

5-15-1998

Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability?

Mitchell Poole

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Mitchell Poole *Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability?*, 25 Pepp. L. Rev. Iss. 4 (1998)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol25/iss4/3>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability?

I. INTRODUCTION

Sex discrimination issues were on the collective mind of the Supreme Court during the 1998 term.¹ The Court, however, left unanswered the question of whether sexual favoritism² is an unlawful form of sex discrimination.³ This Comment raises the question again.

1. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998) (holding that “sex discrimination consisting” of same-sex sexual harassment is actionable under Title VII); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom.*, *Burlington Indus., Inc.*, 118 S. Ct. 876 (Jan. 23, 1998) (97-569) (granting certiorari to determine whether a subordinate must prove an actual job detriment after refusing a supervisor sexual advances or demands in order have a valid Title VII sexual harassment claim under a quid pro quo theory); *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (Nov. 14, 1997) (No. 97-282) (granting certiorari to determine when employers are liable for a supervisor’s sexual harassment of his subordinates); *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir.), *cert. granted*, 118 S. Ct. 595 (Dec. 5, 1997) (No. 96-1866) (granting certiorari to determine whether public schools can be held liable for a teacher’s sexual harassment of a student under the antidiscrimination provisions of Title IX).

2. This Comment defines sexual favoritism as a situation where a consensual romantic relationship between a supervisor and a subordinate results in otherwise undeserved benefits for the subordinate. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986) (discussing this definition of sexual favoritism but holding it is not actionable under Title VII). In turn, a consensual romantic relationship is one where adults enter the relationship freely and for reasons other than a quid pro quo exchange of romance for employment benefits. See *id.* (discussing that the Equal Employment Opportunity Commission (EEOC) indicated that voluntary sexual relations between co-workers are not “subject to Title VII scrutiny, so long as they are personal, social relationships”). That people are suspicious of such sexual favoritism cases is inherent in the alternate title sometimes used for them—“reverse quid pro quo” cases. See *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 828 (N.D. Ill. 1994) (discussing the failure of other courts to recognize reverse quid pro quo cases and itself rejecting such a claim). The implication is that the subordinate is using sex to gain advancement, not that the supervisor is secretly demanding sex as precondition to advancement. See *id.* Of course, the actual intent of either person in the relationship may be difficult to evaluate, or the nature of a consensual relationship may turn quid pro quo over time at the direction of either party. See *infra* note 306 and accompanying text.

3. In 1987, the Supreme Court denied certiorari in a landmark sexual favoritism

Presumably, most people believe that getting a job or a promotion should be based upon unbiased evaluations of an applicant's work-related skills, not upon a scoring system tied to sexual performance. With that premise in mind, the United States Supreme Court has held that sexual harassment is one form of unlawful sex discrimination.⁴ Still, it is not always easy for courts or employers to tell what sex-related conduct in the workplace is deemed illegal harassment or discrimination. For example, which of the following scenarios is unfair, discriminatory, or harassing and also creates a legal cause of action?

(A) A supervisor demands sex from a subordinate as a precondition to giving the subordinate a promotion.

(B) A supervisor propositions numerous subordinates and quickly promotes the one who acquiesces.

(C) A supervisor and a subordinate engage in a consensual romantic relationship. Thereafter, the supervisor promotes the subordinate even though many other subordinates are better qualified.

(D) Same facts as (C), but shortly after getting the promotion, the subordinate ends the affair. As a result, the supervisor retaliates by claiming, accurately, that the subordinate is unqualified for the position and demotes her.⁵

case. See *DeCintio*, 807 F.2d at 308 (holding that sexual favoritism was not actionable under Title VII), cert. denied, 484 U.S. 825 (1987). *DeCintio* directly addressed what the parties and court in *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), left unchallenged: whether sexual favoritism is a viable cause of action under Title VII. See *id.* In 1997, the Court again refused to grant certiorari in another case that raised the issue of sexual favoritism. See *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), cert. denied, 117 S. Ct. 1087 (1997). In *Becerra*, a male employee claimed that a female co-worker obtained a promotion because she was the paramour of two supervisors who used their influence to secure a promotion for their paramour. See *id.* at 146-47, 150.

4. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986); *infra* notes 77-88 and accompanying text (discussing *Meritor*).

5. The feminine pronoun is used only to reflect the most common reported situation—the subordinate being female. See Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 549 & n.7 (1994). Although dated, one study from the late 1970s found that of all office romances, 74% "involved 'a male in a higher-level position than his female counterpart.'" Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 162 n.39 (1991) (quoting Robert E. Quinn, *Coping With Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, 22 ADMIN. SCI. Q. 30, 34 (March 1977), reprinted in *SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS* 38, 42 (Dail Am Neugarten & Jay M. Sharfritz eds., 1980)).

Sexual harassment, favoritism, and discrimination cases, however, are not limited to male supervisors and female subordinates. See, e.g., *Oncale*, 118 S. Ct. at 1003 (where male-on-male sexual harassment occurred); *EEOC v. Domino's Pizza, Inc.*, 909

In each of the examples above, the employees propositioned or passed over for promotion can readily identify the unfair and discriminatory acts which injured them. However, a viable legal action against the supervisor or the employer does not necessarily follow in each case.⁶ Many federal and state courts hold that sexual favoritism is un-

F. Supp. 1529, 1533-34 (M.D. Fla. 1995) (where a female supervisor repeatedly sexually accosted a male subordinate), *aff'd*, 113 F.3d 1249 (11th Cir. 1997); Ryczek v. Guest Servs., 877 F. Supp. 754, 756-57 (D.D.C. 1995) (where a female claimed that another female sexually harassed her).

6. Scenario (A) is sex discrimination under Title VII. The Supreme Court ratified this principle in *Meritor* when it upheld the validity of sexual harassment claims as a form of unlawful sex discrimination. See *Meritor*, 477 U.S. at 65-66. The EEOC made such behavior a definitive example of unlawful quid pro quo sexual harassment. See 29 C.F.R. § 1604.11(a)(1) (1997).

Most courts recognize that scenario (B) raises a valid sexual harassment claim under Title VII. See, e.g., *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 1122 (C.D. Ill. 1994) (holding that a female employee has a valid sexual harassment claim when she rejects a supervisor's quid pro quo sexual advances and is replaced by another employee who was sexually involved with the supervisor); *Priest v. Rotary*, 634 F. Supp. 571, 579-82 (N.D. Cal. 1986) (holding that a supervisor's preferential treatment of the female waitresses who submitted to his sexual advances while harassing, reassigning, and terminating other waitresses who did not submit was ample evidence for a Title VII violation). The employees who either refused the sexual advances or were passed over for promotion have standing to sue in these situations. See, e.g., *Dirksen*, 842 F. Supp. at 1122; *Priest*, 634 F. Supp. at 579-82. In general, an employee who is not directly propositioned can claim that an implied quid pro quo relationship exists if other employees are all propositioned and the willing employee(s) ends up with otherwise unwarranted benefits. See Phillips, *supra* note 5, at 554.

Courts have reached mixed conclusions in scenario (D) cases. The demotion may not be actionable. See *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 458-62 (7th Cir. 1990) (holding that despite some sexual harassment by a supervisor, the supervisor's termination of an incompetent subordinate, whom he initially hired to a position beyond her capacity because of his romantic interest in her, was not actionable under Title VII as a retaliatory termination even though the termination appeared to be based upon the employee's refusal to engage in an intimate sexual relationship after being hired).

Scenario (C) is the primary focus of this Comment. Since 1990, the EEOC has recommended that this scenario not be considered discrimination under Title VII. See Michael W. Casey, III & Richard D. Tuschman, *Sexual Favoritism in the Workplace*, FLA. B.J., July-Aug. 1994, at 53 (citing *EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism*, EEOC Notice No. 915-048 (Jan. 12, 1990) [hereinafter EEOC Notice No. 915-048]). The EEOC claims that sexual "favoritism toward a "paramour" . . . may be unfair," but it is not actionable. *Id.* (quoting EEOC Notice No. 915-048). Most courts have been willing to follow this policy rule. See *infra* notes 183-88 and accompanying text (discussing the circuit courts' positions regarding favoritism).

fair, arbitrary, and discriminatory in nature, but seldom rises to an actionable tort.⁷

These holdings are inconsistent with most people's understanding of what equality in the workplace should be. Indeed, one common legal definition of discrimination is "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."⁸ Granting job benefits based upon an applicant's commitment to a sexual relationship with the employer is a questionable distinction or criterion upon which to base any job or promotion.⁹ Yet, voluntary trading in sexual currency is for the most part accepted by the courts and the Equal Employment Opportunity Commission (EEOC).¹⁰ In most cases, only when sexual favoritism qualifies as a more overt form of sexual harassment is a cause of action recognized.¹¹

Cases of sexual harassment actionable under Title VII of the Civil Rights Act of 1964,¹² however, are not always so easy to distinguish from nonactionable cases of sexual favoritism, and employers are at risk because of this vagary. Once liability does attach to a supervisor's sex-related conduct, the employer can be held liable.¹³ Therefore, employers have a lot at stake when developing workplace policies regarding dating in the workplace, especially dating between supervisors and subordinates.

Although few legal scholars have studied the issue, most favor recognition of sexual favoritism claims or at least acknowledge the harms sexual favoritism causes.¹⁴ Recognizing sexual favoritism as a cause of

7. See, e.g., *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 (11th Cir. 1990); *DeCintio*, 807 F.2d at 307-08; *Proksel v. Gattis*, 49 Cal. Rptr. 2d 322, 324 (Ct. App. 1996).

