}

The positive impacts and the frequency of agree responses by percentage were:

\begin{itemize}
  \item increased coordination 13.3
  \item lowered tensions 11.8
  \item improved teamwork 11.5
  \item improved productivity 8.3
  \item improved the work flow 7.3
\end{itemize}

\textit{Id.} at 49.

\footnote{52. \textit{Id.}}
\footnote{53. \textit{Id.}}
\footnote{54. \textit{Id.}}
\footnote{55. The type of action taken by the male's superior and the frequency of agree responses by percentage were:

\begin{itemize}
  \item No action
    \begin{itemize}
      \item decided to ignore 61.9
      \item felt problem would resolve itself 53.3
      \item did not want to risk taking action 37.1
      \item did not know what to do 33.0
    \end{itemize}
  \item Punitive action
    \begin{itemize}
      \item reprimanded 12.2
      \item warned to change or leave 9.8
      \item transferred 6.7
      \item terminated 4.8
    \end{itemize}
  \item Positive action
    \begin{itemize}
      \item openly discussed situation 32.9
      \item counseled about what to do 22.0
    \end{itemize}
\end{itemize}
The least common response was to terminate one of the parties; however, when the management response was termination, females were twice as likely to be terminated as males.57

Office romances have existed for as long as there have been men and women together in the workplace. Not all office romances result in preferential treatment or discrimination. Relationships between co-workers of equal status or relationships between co-workers in separate departments of the workplace are not necessarily problematic. However, workplace relationships between workers of unequal status, particularly those relationships between a worker and a supervisor, are by their very nature problematic. Preferential treatment and favoritism often stem from these inherently unequal workplace relationships.58

Preferential treatment of sexually compliant workers has a disproportionate impact on women.59 The workplace remains largely sex-stratified.60 Because the majority of occupations are sex-stratified, men and women seldom complete with each other for the same position. Thus, when a female worker receives preferential treatment, the disadvantaged worker is usually another female who was competing for the same opportunity or benefit.61

The type of action taken by the female’s superior and the frequency of agree responses by percentage were:

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<th>Action</th>
<th>Percentage</th>
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<tr>
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<td>57.4</td>
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<tr>
<td>2. felt problem would resolve itself</td>
<td>50.5</td>
</tr>
<tr>
<td>3. did not want to risk taking action</td>
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<tr>
<td>4. did not know what to do</td>
<td>38.4</td>
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<tr>
<td>Punitive action</td>
<td></td>
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<tr>
<td>2. warned to change or leave</td>
<td>8.0</td>
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<tr>
<td>3. transferred</td>
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<tr>
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<td>Positive action</td>
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<tr>
<td>2. counseled about what to do</td>
<td>15.4</td>
</tr>
</tbody>
</table>

Id. at 50.

56. Id. (61.9% of the respondents said that the male’s superior decided to ignore the relationship; 57.4% of the respondents said the female’s superior decided to ignore the relationship).

57. Id. (4.8% of the respondents said that the male’s superior would terminate the male; 10.7% of the respondents said the female’s superior would terminate her).

58. See supra note 48.

59. GÜTEK, supra note 7, at 31-32. Men still hold most of the supervisory positions in the workplace. Women are usually in subordinate positions. The author asserts that most workplace relationships are between supervisors and subordinates; hence most workplace relationships are between male supervisors and their female subordinates. See also Quinn, supra note 39, at 42.


61. Although the female subordinate in a workplace relationship may initially benefit from the preferential treatment she receives from her supervisor, this benefit is often ephemeral. The literature suggests that when workplace relationships end, the woman is either transferred, fired or she
III

SEXUAL FAVORITISM CLAIMS UNDER TITLE VII

Sexual favoritism was first recognized as a form of discrimination in 1980 when EEOC Guidelines were amended to provide that:

[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.]

The EEOC Guidelines categorized sexual favoritism as a "related practice", a form of sex discrimination, to be governed by general Title VII principles. Although the EEOC issued this new provision in response to inquiries about sexual favoritism under the previous guidelines, no reported federal cases on sexual favoritism appeared until 1983. The case law in this area is both sparse and uneven. In the ten years since a cause of action for sexual favoritism was first recognized by the EEOC, only six reported cases involving claims of sexual favoritism brought under Title VII have been reported. The decisions in these six cases are split: in 1985 the D.C. Circuit recognized sexual favoritism as a cogniza-
ble claim under Title VII; however, one year later, the Court of Appeals for the Second Circuit interpreted the EEOC guidelines on sexual favoritism narrowly to hold that such claims cannot form the basis of a sex discrimination suit under Title VII. The lower federal courts are similarly split. Three federal district courts recognize Title VII sexual favoritism claims; one does not. The United States Supreme Court has declined to review the issue. The remainder of this section will focus on these cases and on the EEOC's subsequent efforts, through Policy Guidance, to clarify this unsettled area of Title VII law.

In the first of these cases, Toscano v. Nimmo, the female plaintiff, an unsuccessful applicant for an administrative position at a Veteran's Administration hospital, alleged that she suffered discrimination when the defendant appointed to the position a woman with whom he had a sexual affair.

