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Dangerous Liaisons: Paramour No More

Meghan E. Bass

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Notes

DANGEROUS LIAISONS: PARAMOUR NO MORE

I. INTRODUCTION

Romantic office relationships are far more prevalent than some might realize.¹ Out of 1000 professionals surveyed on the subject, 47% of workers admit that they have been involved in an office romance, while an additional 19% admitted that they would be willing to do so if the opportunity arose.² Eleven percent of respondents answered that they have dated their boss or another superior, while 31% answered that they have never dated their boss or another superior, but would be willing to do so.³ Only 13% of respondents reported that their company has an office romance policy, while 51% said their company does not have an office romance policy.⁴

With so many people engaging in consensual workplace romances, it may be surprising that the number of sex discrimination claims filed with the Equal Employment Opportunity Commission ("EEOC") has increased dramatically since the passage of the Civil Rights Act of 1964.⁵ From 1991 to 1992, the percentage of sexual harassment claims filed with the EEOC increased by 62% (due largely to the Anita-Hill and Clarence

¹ Vault's Office Romance Survey 2003, http://www.vault.com/nr/main_article_detail.jsp?article_id=16513021&ht_type=5 (last visited Oct. 3, 2005). Vault's 2003 Office Romance Survey is based on responses from over 1,000 professionals at companies nationwide. *Id.*

² *Id.* When asked under which circumstances an office romance is unacceptable, only 21% of respondents answered that a relationship between a manager and a subordinate is inappropriate. *Id.*

³ *Id.* Out of the people who have dated their boss or superior, 57% entered the relationship in a mutual manner, while 31% said that their boss or superior initiated the relationship. *Id.*

⁴ *Id.* Thirty-six percent of respondents do not know whether an office romance policy exists within their workplace. *Id.* A long term relationship was established by 19% of respondents as a result of their office romance, whereas 3% answered that one or both of them were terminated as a result of their workplace relationship, and 1% answered that they were merely reprimanded by management. *Id.* Fifty-five percent of respondents answered that they experienced no repercussions resulting from their office romance. *Id.*

⁵ Giovanna Weller & Nick Zaino, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964: How Did Sex Get Into the Act?*, <http://www.carmodylaw.com/CM/Articles/Articles70.asp> (last visited Jan. 8, 2006). Recent EEOC statistics indicate that sex discrimination claims account for 30.1% of charges filed in violation of the Civil Rights Act of 1964. *Id.*

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Thomas hearings),⁶ and such claims increased by an additional 62% between 1992 and 2003.⁷

Recently, the California Supreme Court handed down an unprecedented sex discrimination decision, *Miller v. Department of Corrections*,⁸ which seems poised to create many problems for employers within California and throughout the United States.⁹ This case has broadened the scope of sexual harassment claims above and beyond what any court has previously held when confronted with a consensual inter-office relationship hostile work environment claim between a supervisor and employee.¹⁰ According to the court, even though a romantic relationship between a supervisor and his or her paramour¹¹ is consensual, other employees who believe that the paramour received special treatment in a severe and pervasive manner may sue under a hostile work environment sex discrimination claim.¹² The *Miller* holding marks the first time both men and women can be deemed injured by sexual favoritism.¹³ Consequently, this holding has become a persuasive precedent for other states to follow, thus paving the way for lawsuits from employees to challenge any decision of a supervisor who is involved in, or allegedly involved in, a workplace romance.¹⁴

Part II.A of this Note presents a brief history of Title VII of the Civil Rights Act of 1964 ("Title VII").¹⁵ Part II.B provides an overview of sex discrimination under Title VII, specifically laying out the differences between quid pro quo sexual harassment and hostile work environment sexual harassment claims.¹⁶ Next, Part II.C explains the traditional standards of liability for employers in sexual harassment cases.¹⁷ Part II.D discusses the EEOC's Policy Guidance on employer liability for sexual favoritism under Title VII, which may be used by courts as guidance in making decisions under Title VII law.¹⁸ Part II.E follows,

⁶ See *infra* note 27.

⁷ Weller & Zaino, *supra* note 5.

⁸ *Miller v. Dep't of Corr.*, 115 P.3d 77 (Cal. 2005).

⁹ See *infra* Part III.

¹⁰ See *infra* Part III.A.

¹¹ A "paramour" is defined as "an illicit lover." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 899 (11th ed. 2004).

¹² See *infra* Part II.F.

¹³ See *infra* Part II.F.

¹⁴ See *infra* Part III.B.

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II.B.

¹⁷ See *infra* Part II.C.

¹⁸ See *infra* Part II.D.

explaining the history of sexual favoritism in the workplace, referred to as the “paramour” theory, and the types of scenarios in which such claims arise.¹⁹ Finally, Part II.F introduces the decision in *Miller*.²⁰

Part III begins with a discussion of the expansion in the breadth of sexual harassment law created by *Miller* and how the current EEOC guidelines are insufficient to handle widespread sexual favoritism claims.²¹ Part III.B addresses the implications that the *Miller* holding may have on employers, employees, and the workplace as a whole.²² Part III.C concludes the Analysis portion by discussing various preventative measures employers can take to protect themselves from new risks they face as a result of the *Miller* holding.²³

Part IV proposes amendments to the EEOC Policy Guidance on Sexual Favoritism to better accommodate claims based on sexual favoritism.²⁴ These changes clarify the current guidance and better assist the courts, employers, and employees in determining which factors point to widespread instances rather than isolated instances of sexual favoritism.²⁵ Finally, Part V reiterates that the scope of sexual harassment jurisprudence has been greatly expanded as a result of *Miller* and that immediate action must be taken by the EEOC to protect employers and control sexual harassment claims made by third parties who were not directly subjected to unwelcome sexual harassment.²⁶

II. BACKGROUND

A. A Brief History of Sexual Harassment Jurisprudence

Sexual harassment is a pervasive problem that continues to plague American workplaces in the twenty-first century.²⁷ Title VII establishes a

¹⁹ See *infra* Part II.E.

²⁰ See *infra* Part II.F.

²¹ See *infra* Part III.A.

²² See *infra* Part III.B.

²³ See *infra* Part III.C.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part V.

²⁷ Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002, (June 18, 1999) [hereinafter Enforcement Guidance]. Sexual harassment litigation has expanded at an extraordinary rate. *Id.* The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. *Id.* For example, the number of sexual harassment charges increased from 6,883 in 1991 to 15,618 in 1998. *Id.* One factor offered as explanation for this boom in sexual harassment lawsuits is the 1991 nationally televised

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private cause of action for sexual harassment in the workplace.²⁸ The primary goal of Title VII is to eliminate discrimination in employment against any individual with respect to compensation, terms, conditions, or privileges of employment based on differences in race, color, religion, national origin, and sex.²⁹ Thus, Title VII's purpose in the realm of sex

Clarence Thomas Supreme Court Senate confirmation hearings that introduced the law of sexual harassment in the workplace, as well as the wide variety of workplace conduct that can constitute an actionable harassment claim, to millions of Americans. 62 AM. JUR. *Trials* 235 § 1 (2005). In 1989, the Supreme Court issued several decisions that were seen as a threat to other civil rights protections. *Weller & Zaino*, *supra* note 5. *See also* *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (making it more difficult to establish discrimination by disparate impact); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (allowing the employer to avoid liability in a mixed motive case by showing that it would have made the same decision even if it had not allowed a discriminatory reason to play a role); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that workplace harassment and discrimination on the job were not actionable under Section 1981); *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that white men who were not parties in litigation that resulted in a court-approved affirmative action could challenge the plan); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (limitations period runs from the date of the allegedly discriminatory adoption of a seniority system plan); *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (finding that attorneys' fees can be recovered under Title VII against losing interveners only if the interveners' action is frivolous, unreasonable, or without foundation). Congress recognized what was happening and passed the Civil Rights Act of 1990. *Weller & Zaino*, *supra* note 5. President Bush vetoed the bill, labeling it an unacceptable "quota" bill, so Congress raised a modified version of the bill early the next session. *Id.* The modified bill also seemed "destined to fail" because President Bush had a 91% approval rating due to the Persian Gulf War. *Id.* However, "key events intervened to influence the law" and as the 1991 bill was pending in Congress, President Bush nominated Clarence Thomas to the Supreme Court in July 1991. *Id.* During Justice Thomas's confirmation hearings, a former colleague, Anita Hill, alleged that Thomas sexually harassed her when he was the Chairman of the EEOC. *Id.* Inevitably, "[t]hese allegations caused a media frenzy resulting in nationally televised confirmation hearings that were viewed by millions of Americans." *Id.* After three days of hearings, Thomas's nomination was confirmed. *Id.* Another factor occurring during this period was the widespread riots erupting in Los Angeles in protest to the police beating of Rodney King. *Id.* That issue again put civil rights in the forefront of the minds of Congress and the American people. *Id.* As a result, Congress passed the Civil Rights Act of 1991 with enough votes to override a presidential veto. *Id.* President Bush signed virtually the same bill that just one year before he vetoed as a "quota" bill. *Id.* The 1991 amendments overruled many prior Supreme Court decisions restricting civil rights, "[giving] employees the right to have a jury trial, and expand[ing] the remedies available to prevailing plaintiffs to include compensatory and punitive damages." *Id.*

²⁸ Civil Rights Act of 1964, § 703, *as amended*, 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII was enacted in 1964 and took effect in July of 1965. It was expanded by the Civil Rights Act of 1991, which creates compensatory and punitive damage remedies for claims of intentional discrimination. The 1991 Act was signed into law on November 21, 1991, and the expanded remedies apply to all conduct occurring after that date. Title VII is the principle statutory medium by which sexual harassment suits are prosecuted and the basis from which state legislation is typically drafted.

²⁹ *Id.* The relevant portions of Title VII provide:

discrimination is to eliminate disparate treatment of men and women based on gender.³⁰

On February 8, 1964, while the civil rights bill was being debated on the House floor, Howard W. Smith of Virginia, Chairman of the Rules Committee and staunch opponent of all civil rights legislation, stood up and offered a one word amendment, “sex”, to Title VII.³¹ Smith claimed that “sex” should be added to the bill in order “to prevent discrimination against another minority group, the women,” when in reality, “sex” was offered as a desperate attempt to kill the entire bill.³² However, the

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [her] compensation, terms, conditions, or privileges of employment because of such individual’s . . . sex . . . ; or (2) to limit, segregate, or classify [her or] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her or] his status as an employee, because of such individual’s . . . sex.

Id. The phrase “terms, conditions, or privileges of employment” exudes a congressional intent “to strike at the entire spectrum of disparate treatment of men and women’ in employment,” thus the language of the Act “is not limited to ‘economic’ or ‘tangible’ discrimination.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978))) (some internal quotations omitted). The Act’s language includes allowing people to work in a non-discriminatorily hostile or abusive environment. *Id.* Title VII applies to employees, job applicants, and former employees. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

³⁰ *See Manhart*, 435 U.S. at 707.

³¹ Jo Freeman, Ph.D., *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, <http://www.jofreeman.com/lawandpolicy/titlevii.htm> (last visited Sept. 17, 2005) (referencing 110 CONG. REC. 2577 (1964)).

³² *Id.* Congressman Smith maintained at the time that he was very serious about the bill. *Id.* Such a preposterous notion inspired several hours of humorous debate to which the primary argument against the additional prohibition against discrimination based on sex to Title VII was that sex discrimination was sufficiently different from other types of discrimination and that it ought to receive completely separate legislative treatment. *Id.* The White House, a few women’s rights groups, and others that supported the Civil Rights bill were opposed to the amendment because they feared it would defeat the entire bill. Weller & Zaino, *supra* note 5. Every man that had voted in favor of the amendment, with the exception of Representative Ross Bass, had voted against the bill. *Id.* For further commentary that the word “sex” was added to Title VII to undercut the bill, see *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977); *Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434-35 (W.D. Pa. 1973); David M. Neff, Note, *Denial of Title VII Protection to Transsexuals: Ulane v. Eastern Airlines, Inc.*, 34 DEPAUL L. REV. 553 (1985); Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1113, 1167 (1971).

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amended bill was passed by a 168 to 133 teller vote,³³ and the debate over the word "sex" was later enshrined as "ladies day in the House."³⁴ As a result of such a hurried addition to the amendment, the Supreme Court noted that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"³⁵

B. Elements Common to all Sexual Harassment Claims Under Title VII

The EEOC has defined sexual harassment to include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.³⁶ If the submission to or rejection of such conduct has the

³³ During a teller vote, members vote by turning in signed index cards: green for yea and red for nay. C-Span, Congressional Glossary, <http://www.c-span.org/guide/congress/glossary/tellervt.htm> (last visited Jan. 24, 2006).

³⁴ Freeman, *supra* note 31. Congressman Smith's strategy to defeat the bill backfired and was sent to the Senate. Weller & Zaino, *supra* note 5. Representative Martha Griffiths, one of the few women in Congress at the time, is often credited with convincing the predominantly male House to pass the amendment. *Id.* After 58 days of filibuster by Southern Senators, the longest filibuster in Congressional history, the bill was passed and signed into law by President Johnson on July 2, 1964, prohibiting employment discrimination based on race, color, national origin, religion and sex. *Id.*

³⁵ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

³⁶ 29 C.F.R. § 1604.11(a) (2005). The EEOC oversees Title VII and processes discrimination complaints. Elizabeth Jubin Fujiwara & Joyce M. Brown, *Causes of Action for Post- Ellerth/Faragher Title VII Employment Sexual Harassment Claims*, in 27 CAUSES OF ACTION 2d 1, § 27 (2005). Prior to Title VII's enactment, there was very little recourse available to women who suffered from sexual harassment in the workplace. *Id.* Women in such a circumstance could either threaten legal action or actually bring a lawsuit based on common-law torts, such as assault and battery. *Id.* "This finally changed with the guidelines pronounced by the EEOC originally in 1980 in which the EEOC defines illegal sexual harassment to include: (1) unwelcome sexual advances, (2) requests for sexual favors, and (3) 'other verbal or physical conduct of a sexual nature.'" *Id.* Specifically the EEOC's Sexual Harassment guidelines provide:

- (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. 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.
- (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole

purpose or effect of unreasonably interfering with an individual's work performance, an intimidating, hostile, or offensive work environment may be created.³⁷ Typically, a prima facie case for supervisor sexual harassment can fall under one of two theories: quid pro quo or hostile work environment.³⁸ Under both theories, an employee must prove that (1) the employee was subject to unwelcome harassment, and (2) the harassment complained of was based on sex.³⁹

and at the totality of the circumstances, such as 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.