8. BLACK'S LAW DICTIONARY 323 (6th ed. abridged 1991).

9. A legal, if not layman's, definition of reasonable is "[f]air, proper, just, moderate, suitable under the circumstances." See *id.* at 874.

10. See *infra* notes 157-72, 183-88 and accompanying text (discussing the courts' and the EEOC's views on sexual favoritism).

11. See *infra* notes 157-72 and accompanying text (discussing when sexual favoritism is actionable).

12. See 42 U.S.C. § 2000e-2(a) (1994).

13. See *infra* notes 306-33 and accompanying text (discussing employer liability for sexual favoritism and harassment claims).

14. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.25(d)(2), at 251 (1988) (concluding that sexual favoritism should be a valid cause of action); Casey & Tuschman, *supra* note 6, at 55 (recognizing the "technically 'legal'" aspect of sexual favoritism but counseling employers to avoid it); Phillips, *supra* note 5, at 596-97 (concluding that Title VII does not include "victims" of sexual favoritism); Van Tol, *supra* note 5, at 156 (arguing that sexual favoritism is "a distinct type of sexual harassment actionable under Title VII" although it is not recognized as such yet); Michael J. Levy, Note, *Sex, Promotions, and Title VII: Why Sexual Favoritism Is Not*

action, however, does have its pitfalls. This Comment explores the current legal boundaries of sexual favoritism and the problems these boundaries pose for plaintiffs and employers. Part II introduces the federal sex antidiscrimination statute, Title VII, and a few parallel state laws.¹⁵ Part III discusses the theory through which the Supreme Court of the United States and the EEOC came to recognize sexual harassment as an invalid form of sex discrimination.¹⁶ Part IV traces the courts' and the EEOC's evolving position on sexual favoritism as an actionable form of discrimination.¹⁷ Part V reviews the various theories and rationales as to why sexual favoritism is or is not a valid cause of action.¹⁸ Part VI recommends a framework for recognizing sexual favoritism as an actionable form of sex discrimination under Title VII.¹⁹ Part VII discusses employer liability for sexual favoritism and harassment claims and recommends ways to avoid such exposure.²⁰ Finally, Part VIII concludes that, despite the potential problems associated with sexual favoritism claims, there is sufficient room in both statutory language and Supreme Court precedent to recognize sexual favoritism for what it is—improper and actionable discriminatory behavior.²¹

II. TITLE VII AND PARALLEL STATE LAWS

A variety of laws and legal theories have fostered sex discrimination and sexual favoritism claims.²² Title VII and its state law counterparts,

Sexual Discrimination, 45 HASTINGS L.J. 667, 670 (1994) (stating that his commentary's purpose "is not to refute that instances of sexual favoritism have a negative impact on the workplace," but to argue that sexual favoritism is not prohibited by Title VII); Mary C. Manemann, Comment, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 663 (1989) (concluding that despite recent case law to the contrary, sexual favoritism should be a valid cause of action under Title VII).

15. See *infra* notes 22-65 and accompanying text.

16. See *infra* notes 66-96 and accompanying text.

17. See *infra* notes 97-188 and accompanying text.

18. See *infra* notes 189-290 and accompanying text.

19. See *infra* notes 291-305 and accompanying text.

20. See *infra* notes 306-33 and accompanying text.

21. See *infra* notes 334-40 and accompanying text.

22. When the employers are public entities, plaintiffs can bring sexual harassment and favoritism claims under a variety of federal laws. Plaintiffs can use 42 U.S.C. § 1983 (1993) as the vehicle for such claims. See *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); Manemann, *supra* note 14, at 612 n.4 (noting that § 1983 claims are available against "officials act[ing] under the color of state law").

For claims brought under the Equal Pay Act of 1963, see *DeCintio v.*

however, are the most common vehicles for bringing sexual favoritism or sexual harassment claims.²³ Although state “[w]orkers’ compensation statutes do not . . . preempt remedies available under Title VII,” in approximately one-half of the states, such statutes do preempt all state tort claims for victims of sexual harassment.²⁴ Title VII, therefore, provides the central law under which this Comment examines sexual favoritism.

A. Title VII

Title VII of the Civil Rights Act of 1964²⁵ makes it illegal “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁶ Congress added “sex” to the list very late in the legislative process,²⁷ thereby depriving courts

Westchester County Medical Center, 807 F.2d 304, 308 (2d Cir. 1986) (rejecting the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), claim of a victim of sexual favoritism). See also Manemann, *supra* note 14, at 632 n.134 (discussing the availability of claims under the Equal Pay Act).

For claims brought under the Equal Protection Clause of the Fourteenth Amendment see *Bohen*, 799 F.2d at 1185; see also Manemann, *supra* note 14, at 612 n.4 (noting that some plaintiffs have brought actions under this clause).

For claims brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-624 (1994), see *Ayers v. AT&T*, 826 F. Supp. 443, 444, 447 (S.D. Fla. 1993). In *Ayers*, an employee claimed that her supervisor transferred her to a less desirable store to make room to hire his younger girlfriend. See *id.* at 444-45.

For claims brought under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994), as related to employment decisions based upon “subjective physical attractiveness,” see Manemann, *supra* note 14, at 612 n.4 (noting that courts “have not been sympathetic” to this type of claim).

For claims brought under various torts such as negligent or intentional infliction of emotional distress, invasion of privacy, wrongful discharge, interference with contract, assault, and battery, see Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 359-63 (1990) (discussing the availability of tort remedies); E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the “Reasonable Heterosexualist” Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 58 & nn.7-8 (1997) (discussing tort remedies); Manemann, *supra* note 14, at 612 n.4 (noting the use of tort remedies in this area).

23. See Van Tol, *supra* note 5, at 161 n.30 (stating that Title VII “remains primary basis” of remedies).

24. See Spitko, *supra* note 22, at 59 & nn.10-13.

25. Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-1 to 17 (1994)).

26. 42 U.S.C. § 2000e-2(a)(1).

27. “After a relatively brief debate, the House of Representatives” added sex to Title VII only two days before the full House voted on and passed the 1964 Civil Rights Act. See Phillips, *supra* note 5, at 563 & n.80 (citing 110 CONG. REC. 2577-84, 2804 (1964)). The Senate voted for the Act four months later without any apparent

of a well-developed legislative history that could aid their interpretation of what illegal sex discrimination is intended to encompass.²⁸ In 1977, the Supreme Court stated that the primary purpose of Title VII is to eliminate discrimination in the workplace so that similarly situated employees do not receive disparate treatment simply because they are different sexes.²⁹ This nondescript holding was not the Court's last word on the meaning and scope of sex discrimination under Title VII.³⁰ Given the blank legislative slate regarding the scope of "sex" in Title VII and a broad mandate to prevent discriminatory treatment by employers, the courts, and the EEOC have come to recognize sexual harassment and sexual favoritism claims as forms of sex discrimination.³¹

1. Identifying Discriminatory Actions Under Title VII

The first problem plaintiffs had in getting their sexual harassment or favoritism claims recognized was in proving they were victims of a form

discussion or debate regarding the inclusion of sex to the list of Title VII categories. *See id.* (citing 110 CONG. REC. 14,511 (1964)); N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 385 (1989) (noting that "[e]ven a microscopic examination of the legislative history of Title VII sheds no light on congressional intent as to who has standing to assert sex discrimination").

28. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986); Phillips, *supra* note 5, at 547, 563-64 & n.81 (addressing whether sexual activity is inclusive in the term sex); Levy, *supra* note 14, at 668 (arguing sexual favoritism is not prohibited by Title VII); Manemann, *supra* note 14, at 638-39 & nn.180-81 (citing congressional and U.S. Department of Labor sources that noted sex was actually added to the bill in an attempt to undermine Title VII's passage because it was evident that sex would involve "problems" not applicable to the other categories listed).

29. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) ("[S]imilarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.").

30. *See, e.g., Meritor*, 477 U.S. at 57.

31. In *Meritor*, the Supreme Court confirmed the validity of a sex discrimination claim based upon sexual harassment. *See id.* at 73; *infra* notes 77-88 and accompanying text (discussing *Meritor*). The validity of sexual favoritism claims, however, has not yet received such support. *See Phillips supra* note 5, at 562; *Levy, supra* note 14, at 669.

The EEOC plays an important role in Title VII cases. It is the organization responsible for enforcing Title VII's prohibitions. *See Levy, supra* note 14, at 669 n.11. Further, in order for a plaintiff to prevail against an employer in a Title VII civil action, the plaintiff must file a timely complaint with the EEOC. *See* 42 U.S.C. § 2000e-5(e); *Manemann, supra* note 14, at 614 n.15.

of illegal sex discrimination. As a general approach, the Supreme Court held that Title VII prohibits two forms of discrimination in the workplace.³² One form is “disparate treatment” in which employees suffer intentional and unfavorable treatment based upon impermissible criteria.³³ The other form is “disparate impact” in which facially neutral acts disproportionately injure a class of employees for reasons other than business necessity.³⁴ Sexual harassment and sexual favoritism claims are often judged under the disparate treatment approach.³⁵

In order to prevail in a Title VII disparate treatment case, a plaintiff must establish, by a preponderance of the evidence, four elements of a prima facie case.³⁶ These elements are as follows: (1) the plaintiff’s membership in a protected class; (2) the plaintiff’s application for and qualification for the employment benefit offered; (3) the employer’s rejection of the plaintiff; and (4) the other applicants with the same or lesser qualifications subsequently were considered for or received the benefit offered.³⁷ These elements have some flexibility and can be modified to fit the facts of each case.³⁸ The plaintiff can also rely upon circumstantial evidence alone when proving discriminatory intent.³⁹

2. Standing to Sue Under Title VII

Another issue commonly raised in Title VII cases is standing for “third parties” who are not the direct objects of the disparate treatment.⁴⁰ In some sexual harassment cases and in sexual favoritism cases, the plaintiffs who suffered an injury-in-fact may not have been the direct or intended victims of an employer’s sex-based discriminatory

32. See Manemann, *supra* note 14, at 614.

33. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for a leading case in disparate treatment analysis. See also Manemann, *supra* note 14, at 614 (discussing the disparate treatment analysis).