Margaret Toscano was one of five applicants deemed to be qualified for the position of Chief of Ward Administration Section (Chief WAS). Donna Nelson was ultimately selected for the position by Jesus Segovia, Chief of the Medical Administrative Service. Toscano produced evidence that Segovia and Nelson were engaged in a sexual relationship at the time of Nelson's selection as Chief WAS. Toscano also produced evidence of Segovia's "pattern of conduct toward women," which the court found was proof of his intention to award the position of Chief WAS on the basis of received sexual favors. The court also found that Toscano was as qualified, if not more qualified, than Nelson, the woman who Segovia chose for the position. In short, even though Segovia did not specifically request sexual favors from Toscano, he had conditioned the appointment on the receipt of sexual favors from women. The court found that this violated Title VII because the same condition was not

65. King v. Palmer, 778 F.2d at 880.
71. EEOC Policy Guidance on Current Issues of Sexual Harassment, DAILY LABOR REPORT (BNA) No. 60, at E-1 n.5 (March 28, 1990) ("[t]he law is unsettled as to when a Title VII violation can be established in these circumstances.").
73. Id. at 1200.
74. Id.
75. Id. at 1202-03.
imposed on men.\textsuperscript{76}

The court held that while the facts of this case were slightly different from the "typical" Title VII sexual harassment case, it was "no different in its theoretical underpinnings." \textsuperscript{77} It characterized the case as one in which the decision was based on a criterion which discriminates on the basis of sex.\textsuperscript{78}

The next reported case involving a Title VII claim of sexual favoritism was \textit{King v. Palmer}.\textsuperscript{79} A nurse named Mabel King alleged that she was denied a promotion which was given to Jean Grant. King also maintained that Grant, a less qualified nurse, was having a sexual relationship with their mutual supervisor, Smith. The plaintiff presented evidence that Grant, who was 20 years younger than King, had fewer years of experience as a nurse; that Grant had attended out-of-town conferences with Smith; that Smith made the promotion decision; that Grant and Smith occasionally had long lunches together; and that Grant frequently disregarded her work schedule.\textsuperscript{80} There was also testimony about speculation in the workplace that Grant and Smith were having an affair.\textsuperscript{81}

In assessing King's claim, the court first held that although this case was "superficially different" from the typical case involving sexual conduct by a supervisor aimed at a subordinate,\textsuperscript{82} the theory of the Title VII violation was the same: "sex [was] for no legitimate reason a substantial factor in the discrimination."\textsuperscript{83} Citing the EEOC Guidelines on sexual favoritism and \textit{Toscano v. Nimmo} for support,\textsuperscript{84} the district court found that there was sufficient evidence to support an inference that "some kind

\textsuperscript{76} \textit{Id.} at 1199.
\textsuperscript{77} \textit{Id.} at 1199. The court held that Section 1604.11(g) of the EEOC Guidelines provided the theoretical predicate for Title VII liability for sexual favoritism.

The court's opinion in this case reflects some of the difficulty associated with the resolution of sexual favoritism claims. Even though sexual favoritism seems like sexual harassment, it does not always fit into one of the two recognized categories of sexual harassment: quid pro quo or hostile environment. In this case, the district court did not attempt to categorize the claim. It merely held that this was not a hostile environment case. \textit{Id.} at 1204. On the other hand, the court did not label it a quid pro quo claim; it simply held that basing a decision on sexual favoritism discriminates on the basis of sex.

Despite the district court's finding that the plaintiff had not alleged a hostile environment case, some of the facts suggest that it could have been treated as one. The court found that Segovia had engaged in a pattern of increasingly unprofessional behavior which included phoning employees at home to brag about his sexual encounters with other employees; making sexual advances toward female subordinates; and touching two female employees in a suggestive manner and making suggestive remarks. \textit{Id.} at 1199-1200.

\textsuperscript{78} \textit{Id.} at 1199.
\textsuperscript{79} 598 F. Supp. 65 (D.D.C. 1984). For a more in depth discussion of this case see \textit{Manemann}, \textit{supra} note 2, at 626-32.
\textsuperscript{80} 598 F. Supp. at 67.
\textsuperscript{81} \textit{Id.} Grant's former boyfriend also testified that she had told him she had been intimate with Smith and "was prepared to have sex with him if necessary to get the promotion." \textit{Id.}
\textsuperscript{82} \textit{Id.} at 66.
\textsuperscript{83} \textit{Id.} at 66-67 (quoting Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981)).
\textsuperscript{84} 598 F. Supp. at 67.
of sexual relationship between Dr. Smith and Grant was a substantial factor in Grant’s promotion” and that King had established a prima facie case of discrimination.\footnote{Id.}

Despite finding that the defendant’s explanation for Grant’s promotion was not credible and was clearly pretextual, the district court held that the “proof as a whole fails to satisfy the plaintiff’s burden.”\footnote{Id. at 68.} The court held that the plaintiff had failed to meet her burden because she had “offered no positive proof of sexual conduct or sexual attractiveness as between Grant and the doctors who promoted her.”\footnote{Id. at 69.} Accordingly, the court entered judgment for the defendants.\footnote{Id.}

Because the parties agreed that allegations of sexual favoritism could present a “cognizable cause of action under statutes prohibiting sex discrimination in employment,”\footnote{Id. at 68.} the issue on appeal was the district court’s finding that the plaintiff had failed to carry her burden of proving through direct evidence the existence of the sexual relationship on which the claim of sexual favoritism was based.\footnote{Id. at 69.} The Court of Appeals for the D.C. Circuit reversed, holding that the plaintiff was not required to produce direct evidence that the sexual relationship had been consummated.