29 C.F.R. § 1604.11(a)-(b).

³⁷ Fujiwara & Brown, *supra* note 36.

³⁸ *Id.* A prima facie case in an employee's action alleging sexual harassment under Title VII by a supervisor or superior requires proof that: (1) an unlawful harassment has occurred; (2) the harasser has supervisory status; and (3) the discrimination was based on sex. *Id.*

³⁹ *Id.* An employer is liable for a hostile work environment, even if no tangible employment action was taken, if the harassing conduct was severe or pervasive and the employer failed to take reasonable care to prevent and correct the harassing behavior and the employee reasonably tried to inform the employer to correct the harassment. *Id.* It is important to note that sexual harassment will be deemed "unwelcome" even if the person eventually submits to the request. *Id.* The Supreme Court has held that courts must ask whether the "respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Meritor*, 477 U.S. at 68. See also *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 668 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 617 (2001) (finding where a long term sexual relationship goes sour, no reasonable jury could conclude that plaintiff was anything other than a willing participant, and thus it will be the unusual case that can escape summary judgment); *O'Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir. 2001) (joining the Sixth Circuit and holding, contrary to the Tenth Circuit, that the determination whether a female firefighter was subjected to hostile work environment was not required to be made in the context of blue collar environment in which crude language was commonly used, since a woman who chooses to work in a male-dominated trade does not thereby relinquish her right to be free from sexual harassment); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 736-37 (8th Cir. 2000) (supervisors alleged use of offensive language was not unwelcome where employee's testimony indicated that she used offensive language herself around supervisor and other employees); *Scusa v. Nestle USA Co., Inc.*, 181 F.3d 958, 966 (8th Cir. 1999) (female factory employee failed to demonstrate that behavior of her co-workers was unwelcome where undisputed evidence showed that the employee engaged in behavior similar to that which she claimed was unwelcome and offensive, including the use of profanity, telling off-color jokes at work, and teasing other employees). In addition, courts look to the totality of circumstances to make determinations as to whether the harassment complained of was based on sex. *Meritor*, 477 U.S. at 68. The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) emphasized that harassment in the workplace is not automatically discrimination because of sex "merely because the words used had sexual content or connotations." See also *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085-86 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1656 (2001) (while sexually explicit language and sex stereotyping may constitute evidence of sex discrimination, such does

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1. Quid Pro Quo Sexual Harassment

The term sexual harassment may lead many people to think of the first type of sexual harassment, premised on “quid pro quo” (literally “something for something”), where the employer conditions some type of economic benefit on an employee engaging in sexual acts.⁴⁰ In order to establish a prima facie case of quid pro quo sexual harassment, a plaintiff must present evidence that he or she was subjected to unwelcome conduct, based on sex, and that the reaction to that conduct was then used as the basis for decisions, either actual or threatened, affecting compensation, terms, conditions, or privileges of employment.⁴¹

not inevitably prove that gender played a part in a particular employment decision and sexually explicit insults that arise solely from altercations over work-related issues and because of employee's apparent homosexuality do not violate Title VII). In addition, discrimination based on personal animosity is not actionable. See *Succar v. Dade County Sch. Bd.*, 229 F.3d 1343, 1345 (11th Cir. 2000) (male school teacher failed to establish that harassment by another teacher with whom he had had a consensual sexual relationship was based on sex, where evidence suggested teacher's harassment was motivated not by his male gender, but rather by his contempt for the alleged harasser following their failed relationship; personal animosity is not the equivalent of sex discrimination and an employee cannot turn a personal feud with another employee into a sex discrimination case).

⁴⁰ *Meritor*, 477 U.S. at 65. The plaintiff in *Meritor* feared that she would lose her job if she failed to give in to her employer's sexual demands. *Id.* at 60. This claim could have fallen into the category of quid pro quo since she would be losing an economic benefit; however, the Supreme Court explicitly recognized that a quid pro quo claim was not necessary for the plaintiff to recover under a sexual harassment theory. *Id.* at 65. The Court found that sexual harassment can also occur when the sexual harassment creates a hostile work environment. *Id.* The Court relied on holdings from lower courts and the EEOC Guidelines on Sex Discrimination in reaching its decision. *Id.* at 65-68.

⁴¹ 42 U.S.C. § 2000 (2000). To establish a prima facie case of quid pro quo sexual harassment under Title VII, the employee must show that: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the employee's reaction to the harassment affected tangible aspects of employee's compensation, terms, conditions, or privileges of employment; and (5) that the employer knew, or should have known of the harassment and took no effective remedial action. *Id.* See also *Velez Cortes v. Nieves Valle*, 253 F. Supp. 2d 206 (D.P.R. 2003). In *Velez Cortes*, a female employee established that she was subjected to quid pro quo sexual harassment by the company president where she was employed because she was subjected to unwelcome sexual advances, statements with overt sexual overtones, and inquiries into her personal life. *Id.* at 212-13. The company was aware of the president's actions, but took no steps to stop it and the employee suffered the tangible job detriment of being terminated without ever having been reprimanded previously. *Id.* at 214-15.

2. Hostile Work Environment Sexual Harassment

As a supplement to quid pro quo sexual harassment claims, a broader hostile work environment claim for sexual harassment developed, culminating with the Supreme Court's decision in *Meritor Savings Bank v. Vinson*.⁴² The core of the *Meritor* holding is that a plaintiff may establish a Title VII violation by proving that sex discrimination resulting from sexual harassment creates a hostile or abusive work environment.⁴³ Thus, in order for a hostile work environment claim to be actionable, the sexual harassment in question "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁴⁴

⁴² *Meritor*, 477 U.S. at 57. A number of issues relating to Title VII sexual harassment were decided by the *Meritor* court, ruling that: (1) sexual harassment is indeed sex discrimination, and is prohibited by Title VII; (2) sexual harassment that creates a hostile and abusive environment may violate Title VII, even in the absence of tangible adverse economic consequences for the employee; and (3) an employee's "voluntary" submission to an employer's sexual advances will not necessarily defeat a harassment claim, the true issue being whether the advances were "unwelcome." Fujiwara & Brown, *supra* note 36. However, the *Meritor* court left open the question of employer liability. *Id.* The Court acknowledged the possible injustices which can be created for either the employer or the employee by hard and fast rules. *Id.* However, it was left up to the appellate courts to devise a liability test for employers using agency principles. *Id.* Over the years, two tests emerged from the appellate courts: (1) a proven quid pro quo sexual harassment claim resulting in an employer's vicarious liability; and (2) a proven hostile work environment sexual harassment claim resulting in employer's liability only if the employer was further proven negligent. *Id.* Since the *Meritor* decision, courts nationwide have recognized the distinctions drawn between quid pro quo and hostile work environment sexual harassment. *Id.* In 1998, the Supreme Court granted certiorari to two cases, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to establish more defined parameters for the courts to apply when employer liability issues arose in sexual harassment complaints. *Id.* The Court held that an employer is vicariously liable for unlawful sexual harassment by a supervisor that culminates in a tangible employment action against the victim. *Ellerth*, 524 U.S. at 760-61. This holding established that the Court will look closely at whether the plaintiff establishes a nexus between the harassment and the tangible employment action. Fujiwara & Brown, *supra* note 36. According to employment experts Katz and Kabat, "The result is that practitioners should focus on the presence or absence of a tangible employment action, and not the categories of 'quid pro quo' and 'hostile work environment' which the *Burlington* Court effectively abandoned." Debra S. Katz, et. al., *Advanced Employment Law and Litigation: Sexual Harassment In The Workplace*, ALI-ABA Course of Study, Dec. 5-7, 2002 (on file with the author).

⁴³ *Meritor*, 477 U.S. at 73. The Court rejected the argument that a Title VII claim could only be based on "tangible, economic barriers erected by discrimination." *Id.* at 64.

⁴⁴ *Id.* at 67. Although the Court found that the allegations in *Meritor* supported a hostile environment claim, the Court did not define what types of specific conduct would qualify as "sufficiently pervasive" to support a hostile environment claim. *Id.* at 72.

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Additionally, the creation of a hostile work environment need not necessarily involve unwelcome sexual advances.⁴⁵

Sexual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of [the employee's] statutory right to work in a place free of discrimination, when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt [the employee's] emotional tranquility in the workplace, affect [the employee's] ability to perform her job as usual, or otherwise interferes with and undermines [the employee's] personal sense of well-being.⁴⁶

To determine whether conduct is actionable, courts utilize the following two-part test: (1) the harassment must be sufficiently severe or pervasive to create a work environment that a reasonable person would find hostile or abusive; and (2) the plaintiff must actually perceive the work environment to have been hostile or abusive.⁴⁷

⁴⁵ *Accardi v. Super. Ct.*, 21 Cal. Rptr. 2d 292, 295-96 (Cal. Ct. App. 1993). *See also* *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d. Cir. 1990); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985). To plead a cause of action for hostile work environment sexual harassment, it is "only necessary 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*, 21 Cal. Rptr. 2d at 295-96 (quoting *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 (3d Cir. 1977)). Generally, hostile work environment shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 782 (1st Cir. 1990) (quoting 29 C.F.R. § 1604.11(a) (1983)).

⁴⁶ *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 851 (Cal. Ct. App. 1989). In *Fisher*, a nurse and her husband, a physician, brought actions against the nurse's supervising physician, the hospital where they worked, and a third physician. *Id.* at 846. The action stemmed from the supervising physician's sexual harassment of the nurse and other women, her complaint to the hospital against the supervising physician, and the retaliatory actions against both the nurse and the husband by the third physician and the hospital. *Id.* at 847. The appellate court held that appellants should have been permitted to amend the complaint to allege environmental sexual harassment, that the hospital was not liable for the doctor's behavior, but might have been liable for the lease termination, that there was no retaliation cause of action against the pediatrician, and that there was no interference with business relations nor support for punitive damages. *Id.* at 860-61.

⁴⁷ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). To establish a *prima facie* case of hostile work environment sexual harassment under Title VII, the employee must show that: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or

a. *Severe or Pervasive Conduct*

According to the Supreme Court's ruling in *Harris v. Forklift Systems*,⁴⁸ both an objective and subjective standard needs to be satisfied in order to recover under a hostile work environment sexual harassment theory.⁴⁹ The emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment;⁵⁰ therefore, the proscribed differentiation under Title VII must be a distinction based on a person's sex, not on his or her sexual affiliations.⁵¹

When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," Title VII is violated.⁵² Factors contributing to a hostile environment may include the frequency of the discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.⁵³ All of the circumstances within an environment need to be evaluated to determine if it is "hostile" or "abusive."⁵⁴

The severe or pervasive element in hostile work environment cases is often difficult to assess because there is a general inconsistency among holdings as to what actually qualifies as sufficiently severe or pervasive conduct.⁵⁵ Generally, courts have required more than a single instance of

should have known of the harassment and failed to take proper remedial action. Callahan v. Runyun, 75 F.3d 1293, 1296 (8th Cir. 1996).

⁴⁸ *Harris*, 510 U.S. at 21-22.

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 2000e-2(a)(1) (2000). See *Harris*, 510 U.S. at 21. See also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

⁵¹ *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 408 U.S. 825 (1987). See also *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (the congressional intent of Title VII pertaining to terms, conditions, or privileges of employment was to "strike at the entire spectrum of disparate treatment of men and women" in employment); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting same).

⁵² *Meritor*, 477 U.S. at 65.

⁵³ *Harris*, 510 U.S. at 23.

⁵⁴ *Id.*

⁵⁵ AM. JUR. *Trials*, *supra* note 27, § 37. Not every unpleasant workplace is a sexually hostile environment under Title VII. *Id.* Occasional vulgarities, including banter tinged with sexual innuendo, is neither severe or pervasive nor offensive enough to be actionable. *Id.* Under Title VII, in cases of sexual harassment, a workplace that is actionable is the one that is "hellish." See *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (holding that the employer was not liable for sexual harassment because it did not have reason to know of the alleged harassment and plaintiff had options other than quitting, thus she could not prevail on the constructive discharge claim).

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inappropriate conduct before they will find a basis for a claim under a hostile work environment theory.⁵⁶ However, there are decisions that go even further, establishing that even multiple isolated incidents are not enough to form a basis for a hostile work environment claim where they fall short of a discernable pattern of actual harassment.⁵⁷ Because the requirement is that the conduct must be severe *or* pervasive, some courts apply a sliding-scale approach to the analysis, such that a greater degree of pervasiveness will make up for a lesser degree of severity and vice versa.⁵⁸ One such court observed that “the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.”⁵⁹ How frequently the conduct must occur in order to state a cause of action is difficult to discern given the vast inconsistencies in case law.⁶⁰

b. The Employer Should Have Known About the Hostile Environment

In addition to evaluating the severe or pervasive conduct, the claimant in a hostile work environment claim must establish that the employer knew, or should have known of the hostile work environment, and failed to take the appropriate remedial actions necessary to rid the work environment of the harassment.⁶¹ This may be the most significant

⁵⁶ See, e.g., *Raines v. City of Kimball*, 916 F. Supp. 719 (E.D. Tenn. 1996); *Kuhn v. Philip Morris U.S.A.*, 814 F. Supp. 450 (E.D. Pa. 1993), *cert. denied*, 512 U.S. 1221 (1994); *Raley v. Bd. of St. Mary's County Comm'rs*, 752 F. Supp. 1272 (D. Md. 1990). Under these cases, there was no basis for a sexual harassment claim because a single isolated incident could not be used to prove sexual harassment.

⁵⁷ See, e.g., *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993); *Johnson v. Tower Air*, CV-90-3085, 1993 U.S. Dist. LEXIS 9372 (E.D.N.Y. July 8, 1993). Under these cases, a pattern or practice of offensive conduct is generally required to satisfy the requirement that the conduct be severe or pervasive enough to establish a true hostile work environment claim.