34. See *Connecticut v. Teal*, 457 U.S. 440, 452 (1982) and *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977), as leading examples of disparate impact analysis. See also Manemann, *supra* note 14, at 614-15 & n.17 (discussing both types of employment discrimination).

35. See Manemann, *supra* note 14, at 615-16 & nn.18-20 (noting some disparate impact cases as well).

36. See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802.

37. See *McDonnell Douglas*, 411 U.S. at 802; Manemann, *supra* note 14, at 617.

38. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Burdine*, 450 U.S. at 253 n.6.; *McDonnell Douglas*, 411 U.S. at 802 n.13.

39. The standard does not require any direct evidence. See *Aikens*, 460 U.S. 714 n.3 (indicating no direct evidence is necessary); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (stating no direct evidence is necessary).

40. See *Torrey*, *supra* note 27, at 376; Manemann, *supra* note 14, at 623.

conduct.⁴¹ Standing for such plaintiffs in Title VII cases evolved over the course of a decade and a half beginning in 1971.⁴² In 1972, the Supreme Court, in *Trafficante v. Metropolitan Life Insurance Co.*,⁴³ held that whites had standing to sue in a Title VIII housing discrimination case because the discrimination against nonwhites injured whites' rights to interracial association and business contacts.⁴⁴ Circuit courts quickly adopted this rationale in Title VII cases.⁴⁵ The Fifth through Ninth Circuits all held that white employees had a valid hostile work environment claim under Title VII when their employer discriminated against African-Americans or Latinos.⁴⁶ From this line of thinking, in 1986, the Supreme Court, in *Meritor Savings Bank v. Vinson*,⁴⁷ came to support standing for plaintiffs in sexual harassment cases based upon a hostile work environment theory.⁴⁸

The Court in *Meritor*, however, did not explicitly grant standing for plaintiffs who were not themselves "targets" of sexual harassment.⁴⁹ The Court's lack of specificity on this standing issue is not surprising given that the plaintiff in *Meritor* claimed to be the direct target of the harassment.⁵⁰ Nor was it surprising, therefore, that the Court avoided a discussion of the EEOC Guidelines that authorize indirect victims' claims in sexual harassment cases.⁵¹ Currently, standing for injured

41. See Torrey, *supra* note 27, at 376.

42. See *id.* at 377 (noting that "a retired employee had to represent a class of current employees" and citing *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3d Cir. 1971)).

43. 409 U.S. 205 (1972).

44. See *id.* at 208, 212.

45. See Torrey, *supra* note 27, at 378-80; Manemann, *supra* note 14, at 623-24 & n.71.

46. See, e.g., *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 459-60 (8th Cir. 1985); *Stewart v. Hannon*, 675 F.2d 846, 849-50 (7th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477, 481-83 (5th Cir. 1980); *EEOC v. Bailey Co.*, 563 F.2d 439, 452-54 (6th Cir. 1977); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976).

47. 477 U.S. 57 (1986).

48. See *id.* at 73; Torrey, *supra* note 27, at 378 (citing *Meritor*); Manemann, *supra* note 14, at 623-24 (same). See *infra* notes 77-88 and accompanying text, for a discussion of *Meritor*.

49. See Torrey, *supra* note 27, at 378 (calling the Court's support for standing by third parties in sexual harassment suits "dicta"); Manemann, *supra* note 14, at 624 (noting that the *Meritor* Court did not expressly permit third party standing).

50. See *Meritor*, 477 U.S. at 60-61; Manemann, *supra* note 14, at 624.

51. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(g) (1997); Manemann, *supra* note 14, at 624.

parties in sexual harassment cases, even those based upon a hostile work environment, is not in doubt.⁵²

B. States' Versions of Title VII

Some states have general antidiscrimination statutes, but these often do not apply to cases of sex discrimination in the workplace. For example, California's Unruh Civil Rights Act (Unruh Act)⁵³ generally prohibits all forms of arbitrary discrimination in business establishments, but has no application to employment discrimination cases.⁵⁴ California's Fair Employment and Housing Act (FEHA)⁵⁵ preempts the Unruh Act in such cases.⁵⁶ Although there are some minor differences between the wording of FEHA and Title VII, California law holds that FEHA is to be interpreted in a manner wholly consistent with the federal courts' interpretations of Title VII.⁵⁷ Because the federal courts have leaned toward non-recognition of sexual favoritism claims under Title VII,⁵⁸ California is not likely to recognize sexual favoritism claims under FEHA. The California situation is typical of other states.⁵⁹

"Virtually all states . . . have statutes that, like Title VII, ban sex discrimination in employment."⁶⁰ In *Nicolo v. Citibank*,⁶¹ a New York state court looked to how the Second Circuit interpreted Title VII before interpreting New York's version of Title VII⁶² and held that consensual sexual relations resulting in workplace favoritism are not an actionable form of sex discrimination.⁶³ The *Nicolo* court noted "there

52. See Torrey, *supra* note 27, at 381 ("In short, the many federal circuit courts that have considered the hostile work environment theory have all bestowed standing on plaintiffs asserting this form of indirect discrimination.").

53. CAL. CIV. CODE § 51 (West 1982 & Supp. 1998).

54. See *Rojo v. Kliger*, 801 P.2d 373, 379-80 (Cal. 1990).

55. CAL. GOV'T. CODE § 12900 (West 1992).

56. See *Rojo*, 801 P.2d at 379-81.

57. See *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (citing *Clark v. Claremont Univ. Ctr. and Graduate Sch.*, 8 Cal. Rptr. 2d 151, 164 (Ct. App. 1992)).

58. See *infra* notes 183-88 and accompanying text (discussing the current positions of the courts).

59. See *infra* notes 60-65 and accompanying text (discussing the status of sexual favoritism claims in states other than California).

60. David D. Kadue, *Sexual Harassment at Work*, A.L.I.-A.B.A. Course of Study, Employment Discrimination and Civil Rights Actions in Federal and State Courts, at 494 (1992).

61. 554 N.Y.S.2d 795 (Sup. Ct. 1990).

62. See N.Y. EXEC. LAW § 296(1)(a) (McKinney Supp. 1997-98).

63. See *Nicolo*, 554 N.Y.S.2d at 798 (citing *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986)). See *infra* notes 126-56 and accompanying text for a full description of *DeCintio*.

is nothing precluding a court of this state from making a more expansive interpretation" of the New York statute than the federal courts had of Title VII, but the *Nicolo* court decided to follow a restrictive reading of the state statute.⁶⁴ Other states continue this pattern.⁶⁵ This means sexual favoritism claims commonly fail under state laws that are similar or parallel to Title VII.

III. SEXUAL HARASSMENT IS UNLAWFUL DISCRIMINATION

One reason it has been so difficult for plaintiffs to get courts to recognize sexual favoritism claims is that the roots underlying the viability of sexual harassment claims themselves are neither old nor deep. Despite Title VII's prohibitions against sex discrimination since 1964,⁶⁶ it was not until 1986 that the United States Supreme Court recognized sexual harassment as an unlawful form of sex discrimination.⁶⁷ It is, therefore, almost expected that courts would be slow to take hold of a new branch of the sex discrimination tree.

A. *The Courts and the EEOC Establish Anti-Sexual Harassment Rules*

In the late 1970s, courts began to recognize that sexual harassment created an "unacceptable barrier to the full and equal participation of women in the workforce."⁶⁸ Initially, there was a split in authority

64. *Nicolo*, 554 N.Y.S.2d at 798-99.

65. See, e.g., *Polk v. Pollard*, 539 So. 2d 675, 677-78 (La. Ct. App. 1989) (holding that Louisiana's statute which "is similar in scope" to Title VII does not recognize sexual favoritism claims); *Hickman v. W-S Equip. Co.*, 438 N.W.2d 872, 874 (Mich. Ct. App. 1989) (holding that sexual favoritism is not sex discrimination under Michigan's statute resembling Title VII); *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 802-03 (N.J. 1990) (discussing *DeCintio* and holding that a male employee's claims of a supervisor's sexual favoritism towards a female employee who fired him and promoted his paramour were nonactionable under New Jersey law); *Kryeski v. Schott Glass Techs., Inc.*, 626 A.2d 595, 598 (Pa. Super. Ct. 1993) (holding similarly under Pennsylvania's state statute).