\footnote{Id. The decision in this case was quite curious. The court initially exhibited tremendous sympathy for the plaintiff’s claim, finding that she had established a prima facie case. \textit{Id.} at 67. The court further found that the evidence painted a “dismaying picture of a government agency rank with petty jealousy, backbiting, lack of proper discipline, disregard for proper promotional practices, and incompetence in high authority.” \textit{Id.} at 68. Moreover, the court characterized testimony by the defendant as not credible and “clearly pretextual.” \textit{Id.} The court even suggested an attempt by the defendant to withhold important information. \textit{Id.}}

Despite this fairly explicit finding of antipathy for the defendant’s position, the court imposed on the plaintiff a burden of proof which was without precedent.\footnote{Id. at 68-69.} Ignoring its earlier finding that “some kind of sexual relationship between Grant and Smith was a substantial factor in Grant’s promotion,”\footnote{\textit{Id.}} the court found that:

Where a claim of sex discrimination under Title VII is made by a plaintiff contending that one of the same sex was given favored treatment because allegedly the discriminator was sexually attracted to the favored employee, courts must proceed with great caution given the vagaries and infinite manifestations of sexual stimulation. If a sexual relationship is solicited by or given the supervisor and favored treatment by the supervisor results as the payoff, there is no difficulty. But where, as here, there is no proof of an explicit sexual relationship or indeed of any sexual behavior between the favored employee and the supervisor, difficulties arise.\footnote{Id. at 68-69.}

The court held that because there was no positive proof of a sexual relationship between Grant and Smith, the plaintiff had failed to meet her burden.\footnote{Id. at 69.}

The plaintiff had argued in the alternative that even if there had been no sexual relationship between Grant and Smith, there was some kind of sexual attraction which was the basis for the promotion.\footnote{Id.} In response to this claim, the court used language which seemed to question not only the merits of this claim but also the legitimacy of the plaintiff’s original claim of sexual favoritism. The court said “[c]ases in this category must not rest on rumor, knowing winks and prurient overtones or on inferences allowed in divorce law.”\footnote{Id. 778 F.2d at 880.}

\footnote{King v. Palmer, 598 F. Supp. at 68.}
in order to prevail in her Title VII claim.\textsuperscript{91}

The case was remanded for consideration of an appropriate remedy.\textsuperscript{92} On petition for rehearing, the United States expressed concern that this decision "may represent a significant expansion of Title VII coverage."\textsuperscript{93} The court declined to reconsider its decision en banc because the Title VII issue had not been raised or briefed on the initial appeal, nor had it been raised by either party in the petition for rehearing.\textsuperscript{94}

In \textit{Priest v. Rotary},\textsuperscript{95} a waitress whose employment was terminated claimed that her employer gave preferential treatment to female employees who submitted to his sexual advances. She brought a Title VII action alleging sexual harassment.\textsuperscript{96} The plaintiff, Evelyn Priest, alleged that George Rotary was engaged in a consensual sexual relationship with Mary Durina, another waitress, and that this relationship had advantaged Durina and disadvantaged Priest. Priest specifically alleged that Durina was given better work assignments, was given preferential vacation benefits, was excused from certain duties, and was otherwise excepted from certain workplace rules.\textsuperscript{97} Priest also alleged that Rotary engaged in behavior which made the workplace environment offensive and intimidating.\textsuperscript{98} Citing \textit{Toscano v. Nimmo},\textsuperscript{99} the court noted that:

\begin{quote}
Title VII is also violated when an employer affords preferential treatment to female employees who submit to his sexual advances or other conduct of a sexual nature, or when, by his conduct or statements, implies that job benefits will be conditioned on an employee's good-natured endurance of his sexually-charged conduct or sexual advances.\textsuperscript{100}
\end{quote}

The court held that Priest had established a violation of Title VII by showing that Rotary's consensual sexual partner and others who had tolerated Rotary's conduct had been given preferential treatment.\textsuperscript{101}

The next case involving a Title VII sexual favoritism claim was \textit{DeCintio v. Westchester County Medical Center}.\textsuperscript{102} The plaintiffs in \textit{DeCintio} were seven male respiratory therapists who brought a Title VII action against their employer alleging that they had been discriminated against when their employer, acting through James Ryan, hired a woman...
with whom Ryan was having a consensual romantic relationship as Chief Respiratory Therapist. The male respiratory therapists, each of whom was seeking a promotion to the position of Chief Respiratory Therapist, alleged that Ryan added a special requirement to the Chief Respiratory Therapist job description, which none of them met, but which the successful candidate, Jean Guagenti, did meet.

The district court found that Ryan and Guagenti were engaged in a consensual romantic relationship at the time she was hired and that the defendant's reliance on the additional job requirement was pretextual. Accordingly, the district court held that the defendants had violated Title VII.