⁵⁸ AM. JUR. *Trials*, *supra* note 27, § 37. The current state of the law in regards to this element of a prima facie case of hostile work environment sexual harassment is best summarized as requiring proof of either a long-standing pattern of harassing conduct, or, if there are only a few isolated occurrences, a showing that the offensive conduct was especially egregious. *Id.*

⁵⁹ *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). See also *Ross v. Double Diamond Inc.*, 672 F. Supp. 261 (N.D. Tex. 1987); *Vermett v. Hough*, 627 F. Supp. 587 (W.D. Mich. 1986).

⁶⁰ See also Chad W. King, Note, *Sex, Love Letters, and Vicious Rumors: Anticipating New Situations Creating Sexually Hostile Work Environments*, 36 BYU J. PUB. L. 341 (1995) (discussing evolving bases of employer liability under the Title VII hostile work environment theory).

⁶¹ *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). The term “management” as used for determining whether an employer had actual knowledge of sexual harassment under Title VII includes a person with the power to hire and fire the offending employee, provide significant input into employment decisions, and take

element from an employer's perspective.⁶² The result is that an employer bears no liability for hostile work environment sexual harassment under this element where the employer has no reason to know of the harassing conduct.⁶³ Additionally, if the employer demonstrates that immediate and appropriate action was taken in response to a reported hostile work environment claim, the employer is generally released from liability for a subsequent claim of hostile work environment sexual harassment.⁶⁴ The employer must take prompt remedial action that is both reasonably calculated to end the harassment and of a disciplinary nature.⁶⁵

The situation becomes more delicate when the complainant's supervisor participated in or was the cause of the harassment.⁶⁶ Initially the argument was made that the employer knew, or should have known of the harassing conduct because one of the employer's supervisors was responsible for creating the hostile work environment and thus a strict liability standard was imposed.⁶⁷ Around that same time, other courts ruled that the employer could bear liability for a hostile work

disciplinary action and instruct the offending employee to cease the harassing behavior, or to implement other means of taking remedial action. 42 U.S.C. § 2000 (2000); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

⁶² AM. JUR. *Trials*, *supra* note 27, § 39.

⁶³ See generally *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439 (7th Cir. 1994).

⁶⁴ See, e.g., *Carmon v. Lubrizol Corp.*, 17 F.3d 791 (5th Cir. 1994); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993); *Rouse v. City of Milwaukee*, 921 F. Supp. 583 (E.D. Wis. 1996); *Walsh v. Nat'l Westminster Bancorp.*, 921 F. Supp. 168 (S.D.N.Y. 1995); *Bivens v. Jeffers Vet Supply*, 873 F. Supp. 1500 (M.D. Ala. 1994).

⁶⁵ *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). An employer must satisfy two elements in order to successfully raise an affirmative defense to Title VII liability for sexual harassment by a supervisor: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. 42 U.S.C. § 2000; *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), *cert. denied*, 531 U.S. 926 (2000). The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered. Enforcement Guidance, *supra* note 27.

⁶⁶ AM. JUR. *Trials*, *supra* note 27, § 39.

⁶⁷ See, e.g., *Bundy v. Jackson*, 641 F.2d 934 (D.C. App. 1981). In *Bundy*, the plaintiff was repeatedly subjected to unwelcome sexual advances, which she rejected. *Id.* at 940. The plaintiff complained about the conduct to her supervisor and he replied that "any man in his right mind would want to rape you" and he "casually dismissed" all of her complaints. *Id.* The District Court of Columbia Circuit recognized a claim for sex discrimination based on emotional and psychological factors in the work environment, which took sexual harassment jurisprudence beyond the loss of tangible job benefits realm. *Id.* at 943-44.

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environment created by supervisors only if the employer knew of the harassment and failed to take appropriate remedial action.⁶⁸

Today, courts generally agree that employers are not to be held strictly liable in cases arising from hostile work environment sexual harassment, even if supervisory personnel contributed to the environment.⁶⁹ Some courts apply agency principles as a method of creating a standard,⁷⁰ while others find that the analysis depends upon general negligence principles based on whether the employer knew, or should have known, of the supervisor's proclivity for harassment.⁷¹

⁶⁸ *Henson v. Dundee*, 682 F.2d 897, 915 (11th Cir. 1982). In *Henson*, an employee claimed that the police chief created a hostile and offensive working environment for women, that her resignation was a constructive discharge, and that the police chief prevented her from attending the police academy because she refused to have sexual relations with him. *Id.* at 899-900. The court affirmed the dismissal of employee's constructive discharge claim because the finding that she did not resign because of sexual harassment was not clearly erroneous. *Id.* at 907. The court reversed and remanded her hostile work environment claim because she did not have to show a tangible job detriment and her quid pro quo claim was reversed and remanded because the district court erroneously found a lack of corroborative evidence. *Id.* at 907, 911-13.

⁶⁹ See *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

⁷⁰ The Supreme Court has instructed courts to use agency principles when deciding employer liability for sexually hostile work environments. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). *Meritor* rejects the possibility that employers are strictly liable for hostile environments and also repudiates the notion that a grievance procedure will automatically protect the employer. *Id.* at 72-73. See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1324 (2d Cir. 1995) (Baker, J., dissenting) (arguing that Title VII permits an employer and that employer's agent to be held jointly and severally liable for Title VII violations); *Gary v. Long*, 59 F.3d 1391 (D.C. App. 1995), cert. denied, 516 U.S. 1011 (1995)) (applying traditional common law principles of agency to the facts and holding that the plaintiff failed to support her Title VII sex discrimination claim on either a quid pro quo or hostile work environment basis); *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3d Cir. 1994). In *Bouton*, the court discussed how liability is imposed on the master when the servant purports to act or to speak on behalf of the principal and there is reliance upon apparent authority, or he is aided in accomplishing the tort by the existence of the agency relation. *Id.* at 108. If the harasser is an agent of the employer, the employer is liable. *Id.* at 109. The court held that BMW was not liable under traditional agency principles. *Id.* at 111.

⁷¹ See, e.g., *Rushing v. United Airlines*, 919 F. Supp. 1101, 1107 (N.D. Ill. 1996). The question of liability *vel non* is decided under negligence principles. *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535 (7th Cir. 1993) (quoting *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990)):

It is a negligence standard that closely resembles the "fellow servant" rule, from the era when industrial accidents were governed by negligence rather than workers' compensation law. Under that rule, as under Title VII, the employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee's torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate

Other courts go so far as to combine the elements of the agency and negligence theories.⁷² There is, however, no clear standard for employer liability where supervisors are involved.⁷³

Thus, an employer can be held vicariously liable for a hostile work environment claim if no tangible employment action was taken, but the harassing conduct was severe or pervasive, the employer failed to take reasonable care to prevent and correct the harassing behavior, and the employee reasonably tried to inform the employer to correct the harassment.⁷⁴

C. Employer Defenses

Once it has been determined that an employer should have known about alleged harassment, the standard under which employers are subject to vicarious liability for unlawful harassment by supervisors must be determined.⁷⁵ The Supreme Court spelled out this standard in

corrective action. The employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring.

Id. (internal citations omitted).

⁷² See, e.g., *Redman v. Lima City Sch. Dist. Bd of Educ.*, 889 F. Supp 288 (N.D. Ohio 1995). The court determined that whether or not the employer is liable for an employee's harassing actions depends on: (1) whether the employee's harassing actions were foreseeable or fell within the scope of his employment; and (2) even if they were, whether the employer responded adequately and effectively to negate liability. *Id.* at 294.

⁷³ AM. JUR. *Trials*, *supra* note 27, § 39.

⁷⁴ *Fujiwara & Brown*, *supra* note 36.

⁷⁵ Enforcement Guidance, *supra* note 27. The EEOC defines supervisor to include both an individual with "authority to undertake or recommend tangible employment decisions" and an individual who has "authority to direct the employee's daily work activities." *Id.* See also *Gawley v. Ind. Univ.*, 276 F.3d 301, 310-11 (7th Cir. 2001) (although the harasser was not the female police officer's immediate or higher supervisor, it cannot be said that he was not aided by the agency relationship in carrying out the harassment where the harasser occasionally acted as plaintiff's commanding officer, he had the ability to initiate disciplinary proceedings against her, he had special access to her because of his position as supervisor in charge of uniforms, and it was through this position that harasser had the opportunity to fondle employee's breast and verbally abuse her with regard to the fit of her pants); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 154-55 (3d Cir. 1999) (in general, complete authority to act on employer's behalf without the agreement of others is not necessary to meet Title VII's agency standard for supervisor liability and thus even if the unit leader did not have authority to act alone, where witnesses testified that he was part of the ruling "triumvirate" in the office, and part of a team that decided to strip employee of her office, the unit leader had supervisory authority for purposes of imposing liability on the company for his conduct). But see *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004) (holding that even though the harassers had authority to manage the employee's work assignments, investigate complaints and disputes, and recommend sanctions for rules violations to department manager, they were not supervisors so as to trigger

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*Burlington Industries v. Ellerth*⁷⁶ and *Faragher v. City of Boca Raton*.⁷⁷ The standard of liability set forth in these decisions is based on two principles: (1) that an employer is responsible for the acts of its supervisors; and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.⁷⁸ According to the Court, an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.⁷⁹ However, if a tangible employment action does not occur, the employer may avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁸⁰ The employer

vicarious liability under Title VII); *Mikels v. City of Durham* 183 F.3d 323, 331-34 (4th Cir. 1999) (wherein a female police officer could not establish that a male corporal's sexually harassing conduct was aided by the agency relation since the corporal's authority did not include power to take tangible employment actions against the officer; the question is whether the person's employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not).

⁷⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 742 (1998).

⁷⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 775 (1998). In *Faragher*, the Court referred to a supervisor with immediate (or successively higher) authority over the employee as its definition of who qualifies as a supervisor for liability purposes. *Id.* at 807-08.

⁷⁸ Enforcement Guidance, *supra* note 27. While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the EEOC has always taken the position that the same basic standards apply to all types of prohibited harassment. *See, e.g.*, 29 C.F.R. § 1604.11 n.1 (2005) ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Volume II, § 615.11(a), available at <http://www.eeoc.gov/policy/docs/harassment.htm> ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees."). Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. Enforcement Guidance, *supra* note 27.

⁷⁹ *Faragher*, 524 U.S. at 778.

⁸⁰ Enforcement Guidance, *supra* note 27. "In essence, the affirmative defense requires that sexual harassment disputes be investigated and resolved internally before proceeding to court. A victim who refuses to assist an internal investigation loses her Title VII claim, and an employer who fails to conduct such an investigation loses all defenses to the claim of harassment." Joann Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003). The affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory policy and complement[ing] the Government's Title VII enforcement efforts." *Faragher*, 524 U.S. at 806.

will avoid vicarious liability for its supervisor's acts if the employer is successful in raising the affirmative defense.⁸¹

According to the framework set out in the *Ellerth* and *Faragher* decisions, if the unlawful sexual harassment did not result in a tangible employment action according to the quid pro quo framework, then the alleged sexual harassment is reviewed to determine if the harassment reached the severe or pervasive behavior required for a hostile work environment sexual harassment claim.⁸² If the alleged sexual harassment

⁸¹ Fujiwara & Brown, *supra* note 36. It is very important to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant. Enforcement Guidance, *supra* note 27. An employer is subject to vicarious liability for unlawful harassment if the harassment was committed "by a supervisor with immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The federal employment discrimination statutes do not define the term supervisor. Numerous statutes contain the word supervisor, and some contain definitions of the term. See, e.g., 12 U.S.C. § 1813(r) (2000) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (2000) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C. § 8262(2) (2000) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word supervisor under other statutes does not control, and is not affected by the meaning of that term under the employment discrimination statutes. The statutes make employers liable for the discriminatory acts of their agents, thus logically supervisors are agents. See 42 U.S.C. § 2000e(b) (Title VII); 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer). The determination of whether an individual has sufficient authority to qualify as a supervisor for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law. See *Faragher*, 524 U.S. at 797 (analysis of vicarious liability "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment"); *Id.* at 803 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes). In *Faragher* and *Ellerth*, the Supreme Court reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them. *Id.* at 801; *Ellerth*, 524 U.S. at 762. Thus such authority must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. Enforcement Guidance, *supra* note 27. An individual qualifies as an employee's supervisor if: (1) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (2) the individual has authority to direct the employee's daily work activities. *Id.*

⁸² *Ellerth*, 524 U.S. at 754. Prior to *Ellerth*, the Court noted that there were distinctions in employer's liability based on whether a quid pro quo sexual harassment or hostile work environment sexual harassment was alleged. Fujiwara & Brown, *supra* note 36. Because of such a distinction in liability, the negative effect of encouraging a plaintiff to file a quid pro quo sexual harassment claim emerged because such a litigation strategy would leave the plaintiff in the preferable position of being able to prevent the employer from raising an affirmative defense. *Id.* Such an action defeats the purposes of Title VII that specifically encouraged employers to prevent discrimination. *Id.* The Court in *Ellerth* believed there was no statutory basis for such differentiation, stating, "Cases based on threats which are

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is found to be severe or pervasive, then the employer may raise an affirmative defense.⁸³ Once the possibility exists that a sexual harassment claim may be brought under Title VII, courts often turn to EEOC guidance, which does not bind the courts but provides a useful framework for describing Title VII sexual harassment law.⁸⁴

D. EEOC Guidance

Relying on several federal court decisions that have considered sexual favoritism, particularly favoritism shown by a supervisor to employees who are the supervisor's sexual partners, the EEOC issued a policy statement that examines the question of sexual favoritism within the Title VII sexual harassment realm.⁸⁵ The 1990 policy statement, titled *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism*, closely examines three topics: Section A discusses isolated favoritism; Section B discusses favoritism when sexual favors have been coerced; and Section C discusses widespread favoring of consensual sexual partners.⁸⁶ In Section A, the EEOC observed that Title VII does not

carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Ellerth*, 524 U.S. at 751. Those two terms do not appear in Title VII, which forbids only "discriminat[ion] against any individual with respect to his . . . terms [or] conditions . . . of employment, because of . . . sex." *Id.* The Court's opinion criticized the use of the two types of sexual harassment categories, *quid pro quo* and hostile work environment, that had developed over years to define a sexual harassment claim. 27 CAUSES OF ACTION 2d 1, § 27 (2005). Nevertheless, the Court used the term hostile work environment to determine the nature of *Ellerth*'s sexual harassment claim, concluding that the two terms are of limited utility. *Ellerth*, 524 U.S. at 751. The distinction between cases involving a carried-out threat and cases involving offensive conduct in general are relevant only when there is a threshold question whether a plaintiff can prove discrimination. *Id.* A claim involving only unfulfilled threats, such as the case here, is a hostile work environment claim requiring a showing of severe or pervasive conduct. *Id.*

⁸³ Fujiwara & Brown, *supra* note 36.