66. See Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-1 to 17 (1994)).

67. See *infra* notes 77-88 and accompanying text for a discussion of the landmark case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

68. Spitko, *supra* note 22, at 57 (citing CATHERINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 27 (1979)); see also Phillips, *supra* note 5, at 551 (citing 1 ARTHUR LARSON & LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 41A.21, at 8-155 to 8-158 (1993)) (discussing the historical development of sexual harassment claims); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehen-*

among the federal courts over whether Title VII allowed sexual harassment claims.⁶⁹ By 1980, however, the majority of the courts were leaning toward the acceptance of sexual harassment claims.⁷⁰ During that same year, the EEOC issued sexual harassment guidelines declaring that “unwelcome” sexual advances were potential Title VII violations.⁷¹ The EEOC guidelines went on to distinguish the two primary types of sexual harassment: quid pro quo cases and hostile work environment cases.⁷²

Quid pro quo sexual harassment occurs when either (1) an employee’s submission to unwelcome sexual advances, requests, or conduct is made an explicit or implicit term or condition of employment, or (2) the employer uses the “submission to or rejection of such conduct . . . as the basis for employment decisions” that impact the employee.⁷³ A hostile work “environment occurs when the sexually-oriented conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁷⁴ Although these EEOC guidelines for Title VII liability are not binding upon the courts,⁷⁵ they were given the Supreme Court’s blessing in 1986.⁷⁶

B. The Supreme Court Confirms that Sexual Harassment is a Form of Sex Discrimination

In 1986, the Court, in *Meritor Savings Bank v. Vinson*,⁷⁷ gave its imprimatur to what most of the lower courts and the EEOC had already done over the prior decade.⁷⁸ The plaintiff claimed she had been sexu-

sive Treatment of Sexual Harassment, 55 U. CHI. L. REV. 328, 329-37 (1988) (tracing the evolution of sexual harassment claims).

69. See Phillips, *supra* note 5, at 551-53 (citing various district court cases with conflicting holdings); Van Tol, *supra* note 5, at 154 n.3 (same).

70. See Phillips, *supra* note 5, at 553 (citing LARSON & LARSON, *supra* note 68, § 41A.22, at 8-158 to 8-159).

71. See *id.* (citing 29 C.F.R. § 1604.11 (1993)). These guidelines have remained unchanged. See 29 C.F.R. § 1604.11 (1997).

72. See Phillips, *supra* note 5, at 554 (citing 29 C.F.R. § 1604.11(a) (1993)); Levy, *supra* note 14, at 670 (same).

73. See 29 C.F.R. § 1604.11(a) (1997).

74. *Id.* § 1604.11(a)(3).

75. See Phillips, *supra* note 5, at 553.

76. See *infra* notes 77-88 and accompanying text.

77. 477 U.S. 57 (1986).

78. See Paul, *supra* note 22, at 343; see also Christine Godsil Cooper, *Sexual Harassment: Preventative Steps for the Health Care Practitioner*, 2 ANNALS HEALTH L. 1, 12 (1993) (noting that by 1977 courts recognized sexual harassment as a form of sex discrimination).

ally involved with her supervisor for a period of several years.⁷⁹ The plaintiff claimed this involvement was a form of sexual harassment because even though some of the sexual conduct was voluntary, other times it was rape.⁸⁰ Because the lower courts in the case determined there was insufficient evidence for a quid pro quo theory of sexual harassment, the Court took up the remaining issue of whether a sexual harassment claim was a valid cause of action under a hostile environment theory.⁸¹

The Court held that sexual harassment is a form of unlawful sex discrimination under Title VII, even though the legislative history and the statute itself are silent on the issue.⁸² The Court further held that sexual harassment under a hostile work environment theory "must be sufficiently severe or pervasive" before it is actionable.⁸³ The standard for severity or pervasiveness, however, is not unreasonably high; the plaintiff must show that the actions complained of altered the plaintiff's employment conditions and made the work environment abusive.⁸⁴ A plaintiff can accomplish this showing by demonstrating that the supervisor's repeated sexual advances were "unwelcome."⁸⁵

On the issue of employer liability in hostile environment theory cases, however, the Court chose not to resolve the "tension" between the EEOC's amicus curiae brief and its guidelines.⁸⁶ The Court "decline[d] the parties' invitation" to decide the standard under which employers would be held liable for their supervisor's sexual harassment of an employee.⁸⁷

In total, *Meritor* is significant for proponents of sexual favoritism claims in two different ways. On one hand, it shows that the Court is willing to expand Title VII's definition of sex discrimination. On the oth-

79. See *Meritor*, 477 U.S. at 60-61.

80. See *id.*

81. See *id.* at 61-63, 66-69.

82. See *id.* at 63-67. In making this holding the Court also sought support from the EEOC guidelines. See *id.* at 65 (citing 29 C.F.R. § 1604.11(a), (a)(3) (1985)).

83. See *id.* at 67.

84. See *id.*

85. See *id.* at 68.

86. See *id.* at 70-71 (citing Brief for United States and EEOC as Amici Curiae at 26 and 29 C.F.R. § 1604.11(c)).

87. See *id.* at 72. The Court suggested, however, that the lower courts consider the issue in light of agency theories. See *id.* Nevertheless, this issue may be resolved fully once the Court makes its ruling in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), cert. granted, 118 S. Ct. 438 (Nov. 14, 1997) (No. 97-282).

er, the ruling shows that the Court will sometimes, but not in all cases, rely upon EEOC guidelines and policy statements to help it interpret Title VII.⁸⁸

C. Sexual Favoritism's Similarities to Sexual Harassment and Traditional Sex Discrimination

Some scholars claim that when courts accepted the argument that sexual harassment is a form of sex discrimination, the courts were judicially constructing a new tort because neither the legislative history nor the express text of Title VII supports such claims.⁸⁹ Even if sexual harassment is a judicially created tort, this does not preclude the courts from judicially recognizing sexual favoritism claims.⁹⁰

Given that sexual favoritism is based first upon a supervisor's attraction to a particular gender, a causal connection exists between the supervisor's subsequent actions, gender, and who gets harmed.⁹¹ The individuals that fall within the supervisor's gender preference are conceivably subjected to an implicit demand that they need to be engaged romantically with the supervisor in order to receive benefits.⁹² This situation is sometimes called the implied quid pro quo form of sexual harassment.⁹³ The individuals of the gender denied the supervisor's attention and assistance suffer from what is similar to traditional sex discrimination; they are denied opportunities because of their gender.⁹⁴

88. The Court made a particular point of emphasizing the useful but non-binding nature of the EEOC guidelines. See *Meritor*, 477 U.S. at 65 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) for the ruling that the guidelines are "not controlling upon the courts").

89. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 357 (1992); Theodore F. Claypoole, Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1160 (1987).

90. The EEOC recognizes that sexual favoritism may be actionable. See 29 C.F.R. § 1604.11(g) (1997) ("Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.").

91. See Phillips, *supra* note 5, at 585-89 & n.175 (discussing this possible interrelationship between sexual favoritism and implied quid pro quo sexual harassment claims); Van Tol, *supra* note 5, at n.142. The EEOC's guidelines indicate that a valid sexual harassment claim need not rely upon explicit quid pro quo demands but that such demands could be made "implicitly." See 29 C.F.R. § 1604.11(a).

92. See 29 C.F.R. § 1604.11(a) (noting that submission to an employer's sexual overtures could be made "implicitly a term or condition of an individual's employment.").

93. See *supra* notes 91-92 and accompanying text.

94. See Phillips, *supra* note 5, at 565 (assuming that if sexual favoritism is gender-

These two different types of claims, in turn, could underlie a sexual harassment claim based upon the hostile work environment theory.⁹⁵ These are just a few of the theories and rationales that tend to support the actionability of sexual favoritism.⁹⁶

IV. STATUS OF SEXUAL FAVORITISM CLAIMS BEFORE AND AFTER *MERITOR*

A. *Sexual Favoritism Seemingly Recognized by the EEOC in 1980*

Six years before *Meritor*, in 1980, the EEOC guidelines seemingly added sexual favoritism to the list of illegal forms of sex discrimination.⁹⁷ The guidelines stated that when an employer grants opportunities or benefits to employees that submit "to the employer's sexual advances or requests for sexual favors," the other qualified persons denied the opportunity or benefit have a viable legal claim against the employer for sex discrimination.⁹⁸ This remedial allowance raised one key interpretational problem regarding the ultimate viability of sexual favoritism claims; the issue was whether consensual romantic involvements were the same as ones "submitted to" by employees.⁹⁹

The EEOC and most courts eventually found inherent conflicts in their desire to protect third-party rights and simultaneously avoid responsibility for investigating the effects of consensual affairs among co-workers. Initially, the EEOC and courts accepted favoritism claims, but by 1990 the tide changed.¹⁰⁰

B. *Federal Courts and Sexual Favoritism Claims*

Between 1983 and 1988 only six federal court cases addressed sexual favoritism claims under the 1980 EEOC guidelines. Four courts (one

based discrimination, it may fit within the definition of a traditional form of sex discrimination).

95. *See id.* at 589.

96. *See infra* notes 235-90 and accompanying text (discussing the reasons why sexual favoritism is sex discrimination).

97. *See* 45 Fed. Reg. 74,676, 74,677 (1980) (codified at 29 C.F.R. § 1604.11(g) (1997)).

98. *See id.*

99. In *DeCintio v. Westchester Medical Center*, 807 F.2d 304, 307-08 (2d Cir. 1986), the court held that the EEOC's use of "submission" implied non-consensual affairs, thus obviating sexual favoritism claims. *See id.*

100. *See infra* Part IV.B-C (discussing the evolution of sexual favoritism claims in federal courts and with the EEOC).

circuit court and three district courts) recognized sexual favoritism as a violation of Title VII.¹⁰¹ Two other courts (one circuit court and one district court) denied the validity of a sexual favoritism claim.¹⁰² Three of these cases are discussed below.