On appeal the Second Circuit framed the issue as follows: whether under Title VII . . . , the phrase "discrimination on the basis of sex" encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired. The court characterized King v. Palmer as a case in which the court recognized a Title VII claim for non-gender based sex discrimination and declined to adopt its view. The Second Circuit court distinguished Toscano v. Nimmo as a case in which the Title VII "claim itself was premised on the coercive nature of the employer's acts, rather than the fact of the relationship itself." It concluded that the claim in Toscano was the "substantial equivalent" of a sexual harassment claim. Furthermore, the court found that the EEOC Guidelines on sexual favoritism did not buttress the plaintiffs' claim because they apply only where there is an element of coercion or harassment.

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103. 807 F.2d at 305. The plaintiffs also filed a claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982). This claim was denied on the ground that there was "no valid justification for defining 'sex' for Equal Pay Act purposes in a manner inconsistent with the words' meaning under Title VII." Id. at 308.

104. Id. at 305. The special requirement added by Ryan was that the applicant be registered with the National Board of Respiratory Therapists (NBRT). NBRT registration requires successful completion of an examination and prior experience as a respiratory therapist. Id. at 305 n.1.

105. Id. at 306.

106. Id. The district court also found that the defendants had violated the Equal Pay Act. Id.

107. Id.

108. See supra text accompanying notes 79-94.


110. See supra text accompanying notes 72-78.


112. Id.

113. Id. at 307-08. This interpretation of the Guidelines was based on the court's finding that the use of the word "submission" implied coercion or harassment. Id. The court further held that "sexual relationships between coworkers should not be subject to Title VII scrutiny, so long as they are personal, social relationships." Id. (citing the preamble to Interim Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 25024 (1980)). The supplementary information which accompanies the interim guidelines fails to support the court's finding. Instead the relevant language of the prefatory information provides that:
Instead, relying on a restrictive reading of the case law and the EEOC Guidelines and a narrow interpretation of the meaning of the word "sex" in Title VII, and to avoid the involvement of the "EEOC and the federal courts in the policing of intimate relationships," the court found that "voluntary, romantic relationships cannot form the basis of a sex discrimination suit" under Title VII.

The same result was reached in *Miller v. Aluminum Company of America.* The plaintiff, Nancy Miller, filed a Title VII action against her former employer alleging *inter alia* that her supervisor, Joseph Caylor, had treated her less favorably than Mary Holihan, a fellow employee who was having a romantic relationship with the plant manager, Thomas Plantin.

The district court held as a matter of law that assertions of sexual favoritism do not state a Title VII claim. The court rejected those cases which recognize such claims "[b]ecause they underestimate the essential element of disparate treatment based on gender."

The most recent sexual favoritism case is *Broderick v. Ruder.* In *Broderick,* the plaintiff, a staff attorney at the Securities and Exchange Commission, brought a Title VII action alleging *inter alia* that the defendant had created a sexually hostile or offensive work environment by giving preferential treatment to those employees who submitted to their managers' sexual advances. The plaintiff, who received only one promotion during the five years in question, alleged that conduct of a sexual nature was pervasive, that she was sexually harassed, and that the preferential treatment of those employees who submitted to the sexual advances undermined her motivation and job performance. After recognizing that Title VII permits a claim for hostile work environment, the district court also found as a matter of law that "Title VII is also violated

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Interim § 1604.11(b) recognizes that the question of whether a particular action or incident establishes a purely personal, social relationship without a discriminatory employment effect requires a factual determination. In making such a determination, the Commission will look at the record as a whole and at the totality of the circumstances, emphasizing the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

Id. 114. 42 U.S.C. § 2000e-2(a)(1) (1988) (prohibits discrimination in employment "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin").

115. 807 F.2d at 308.

116. *Id.*


118. *Id.* at 500-01.

119. *Id.* at 501.

120. *Id.*


122. *Id.* at 1278. The court found this allegation to be true but deemed it less important than the fact that the plaintiff was forced to work in a sexually abusive and hostile environment. *Id.*
when an employer affords preferential treatment to female employees who submit to sexual advances or other conduct of a sexual nature and such conduct is a matter of common knowledge." 123 Using a hostile environment analysis, the court found for the plaintiff, holding that "consensual sexual relations, in exchange for tangible employment benefits, while possibly not creating a cause of action for the recipient of such sexual advances who does not find them unwelcome, do, and in this case did, create and contribute to a sexually hostile working environment." 124

Three of these six sexual favoritism cases were decided before the Supreme Court's decision in Meritor v. Vinson. 125 Thus, to some extent these courts were exploring uncharted territory. Even before the Supreme Court's decision in Meritor, there was general agreement that sexual harassment was actionable as sex discrimination under Title VII; 126 however, the limits of this theory were somewhat uncertain, particularly with regard to hostile work environment claims. 127

Despite, or perhaps because of, this uncertainty, all of the pre-Meritor sexual favoritism cases were decided in favor of the claimant. In Toscano, the court treated the plaintiff's sexual favoritism claim much like a sexual harassment claim. In fact, the court noted that the theoretical underpinnings of sexual favoritism and sexual harassment cases were the same and relied on the EEOC guidelines on sexual favoritism as well as several sexual harassment cases to find a Title VII violation. 128 The theoretical basis of the plaintiff's claim of sexual favoritism was not before the court in King v. Palmer because the parties agreed that allegations based on a sexual relationship were cognizable under Title VII. In Priest v. Rotary, 129 the court used the Toscano precedent to find in favor of the plaintiff on her sexual favoritism claim. 130

The law of sexual favoritism seemed to be headed toward the recognition of sexual favoritism as a distinct injury which is actionable under Title VII principles as either a form of sexual harassment or as an in-


124. 685 F. Supp. at 1280.