⁸⁴ Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 553 (1994). The EEOC guidelines have since been adopted by many courts, and were clearly endorsed by the Supreme Court in 1986 in *Meritor*. Fujiwara & Brown, *supra* note 36.

⁸⁵ Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice No. 915.048 (Jan. 12, 1990) [hereinafter Policy Guidance].

⁸⁶ *Miller v. Dep't of Corr.*, 115 P.3d 77, 88 (Cal. 2005). Section A explains:

An isolated instance of favoritism toward a "paramour" may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman.

prohibit isolated instances of preferential treatment based upon consensual romantic relationships.⁸⁷ Section A of the policy guidance specifies that "An isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."⁸⁸ Furthermore, "A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman."⁸⁹ This portion of the EEOC Policy Statement reflects the

Policy Guidance, *supra* note 85. Section B explains the Commission's position concerning coerced sexual activity, which is not relevant to this analysis. *Id.* Section C is the portion in which the EEOC discusses sexual favoritism that is based upon consensual affairs that are more than isolated:

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment.'"

Id. (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

"An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them." *Id.* Section C of the Policy Guidance continues, stating:

Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit "quid pro quo" harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.

Id.

⁸⁷ Policy Guidance, *supra* note 85.

⁸⁸ *Id.* See *Benzies v. Ill. Dep't of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987) (holding that the denial of a promotion to a woman is not a violation if motivated by personal or political favoritism or a grudge); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 180 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) (stating that the discharge of a female employee violates Title VII only if it is done on a basis that would not result in the discharge of a male employee).

⁸⁹ Policy Guidance, *supra* note 85. See *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495 (W.D. Pa. 1988), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988). The plaintiff in *Aluminum* alleged

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traditional position taken by the vast majority of federal courts that have considered Title VII sexual favoritism claims.⁹⁰

that her supervisor treated her less favorably than her co-worker because the supervisor knew that the co-worker was engaged in a romantic relationship with the plant manager. *Id.* at 500-01. The lower court held that in order to establish a Title VII claim, the plaintiff would have to show that her employer would have or did treat males differently. *Id.* at 501. Since the plaintiff's male co-workers shared with her the same disadvantage relative to the co-worker who was engaged in the affair with the manager, the plaintiff could not show that she was treated differently than males. *Id.* See also *DeCintio v. Westchester County Med. Center*, 807 F.2d 304 (2d Cir. 1986).

⁹⁰ See *Mundy v. Palmetto Ford, Inc.*, 998 F.2d 1010 (4th Cir. 1993) (holding that for Title VII purposes, "sex" does not include voluntary romance); *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (recognizing possibility of sexual favoritism recovery and of work environment sexual harassment claim based in part on sexual favoritism, but denying recovery on facts); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861-63 (3d Cir. 1990) (recognizing possibility of work environment sexual harassment recovery based in part on sexual favoritism, but denying recovery on facts); *DeCintio*, 807 F.2d at 306-08 (holding that sexual favoritism based on consensual sexual relationship does not constitute sex discrimination); *King v. Palmer*, 778 F.2d 878, 880-82 (D.C. Cir. 1985) (recognizing possible recovery for sexual favoritism, but reversing and remanding trial court decision that recognized favoritism claim but denied liability on facts); *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 1121-22 (C.D. Ill. 1994) (holding that sexual favoritism, although not actionable as such, may help establish that advancement generally hinged on granting sexual favors, which supports quid pro quo harassment claim); *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 828-30 (N.D. Ill. 1994) (denying sexual favoritism claim and holding that sexual favoritism can help establish quid pro quo sexual harassment claim); *Ayers v. AT&T*, 826 F. Supp. 443, 445 (S.D. Fla. 1993) (finding that sexual favoritism does not constitute sex discrimination); *Parrish v. English Am. Tailoring Co.*, No. HAR 86-1879, 1988 U.S. Dist. LEXIS 14240, at *11 (D. Md. Dec. 14, 1988) (noting that Title VII does not prohibit discrimination based upon sexual affiliations); *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (granting recovery for work environment sexual harassment based almost wholly on sexual favoritism); *Aluminum*, 679 F. Supp. at 501-02 (holding that sexual favoritism based on consensual sexual relationship does not constitute sex discrimination and noting that sexual favoritism may contribute to work environment sexual harassment claim, but denying harassment claim on facts); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (finding a violation of Title VII when employer prefers female employees who submit to his sexual advances); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983) (holding that proof of sexual favoritism helps plaintiff establish that granting sexual favors is necessary for advancement, which constitutes quid pro quo sexual harassment that violates Title VII). See also *Herman v. Western Fin. Corp.*, 869 P.2d 696, 701-03 (Kan. 1994) (finding sexual favoritism and other sex-related employer behavior insufficient for work environment sexual harassment liability under Title VII); *Polk v. Pollard*, 539 So. 2d 675, 677-78 (La. App. 1989) (holding that sexual favoritism does not constitute sex discrimination under state statute resembling Title VII); *Hickman v. W-S Equip. Co.*, 438 N.W.2d 872, 874 (Mich. Ct. App. 1989) (same); *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 802-03 (N.J. 1990) (holding that at least when the sexual relationship is consensual, resulting sexual favoritism does not violate a state statute resembling Title VII); *Nicolo v. Citibank*, 554 N.Y.S.2d 795, 798-99 (N.Y. Sup. Ct. 1990) (holding that isolated act of sexual favoritism favoring only one employee is not actionable under a state statute resembling Title VII, but that sexual favoritism may

Section C of the EEOC policy statement also entertains the possibility that widespread sexual favoritism *may* create a hostile work environment in violation of Title VII.⁹¹ Both male and female colleagues who do not welcome the widespread granting of sexual favors can establish a hostile work environment claim in violation of Title VII regardless of whether any objectionable conduct is directed at them, and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.⁹² This portion of the policy suggests that a demeaning message is implicitly conveyed, namely that the managers view women as “sexual playthings” in such circumstances.⁹³ The EEOC guidance also states that managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct, or that sexual solicitations are a prerequisite to their fair treatment.⁹⁴ This can form the basis of an implicit “quid pro quo” harassment claim for female employees, as well as a hostile environment claim for both women and men who find such conduct offensive.⁹⁵

contribute to quid pro quo and work environment sexual harassment claims on appropriate facts); *Kersul v. Skulls Angels Inc.*, 495 N.Y.S.2d 886, 889 (N.Y. Sup. Ct. 1985) (denying motion to dismiss sexual favoritism claim under state statute resembling Title VII); *Kryeski v. Schott Glass Tech., Inc.*, 626 A.2d 595, 598 (Pa. Super. Ct. 1993) (holding that sexual favoritism resulting from consensual relationship does not constitute sex discrimination under state statute resembling Title VII), *app. denied*, 639 A.2d 29 (Pa. 1994).

⁹¹ Policy Guidance, *supra* note 85 (emphasis added).

⁹² *Id.* An analogous situation is one in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor play along with the conduct and do not clearly object, fellow co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them. *See Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (discriminatory treatment of medical patients created hostile work environment for plaintiff employee); Commission Decision No. 71-969, CCH EEOC Decisions (1973) (supervisor's habitual use of racial epithet in referring to Black employees created discriminatory work environment for White Charging Party); EEOC Compliance Manual, *supra* note 78, § 615.3(a)(3) Ex. (1)-(2) (sexual harassment of females may create hostile work environment for other male and female employees).

⁹³ Policy Guidance, *supra* note 85.

⁹⁴ *Id.* *See, e.g., Rotary*, 634 F. Supp. at 571, in which the defendant gave preferential treatment to his consensual sexual partner and to those female employees who reacted favorably to his sexual advances and other conduct of a sexual nature, and he disadvantaged those employees, including the plaintiff, who reacted unfavorably to his conduct. *Id.* at 576. The court found a violation of Title VII in part because the defendant's conduct implied that job benefits would be conditioned on an employee's good-natured endurance of his sexually-charged conduct or sexual advances. *Id.* at 581.

⁹⁵ Policy Guidance, *supra* note 85. *But see Aluminum*, 679 F. Supp. at 501-02. The court rejected a claim that sexual favoritism based on a consensual relationship can create a

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E. *A Brief History of Sexual Favoritism and the Paramour Theory*

The prohibition of sexual discrimination in the workplace has given rise to an expansive judicial battleground;⁹⁶ in fact, within the last twenty years, recovery for sexual favoritism has become one such battleground.⁹⁷ The EEOC's first recognition of a Title VII sexual favoritism claim did not surface until the mid-1980s.⁹⁸ Shortly thereafter, two Title VII cases involving claims that an employer unlawfully favored a paramour, brought under Title VII, reached the United States Court of Appeals: *King v. Palmer*⁹⁹ in the District of Columbia Circuit, and *DeCintio v. Westchester County Medical Center*¹⁰⁰ in the Second Circuit.

King v. Palmer was the first case to clearly recognize the sexual favoritism theory as a cause of action.¹⁰¹ In *King*, the plaintiff, a female nurse, claimed she had been denied a promotion to a supervisory position in violation of Title VII and that the position went to a less qualified co-worker who was engaged in an intimate relationship with the male doctor responsible for the promotion.¹⁰² Although the issue of whether Title VII applied to preferential treatment was not raised on appeal, the court stated that it agreed with the lower court's conclusion that the cause of action was cognizable under Title VII.¹⁰³

hostile environment for others in the workplace. *Id.* at 501. The court found that the favoritism itself did not violate Title VII since it was voluntary, and that "hostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim." *Id.* at 502. However, it is the Commission's position that had the sexual favoritism been widespread, the fact that it was exclusively voluntary and consensual would not have defeated a claim that it created a hostile work environment for other people in the workplace. Policy Guidance, *supra* note 85.

⁹⁶ Phillips, *supra* note 84, at 547.

⁹⁷ *Id.*

⁹⁸ *Toscano v. Nimmo*, 574 F. Supp. 1197, 1197 (D. Del. 1983), has generally been associated with the first Title VII sexual favoritism claim, although this case falls more along the lines of an implied quid pro quo sexual harassment case in which sexual favoritism played a significant role. See Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 177 (1991).

⁹⁹ *King v. Palmer*, 778 F.2d 878, 878 (D.C. Cir. 1985).

¹⁰⁰ *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 304 (2d Cir. 1986).

¹⁰¹ *King*, 778 F.2d at 878.

¹⁰² *King v. Palmer*, 598 F. Supp. 65, 66 (D.D.C. 1984), *rev'd*, 778 F.2d 878 (D.C. Cir. 1985).

¹⁰³ *King*, 778 F.2d at 880. The court ruled in favor of the plaintiff on the basis of its finding that her co-worker was promoted because of the sexual relationship. *Id.* at 882. There were two reasons that the District Court for the District of Columbia recognized that this claim fell within the purview of Title VII. The first reason was that the EEOC's guidelines supported it. *King*, 598 F. Supp. at 67. The second reason was that when sexual favoritism occurs, sex is "for no legitimate reason a substantial factor in the discrimination." *Id.* at 66-67 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981)).

A year later, *King* was countered by *DeCintio*.¹⁰⁴ In *DeCintio*, seven male respiratory therapists claimed that they were unlawfully disqualified for a promotion that went to a woman who was engaged in a romantic relationship with the department administrator.¹⁰⁵ The plaintiffs alleged that the department administrator added a requirement to the position in order to disqualify them in an effort to enable the administrator to hire the woman with whom he had a consensual sexual relationship.¹⁰⁶ The court held that the department administrator's conduct, although unfair, did not violate Title VII because a consensual romantic relationship cannot form the basis of a sex discrimination suit.¹⁰⁷ The court reasoned that the prohibition of sex discrimination in Title VII refers to discrimination on the basis of one's sex, not on the basis of one's sexual affiliations.¹⁰⁸ The therapists' claims were not cognizable under the Act, as they were denied promotions because the administrator preferred his paramour, rather than because of their status as males.¹⁰⁹

The court observed that in order to recognize plaintiffs' claims for sex discrimination, the traditional definition of "sex" for Title VII purposes would have to be expanded to include "sexual liaisons" or "sexual attractions" in addition to gender.¹¹⁰ However, the court found no justification for expanding the traditional definition so broadly as to include an ongoing, voluntary, romantic engagement.¹¹¹ Moreover, the court found that distorting the meaning of the word "sex" in the context of Title VII is both "impracticable and unwarranted."¹¹²

¹⁰⁴ *DeCintio*, 807 F.2d 304.

¹⁰⁵ *Id.* at 305.

¹⁰⁶ *Id.* The additional provision to be qualified for the position required the applicants to be registered with the National Board of Respiratory Therapists. *Id.* The woman with whom the administrator was romantically involved was the only person that met this requirement. *Id.*

¹⁰⁷ *Id.* at 308. The Second Circuit declined to adopt the *King* approach, "[t]o the extent that [it] ... [could] be interpreted as recognizing Title VII claims for non-gender based sex discrimination." *Id.* at 307.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* According to the *DeCintio* court, "sex" as applied to Title VII, in contrast to the other categories afforded protection under the Act, such as race, color, religion, or nationality, "logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender." *Id.* at 306. Based on this standard, the court stated that the plaintiffs "were not prejudiced because of their status as males; rather, they were discriminated against because [the plaintiff's supervisor] preferred his paramour." *Id.* at 308.

¹¹⁰ *Id.* at 306.

¹¹¹ *Id.* at 307.

¹¹² *Id.* at 308.