1. *Toscano v. Nimmo*¹⁰³

Toscano was the first federal case to issue an opinion on the subject of sexual favoritism.¹⁰⁴ Margaret Toscano claimed the reason she did not receive a promotion in spite of being better qualified than Donna Nelson, the ultimate recipient of the promotion, was that Nelson engaged in a sexual affair with their mutual supervisor.¹⁰⁵ The court found that the supervisor evidenced a pattern of unprofessional and lascivious conduct toward women under his supervision and that he intended to make the promotion based upon sexual performance.¹⁰⁶ Because men did not receive comparable treatment, the court held the supervisor's conduct discriminatory and in violation of Title VII.¹⁰⁷

Although the *Toscano* case resembles a case of sexual favoritism because the promotee supposedly engaged in a consensual relationship with her supervisor and a third party won a claim based upon the resulting discriminatory treatment, *Toscano* could also be classified as a run-of-the-mill sexual harassment case whereby the plaintiff and her co-workers faced a hostile work environment.¹⁰⁸ Another commentator

101. See *King v. Palmer*, 778 F.2d 878, 880 (D.C. Cir. 1985); *Broderick v. Ruder*, 685 F. Supp. 1269, 1277-78 (D.D.C. 1988); *Priest v. Rotary*, 634 F. Supp. 571, 581-82 (N.D. Cal. 1986); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983). For a brief discussion of each of these cases see Van Tol, *supra* note 5, at 167-77, and Levy, *supra* note 14, at 674-81. It is worth noting that although the *Broderick* court seemed to accept the viability of a sexual favoritism cause of action, the court did not actually reach the question because it found for the plaintiff on sexual harassment grounds. See Levy, *supra* note 14, at 669 (citing *Broderick*, 685 F. Supp. at 1277).

102. See *DeCintio*, 807 F.2d at 306-08; *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988). For a brief discussion of each of these cases, see Van Tol, *supra* note 5, at 171-75.

103. 570 F. Supp. 1197 (D. Del. 1983).

104. See Phillips, *supra* note 5, at 556 n.48 (citing Van Tol, *supra* note 5, at 154).

105. See *Toscano*, 570 F. Supp. at 1200-03.

106. See *id.* at 1200.

107. See *id.* at 1199.

108. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307 (2d Cir. 1986) (noting that the claim in *Toscano* "was premised on the coercive nature of the employer's acts," not upon a supposed consensual relationship); see also Van Tol, *supra* note 5, at 169 n.77 (citing *Toscano* for the supervisor's persistent solicitations of women, his "phoning employees at home to brag about his sexual encounters with other employees," and his touching and speaking to female employees in a suggestive manner).

claimed *Toscano* was really a case of implied quid pro quo sexual harassment "in which sexual favoritism played a significant role."¹⁰⁹ Regardless of which interpretation is correct, it would take a different case to better present the viability of a sexual favoritism cause of action.

2. *King v. Palmer*¹¹⁰

The next reported case of sexual favoritism was one where a consensual relationship did lead to favoritism.¹¹¹ In *King*, Mabel King claimed that Jean Grant, twenty years King's junior with less experience as a nurse, received a promotion to a supervisory position instead of King because Grant was having a sexual affair with their mutual supervisor.¹¹² The district court relied upon the 1980 EEOC guidelines when recognizing the validity of third party claims against employers in sexual favoritism cases.¹¹³ With those guidelines in mind, the district court found that some level of discrimination existed because "sex [was] for no legitimate reason a substantial factor" in Grant's promotion.¹¹⁴

Yet, the district court did not rule in favor of King.¹¹⁵ The court concluded that King failed to *prove* that Grant and their supervisor had a sexual relationship, an obvious causal element in a sexual favoritism claim.¹¹⁶ The district court held that a sexual favoritism case "must not rest on rumor, knowing winks and prurient overtones or on inferences allowed in divorce law."¹¹⁷

109. See Phillips, *supra* note 5, at 556 n.48.

110. 598 F. Supp. 65 (D.D.C. 1984), *rev'd*, 778 F.2d 878 (D.C. Cir. 1985).

111. See Manemann, *supra* note 14, at 626-32, for a thorough discussion of the district and circuit court cases of *King*.

112. See *King*, 598 F. Supp. at 66-67 (noting also that the supervisor made the promotional decision).

113. See *id.* at 67 (citing 29 C.F.R. § 1604.11(g)).

114. See *id.* at 66-67 (citations omitted). The court also went so far as to reject explicitly as "unsupported" and incredible the employer's claim that Grant received a promotion because she was the superior candidate. See *id.* at 68.

115. See *id.*

116. See *id.* at 67-69.

117. See *id.* at 69. The evidence of the affair was based upon the speculation of co-workers, Grant and her supervisor's joint attendance at out-of-town conventions, their long lunches together, a physical friendliness at the office, Grant's favorable treatment regarding scheduling, and the testimony of one of Grant's former boyfriends who claimed that Grant "was prepared to have sex with [her supervisor] if necessary to get the promotion." See *id.* at 67-69. The evidence against the affair was based

On appeal, the parties in *King* stipulated that a sexual favoritism claim was a viable cause of action under Title VII.¹¹⁸ The District of Columbia Circuit Court accepted the lower court's ruling that the facts of the case demonstrated a prima facie case of sex discrimination.¹¹⁹ The circuit court, however, overruled the district court's seeming requirement that plaintiffs must prove the occurrence of sexual intercourse.¹²⁰ The court held that circumstantial evidence such as "kisses, embraces and other amorous behavior" is sufficient to meet the plaintiff's burden of proof of a sexual affair.¹²¹ The circuit court found ample evidence that, at some level, a sexual relationship did exist between Grant and her supervisor, that the lower court correctly found claims of Grant's superior qualifications unconvincing, and that the sexual relationship between the two was the motivating factor in Grant's preferential treatment.¹²² The court remanded the case for determination of an appropriate remedy for King.¹²³

The parties in *King* may have recognized that sexual favoritism is largely indistinguishable from giving promotions based upon unjustified racial preferences. For example, compare two hypothetical statements by an employer. In the first case, an employer informs his employees he is not going to promote an aging African-American woman because he always prefers whites over African-Americans. In the second case, an employer informs his employees he is not going to promote an aging

upon the supervisor's claim of being a "settled" family man with wife and kids and that Grant was sexually active with other men. *See id.* at 68. The district court's rejection of circumstantial evidence to prove either a fully consummated sexual affair or discrimination, however, is inconsistent with the Supreme Court's holding in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 771, 714 n.3 (1983), which allows use of circumstantial evidence to prove discrimination in disparate treatment cases.

118. *See King*, 778 F.2d 878, 880 (D.C. Cir. 1985). Because the D.C. Circuit Court never had to decide the issue, it is unclear whether the court would have accepted a sexual favoritism claim if the issue was raised properly. *See id.* at 883.

119. *See id.* at 880-81. In this regard, the circuit court implicitly accepted the conclusion that "gender is a substantial factor in sexual favoritism." *See Phillips, supra* note 5, at 559 & n.65. For a discussion of the elements of a prima facie case in disparate treatment cases for Title VII actions, see *supra* notes 36-39 and accompanying text.

120. *See King*, 778 F.2d at 882.

121. *See id.*

122. *See id.* at 881-82.

123. *See id.* at 882-83. On remand, the court awarded King the promotion with back pay and prejudgment interest. *See King v. Palmer*, 641 F. Supp. 186, 188 (D.D.C. 1986). This level of relief is common when plaintiffs can prove that they were not only discriminated against, but were the better applicant for the promotion. *See Manemann, supra* note 14, at 630 n.125. The district court on remand, however, did not grant King an injunction against improper sexual conduct by her employer. *See id.* at 630-32.

African-American woman because his sexual preferences do not include such a person. The applicant passed over for the promotion gets the same message—job skills do not count; only the arbitrary age, race, or sex-based personal prejudices and preferences of the employer matter. This nondistinction in cases is a clear example of why sexual favoritism cases are in fact examples of unlawful disparate treatment.

King represents a high-water mark for sexual favoritism claims. Perhaps it is because of the seeming ease with which a plaintiff could prevail in sexual favoritism cases that many courts and the EEOC came to retreat from it.¹²⁴ Assuming that Grant and her supervisor's sexual relationship consisted merely of conspicuous flirting based upon a genuine mutual attraction, some might argue *King* exposes employers and supervisors to unwarranted liability should they show any sexual attraction towards an employee who appears to gain job benefits as a result. Such overexposure might, in turn, lead to a tidal wave of lawsuits that would threaten to engulf the courts. This concern, however, is not based upon the facts and holding of *King*.

The court of appeals found that Grant's promotion was not based upon superior work-related qualifications but upon blatant sexual favoritism.¹²⁵ There is little doubt that the employees who did not receive the same preferential treatment that Grant did were well aware of what factors precluded their equal treatment: either they lacked some of the attributes that garnered the supervisor's sexual interest (gender, race, or age), or they simply were unwilling to cultivate a sexual relationship with their supervisor in order to get a better job.

3. *DeCintio v. Westchester County Medical Center*¹²⁶

One year later, in 1986, however, the Second Circuit, in *DeCintio*, rejected the law on sexual favoritism as stipulated to by the parties in *King*.¹²⁷ In *DeCintio*, the plaintiffs were seven male respiratory therapists.¹²⁸ Each therapist claimed he was discriminated against when the supervisor added an irrelevant requirement to the promotional job de-

124. See *infra* notes 157-72, 183-88 and accompanying text (discussing the EEOC's policy change on sexual favoritism in 1990 and courts' current position on the issue).

125. See *King*, 778 F.2d at 881-82.

126. 807 F.2d 304 (2d Cir. 1986).