126. See supra note 30 and accompanying text.

127. As one commentator noted, "although the conceptual battle for recognition of sexual harassment as sex discrimination is over, the need for a deeper legal understanding of the problem remains." Note, supra note 18, at 1467.


130. Id. at 581 and supra text accompanying notes 72-78.
dependent theory of liability. However, following the Supreme Court's decision in Meritor, there was a marked difference in the courts' treatment of sexual favoritism cases. For example, in DeCintio the Second Circuit focused on the language and jurisprudence of Title VII, rather than sexual harassment law, to dispose of the plaintiff's sexual favoritism claims. Because the Second Circuit treated the claim as a disparate treatment Title VII sex discrimination case, it gave little consideration to Meritor and the Supreme Court's analysis of sexual harassment claims. Using a strict Title VII disparate treatment analysis, the court found that because the disadvantaged male claimants faced the same predicament that any female who was not the employer's lover would face, there was no sex discrimination.

In Miller v. Aluminum Co. of America, the district court used a sexual harassment quid pro quo analysis to take the plaintiff's sexual favoritism case outside the reach of the EEOC guidelines on sexual favoritism. It found that the plaintiff had failed to show that "any of her supervisors conditioned employment benefits on her submission to his sexual advances." The court cited the DeCintio decision with approval and held that because males and females had been equally disadvantaged by the relationship at issue, the plaintiff could not state a Title VII cause of action. The court referred to the Meritor decision, but only to set the standard for its consideration of the plaintiff's related hostile work environment claims.

In Broderick v. Ruder the court used the Meritor hostile work environment sexual harassment analysis to find that by "forcing" the plaintiff to work in an environment where the defendants bestowed preferential treatment upon those who submitted to their sexual advances, the defendants had violated Title VII. The district court's opinion does not make clear whether or not the court considered the plaintiff's sexual favoritism claim to be separate from or a part of her hostile work environment claim. In any event, it is clear that the court employed the

131. 807 F.2d at 307. The court distinguished Toscano on the grounds that the "Title VII action at issue in Toscano ... was the substantial equivalent of a 'sexual harassment' suit." Id.
132. Id. at 306 (disparate treatment claim is one "premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired").
133. Id. at 306-07.
134. Id. at 308.
135. Miller v. Aluminum Co. of Am., 679 F. Supp. at 501. The court erroneously cited § 1604.11(g) of the EEOC Guidelines for this proposition. This section of the guidelines refers to sexual favoritism, not quid pro quo harassment. Id.
136. Id.
137. Id.
138. 685 F. Supp. at 1278.
139. Id. The district court first recognized that a hostile work environment claim is actionable under Title VII. Id. at 1277. It then said "[a]dditionally, Title VII is also violated when an employer affords preferential treatment to female employees who submit to sexual advances or other
Meritor hostile work environment analysis, which requires proof that the offensive behavior be pervasive in order to recover under Title VII.¹⁴⁰

None of the post-Meritor cases explicitly disavowed the legitimacy of sexual favoritism claims; however, taken together the cases reveal an intention to narrow the scope of an employer's liability for sexual favoritism in the workplace. This intent is evidenced by the EEOC Policy Guidance on sexual favoritism, which was issued after the Meritor decision.¹⁴¹ The Policy Guidance clearly narrows the employer's scope of liability by recognizing just two forms of sexual favoritism: one which is based on coerced sexual conduct and one which is based on claims of widespread sexual favoritism.¹⁴² The new EEOC policy on sexual favoritism requires claimants to state their claims as either quid pro quo or hostile work environment sexual harassment.

The EEOC's post-Meritor view of sexual favoritism is that "Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships."¹⁴³ Preferential treatment or sexual favoritism which stems from an isolated "consensual" relationship between a worker and supervisor does not violate Title VII, even though third parties, male and female, may be disadvantaged by the relationship.¹⁴⁴

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conduct of a sexual nature and such conduct is a matter of common knowledge." Id. (emphasis added).

At first glance it appears that court does recognize two separate causes of action. In the final analysis, however, the court seems to telescope the sexual favoritism claim into the hostile work environment claim. See id.