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Additionally, the court distinguished the EEOC's guidelines, stating that the guidelines address the granting of employment benefits because of an individual's "submission" to sexual advances or requests, and that the word "submission" connotes a lack of consent.¹¹³ Since the department administrator did not force anyone to submit to sexual advances in order to win a promotion, his conduct was not within the purview of the EEOC guidelines.¹¹⁴ Furthermore, the court found that the EEOC guidelines referencing sexual relationships between co-workers should not be used to evaluate personal and social relationships.¹¹⁵ In holding that "voluntary, romantic relationships" cannot form a basis for a sex discrimination suit under Title VII, the court cited its desire to steer clear of "the policing of intimate relationships."¹¹⁶

Contrary to the desire of the *DeCintio* court to stay away from personal relationships, the concept of widespread favoritism was acknowledged a year later in *Broderick v. Ruder*.¹¹⁷ In fact, in its 1990 Policy Guidance, the EEOC discusses *Broderick* to illustrate how widespread sexual favoritism *can* be found to violate Title VII.¹¹⁸ In *Broderick*, a staff attorney at the Securities and Exchange Commission alleged that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits.¹¹⁹ Another of her supervisors allegedly promoted a staff attorney with whom he socialized extensively and to whom he was "noticeably attracted."¹²⁰ The court found that the supervisor's conduct created a hostile and offensive work environment for the plaintiff and other women working in the office.¹²¹ The court acknowledged that sexual favoritism in the workplace "undermined [the] plaintiff's motivation and work performance and deprived plaintiff, and other . . . female employees, of promotions and job opportunities."¹²² Although

¹¹³ *Id.* at 307-08.

¹¹⁴ *Id.* The court focused extensively on the fact that the relationship between the administrator and his alleged lover was voluntary and consensual and found that it did not equate to coercive behavior as prohibited by the EEOC. *Id.* at 307-08 (citing 29 C.F.R. § 1604.11(g) (2005)).

¹¹⁵ *Id.* at 308.

¹¹⁶ *Id.*

¹¹⁷ *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

¹¹⁸ Policy Guidance, *supra* note 85 (emphasis added).

¹¹⁹ *Broderick*, 685 F. Supp. at 1274.

¹²⁰ *Id.*

¹²¹ *Id.* at 1278.

¹²² *Id.* The district court, in reaching its conclusion that Title VII applied to consensual relationships did not find that the plaintiff was denied an employment opportunity that was granted to another less qualified employee who participated in such a relationship. *Id.* at 1274. The court found that this claim lacked evidentiary support. *Id.*

the *Broderick* decision turned on the hostile environment theory, the EEOC's Policy Guidance takes the position that the facts in *Broderick* could also support an implicit quid pro quo harassment claim "since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct."¹²³

The same year that *Broderick* was decided, the Third Circuit rejected a paramour claim brought by a plaintiff employed at a plant in *Miller v. Aluminum Company of America*.¹²⁴ The court found that such claims "underestimate the essential element of disparate treatment based on gender."¹²⁵ The court adhered to the *DeCintio* holding, finding preferential treatment arising from a consensual relationship between a supervisor and employee does not qualify as gender-based discrimination.¹²⁶

¹²³ Policy Guidance, *supra* note 85 (citing *Broderick*, 685 F. Supp. at 1278). The EEOC guidelines further note that there were instances of unwanted sexual advances directed at the plaintiff by her supervisor, which supported a quid pro quo claim more than a hostile environment claim. *Id.* See also *Spencer v. Gen. Elec. Co.*, 697 F. Supp. 204 (E.D. Va. 1988). Although *Spencer* did not involve sexual favoritism, it is an early example of a case that supports the proposition that pervasive sexual conduct can create a hostile work environment for those who find it offensive, even if the targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim. Policy Guidance, *supra* note 85, at n.14. In *Spencer*, the supervisor of an office engaged in daily horseplay of a sexual nature with female subordinates. *Spencer*, 697 F. Supp. at 213. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. *Id.* The subordinates joined in and generally found the horseplay funny and not offensive. *Id.* at 214. With the exception of one incident, none of the horseplay was directed at the plaintiff. *Id.* The supervisor was also engaged in consensual relations with at least two of his subordinates. *Id.* The court found that the supervisor's conduct would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable employee, and on that basis it found a violation of Title VII. *Id.* at 218.

¹²⁴ *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988).

¹²⁵ *Id.*

¹²⁶ *Id.* The *Aluminum* court also examined and ultimately rejected the plaintiff's other claims alleging that she was subjected to a hostile work environment and that her termination resulted from preferential treatment of males in her workplace. *Id.* at 501-04. The plaintiff then abandoned her original claim that she was discharged because of preferential treatment of males, and based her new discharge claim solely on the favoritism shown to her manager's lover. *Id.* at 502. The court found that the defendant had brought forth "ample" evidence of legitimate reasons for the plaintiff's discharge and that the plaintiff was discharged because the other woman was more experienced in the position and had received higher performance ratings. *Id.* at 503. As for the plaintiff's "paramour" and hostile environment claims, summary judgment was granted to the defendant. *Id.* at 508.

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In examining *DeCintio* and *Broderick*, there appear to be two different scenarios in which a hostile work environment claim may arise when an employer promotes or hires the person with whom he or she is engaged in a consensual sexual relationship.¹²⁷ One scenario centers upon a consensual relationship, which is kept separate from the workplace, until the paramour is hired or promoted, as was the case in *DeCintio* and *King*.¹²⁸ The other scenario occurs when an employer or supervisor hires or promotes an employee with whom he or she has an already established consensual sexual relationship that is prevalent to those in the workplace, such as the situation in *Broderick*.¹²⁹ When *DeCintio* and *Broderick* were decided, the EEOC guidelines had established that if a better qualified employee was denied job benefits in favor of a paramour, that situation might be enough to support a cause of action for sex discrimination under a hostile work environment theory, even if the discrimination was not so pervasive as to qualify as a hostile environment under the *Meritor* guidelines.¹³⁰ This is precisely the scenario that the California Supreme Court was recently confronted with in *Miller v. Department of Corrections*.¹³¹

F. *The Decision in Miller v. Department of Corrections*

In a groundbreaking development, the California Supreme Court issued a unanimous decision in *Miller v. Department of Corrections* holding that employees may sue their employers for sexual harassment if a sexual affair between a supervisor and subordinate results in

¹²⁷ 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, 654, 656-57 (1989).

¹²⁸ *Id.* Despite the circumstances, these cases created the possibility of Title VII violations. *Id.* See also *Kersul v. Skulls Angels, Inc.*, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985). In *Kersul* the plaintiff alleged that a "close personal relationship" between her employer and another female employee resulted in promotions and benefits for the other employee, despite her substandard performance. *Id.* at 887. Furthermore, the plaintiff claimed that she was terminated from her position because she criticized the promoted employee. *Id.* The court in *Kersul* refused to dismiss the plaintiff's claim of sex discrimination based on a law with language nearly identical to that of Title VII, and directed her to amend her pleadings to specifically state that the employer and the promoted employee were having a sexual relationship. *Id.* at 888-89.

¹²⁹ *Id.* Thus under this scenario, courts have indicated that employees need not be specifically targeted themselves in order to have a hostile environment sexual harassment claim, if the harassment is sufficiently pervasive. See *Broderick*, 685 F. Supp. at 1277 (citing *Vinson v. Taylor*, 753 F.2d 141, 146 (D.D.C. 1985)).

¹³⁰ *Id.*

¹³¹ *Miller v. Dep't of Corr.*, 115 P.3d 77 (Cal. 2005).

widespread sexual favoritism, creating a hostile work environment for other employees not involved in the affair.¹³²

In *Miller*, Edna Miller and Frances Mackey, both employees at the Valley State Prison for Women, sued the Department of Corrections, alleging that they were subjected to sexual discrimination and harassment.¹³³ Edna Miller began working for the Department in 1983.¹³⁴ In 1994, while she was employed at the Central California Women's Facility, she heard rumors through other employees at the Department that the chief deputy warden was engaged in sexual affairs with his secretary and with another subordinate, an associate warden.¹³⁵ Another department employee admitted to Miller that she was also engaged in a sexual affair with the warden.¹³⁶ These affairs were not hidden from the rest of the department; rather, there were occasions when the three women would publicly argue over the warden while they were in the workplace.¹³⁷

In 1995, Miller competed for a promotion for facility captain against one of the women with whom the warden was sexually involved.¹³⁸ The warden served on the interview panel and despite Miller's "higher rank, superior education, and greater experience," the promotion went to the warden's paramour.¹³⁹ At trial, Miller set forth evidence showing a

¹³² Stephen C. Tedesco & Jamie M. Harding, *Employers Face Greater Risk from Workplace Romance: California Supreme Court Rules that Office Affair May Give Rise to Sexual Favoritism Claim*, <http://www.littler.com/presspublications/index.cfm?event=pubItem&pubItemID=12824&childViewID=250> (last visited Sept. 1, 2006).

¹³³ *Miller*, 115 P.3d at 80. The plaintiffs also alleged that they were retaliated against for complaining about the discrimination and harassment. *Id.* The other causes of action brought by the plaintiffs were for sexual discrimination in violation of public policy, disability discrimination in violation of FEHA, negligent retention and promotion, invasion of privacy, assault and battery, false imprisonment, defamation, and intentional infliction of emotional distress. *Id.* at 80 n.2. Frances Mackey passed away in 2003 and Edna Miller was designated as the lead plaintiff in this case. *Id.* at 80 n.1.

¹³⁴ *Id.* at 80.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 83.

¹³⁸ *Id.* at 82.

¹³⁹ *Id.* Within a year and a half, the warden's lover was moved up at an "unusually rapid" pace to the position of associate warden. *Id.* Because Miller was not previously promoted to facility captain, she was ineligible to compete for any higher-ranking positions, and the warden's lover became her direct supervisor. *Id.* The plaintiffs expressed concerns about the warden's behavior and as a result of the complaints, one of the plaintiff's supervisors, who was also one of the warden's friends, became abusive towards the plaintiffs. *Id.* at 83. Miller eventually resigned when her complaints failed to materialize into better working conditions, and Mackey also resigned after being

pattern wherein co-workers having sexual relationships with the warden received favorable treatment.¹⁴⁰ She claimed that there was a message being sent to other employees, including herself, that the only way to move up in the workplace was to have sex with the warden, and that such conduct constituted sexual harassment in violation of California's Fair Employment and Housing Act ("FEHA"),¹⁴¹ which is closely based upon Title VII of the federal law.¹⁴²

repeatedly questioned by her supervisor regarding her participation in a Department internal investigation into the warden's behavior. *Id.* at 84-85.

¹⁴⁰ *Id.* at 80.

¹⁴¹ *Id.* The FEHA defines "harassment because of sex as including sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." Department of Fair Employment and Housing, Definition of Sexual Harassment, <http://www.dfeh.ca.gov/statutes/sexualhar.asp> (last visited Nov. 13, 2005). The FEHA regulations define "sexual harassment" as "unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature." *Id.* This definition includes many types of offensive behavior, including gender-based same sex harassment.

The following is a partial list of violations: Unwanted sexual advances; Offering employment benefits in exchange for sexual favors; Making or threatening reprisals after a negative response to sexual advances; Visual conduct: leering, making sexual gestures, displaying of suggestive objects or pictures, cartoon or posters; Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes; Verbal sexual advances or propositions; Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations; Physical conduct: touching, assault, impeding or blocking movements.

Id.

Under FEHA, "[a]ll employers are prohibited from harassing employees in the workplace." Department of Fair Employment and Housing, Employer Liability, <http://www.dfeh.ca.gov/statutes/employerliability.asp> (last visited Nov. 13, 2005).

If harassment occurs, an employer may be liable even if management was not aware of the harassment. An employer might avoid liability if the harasser is a non-management employee, the employer had no knowledge of the harassment, and there was a program to prevent harassment. If the harasser is a non-management employee, the employer may avoid liability if the employer takes immediate and appropriate corrective action to stop the harassment once the employer learns about it. Employers are strictly liable for harassment by their supervisors or agents. The harasser can be held personally liable for damages. Additionally, Government Code section 12940, subdivision (k), requires an entity to take "all reasonable steps to prevent harassment from occurring." If an employer has failed to take such preventative measures, that employer can be held liable for the harassment. A victim may be entitled to monetary damages even though no employment opportunity has been denied and there is no actual loss of pay or benefits.

The trial court dismissed the case, finding that the warden's sexual favoritism did not constitute harassment or discrimination under FEHA.¹⁴³ The California Court of Appeals affirmed, concluding that non-favored employees are not victims of sexual harassment or discrimination just because a supervisor grants favorable employment opportunities to the person with whom the supervisor is having a sexual affair.¹⁴⁴ The court found that the female employees who were passed over for promotions were in the same situation as male employees who were passed over for the same employment benefits, thus concluding that the case was not founded on sex based discrimination.¹⁴⁵

Id. Under FEHA, all employers have a legal obligation to prevent sexual harassment. Department of Fair Employment and Housing, Employer Obligations, <http://www.dfeh.ca.gov/statutes/employerobligations.asp> (last visited Nov. 13, 2005).

Employers must take all reasonable steps to prevent discrimination and harassment from occurring. Employers must help ensure a workplace free from sexual harassment by posting in the workplace a poster made available by the Department of Fair Employment and Housing. Employers must help ensure a workplace free from sexual harassment by distributing to employees information on sexual harassment. An employer may either distribute a brochure that may be obtained from the Department of Fair Employment and Housing or develop an equivalent document, which must meet the following requirements: The illegality of sexual harassment; The definition of sexual harassment under state and federal laws; A description of sexual harassment, utilizing examples; The internal complaint process of the employer available to the employee; The legal remedies and complaint process available through the Department and the Fair Employment and Housing Commission; Directions on how to contact the Department and the Fair Employment and Housing Commission; [and] The protection against retaliation for opposing the practices prohibited by law or for filing a complaint with, or otherwise participating in investigative activities conducted by, the Department or the Commission.

Id.

¹⁴² Thomas G. Servodidio, *Recent California Employment Cases: Instructive for Employers in All States*, MONDAQ BUS. BRIEFING, Sept. 7, 2005 (also available on Westlaw at 2005 WLNR 14088574). The court noted that in interpreting California's FEHA, it would look to federal authorities interpreting Title VII. *Miller*, 115 P.3d at 88.