127. See *id.* at 307.

128. See *id.* at 305.

scription listing for Assistant Chief Respiratory Therapist.¹²⁹ None of the seven men met the added requirement, but the woman with whom the supervisor was having an consensual romantic affair, Jean Guagenti, did.¹³⁰

The district court found that Guagenti and the supervisor were engaged in a sexual affair and that the added promotional requirement was irrelevant to the job and was used merely as a “pretext” to promote a lover.¹³¹ The lower court held that these actions constituted sex discrimination under Title VII.¹³²

On appeal, the circuit court accepted the factual findings of the district court but reversed the lower court’s holding.¹³³ The Second Circuit Court of Appeals explicitly rejected the logic behind the stipulation in *King* and chose to answer for itself the question of whether Title VII’s prohibition against “discrimination based upon sex” also prohibits sexual favoritism.¹³⁴ The court answered in the negative.¹³⁵ In particular, the court noted that the word sex in Title VII appeared “within a list of categories.”¹³⁶ “[R]ead in this context,” the court concluded, sex could only “logically” denote “membership in a class delineated by gender, rather than sexual activity regardless of gender.”¹³⁷ Further, the court found that even *Meritor’s* recognition of sexual harassment as sex discrimination under the hostile environment theory was based upon “a causal connection” between one’s gender and the resulting disparate treatment.¹³⁸

129. *See id.*

130. *See id.*

131. *See id.* at 306. The requirement added to the job listing was that the new Chief Respiratory Therapist be registered with the National Board of Respiratory Therapists (NBRT). *See id.* at 305. In order to register with the NBRT, the individual needed to have experience as a respiratory care practitioner and pass an exam on that general subject. *See id.* at 305 n.1. Registration with this group did not demonstrate special skills or knowledge in the field of neonatal care, the specific area of service in which the plaintiffs and Guagenti worked. *See id.* at 305 & n.1.

132. *See id.* at 306.

133. *See id.* at 308.

134. *See id.* at 306-07.

135. *See id.* at 307.

136. *See id.* at 306. The other classifications are “race, color, religion or nationality.” *See* 42 U.S.C. § 2000e-(2) (a)(1) (1995); *DeCintio*, 807 F.2d at 306.

137. *DeCintio*, 807 F.2d at 306.

138. *See id.* at 307. Even if the legislative history of Title VII does imply that sex should be defined as gender, however, such an implication “does not logically entail the rejection of sexuality as an additional forbidden criterion.” *See Phillips; supra* note 5, at 564. In this regard, the parties in *King* were not in error when they interpreted Title VII’s prohibition against sex discrimination to include discriminatory conduct based upon sexual affairs. Of course, the *DeCintio* court was not obligated to adopt the validity of sexual favoritism claims.

The *DeCintio* court's rationale for limiting the definition of sex to gender, however, did not logically preclude adjudication of the male plaintiffs' complaints about their supervisor's favoritism towards a female co-worker, Guagenti. Perhaps recognizing the logical gap in its analysis, the court turned to the EEOC guidelines for help.¹³⁹ The court held that the guidelines' inclusion of the word "submission" when discussing sexual relationships between employer and employee implicitly required coercive or harassing behavior on the part of the employer before Title VII liability arises.¹⁴⁰ The court implicitly held that if the relationship was consensual, there was no coercion and no liability.¹⁴¹

To further bolster its holding that consensual relationships were not subject to Title VII liability, the court noted the EEOC's guideline that "sexual relationships between coworkers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."¹⁴² The court, however, conveniently ignored other EEOC guidelines stating that the question of whether a purely personal and social relationship exists "without a discriminatory effect" is to be a factual determination based upon the totality of the circumstances.¹⁴³ By sidestepping this guideline, the court prevented liability from attaching to the supervisor's "unfair" and discriminatory behavior.¹⁴⁴

The court, therefore, concluded that sexual favoritism was not a viable cause of action under Title VII because the plaintiffs were not discriminated against because of their gender; "rather, *they were discriminated against* because [the supervisor] preferred his paramour."¹⁴⁵ In other words, because of Guagenti's "special relationship" to her supervisor, the male plaintiffs were discriminated against in the

139. See *DeCintio*, 807 F.2d at 307-08 (quoting 29 C.F.R. § 1604.11(g) (1986), the court noted with emphasis added "that [w]here employment opportunities or benefits are granted because of an individual's *submission* to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit").

140. See *DeCintio*, 809 F.2d at 307-08 (citing 29 C.F.R. § 1604.11(g)).

141. See *id.* at 308.

142. See *id.* (citing Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25,024 (1980)).

143. See Van Tol, *supra* note 5, at 172-73 & n.113 (citing 29 C.F.R. § 1604.11(b) (1986)); Manemann, *supra* note 14, at 634 & n.148 (citing Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25,024 (1980)).

144. See *DeCintio*, 807 F.2d at 308.

145. See *id.* (emphasis added).

same way any female applicant (other than Guagenti) would be.¹⁴⁶ One commentator noted that taking the court's special relationship rationale to its logical conclusion results in an absurdity.¹⁴⁷ For example, if a supervisor demands sex from only one woman as a condition of her employment and does not make that same demand upon other women or men, the targeted woman was not victimized because of her gender; she was only affected by her special relationship to the supervisor.¹⁴⁸

A second weakness of the special relationship theory advanced by the *DeCintio* court is the flawed assumption that gender was not the basis of the favoritism.¹⁴⁹ If *DeCintio's* rationale is accurate, then the court must have also concluded that the supervisor was bi-sexual in his sexual preferences.¹⁵⁰ The necessity of this secondary conclusion is easily understood when the situation is analogized to a racial setting. For example, suppose a supervisor does not favor all white employees equally but does favor all whites over African-Americans. When that supervisor promotes a favored but incompetent white employee, it should hardly matter that other white employees are passed over along with all qualified African-Americans. Racial bias against African-Americans is the threshold motivating factor, not the special relationship between the supervisor and the favored white employee. By using the same example but replacing "white" with "female" and "African-American" with "male," it is clear that Guagenti's special relationship with her supervisor was based foremost upon the completely arbitrary gender biases of the supervisor.¹⁵¹ Recognizing this reality, some commentators refer to sexual favoritism as "actionable 'sex-plus' discrimination: discrimination on [the] basis of gender plus some other factor such as sex appeal or willingness to engage in [a] sexual relationship."¹⁵²

Perhaps the best explanation of *DeCintio's* holding is a fear of an endless stream of lawsuits arising from sexual favoritism claims.¹⁵³

146. *See id.*

147. *See* Spitko, *supra* note 22, at 61-62.

148. *See id.*

149. *See DeCintio*, 807 F.2d at 308.

150. *See* Phillips, *supra* note 5, at 565 (noting that the supervisor is presumed to have greater sexual attraction towards females than males).

151. *See id.* (noting that "sexual favoritism might qualify as gender-based discrimination").

152. *Id.* at 565 n.92 (citing *PLAYER*, *supra* note 14, § 5.25(d)(2), at 251 & n.68).

153. One commentator referred to the "flood-gate of cases involving sexual harassment" since the late 1980s but did not address the probability of sexual favoritism claims creating such a deluge upon the legal system. *See* Judge Debra H. Goldstein, *A Basic Understanding of Sexual Harassment*, 57 ALA. LAW. 105, 105 (1996). A different commentator speculated that sexual favoritism cases are "less common" than traditional sex discrimination claims. *See* Phillips, *supra* note 5, at 574.

The court itself asserted that if sexual favoritism was actionable under Title VII, then the EEOC and the federal courts would be put in the business of "policing [] intimate relationships. Such a course . . . is both impracticable and unwarranted."¹⁵⁴

What the court failed to recognize, however, is that it would not be policing the bedroom; it would be policing an employer's irrelevant and harmful gender-based prejudices that favor less qualified applicants and discriminate against better qualified applicants. Such discriminatory treatment is sufficient reason to warrant relief.¹⁵⁵ Finally, the court's claim of impracticability is hollow; as the district court in *DeCintio* and the courts in *King* illustrated, there are no practical difficulties encountered by the courts in recognizing the four elements of a prima facie case of sex discrimination based upon sexual favoritism.¹⁵⁶ However, *King's* legacy was put further in doubt by a change in the EEOC guidelines regarding sexual favoritism.

C. EEOC Changes Its Policy on Sexual Favoritism in 1990

In early 1990, EEOC chair and future United States Supreme Court Associate Justice, Clarence Thomas, approved a new EEOC policy that all but killed any life the sexual favoritism cause of action had after *DeCintio*.¹⁵⁷ The EEOC's primary guideline on sexual favoritism announced that Title VII does not apply in cases of a supervisor's favoritism towards his paramour, even though such treatment may be unfair and discriminatory in nature.¹⁵⁸ A clarifying portion of the guidelines

154. See *DeCintio*, 807 F.2d at 308.

155. Even if there was recognition of sexual favoritism claims, the plaintiffs' claim in *DeCintio* still might fail because their prima facie case failed to show that Guagenti was not better qualified. See Manemann, *supra* note 14, at 657; see also *infra* notes 295, 301-03 and accompanying text (discussing an analogous situation in *Candelore v. Clark County Sanitation District*, 975 F.2d 588 (9th Cir. 1992)). The *DeCintio* plaintiffs were only able to show that the requirement added to the promotional specification was pretextual and for Guagenti's benefit. See *DeCintio*, 804 F.2d at 308. The defendants in *DeCintio* could prevail if they demonstrated that Guagenti was still a better candidate in spite of the rigged promotional announcement or sexual affair. See Manemann, *supra* note 14, at 658-61.

156. See *King v. Palmer*, 778 F.2d 878, 880-81 (D.C. Cir. 1985); Manemann, *supra* note 14, at 633 & n.140 (citing *DeCintio v. Westchester County Med. Ctr.*, No. 84 Civ. 5566, (S.D.N.Y. May 27, 1986)).

157. See *Casey & Tuschman*, *supra* note 6, at 53 (noting the irony of Justice Thomas's involvement in the new EEOC policy).