¹⁴¹. EEOC Policy Guidance on Employer Liability for Sexual Favoritism, DAILY LABOR REPORT (BNA) No. 32, at D-1 (Feb. 15, 1990). This policy guidance which was issued in February of 1990 purports to provide "guidance on the extent to which an employer should be held liable for discriminating against individuals who are qualified for but are denied an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests." Id. However, in subsequent policy guidance on sexual harassment, the EEOC acknowledges that the law on sexual favoritism is unsettled. Policy Guidance on Current Issues of Sexual Harassment, DAILY LABOR REPORT (BNA) No. 32, at D-4 n.5 (Mar. 28, 1990). The purpose of this policy guidance is to "provide guidance on defining sexual harassment and establishing employer liability in light of recent cases." Id. at D-2.

¹⁴². Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, DAILY LABOR REPORT (BNA) No. 32, at D-1 (Feb. 15, 1990) (emphasis added). The EEOC also recognized a hybrid form of sexual harassment which it labelled "implicit quid pro quo." This type of harassment occurs when a manager engages in widespread sexual favoritism which communicates that the "way for woman (sic) to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment." Id. at 6. Women who are affected by this message could have an "implicit quid pro quo" claim, while men who are offended by the message could have a hostile environment claim. Id.

¹⁴³. Id. (citation omitted). In support of this restrictive view of sexual favoritism the EEOC cited Miller v. Aluminum Co. of Am. and DeCintio v. Westchester Co. Med. Ctr. The EEOC acknowledged, but apparently dismissed, the contrary precedent of King v. Palmer.

¹⁴⁴. The EEOC Policy Guidance provides an example of the type of sexual favoritism which would not result in employer liability:

Charging Party (CP) alleges that she lost a promotion for which see was qualified because
For the first time, sexual favoritism is defined as either a derivative quid pro quo claim or as a hostile work environment claim. Accordingly, the claimant must establish either that the underlying sexual relationship is based on coercion or that the underlying sexual relationship is one of a number of such incidents which combine to make the workplace environment abusive or hostile. 145

IV
RETHINKING TITLE VII LIABILITY FOR SEXUAL FAVORITISM

The post-Meritor/EEOC doctrine of sexual favoritism is based on a misinterpretation of the Supreme Court's decision in Meritor and reflects an erroneously narrow view of the legal wrong of sexual harassment. Sexual favoritism is a distinct form of sexual harassment which should be actionable as a separate claim under Title VII.

The Meritor decision supports an expanded theory of sexual harassment which recognizes sexual favoritism as a distinct form of sexual harassment. The Supreme Court in Meritor employed a two step analysis to define sexual harassment: it considered first the type of conduct involved, and second the effect of this conduct. 146 The Court noted that the types of workplace conduct which may be actionable under Title VII as sexual harassment "include [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 147 Neither the tone nor the language of the Court's holding indicated an intention to exclude other acts of sexual misconduct in the workplace which might violate Title VII.

To determine whether acts of sexual misconduct constituted sexual

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145. At least one commentator proposed this approach prior to the issuance of the EEOC Policy Guidance. Shearer, supra note 7, at 63. Shearer asserts that § 1604.11(g) of the Guidelines should be interpreted as requiring that "there must have been underlying sexual harassment of the individual receiving preferential treatment as a basis for the claim of the person who was denied a benefit or opportunity" and that § 1604.11(g) should be interpreted to provide a "means of protecting employees from the adverse effects of a workplace made hostile by preferential treatment for employees who are sexually involved with supervisory personnel." Id. at 64.

146. Meritor Savings Bank v. Vinson, 477 U.S. at 65. This two step approach to the definition of sexual harassment is suggested by the EEOC Guidelines on Discrimination Because of Sex. 29 C.F.R. § 1604.11(a) (1991).

harassment, the Court also considered the effects of the misconduct. The Court noted that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." In recognizing a cause of action for hostile environment sexual harassment, the Court soundly rejected the defendant's argument that Congress was not concerned with the "purely psychological aspects of the workplace environment." The Court could have restricted its analysis of the plaintiff's sexual harassment claim to consideration of the more widely accepted quid pro quo theory of sexual harassment; it chose instead to recognize the validity of the plaintiff's hostile environment claim and thus give victims of sexual harassment an additional avenue of recourse. Moreover, the Court also expressed concern about the arbitrary barriers to equality created by workplace harassment.

The post-Meritor/EEOC doctrine of sexual favoritism fails to recognize that workers who are disadvantaged by preferential treatment based on sexual favoritism are in every respect victims of a type of sexual harassment that is just as real and just as offensive as the quid pro quo and hostile work environment harassment recognized in Meritor.

The present doctrine of sexual favoritism under the EEOC considers sexual favoritism claims to be derivative and requires that the underlying relationship be nonconsensual. In doing so, it ignores the impact that even consensual sexual relationships in the workplace (particularly those between persons of unequal power) can have on co-workers. When co-workers are disadvantaged by these relationships, the message they receive is that the only way to advance in the workplace is to "use" or

149. Id. at 64.
150. Henken, supra note 7, at 1263 ("hostile work environment claim developed because women needed a viable course of legal action in situations that fell outside of the quid pro quo exchange") (citing C. LEFCOURT, WOMEN AND THE LAW § 3.04 (release No. 2, July 1988)).
151. Meritor Savings Bank v. Vinson, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)):

    Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

152. One commentator suggests that:

    [A] real connection between sexual harassment and sexual payoff probably exists because work forces permeated with harassment also tend to be likely environments for sexual payoffs. Moreover, in sexual payoff cases, the "advantaged" employee is likely to be a woman, and the decision maker, a man. In these cases, the specter of sexual harassment is often present. If the courts are particularly desirous of eliminating sexual harassment, they will be inclined to prohibit sexual payoffs as well.