¹⁴³ *Miller*, 115 P.3d at 85-86. The trial court determined that the evidence of the warden's sexual favoritism did not constitute discrimination or harassment under the FEHA, thus summary judgment was granted to the defendant on that claim. *Id.* at 85.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* In regards to the plaintiff's claim that the warden's behavior created an actionable hostile work environment claim, the Court of Appeals determined that:

Ignoring for the moment evidence of retaliation for threatened, or actual, reporting of the relationships, plaintiffs have demonstrated unfair conduct in the workplace by virtue of [the warden's] preferential treatment of his various sexual partners. However,

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The California Supreme Court reversed, relying heavily on the 1990 EEOC guidelines addressing employer liability under Title VII for sexual favoritism, finding that the plaintiffs established a *prima facie* case of sexual harassment.¹⁴⁶ The EEOC policy statement explains that while an isolated incident of favoritism toward a paramour will not support a sexual harassment claim, a “widespread sexual favoritism” involving consensual relations may support a claim for workplace harassment based on a hostile work environment for both male and female co-workers.¹⁴⁷ The court acknowledged that an isolated incident of favoritism towards an employee, with whom a supervisor is engaged in a consensual sexual affair, does not ordinarily constitute sexual harassment.¹⁴⁸ The court concluded, however, that if the sexual favoritism in the workplace is “sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’” or that the only way for a female employee to advance her career is to engage in sexual conduct with her supervisor.¹⁴⁹

beyond the fact of those relationships and the preferential treatment, plaintiffs have not shown a concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex. Plaintiffs were not themselves subjected to sexual advances, and were not treated any differently than male employees at [the prison]. Hence the trial court correctly concluded there is no evidentiary basis for plaintiffs’ various sex discrimination and harassment claims.

Id. at 86.

¹⁴⁶ *Id.* at 90. The court found that “an employee may establish an actionable claim of sexual harassment . . . by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” *Id.*

¹⁴⁷ *Id.* at 88. Accordingly, a hostile work environment claim can be found regardless of whether any objectionable conduct is directed at both male and female employees, and regardless of whether those who were actually granted some type of favorable treatment willingly engaged in the sexual favors or acts. *Id.* at 816. *See also supra* Part II.D.

¹⁴⁸ *Miller*, 115 P.3d at 80. *See also supra* Part II.D.

¹⁴⁹ *Miller*, 115 P.3d at 80. The Court found that this was much more than an isolated act of favoritism by the warden towards his paramours given that he had caused his paramours to be transferred to his new facility, had allowed the other supervisor to abuse those who complained about his sexual affairs, specifically the plaintiff, and had solidified his paramour’s job advancement based on sexual favors. *Id.* at 90. All of these factors led the Court to its decision that the message was implicitly conveyed that the management viewed women as “sexual playthings,” noting specifically that “it is clear under California law that a plaintiff may establish a hostile work environment without demonstrating the existence of coercive sexual conduct directed at the plaintiff or even conduct of a sexual nature.” *Id.* at 92. This decision allows lawsuits by any employee challenging the employment decisions by a supervisor who is confirmed to be engaged in, or is believed to be engaged in, an office relationship. Greg Klawitter, *Three California Supreme Court*

The court found the conduct to be “severe or pervasive” enough to alter other employees’ working conditions and create a hostile work environment.¹⁵⁰ Therefore, *Miller* is the first published decision finding a hostile work environment claim viable without evidence that any individual, be it a third party colleague or the plaintiff herself, was directly subjected to unwelcome sexual conduct.¹⁵¹

Sexual harassment jurisprudence has expanded quite a bit since “ladies day in the house” when the word “sex” was added to the Civil Rights Act of 1964.¹⁵² Forty years hence, sexual harassment laws are still being interpreted and expanded in new ways.¹⁵³ It may be difficult to predict the future of the law, but it is possible to prepare for new interpretations and to modify current practices in an effort to catch problems before they start, from an employer, employee, and judicial perspective.¹⁵⁴

III. ANALYSIS

In light of *Miller*, the guidelines of hostile work environment jurisprudence have been significantly expanded and the implications that could arise, especially in the form of employer liability, are worthy of exploration.¹⁵⁵ Part III begins with the proposition that the current EEOC guidelines are insufficient to handle sexual favoritism claims

Decisions: Not All Good News (Aug. 31, 2005), available at <http://www.mofo.com/news/updates/bulletins/bulletin02030.html#ThreeCalifornia>. Thus any employee who knows about an office romance and believes that he or she has been the victim of some type of adverse employment decision can potentially file a lawsuit against the employer. *Id.* See also *Birshtein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994, 1007 (1st Dist. 2001), *reh'g denied*, S102158, 2002 Cal. LEXIS 288 (Cal. Jan. 16, 2002) (finding that employers are liable for failing to remedy a hostile or offensive work environment of which supervisory or management-level employees knew or should have known of the harassment and holding that the employer may be held liable for a managerial failure to intervene to prevent or end sexual harassment in the workplace caused by a fellow employee). The federal standard for supervisory acts is different in that it requires that the employer have knowledge or notice of the harassment. See, e.g., *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

¹⁵⁰ *Id.* at 91 (quoting *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 851 (Cal. 1999)) The Supreme Court stated that the FEHA clearly intrudes upon personal relationships, thus any type of office romance between a supervisor and subordinate is subject to not only scrutiny, but also potential liability. *Id.* at 93.

¹⁵¹ John H. Douglas, *Consensual Office Affairs: On-the-Job Relationships Pose Risks if They Evidence Widespread Sexual Favoritism*, NAT'L L.J., Oct. 31, 2005, at 9. See also *supra* note 90 (cases holding contrary to the *Miller* holding).

¹⁵² See *supra* Part II.A.

¹⁵³ See *supra* Part II.F.

¹⁵⁴ See *infra* Part III.

¹⁵⁵ See *supra* Part II.F.

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based on hostile work environment sexual harassment jurisprudence,¹⁵⁶ and continues with a discussion of the tremendous effects *Miller's* legacy will have on employers, employees, and the workplace atmosphere.¹⁵⁷ Finally, Part III analyzes why courts like the California Supreme Court have gone too far in expanding hostile work environment sexual harassment jurisprudence, which may lead to devastating effects on employers nationwide.¹⁵⁸ This Part will also detail what steps employers must take to protect themselves.¹⁵⁹

A. *Insufficient EEOC Guidance*

Hostile work environment sexual harassment jurisprudence has branched off in a new direction, dramatically increasing the potential breadth of sexual harassment law from the previously settled legal framework.¹⁶⁰ Traditionally, federal and state courts have followed the reasoning stated in Section A of the EEOC Policy Guidance on Sexual Favoritism that "an isolated instance of favoritism toward a "paramour" (or a spouse or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."¹⁶¹ However, now a precedent has been set, resulting from an adherence to Section C of the EEOC guidance, whereby employees may sue their employers for sexual harassment if a sexual affair between a supervisor and a subordinate results in sexual favoritism, thus creating a hostile work environment for those employees not involved in the affair.¹⁶²

The *Miller* decision creates a cause of action for employees who may challenge any decision of a supervisor who is involved in, or allegedly involved in, an affair or workplace romance and will create new sexual harassment claims where none previously existed.¹⁶³ This is significant

¹⁵⁶ See *infra* Part III.A.

¹⁵⁷ See *infra* Part III.B.

¹⁵⁸ See *infra* Part III.C.

¹⁵⁹ See *infra* Part III.C.

¹⁶⁰ See *supra* note 90.

¹⁶¹ Policy Guidance, *supra* note 85. According to Scott Witlin, a shareholder in the Los Angeles office of Ogletree Deakins, "The *Miller* decision weakens somewhat the long line of cases which held that favoritism toward a paramour was not discrimination against others." Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Workplace Romance Presents Liability Risk for California Employers* (Aug./Sept. 2005), available at <http://www.ogletreedakins.com/uploads/publications/CA-Alert%20Aug-Sept%202005.pdf>.

¹⁶² See *supra* Part II.F.

¹⁶³ Tedesco & Harding, *supra* note 132. "The facts in the *Miller* case were a bit extreme, but it is likely to spawn numerous lawsuits based on less extreme facts." Ron Brand,

because now both men and women can be deemed injured by sexual favoritism.¹⁶⁴ Given the long line of cases adhering to diametrically opposed legal standards than that which *Miller* created, employers faced with such claims will undoubtedly argue the merits of the former standard in hostile work environment sex discrimination cases to prevent the *Miller* rationale from prevailing.¹⁶⁵

The EEOC has not fully addressed the scope of this issue, and as demonstrated in California, fifty states may have fifty different approaches to widespread sexual favoritism claims with no consistency among them.¹⁶⁶ Before *Miller*, courts relied on the standard set forth in Section A of the EEOC guidance which describes in vague terms the requirements for an isolated sexual favoritism claim.¹⁶⁷ Although Section A has been the default guidance for many courts, it fails to clearly define and explain specific characteristics akin to isolated favoritism as opposed to widespread favoritism.¹⁶⁸ The policy guidance is unclear as to why a party's claim may fail on grounds of being isolated and how many incidents must occur for a claim to fit into the "isolated favoritism" category.¹⁶⁹ Furthermore, the EEOC has failed to explain what players are involved in an isolated favoritism claim.¹⁷⁰ This lack of clarification makes it difficult to differentiate between isolated and widespread favoritism and leaves employers, employees and the courts with very little guidance to follow.¹⁷¹

The current EEOC guidance is also insufficient to adjudicate widespread sexual favoritism claims.¹⁷² Section C of the policy guidance provided by the EEOC has suggested for several years the theoretical possibility of a claim for sexual harassment based on sexual favoritism, but the *Miller* decision is the first to fully succumb to the EEOC's guidance on widespread favoritism.¹⁷³ Thus, despite the completely consensual nature of the affair or romance, any employee, male or female, who believes that a paramour received special treatment, may

Favoring a Paramour May Be Sexual Harassment (Oct. 2005), available at <http://laborlawyers.com/CM/Labor%20Letter/eLloctoberr2005.pdf>.

¹⁶⁴ Douglas, *supra* note 151.

¹⁶⁵ See *supra* note 90.

¹⁶⁶ See *supra* Part II.F.

¹⁶⁷ See *supra* note 90.

¹⁶⁸ See *supra* note 86 and *infra* Part IV.

¹⁶⁹ See *supra* note 86 and *infra* Part IV.

¹⁷⁰ See *supra* note 86 and *infra* Part IV.

¹⁷¹ See *supra* note 86 and *infra* Part IV.

¹⁷² See *supra* note 86 and *infra* Part IV.

¹⁷³ See *supra* Part II.F.

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now sue, as long as the conduct was considered severe and pervasive.¹⁷⁴ However, Section C fails to clearly explain what constitutes this type of behavior, how frequently the alleged conduct must occur, who can be the perpetrator or victim in a widespread sexual favoritism claim, and what exactly widespread favoritism means.¹⁷⁵

Based upon the recent analysis of the EEOC guidance in *Miller*, the vagueness of the language used in Sections A and C may lead to broader interpretations of the law than the EEOC intended when the guidance was drafted.¹⁷⁶ The implications derived from *Miller* will impact sexual harassment jurisprudence for years to come as employers and the courts battle over sexual favoritism and the fine line differentiating “isolated” and “widespread” sexual favoritism.¹⁷⁷ Without clearer direction from the EEOC, there is no telling how far sexual favoritism claims may reach and how much sexual harassment jurisprudence will continue to expand.¹⁷⁸

B. Broadened Sexual Harassment Jurisprudence Affecting Employers

A whole new class of sexual harassment cases has emerged, brought by a new class of plaintiffs, to recover under a theory that their workplace is permeated with widespread sexual favoritism as a result of consensual sexual relationships among colleagues.¹⁷⁹ *Miller* drastically expands the scope of hostile workplace sexual harassment claims and opens employers to liability from which they previously were immune under existing sexual harassment jurisprudence.¹⁸⁰ Thus, the broadened

¹⁷⁴ Tedesco & Harding, *supra* note 132. See also *supra* Part II.F.

¹⁷⁵ See *infra* Part IV. Additionally, the Court in *Miller* failed to clearly explain when a workplace “gets to the point where women are ‘sexual playthings.’” Brand, *supra* note 163.

¹⁷⁶ Brand, *supra* note 163.

¹⁷⁷ Elizabeth M. Marsh, *Sexual Favoritism: When an Office Romance Can Result in a Hostile Work Environment Claim* (Sept. 12, 2005), available at <http://www.thompsoncoe.com/default.aspx?tabid=116&ArticleID=229&ctl=AttPub&mid=791&From=Att&action=Edit>.

¹⁷⁸ See *infra* Part IV. “The Supreme Court’s decision in *Miller* means that employers now face greater risk from workplace romances, and the decision will impact sexual harassment litigation for years to come as both employers and the courts struggle with the definition of sexual favoritism and the difference between isolated and widespread sexual favoritism.” Tedesco & Harding, *supra* note 132.

¹⁷⁹ See *supra* Part II.F.

¹⁸⁰ Michael J. Lotito, *Workplace Romance May Create Hostile Work Environment for Other Employees* (July 25, 2005), available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=818>. See also *supra* note 90.

scope of hostile work environment sexual harassment claims may have a great effect on all aspects of the workplace.¹⁸¹

Prior cases limited actionable sexual harassment claims to only those employees either directly involved in sexual liaisons at the workplace or recipients of unwanted sexual advances on the job.¹⁸² The *Miller* holding demonstrates the extent to which intra-office relationships can lead to litigation, and now, as a result of this holding, not necessarily just litigation brought by a scorned lover.¹⁸³ The risk-management implications from an employer's perspective are now far greater for any kind of interactions between supervisory and subordinate employees, be it simply flirtatious banter or a full blown consensual affair.¹⁸⁴ This new standard practically guarantees that any action taken by a supervisor and his or her paramour in the workplace will be subject to heightened scrutiny because employers will now be forced to monitor their employees' conduct and the relationships of their supervisors to ensure that paramour favoritism does not become a widespread problem within the workplace.¹⁸⁵ Employers will have to take great care to investigate workplace rumors and carefully monitor and review any new hires or promotions in which a supervisor is involved in order to avoid hostile work environment claims from third party employees down the road.¹⁸⁶

By thoroughly investigating purportedly severe and pervasive discrimination claims brought by non-favored employees, employers will be left with little choice but to inquire into affairs that previously may have been considered private matters between mutually consenting adults.¹⁸⁷ If the alleged hostile environment claim were to involve only one paramour, then even under the *Miller* standard, a claim of discrimination might not be actionable.¹⁸⁸ However, if the claim involves more than one alleged paramour, the employer should consider whether

¹⁸¹ See *supra* Part II.F. "Although this is a California decision, employment lawyers everywhere are sounding the alarm for employers who wish to avoid this type of claim." Marsh, *supra* note 177.