158. See *Van Tol*, *supra* note 5, at 176 (citing *EEOC Policy Guidance on Employer*

specifically stated that "Title VII does not prohibit *isolated* instances of preferential treatment based upon *consensual* romantic relationships."¹⁵⁹ The EEOC reinforced this position with an illustrative example: A Charging Party (CP) accurately claims a coworker gained a promotion ahead of the CP because the coworker engaged in a consensual romantic affair with the supervisor.¹⁶⁰ So long as the supervisor did not subject CP's coworkers to widespread and unwelcome sexual advances, the EEOC will not find a Title VII violation in the isolated incident, "because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders."¹⁶¹ The EEOC's new policy, therefore, effectively adopted the Second Circuit's holding in *DeCintio*.¹⁶²

The EEOC, however, apparently recognized that this policy was not fully compatible with the Supreme Court's holding in *Meritor*, where sexual activity or conduct can be highly correlated to gender and result in unlawful discrimination.¹⁶³ The EEOC, therefore, recognized two limited forms of "sexual favoritism" claims.¹⁶⁴ One form of actionable sexual favoritism is based upon explicit or implicitly coerced sexual conduct.¹⁶⁵ The other form of actionable sexual favoritism arises when sexual favoritism is widespread in the workplace.¹⁶⁶

Liability Under Title VII for Sexual Favoritism, Daily Lab. Rep. (BNA) No. 32, at D-1 (Feb. 15, 1990) available in WESTLAW, BNA-DLR File [hereinafter *EEOC Policy II*].

159. See *id.* (quoting *EEOC Policy II*, *supra* note 158, at D-1).

160. See Van Tol, *supra* note 5, at 176 n.144 (citing *EEOC Policy II*, *supra* note 158, at D-1).

161. See *id.*

162. Cf. *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986) (holding that the male plaintiffs "were not prejudiced because of their status as males; . . . [they] faced exactly the same predicament as that faced by any woman").

163. For a discussion of *Meritor*, see *supra* notes 77-88 and accompanying text.

164. See Van Tol, *supra* note 5, at 176. The EEOC's definition of sexual favoritism is vastly different from the one used in this Comment. See *supra* note 2 (discussing this Comment's definition of sexual favoritism).

165. See *id.* at 176 & n.142 (citing *EEOC Policy II*, *supra* note 158, at D-1 to D-2); Levy, *supra* note 14, at 682. Because explicitly coerced sexual conduct does not comport with this Comment's definition of sexual favoritism, the EEOC's definition of sexual favoritism in this case is really just run-of-the-mill sexual harassment. See 29 C.F.R. § 1604.11(a) (1997) (defining "typical" sexual harassment). Implicit coercion, however, potentially touches upon sexual favoritism cases so long as there is a presumption that subordinates are always subject to some implicit coercion when approached by their supervisors for a sexual relationship. See Van Tol, *supra* note 5, at 160 n.27, 178-79.

166. See Van Tol, *supra* note 5, at 176 (citing *EEOC Policy II*, *supra* note 158, at D-1 to D-2). This definition of sexual favoritism is also inconsistent with the one used in this Comment. See *supra* note 2 (discussing this Comment's definition of sexual favoritism). The situation EEOC describes is one where a hostile work envi-

In the latter case, "widespread" has the potential of being vague, so the EEOC cited the case of *Broderick v. Ruder*¹⁶⁷ as an example of when the number and frequency of "consensual" relationships is excessive.¹⁶⁸ The EEOC's summary of the facts in *Broderick* is as follows: A staff attorney claimed that two secretaries had romantic affairs with two of the staff attorney's supervisors and received "promotions, cash awards, and other job benefits" while another supervisor promoted the career of a staff attorney to whom he clearly felt an attraction.¹⁶⁹ While the *Broderick* court found the facts constituted a hostile work environment, the EEOC "declared that: '[T]hese facts 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."¹⁷⁰

Conceivably, a practice or pattern of improper behavior in work environments could occur when, in a small office, only one promotion per year is possible but the supervisor's new paramour gets it for two consecutive years.¹⁷¹ Further, the *Broderick* example demonstrates that the level of voluntariness of a relationship between the supervisor and the beneficiary does not necessarily alter the hostile work environment created or the implicit quid pro quo message received by the employees.¹⁷² Given this possibility, the difference between isolated instances and widespread cases of actionable sexual favoritism is rather small.

ronment theory is applicable, and widespread sexual favoritism is merely proof of the problem. See Levy, *supra* note 14, at 683. Further, if the environment is such that it effectively tells one gender that the way to get ahead is by sleeping with the boss, then that gender has an implicit quid pro quo claim against the employer. See Van Tol, *supra* note 5, at 176 n.142; Levy, *supra* note 14, at 683 n.133.

167. 685 F. Supp. 1269 (D.D.C. 1988).

168. See Casey & Tuschman, *supra* note 6, at 55 (citing *EEOC Policy II*, *supra* note 158, at D-2); Levy, *supra* note 14, at 683 n.133.

169. See Casey & Tuschman, *supra* note 6, at 55 (citing *EEOC Policy II*, *supra* note 158, at D-2).

170. See *id.* (quoting *EEOC Policy II*, *supra* note 158, at D-2).

171. Such patterns of behavior, "[b]eyond the fear of sexual harassment . . . may be perceived as harmful insofar as they taint the decision making process. Any grant of a benefit based on considerations other than merit is likely to be viewed as unfair." Martha Chamallas, *Consent, Equity, and the Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 856 (1988).

172. See *id.* (suggesting that sexual favoritism may transmit tacit signals of a hostile work environment); Van Tol, *supra* note 5, at 178-79 (arguing that "consensual sexual relationships" nevertheless create a hostile work environment for workers).

D. 1991 Amendments to Title VII

Prior to 1989, the Supreme Court used a “but-for” test¹⁷³ when determining whether an employee received discriminatory treatment because of her sex.¹⁷⁴ In 1989, the Court, in *Price Waterhouse v. Hopkins*,¹⁷⁵ discarded the but-for test and, via a plurality opinion, adopted a “because-of” test.¹⁷⁶ This new test was not much different from the but-for test. The because-of test requires that a plaintiff merely show “that gender played a motivating part in an employment decision.”¹⁷⁷ This test, however, began to resemble the but-for test when the plurality also held that an employer could avoid liability if it could prove by a preponderance of the evidence that it would have taken the same action if gender was not a factor in the employer’s decision or act.¹⁷⁸

In 1991, Congress amended Title VII by adding § 703(m) to the Civil Rights Act of 1991.¹⁷⁹ The amendment stated that “[e]xcept as otherwise provided” in Title VII, unlawful sex discrimination is established once the plaintiff demonstrates that sex “was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁸⁰ This language purported to overrule the portion of *Hopkins* that sheltered employers and to reinforce the rule that whenever discrimination is shown to be a contributing factor in an employment decision, liability can attach.¹⁸¹ This new “motivating factor” test clearly has the potential to fully legitimize a cause of action for sexual favoritism, assuming that courts are willing to accept the fact that gender plays a key role in sexual favoritism cases.¹⁸²

173. The but-for test asks whether the disparate treatment an employee received would have occurred if the plaintiff’s gender was different. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (applying the but-for standard); *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (employing the but-for test).

174. *See Phillips*, *supra* note 5, at 566.

175. 490 U.S. 228 (1989). In *Hopkins*, a plaintiff claimed that she did not make partner at an accounting firm because of a combination of sex discrimination and a disagreeable personality. *See id.* at 234-36.

176. *See id.* at 240-42.

177. *See id.* at 250.

178. *See id.* at 252-53.

179. *See Phillips*, *supra* note 5, at 567.

180. 42 U.S.C. § 2000e-2(m) (1994).

181. *See Phillips*, *supra* note 5, at 567-70 & nn.102-07 (citing numerous sources of legislative history behind the 1991 amendment to Title VII).

182. *See id.* at 569.

E. Courts' Current Views of Sexual Favoritism

Despite the potential favorable impact the 1991 amendment to Title VII could have on the viability of sexual favoritism claims, *DeCintio* and the 1990 EEOC policy statements still persuade more courts than not against recognition of sexual favoritism claims. At the start of 1998, the Second,¹⁸³ Fourth,¹⁸⁴ and Tenth¹⁸⁵ Circuits and some states¹⁸⁶ explicitly rejected the validity of sexual favoritism claims. The Ninth Circuit explicitly left the issue undecided.¹⁸⁷ Only the D.C. Circuit still tacitly accepts the validity of sexual favoritism claims.¹⁸⁸ The other circuits have yet to address the issue.

183. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986); *supra* notes 126-56 and accompanying text (discussing *DeCintio*).

184. See *Becerra v. Dalton*, 94 F.3d 145, 149-50 (4th Cir. 1996) (holding that sexual favoritism is not actionable under Title VII and citing *DeCintio*), *cert. denied*, 117 S. Ct. 1087 (1997).

185. See *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997) (holding that sexual favoritism although "unfair" and "unwise" does not violate Title VII and citing *DeCintio*).

186. Some states' highest courts have found sexual favoritism nonactionable. See *Herman v. Western Fin. Corp.*, 869 P.2d 696, 701-03 (Kan. 1994) (holding that sexual favoritism does not by itself rise to sexual discrimination or sexual harassment under a hostile work environment theory); *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 801-03 (N.J. 1990) (citing *DeCintio* and holding that a male employee's claims of sexual favoritism towards a female employee by a supervisor who fired him and promoted his paramour is nonactionable under New Jersey law). The Third Circuit, using New Jersey state law but referring to EEOC guidelines, confirmed *Erickson* and held that sexual favoritism is only partial evidentiary proof that a hostile work environment exists. See *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860-63 (3d Cir. 1990) (citing *Erickson*, 569 A.2d at 801).