Chamallas, supra note 2, at 849.

153. Of course, one way to meet this obstacle is to accept the argument that workplace relationships between persons of unequal power are inherently coercive. See supra note 27.
“surrender” one’s sexuality. This is the same message that victims of direct sexual harassment receive. This message is just as offensive when it is communicated to a worker who is not the direct recipient of the harassment; it should therefore be prohibited by Title VII regardless of the nature of the underlying relationship.

It is the imposition of a sexual standard, not the nature of the relationship from which the standard originates, which should give rise to a claim of sexual favoritism. It is the use of this sexual standard to the disadvantage of other equally qualified workers which is the gravamen of the sexual favoritism claim.

The restrictive interpretation of § 1604.11(g) of the Guidelines favored by the EEOC and the DeCintio and Miller courts is repugnant because it forces an even closer inquiry into the nature of the underlying sexual relationship on which the claim of sexual favoritism is based. In addition to having to prove the existence of a sexual relationship between the advantaged employee and the employer, the plaintiff also has to prove that the advantaged employee was coerced into the underlying relationship. It would be virtually impossible to prove that the underlying relationship is or was coercive without the cooperation of the advantaged party. It is unlikely that a worker who has been advantaged by a workplace relationship would provide evidence of coercion. Moreover, this type of inquiry into the details of the workplace relationship at issue would lead directly to the exact result that the DeCintio court sought to avoid: “the policing of intimate relationships.”

EEOC guidelines do not perforce require a restrictive interpretation of § 1604.11(g). The supplementary information which accompanies the

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154. See Chamallas, supra note 2, at 856 (“What makes sex based favoritism so damaging, however, may flow more from the message it conveys than from any specific misallocation of benefits. When a female employee observes that another female employee has received favored treatment because of her sexual relationship with the supervisor, she may be led to believe that sexual receptiveness is expected from female employees.”).


156. See Hemming, supra note 7.

157. DeCintio v. Westchester Co. Med. Ctr., 807 F.2d at 308. Some relationships, particularly those in the workplace, begin with consent but become nonconsensual. “Consent to sexual activity with the initial harasser or other male may be given in hopes of eliciting protection from the male to the female. If protection is received, the female may feel gratitude. Protection and cessation of harasser aggression is highly rewarding and may result in passionate love.” Hemming, supra note 7, at 74. See also Women in the Workforce Hearings, supra note 2, at 111 (prepared statement of Lorence L. Kessler, attorney, McGuinness & Williams). While acknowledging that it was difficult to gather reliable statistics of the point, Kessler cited a survey by psychologist Srully Blotnick which found that “even though some 20 percent of romantic relationships which begin in the workplace do result in marriage, workplace relationships overall have an average duration of 51 days. This sug-
final amendments to the guidelines refers to the "question of whether a third party who was denied an employment benefit would have a charge cognizable under Title VII where the benefit was received by a person who was granting sexual favors to their mutual supervisor."\textsuperscript{158} The common meaning of the word "grant" does not connote coercion.\textsuperscript{159} The provisions of § 1604.11(g) could therefore apply equally to underlying relationships which are not coercive. In fact, the EEOC previously took the position that:

[s]ection 1604.11(g) applies with equal force to a situation in which the acquiescence of the other female to her employer's request for sexual favors was consensual, as in this case. Section 1604.11(g) draws no distinction between 'unwelcome' as opposed to consensual behavior.\textsuperscript{160}

This interpretation of § 1604.11(g) is more consistent with the avowed purpose of subsection (g), which is to create a "balance of protection of all persons in the workplace" and "afford protection for persons who are not involved in the situation but who, nevertheless, are adversely affected by the sexual conduct of others."\textsuperscript{161}

The 1990 EEOC policy guidance focuses solely on the Meritor hostile work environment standard in defining claims of sexual favoritism. The Meritor hostile work environment standard requires that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'\textsuperscript{162} As interpreted by the EEOC, this standard fails to recognize that in some instances even an isolated case of sexual favoritism can be sufficiently abusive to affect a "term, condition or privilege" of employment within the meaning of Title VII.\textsuperscript{163} This standard may be appropriate for cases of atmospheric or environmental sexual harassment, but it is not appropriate in a case of sexual favoritism.


\textsuperscript{159} The word grant is defined as "to agree or assent to." \textsc{Webster's Third New International Dictionary} 989 (1981).

\textsuperscript{160} Petition for Certiorari to the United States Court of Appeals for the Second Circuit at A40, 46, DeCintio v. Westchester Co. Med. Ctr., 807 F.2d 304 (2d Cir. 1986) (No. 86-1946) (opinion of the EEOC in Matter of the Request to Reopen by United States Postal Service, Request No. 05830088 (Oct. 8, 1982)).