¹⁸² Lotito, *supra* note 180. See also *supra* Part II.B.

¹⁸³ See *supra* Part II.F.

¹⁸⁴ See *supra* Part II.F.

¹⁸⁵ Tedesco & Harding, *supra* note 132. The California Supreme Court, in recognizing that its decision puts employers in the position of becoming involved in employees' personal consensual relationships, noted that the consensual relationship alone is not the problem; rather, it is the effect of the relationship upon the workplace that creates potential liability. *Miller v. Dep't of Corr.*, 115 P.3d 77, 94 (Cal. 2005).

¹⁸⁶ See *supra* Part II.F.

¹⁸⁷ See *supra* Part II.F. "Alliances, affairs and romances between employees are a fact of life." Tedesco & Harding, *supra* note 132.

¹⁸⁸ See *supra* Part II.F.

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the supervisor's actions may be considered severe or pervasive and whether such conduct interferes with other employees' working conditions or work performance, as was found to be the case in *Miller*.¹⁸⁹ Unfortunately, the *Miller* court failed to clearly establish when conduct within a workplace reaches the point where women are seen as "sexual playthings," which still makes the severe and pervasive requirement inquiry unclear.¹⁹⁰ Thus, there is very little guidance provided to employers which can be used as guidelines in looking for these warning signs in order to protect themselves.¹⁹¹

C. *Preventative Measures Must Be Taken by Employers*

The workplace is a major social center for men and women who share a common interest through their employment and who may spend eight to twelve hours a day working with and getting comfortable with other employees.¹⁹² Employees often meet their significant other in the workplace.¹⁹³ In light of this expanded sexual harassment jurisprudence, employers face new risks and need to gain an understanding of how everyday operations may be impacted within the workplace.¹⁹⁴ Employers may not learn about a consensual relationship until it has already had an adverse effect on the workplace and once it is that late in the game, employers may face significant liability for sexual harassment.¹⁹⁵

The *Miller* court failed to lay out precise standards spelling out the differences between isolated and widespread sexual favoritism.¹⁹⁶ Thus, there appears to be a very thin line separating the two, which guarantees that any action taken by a supervisor with regard to his or her paramour could leave the employer wide open to lawsuits filed by non-favored employees.¹⁹⁷ Employers need to become aware that sufficiently severe or pervasive circumstances may provide the basis for a cause of action

¹⁸⁹ See *supra* Part II.F.

¹⁹⁰ See *supra* Part II.F.

¹⁹¹ See *supra* Part II.F.

¹⁹² Dennis M. Powers, *The Eight Managerial Office Romance Strategies*, http://www.thevault.com/nr/newsmain.jsp?nr_page=3&ch_id=420&article_id=19042&cat_id=1441 (last visited June 30, 2006).

¹⁹³ Tedesco & Harding, *supra* note 132. See also *supra* Part I.

¹⁹⁴ See *supra* Part II.F.

¹⁹⁵ Jack Sholkoff, *California Supreme Court Expands Definition of Sexual Harassment; Court Imposes New Duties on Employers To Monitor Effects of Consensual Relationships Between Employees* (July 19, 2005), available at http://www.martindale.com/labor-employment-law/article_Holland-Knight-LLP_173296.html.

¹⁹⁶ See *supra* Part II.F.

¹⁹⁷ See *supra* Part II.F.

for sex discrimination, despite the fact that the employer may have assumed that any decisions were based on personal preference rather than sex.¹⁹⁸ A politically incorrect twist is that *Miller* may have the effect of “leveling the workplace playing field somewhat for the ‘attractively impaired’”¹⁹⁹ as supervisors consciously or subconsciously monitor their own behavior for signs of favoritism based on lusty appetites or physical appearance.²⁰⁰

Because it is not the affair or romance itself that is unlawful, but its possible impact on other employees that is the impetus for employer liability, all employers can do to protect themselves is to prevent the romantic relationship from affecting other employees in the workplace.²⁰¹ First, employers need to treat claims of sexual favoritism as seriously as a quid pro quo claim for unwanted sexual advances and follow up on any claims with prompt and thorough investigations, just as they would do for any other sexual harassment claim.²⁰²

Second, employers should take preventative measures including the implementation of “detailed, narrowly-tailored anti-harassment, non-fraternization, and/or anti-nepotism policies”²⁰³ which discourage office

¹⁹⁸ Jeffrey S. Klein & Nicholas J. Pappas, *Employer Liability for Sexual Favoritism*, N.Y.L.J., Aug. 1, 2005, at 3, available at <http://www.weil.com/wgm/pages/Controller.jsp?z=r&sz=bl&db=wgm/cbyline.nsf&d=FCD05FD0779C4E448525705700528C91&v=0>.

¹⁹⁹ Douglas, *supra* note 151.

²⁰⁰ *Id.*

²⁰¹ Tedesco & Harding, *supra* note 132. A spokesman for the California Attorney General’s office called *Miller* a warning that “tells employers that having an antinepotism policy is not enough.” Lotito, *supra* note 180.

²⁰² Lotito, *supra* note 180. Employers “need to do more to make sure . . . [they] have a hostility-free work environment even when workers are having consensual sexual relationships.” *Id.*

²⁰³ See *supra* Part II.C. Employers that think they are safe under the protection of employment practices liability insurance must verify that their coverage extends to new causes of action such as job related favoritism leading to sexual harassment claims, or else seek out other measures to reduce the risks. Lotito, *supra* note 180.

²⁰⁴ Klawitter, *supra* note 149. Employers need to hit home the message to their supervisors that the implications of *Miller* mean that an inter-office sexual relationship need not be coerced in order to result in potential employer liability. *Id.* See Powers, *supra* note 192.

1. Adopt a Reasonable Office Romance Policy. Most companies adopt a “benign neglect” policy towards office romances between coworkers, provided there are no legitimate complaints about performance or keeping the relationship discrete. Many will adopt a more restrictive approach to boss/subordinate relationships, including the ability to transfer or remove the evaluative function of the subordinate to a third party. It makes sense to adopt written reasonable policies, so employees understand the ground rules and

relationships, particularly between employees who are in a subordinate/supervisor work-relationship to the extent allowed by state privacy laws.²⁰⁴ Of course a fine line exists as to policies engaging in the latter arrangement where two people on equal footing engage in a

feel comfortable in their workplace (see *The Office Romance* for the managerial details).

2. Communicate this Policy. Clearly communicate your firm's reasonable policies on office romance—including who to contact for confidential advice and what procedures to follow in a conflict-of-interest or supervisory situation. Be sure that every employee understands the corporate climate at your office.

3. Mediate. When a broken romance spills over into the workplace, restrain the urge to arbitrarily assign blame and transfer or fire the culprit under a one-size-fits-all sexual harassment policy. Instead, suggest mediation to help the couple work out their differences—and the conditions under which to continue working together. A mediator can be a trained facilitator, the company appointed “ombudsman,” or even a coworker that both parties respect.

4. Keep the channels of communication open. Encourage employees to “speak their piece” openly and confidently, regardless of their complaint or concern. A positive, supportive environment fosters not only the airing of problems, but also potential solutions—without an attorney getting into the fray.

5. Follow basic concepts of fairness. Fairness means employing a neutral and consistent investigation of complaints that treats each party with equal respect—regardless of gender or rank in the workforce. Fairness does not mean addressing every employee's complaint—only the reasonable and legitimate ones.

6. Respond promptly and discreetly to problems. Reassure employees that valid complaints will be taken seriously. Make your response timely, confidential, and appropriate—whether it's mediation or an investigation. Train your managers on how to properly manage workplace romances.

7. Respect your employees' privacy. Adopt at least a neutral attitude toward employee dating and other off-the-job behavior, focusing instead on what workers do on company time in meeting corporate goals. Unless you suspect illegal action, do not police your employees or intercept their confidential messages. Don't make employees into “love” police.

8. Be “pro-interactive.” Support concepts of gender equality, day care and elder care, family leave, and other corporate “pro-interactive” policies. Support the inevitable relationships and marriages that will occur. People who enjoy working together in an open, positive environment work better—and to the benefit of their supervisors and the company. Pro-interactive companies just don't have the same problems as others do. Remember love does win out, despite restrictive policies—and the best employees do leave to work for more progressive organizations.

Id.

²⁰⁴ See Klein & Pappas, *supra* note 198. The policies need to be drafted with care because they may create even more litigation. Tedesco & Harding, *supra* note 132.

relationship and one of the parties is promoted to a position of direct power or control over the other party in the consensual romantic relationship.²⁰⁵ Issues of that nature may encourage an all-or-nothing policy whereby no dating whatsoever is allowed between any employees in order to prevent case by case discrepancies.²⁰⁶ If employees are prohibited from dating, it is logical to infer that there should be no instances of sexual favoritism in the workplace.²⁰⁷ These are necessary measures to protect the employer and employee interests, even if such a policy is interpreted as interfering with personal and private relationships, which can in turn harm employee morale.²⁰⁸

Third, employers may want to consider implementing consensual relationship agreements known as “love contracts.”²⁰⁹ Such agreements spell out the standards of behavior and professionalism required of the individuals that choose to enter into a romantic relationship and help protect employers from a sexual harassment suit if two employees are dating and the relationship ends badly.²¹⁰ Furthermore, if the employees are in a supervisor-subordinate working relationship, it may be wise for both parties to agree that one will transfer to another area within the company or some other comparable provision.²¹¹ This type of protection may provide an alternative that appeases employers, while still allowing employees to maintain personal relationships without fear of reprisal.²¹²

Finally, employers may also want to consider adding another provision to the language of their sexual harassment policies that specifies that harassment can occur when supervisors favor subordinates or other colleagues due to consensual sexual involvement and include a discussion on the topic during anti-sexual harassment training.²¹³ After

²⁰⁵ Lotito, *supra* note 180.

²⁰⁶ *Id.*

²⁰⁷ Klein & Pappas, *supra* note 198.

²⁰⁸ *Id.* A recent commentator on the *Miller* holding said that, “[T]he Court’s decision will likely have deleterious effects upon employee privacy and impose significant and what may seem as unfair burdens upon employers to monitor employee personal relationships in an effort to avoid sexual harassment—as defined by the Court in *Miller*—from developing in the workplace.” Sholkoff, *supra* note 195.

²⁰⁹ Tedesco & Harding, *supra* note 132.

²¹⁰ Lindsay Fortado, *Workplace ‘Love Contracts’ on the Rise: Agreements Used To Hedge Against Sexual Harassment Claims*, NAT’L L.J., Feb. 21, 2005, at 24. “The use of love contracts is ‘not a majority rule yet, but it’s increasing,’ said April Boyer, an employment partner in Kirkpatrick & Lockhart Nicholson Graham’s Miami office.” *Id.* “Some employers are going beyond traditional.” *Id.*

²¹¹ Tedesco & Harding, *supra* note 132.

²¹² *Id.*

²¹³ *See supra* Part II.F.

the *Miller* decision, a failure to implement these steps may send the message to other employees that engaging in an affair with a supervisor, although consensual, is the way to get ahead.²¹⁴

The *Miller* decision has created the need for the EEOC to clarify its Policy Guidance on Sexual Favoritism in the isolated and widespread contexts so that employers, employees, and the courts have a better set of guidelines to follow as sexual harassment jurisprudence grows and changes.²¹⁵ Additionally, as the law changes, employers will be faced with many new challenges in the hostile work environment arena; therefore, employers must take proactive measures to prevent a widespread problem of sexual favoritism in the workplace.²¹⁶ Employers will have to, at a minimum, discourage workplace affairs, and possibly prohibit them altogether, and then thoroughly investigate any claims that may arise.²¹⁷

IV. PROPOSED CHANGES TO THE EEOC POLICY GUIDANCE ON SEXUAL FAVORITISM

One cannot fit a square peg into a round hole, but that is exactly what the California Supreme Court attempted to do in *Miller*. The square peg of sexual favoritism, based on the EEOC Policy Guidance supporting the widespread favoritism theory, was forced into the round hole known as hostile work environment sexual harassment jurisprudence. The broadened sexual harassment jurisprudence appears to raise as many questions as it answers. Under this new standard, liability for all office romances turns on the fine line distinction between isolated sexual favoritism, which is currently not actionable, and widespread sexual favoritism, that now can be construed as creating a hostile work environment.²¹⁸ New widespread favoritism cases will be coming to the forefront as a result of *Miller*, and perhaps an even greater expansion of the current sex discrimination laws will be the goal of the next case to come along. Courts need a concise framework to control such claims. In an effort to curb frivolous claims based on sexual favoritism, and to protect employers from undue liability, the guidance provided by the EEOC must be amended to provide a concise formula for the courts to follow when confronted with claims in the newly

²¹⁴ See *supra* Part II.F.

²¹⁵ See *supra* Part III.A.

²¹⁶ See *supra* Parts III.B & C.

²¹⁷ See *supra* Parts III.B & C.

²¹⁸ See *supra* Part II.F.

recognized area of widespread sexual favoritism, in order to accommodate the proverbial square peg.

Immediate action must be taken so that employers are not wrongfully subjected to liability for claims that do not fit within the ambiguous widespread sexual favoritism framework that currently exists under Section C of the EEOC Policy Guidance.²¹⁹ Sex discrimination laws were not created to include unfairness claims, or claims based on a person's preference for a paramour over other employees; rather they are in place to protect people from discrimination based on sex.²²⁰ The California Supreme Court's interpretation of the law is overbroad; thus the way to control claims based on sexual favoritism is to clarify and define what types of conduct qualify as widespread, severe, or pervasive enough to be actionable under hostile work environment sexual harassment jurisprudence. The EEOC Policy Guidance has been influential in helping courts analyze sexual harassment claims, however, no cognizable bright line standard exists which easily discerns the differences between isolated and widespread favoritism based on the current standards set out by the EEOC. Updated standards need to be formulated to create a sexual favoritism framework that does not allow for gross misinterpretations of the law.