\textsuperscript{161} \textit{Sex Discrimination in the Workplace Hearings}, supra note 63, at 342 (testimony of J. Clay Smith, Acting Commissioner of the EEOC).

\textsuperscript{162} Meritor Savings Bank v. Vinson, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

\textsuperscript{163} \textit{See Meritor Savings Bank v. Vinson}, 477 U.S. at 67 ("not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII").
where a worker can be directly disadvantaged by a single act of sexual favoritism. The type of harm alleged in most cases of sexual favoritism is more akin to a quid pro quo claim of harassment in which there is "economic or tangible discrimination."  

CONCLUSION

The narrow definition of sexual harassment on which the post-Meritor/EEOC doctrine of sexual favoritism is based warrants re-examination. Sexual favoritism is sexual harassment. Sexual favoritism is simply a less direct expression of power, which objectifies both the sexually compliant employee and the disadvantaged employee. By imposing a sexual standard to measure employees' performance and worth, the employer tells employees that "their value is not in their job performance but in their use as sexual objects." The use of a sexual standard focuses on employees' sexuality rather than their abilities; it devalues the

164. See Meritor Savings Bank v. Vinson, 477 U.S. at 64. In all of the reported cases of sexual favoritism decided to date, the plaintiffs have alleged that they were denied some tangible, economic job benefit because of their employer's preferential treatment of a co-worker.

Where rampant or pervasive sexual favoritism in the workplace results in an abusive work environment, but does not otherwise directly disadvantage a particular worker or workers, a Title VII action would be more appropriately framed as a hostile work environment, not sexual favoritism, claim. The plaintiff in Broderick v. Ruder, 685 F. Supp. at 1270. The plaintiff alleged, and the district court found, that she was disadvantaged because co-workers who submitted to their supervisors' sexual advances received preferential treatment. Id. at 1269.

165. Indeed, periodic reformulations of the theory of sexual harassment have been anticipated since the theory was first proposed. See, e.g., MacKinnon, supra note 3, at 26. Professor MacKinnon described the process as follows:

I envision a two-way process of interaction between the relevant legal concepts and women's experience. The strictures of the concept of sex discrimination will ultimately constrain those aspects of women's oppression that will be legally recognized as discriminatory. At the same time, women's experiences, expressed in their own way, can push to expand that concept. Such an approach not only enriches the law. It begins to shape it so that what really happens to women, not some male version of what happens to women, is at the core of the legal prohibition. Women's lived-through experience, in as whole and truthful a fashion as can be approximated at this point, should begin to provide the starting point and context out of which is constructed the narrower forms of abuse that will be made illegal on their behalf.

Id. (emphasis in original)

166. The focus here is on how the sexually non-compliant employee is harmed by preferential treatment of the sexually compliant employee. In many respects the injury suffered by the sexually compliant employee is similar.

167. Women in the Workforce Hearings, supra note 2, at 96 (prepared statement of Sarah Burns, Assistant Director, Georgetown University Law Center Sex Discrimination Clinic). A study by the U.S. Merit Systems Protection Board found that more than 90% of the workers surveyed believe that morale suffers when it appears as though some employees get ahead because of their sexuality. Id. (citing Sexual Harassment in the Workplace, Report of the U.S. Merit Systems Protection Board 29 (1981)).
worker's real worth, fosters resentment towards women, and reinforces the insidious stereotypical notion that women can "sleep their way to the top." Such a standard and its effect on the workplace are exactly the discrimination which Title VII was intended to eliminate.

The prevailing doctrine of sexual favoritism fails to reflect workers' experiences, and it fails to address and provide a remedy for the distinct injury suffered by workers disadvantaged by their employers' sexual favoritism. Sexual favoritism is more than unfair; it is sexual harassment and thus discrimination because it uses sex in the decision-making process for no legitimate reason.

The elimination of inequality in the workplace\textsuperscript{168} cannot be achieved when a segment of workers who are disadvantaged by sexual favoritism are left without a remedy or are forced to distort their claims in order to be heard. One way to achieve the goal of equality is to empower the victims of sexual favoritism and to legitimize their sense of injury and outrage by recognizing that the preferential treatment of sexually compliant employees is sexual harassment when it disadvantages non-compliant employees or employees who for any reason are not involved with their supervisors.\textsuperscript{169}

\textsuperscript{168} There is a lack of consensus on the goals to be furthered by the recognition of sexual harassment as a legal wrong. Frances Hoffmann found a "basic tension" in the literature on sexual harassment which she reduced to the following questions:

Is the object to eliminate the behavior itself or to eliminate the inequality between men and women which gives rise to the behavior? If inequality is the central concern, what effects on power and status differences between men and women can we expect from the elimination of sexual harassment? Conversely, if the goal is the elimination of sexual harassment, are prohibitions on the behavior of individuals or protective grievance procedures likely to produce the desired results or are there structural transformations which would be a more effective means of addressing the problem? Hoffmann, supra note 7, at 106.

\textsuperscript{169} "[W]omen can most clearly perceive that their sense of injury and outrage is legitimate if what happened to them is explicitly made illegal, rather than it is only made illegal when presented in a distorted form that fits pre-existing legal doctrines." Crocker and Simon, supra note 27, at 545 (citations omitted).