Relevant circumstances within a hostile work environment may include the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.²²¹ However, the severe and pervasive elements in hostile work environment cases are difficult to assess because courts have been inconsistent in defining the conditions needed to qualify as sufficiently severe or sufficiently pervasive.²²² An additional inconsistency that must be addressed is the frequency with which the conduct must occur before a cause of action can be found under widespread favoritism. There is also no clear standard in place for employer liability where supervisors are involved in the favoritism context. Thus, based on the *Miller* holding, it is unclear what amounts to severe and pervasive, or even the exact definitions of isolated and widespread favoritism. A single supervisor could have more than one paramour, or multiple supervisors could each have their own paramour.

²¹⁹ See *supra* note 86.

²²⁰ See *supra* Part II.A.

²²¹ See *supra* Part II.B.

²²² See *supra* Part II.B.

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Without exacting guidelines, it is impossible for employers to know what conduct qualifies as severe or pervasive within their workplace, if it is widespread or isolated, and how to prevent such acts in an effort to protect themselves from litigation.

Section A of the EEOC guidance currently states:

[A]n isolated instance of favoritism toward a “paramour” (or a spouse or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman.²²³

An amended version of Section A of the EEOC guidance may state:

Isolated favoritism is favoritism toward a paramour that occurs on no more than three occasions and is not severe and pervasive within the workplace. Conduct is found to be severe and pervasive when both men and women who find this offensive can establish that the conduct was so uncomfortable that the conditions of [their] employment are altered, creating an abusive working environment that a reasonable person would find intolerable. An isolated instance of favoritism toward a “paramour” (or a spouse or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman. A claim alleging sexual favoritism will be considered isolated if the supervisor or authority figure was engaging in acts with a single paramour on three occasions or less, provided that the general workplace atmosphere was not impacted by such behavior. If the supervisor or authority figure was involved with either

²²³ See *supra* note 86.

more than one paramour, or, acted on more than three occasions with either a single or multiple paramours, the behavior will not be considered isolated. However, even if the behavior is not isolated, that does not mean that it fits within the definition of widespread favoritism, unless the behavior is also severe and pervasive, according to the guidelines specified in Section C.

Although there have been consistent holdings rejecting isolated favoritism claims, for purposes of clearly differentiating isolated favoritism factors from widespread favoritism factors, it would be beneficial for the EEOC to alleviate any confusion by providing exact factors that spell out isolated favoritism characteristics under Section A of the policy guidance. The amended version of Section A first includes a definition of “isolated.” Isolated is defined in the dictionary as “occurring alone or once; sporadic.”²²⁴ However, the EEOC may refine the definition of isolated so that it is even more tailored to sexual harassment claims in the favoritism context.

Second, the EEOC should include the exact number of incidents necessary to qualify as isolated favoritism. For example, as shown in the amended version of Section A, an isolated instance of favoritism may mean that the alleged conduct occurred no more than three times. The number of instances could be higher or lower depending on the EEOC’s adopted definition of isolated, assuming that the EEOC would not follow a strict dictionary definition. Although three is an arbitrary number, the number of instances necessary to qualify as isolated should not be so limited that a claim could be made based on just a single incident. If only one occurrence of favoritism was necessary to form a valid cause of action, then anyone could complain at any time about anything they perceive to be even remotely offensive. If that were the case, then all incidents of favoritism would have to, by default, fit into the widespread favoritism category and there would be no way to differentiate between isolated and widespread claims. Additionally, the amended version of Section A specifies that an isolated instance of favoritism is not severe or pervasive and provides guidelines as to when conduct qualifies as severe or pervasive.

Third, the EEOC needs to identify the parties in an isolated favoritism claim. Right now it is unclear whether an isolated claim involves just one supervisor and just one paramour, or if multiple

²²⁴ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 664 (11th ed. 2004).

supervisors could each have their own paramours. There are obvious ambiguities within this area that the EEOC should address by providing examples of who fits within the isolated framework. The proposed amended version of Section A specifies that a supervisor or authority figure who has engaged in acts with a single paramour on three occasions or less, provided that the general workplace atmosphere was not impacted by such behavior, will be considered isolated. Furthermore, to elaborate on the differences between isolated and widespread favoritism claims, the proposed amended Section A also provides that a claim will not be considered isolated if a supervisor or authority figure was involved with either more than one paramour, or, acted on more than three occasions with either a single or multiple paramours.

By creating its own definition of isolated sexual favoritism, spelling out the exact number of instances necessary to qualify as isolated favoritism, and clearly identifying the players, frivolous claims alleging sexual favoritism can be identified early and eliminated before they affect employers, other employees and the workplace morale.

The same principles apply to Section C of the current EEOC guidance which currently provides:

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as “sexual playthings,” thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is “sufficiently severe or pervasive” to alter the conditions of [their] employment and create an abusive working environment.²²⁵

An amended version of Section C may state:

²²⁵ See *supra* note 86.

If favoritism based upon a ~~granting of sexual favors~~ *consensual romantic or sexual relationship* is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII, ~~regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.~~ *In these circumstances, if a message is implicitly conveyed in a severe or pervasive manner that the managers view women or men as "sexual playthings," thereby creating an atmosphere that is demeaning to all women or men within the workplace. The sexual favoritism is widespread if the relationship is conducted publicly within the workplace and is known or should be known by the employer, and where the favoritism was displayed in a severe and pervasive manner, occurring on at least four or more occasions. The conduct may not be mere office gossip. Conduct is severe and pervasive when both men and women who find this offensive can establish that the conduct was so uncomfortable that the conditions of [their] employment are altered, creating an abusive working environment that a reasonable person would find intolerable. A claim alleging sexual favoritism will be considered widespread if the supervisor or authority figure was engaging in acts with a single paramour on three or more occasions and the general workplace atmosphere was permeated by such severe and pervasive behavior. If the supervisor or authority figure was involved with more than one paramour, or, acted on more than three occasions with either a single or multiple paramours, the behavior will be considered widespread if the general workplace atmosphere was permeated by such severe and pervasive behavior.*

The requirements to bring a successful hostile work environment claim are stringent; therefore Section C of the EEOC guidance should ensure that the requirements for bringing a claim under the widespread favoritism theory are just as strict.²²⁶ As shown in the amended version of Section C, the EEOC should replace the words "granting of sexual favors" with "consensual romantic or sexual relationship." This change is necessary because the current wording creates the inference that the

²²⁶ See *supra* Part II.B.2.

relationship is based purely on sex or may even be a quid pro quo relationship. As the amended Section C shows, it should be emphasized that the relationship in question was entered into by both parties on a consensual basis.

Second, the line in the current EEOC guidance pertaining to claims brought by third parties who are not the targets of objectionable conduct should be eliminated. This sentence causes problems because it allows anyone to bring a claim, even those not directly targeted by objectionable conduct. Parties bringing claims under the widespread sexual favoritism framework should only be allowed to do so when the conduct is directed at them, or adversely affects all men and women in the workplace. This clarification will help eliminate frivolous claims. Furthermore, it is contradictory to say that a message is being conveyed that women are seen as “sexual playthings” when the women involved in the relationship willingly and consensually bestow sexual favors. Section C does not currently take into consideration that a female supervisor could become involved with a male employee, even though the possibility exists that men could be consensually bestowing sexual favors and could thus be perceived by others in the workplace as “sexual playthings.” The proposed amended version of Section C eliminates this problem by acknowledging that men could also be viewed as “sexual playthings.” To that end, when the message is found to be demeaning to all women or men within the workplace, a claim will hold greater weight than if only one completely unrelated third party lodges a complaint because the possibility of the problem being widespread is considerably greater.

Third, because this area of sexual harassment law is still rather unexplored, the EEOC must provide an exact definition of widespread favoritism. The dictionary definition of widespread is “widely diffused or prevalent; widely extended or spread out.”²²⁷ Since widespread is a rather broad concept, the EEOC will have to first adopt a more specific definition that caters to the favoritism context. For example, as shown in the proposed amended version, the EEOC must redefine widespread sexual favoritism. The amended definition is better than the EEOC’s current explanation of widespread favoritism because it explains that an employer should know, or should have known of the conduct and when the conduct is considered to be common knowledge within the workplace, and how many incidents must occur to qualify as widespread. Whatever definition the EEOC adopts needs to be clearly differentiated from its adopted definition of isolated favoritism.

²²⁷ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1431 (11th ed. 2004).

Fourth, severe and pervasive elements are among the most important factors pertaining to a hostile work environment claim, yet there are no precise guidelines defining these elements for employers and courts to follow.²²⁸ There must be greater emphasis on the exact factors necessary to equate severe or pervasive behavior. The dictionary definition of severe is “inflicting physical discomfort or hardship; inflicting pain or distress.”²²⁹ The dictionary definition of pervade, which is the root of pervasive, is “to become defused throughout every part.”²³⁰ A better explanation of severe or pervasive in the widespread favoritism context, as shown in the amended version of Sections A and C, would read,

*Conduct is severe or pervasive when both men and women who find this offensive can establish that the conduct has altered the conditions of [their] employment, creating an abusive working environment that a reasonable person would find intolerable.*²³¹

The EEOC could also impose a mandatory sliding scale approach to be used when analyzing elements that could be perceived as severe or pervasive.²³² This approach allows a greater degree of pervasiveness to make up for a lesser degree of severity and vice versa.²³³ These definitions and distinctions between severe and pervasive conduct are extremely important because they are the basis of hostile environment claims and yet there are currently no standard definitions for courts to follow when evaluating such claims.

Fifth, greater emphasis needs to be placed on how the employee complaining about the harassment was actually affected by the alleged acts. Since hostile work environment claims can currently be alleged by third parties who were not directly subjected to unwelcome sexual conduct, the degree of conduct that can be perceived as disparate is far broader. The EEOC must address how vast the degrees of separation between the supervisor, paramour, and third party can be before the person is too far removed to make a claim. For example, the EEOC could require that the person making the claim must share the same supervisor as the paramour, or that the paramour must have a comparable job

²²⁸ See *supra* Part II.B.

²²⁹ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1140 (11th ed. 2004).

²³⁰ *Id.* at 925.

²³¹ See *supra* text accompanying note 229.

²³² See *supra* text accompanying note 59.

²³³ See *supra* text accompanying note 59.

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position as the complainant. This type of guidance will ensure that claims made by far removed parties will not fit within the proscribed framework set out by the EEOC. Furthermore, this type of guidance can be incorporated into company anti-dating policies to help employers and employees understand what types of conduct will cause trouble and who is in a position to make a claim should inappropriate conduct occur.

Sixth, it is imperative that a minimum number of sexual favoritism instances must have occurred to fit within the widespread category. This number must be considerably broader than the number of claims falling within the isolated favoritism category. Although the four instance minimum mentioned in the above amended version of Section C is arbitrary, it shows that the conduct occurred frequently enough to be a legitimate problem that fits within the widespread sexual favoritism framework, as long as the conduct was also severe or pervasive under the amended EEOC guidance.

Finally, the EEOC must also address the parties involved in a widespread sexual favoritism claim. In *Miller*, the supervisor was romantically involved with three different women.²³⁴ The EEOC should specify that for a claim to fall within the widespread category, a supervisor must either engage in a certain specified number of instances of favoritism with only one paramour, or, the supervisor must engage in a certain number of separate acts with a minimum number of paramours. As demonstrated in the amended version of Section C, this type of guidance will further the goal of drawing a brighter line between isolated and widespread sexual favoritism claims.

Although sexual harassment and sex discrimination claims are very fact specific, the EEOC must provide greater guidance in this area. The key is that employers and courts cannot be expected to delve into a new area of sexual harassment jurisprudence without having stricter guidelines to follow. Although the above suggestions are strictly hypothetical, the principle ideas behind the amendments to the guidelines are applicable. By adding more specific information to the current EEOC guidelines, employers, employees, and the courts will have better guidance in this area of law.

V. CONCLUSION

The law is not perfect, which is why it is always changing and evolving alongside our nation. However, the California Supreme

²³⁴ See *supra* Part II.F.

Court's decision in *Miller v. Department of Corrections* has taken hostile work environment sexual harassment claims to an unprecedented level and courts are quickly responding to the new trend.²³⁵ Employers throughout the United States will inevitably suffer dire consequences if they are held responsible for consensual relationships that are nearly impossible to restrict.²³⁶ Although workplace romances are typically discouraged, there will never be a completely fool-proof plan to eliminate romances in the workplace, be they secretive or completely open.²³⁷ Employers need to know that they may be liable even when no one in the workplace is being discriminated against on the basis of sex.²³⁸ The immediate solution to this growing problem is to provide stricter guidelines for the courts to follow which clearly spell out the exact elements necessary for a claim to be brought under the widespread sexual favoritism framework.²³⁹ With stricter guidelines and a sliding scale to help weigh the most important factors, the possibility of keeping the number of successful widespread sexual favoritism claims to a minimum may be achieved.²⁴⁰

At this time, it is difficult to ascertain whether courts will follow *Miller's* precedent or if they will continue to apply precedents, such as *DiCintio*, that clearly preclude claims of sexual discrimination based on sexual favoritism.²⁴¹ Either way, the foundation for a whole new class of sexual harassment claims has been laid and employers nationwide should pay close attention because the California judiciary often sets the stage for precedents that are later adopted by other states and jurisdictions.²⁴² Every office has its secret romances, but now, as this judicial trend spreads across the nation, employers may be the ultimate loser in the tangled game of lust.²⁴³

Meghan E. Bass*

²³⁵ See *supra* Part II.F.

²³⁶ See *supra* Parts III.B & C.

²³⁷ See *supra* Parts III.B & C.

²³⁸ See *supra* Parts III.B & C.

²³⁹ See *supra* Part IV.

²⁴⁰ See *supra* Part IV.

²⁴¹ See *supra* Part II.E.

²⁴² Servodidio, *supra* note 142.

²⁴³ See *supra* Part III.C.

* J.D. Candidate 2007, Valparaiso University School of Law; B.S., Hotel Administration, Cornell University, 2004. I would like to thank my mother and father, brother, and aunt and uncle for their continued support of all of my dreams, their constant guidance during trying times, and helping to make me into the person I am today. I would also like to thank Professor Nuechterlein for all of her assistance throughout the notewriting process.