187. See *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 591-92 (9th Cir. 1992) (*per curiam*) (Kleinfeld, J. concurring) (emphasizing that *Candelore* does not decide the issue of whether sexual favoritism is actionable under Title VII and that the issue had not been reached in the Ninth Circuit). Similar holdings exist at the district court level within other circuits. For example, in the Seventh Circuit, the Central District Court of Illinois claimed that "the Seventh Circuit has not addressed the issue" of whether sexual favoritism is actionable. See *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 1121 (C.D. Ill. 1994).

188. See *King v. Palmer*, 778 F.2d 878, 880-82 (D.C. Cir. 1985) (where the parties and the district court did not challenge the presumption that single instances of sexual favoritism are actionable as a form of sex discrimination under Title VII); see also *Broderick v. Ruder*, 685 F. Supp. 1269, 1277-78 (D.D.C. 1988) (considering application of a sexual favoritism cause of action analysis but never reaching the issue).

V. CORRELATION BETWEEN SEXUAL FAVORITISM AND SEX DISCRIMINATION

Sexual favoritism should be actionable if its causes and effects are sufficiently similar to traditional sexual harassment or sex discrimination cases or if its causes and effects are within the scope of Title VII's prohibitions. Courts, scholars, and the EEOC have commented on whether either of these situations exist. This Comment summarizes many of the arguments made.

A. *Sexual Favoritism is not Sex Discrimination*

There are at least nine interrelated arguments for rejecting sexual favoritism claims. Many of these arguments are based upon strictly limiting the definition of sex in Title VII to gender. Other arguments rely upon public policy rationales.

1. "Sex" Plainly Means "Gender" Under Title VII

If the definition of sex under Title VII was not limited to gender but included sexual activity, it would much easier to justify making sexual favoritism claims actionable.¹⁸⁹ The relevant, albeit scanty, legislative history for Title VII, however, lacks any discussion of sexuality or sexual conduct.¹⁹⁰ "Instead, [the legislative history] stresses gender at every turn."¹⁹¹ Even the outspoken opponents of the amendment that added sex to Title VII acted on the premise that sex was limited to gender.¹⁹² The Second Circuit focused on this issue in *DeCintio* and in doing so also cited other courts' refusals to extend sex beyond gender-based discrimination.¹⁹³

189. See Phillips, *supra* note 5, at 563.

190. See *id.* Indeed, it is this very absence of such language that prompted more than one commentator to argue that even egregious sexual harassment claims are technically improper causes of action under Title VII. See, e.g., EPSTEIN, *supra* note 89, at 357; Claypoole, *supra* note 89, at 1160.

191. Phillips, *supra* note 5, at 564 (citing multiple sources within the legislative record).

192. See *id.* (citing 110 CONG. REC. 2577-78, 2581-82, 2584 (statements of Rep. Celler, Rep. Green, and Rep. Roosevelt)).

193. See *DeCintio*, 807 F.2d 304, 306-07 (2d Cir. 1986) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986), and quoting *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), for precedent regarding sex's "traditional definition"); Manemann, *supra* note 14, at 639-41.

2. Congress Meant Only to Provide Equality for Women

Even if sexual favoritism cases are deemed to have some level of gender-based causal connection to an employer's disparate treatment of employees in the workplace, Title VII's prohibitions against sex discrimination are focused only on "providing equal opportunities for women."¹⁹⁴ One supporter of the sex amendment claimed that the purpose of the amendment was to provide "equal opportunity in employment for women. No more—no less."¹⁹⁵ If equality of women in the workplace is the sole and limited intent of the sex discrimination provision of Title VII, then sexual favoritism cases, where women are not the only victims, exceeds the scope of the Act. At the very least, the sponsors' preoccupation with equality for women in the workplace tends to support the argument that gender is the proper and limited definition of sex under Title VII.

3. There is No Sex Discrimination in Sexual Favoritism Cases

Because both men and women are considered to be equal victims in a sexual favoritism case, sex (gender) does not have a causal connection to the discriminatory acts of the employee and is, therefore, not actionable. This was the central argument in *DeCintio*¹⁹⁶ which the EEOC¹⁹⁷ and other courts adopted.¹⁹⁸

4. Congress Refuses to Broaden Title VII's Scope

In the 1970s and 1980s, Congress was highly unsuccessful in expanding Title VII prohibitions to include discrimination in "affectional or

194. See Manemann, *supra* note 14, at 641 (quoting *Sommers*, 667 F.2d at 750); see also Phillips, *supra* note 5, at 563-64 (citing various legislative sponsors of the amendment to include the word sex in Title VII). This rationale, of course, was conclusively rejected in *Oncala v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002-03 (1998) when the Court held that even male-on-male sexual harassment is illegal under Title VII.

195. See Phillips, *supra* note 5, at 564 (quoting 110 CONG. REC. 2583 (1964) (statement of Rep. Kelly)).

196. See *supra* notes 126-56 and accompanying text (discussing *DeCintio*).

197. See *supra* notes 157-72 and accompanying text (discussing the EEOC's 1990 policy change).

198. See, e.g., *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145, 149-50 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1087 (1997); *Nicolo v. Citibank*, 554 N.Y.S.2d 795, 798-99 (Sup. Ct. 1990).

sexual orientation” cases.¹⁹⁹ Some courts took notice of these failures when justifying their “narrow, traditional interpretation” of the definition of sex when addressing claims based upon transsexuality.²⁰⁰ While Congress’s failure to pass bills explicitly broadening sex discrimination liability does not directly speak to the issue of sexual favoritism, it does reinforce the argument that the definition of sex is intended to be limited to gender.²⁰¹

5. Judicial Restraint

The courts are often slow to act where Congress has not. The doctrine of judicial restraint is a rationale for limiting the scope of liability under Title VII.²⁰² Although this doctrine is not absolute,²⁰³ most courts choose to engage in judicial restraint when it comes to sexual favoritism claims.²⁰⁴ As one court noted, even though remedial statutes, such as Title VII, should be liberally interpreted, courts should not exceed “the prerogatives of Congress.”²⁰⁵

An additional justification for courts’ reluctance to recognize sexual favoritism claims is the 1990 EEOC guidelines that clearly disfavor such claims.²⁰⁶ The guidelines “constitute a body of experience and informed judgment to which the courts and litigants may properly resort

199. See Manemann, *supra* note 14, at 642 & n.210 (quoting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)); see also Phillips, *supra* note 5, at 564-65 & n.90.

200. See *Ulane*, 742 F.2d at 1084-87; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

201. See Phillips, *supra* note 5, at 565.

202. See Manemann, *supra* note 14, at 642. Judicial restraint “compels judges to defer to explicit or implicit legislative judgments on policy issues” because publicly elected bodies are best able to represent the governed and determine what is best for the public. See *id.* at 647.

203. See Phillips, *supra* note 5, at 564. The doctrine has not prevented the courts from recognizing that improper sexual conduct or sexual favoritism is within the scope of unlawful sex discrimination. See *id.* at 551-62; see also Manemann, *supra* note 14, at 647-49 (discussing the viability of the “opposite pole”—“judicial activism”). *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), clearly stands out as an example of the courts’ freedom in deciding the limits of Title VII. See *supra* notes 77-88 (discussing *Meritor*).

204. See Phillips, *supra* note 5, at 564. Judicial restraint was “a primary rationale underlying the *DeCintio* decision.” See Manemann, *supra* note 14, at 647. On the other hand, it was the non-application of this doctrine which first allowed sexual harassment cases to be recognized as a form of sex discrimination under Title VII. See Claypoole, *supra* note 89, at 1160; Manemann, *supra* note 14, at 649.

205. See *Ulane*, 742 F.2d at 1086. For a discussion of the remedial nature of Title VII, see *infra* note 258 and accompanying text.

206. See *supra* notes 157-72 and accompanying text (discussing the 1990 EEOC guidelines).

for guidance."²⁰⁷ In total, the courts have not challenged the silence of Congress nor rejected the narrow policy statements of the EEOC.²⁰⁸

6. Title VII's 1991 Amendment does not Support Sexual Favoritism Claims

As noted earlier, section 703(m) was added to Title VII in 1991,²⁰⁹ and it authorizes sex discrimination claims in cases where sex is a "motivating factor" in an employer's discriminatory actions.²¹⁰ The opening clause to section 703(m) is significant; it contained the qualifier "[e]xcept as otherwise provided in this subchapter."²¹¹ This exception does not overrule section 703(a)'s mandate that the victim of sex discrimination must suffer an injury "because of" her sex or gender.²¹² Even if the "because of" language under section 703(a) is held to section 703(m)'s motivating factor test, section 703(a) still requires the test be focused upon the gender of the victim, not the benefiting paramour.²¹³ In sexual favoritism cases, it is the paramour's gender, not the victim's, that partially motivates the employer or supervisor.²¹⁴ Therefore, section 703(m) does not support sexual favoritism claims, and "[t]his conclusion is reinforced by the legislative history of section 703(m), which is almost entirely preoccupied with *Hopkins* and which does not mention sexual favoritism claims."²¹⁵

7. Sexual Favoritism is Not Sufficiently Coercive

Title 29 of the Code of Federal Regulations conditions sexual harassment and third party liability primarily upon an individual's *submission to* an employer's sex-based acts.²¹⁶ "Submission to" necessarily invokes

207. Levy, *supra* note 14, at 669 n.11. (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976)).

208. See *supra* notes 183-88 and accompanying text (discussing the current status of sexual favoritism claims in the courts).

209. See *supra* notes 179-82 and accompanying text.

210. See 42 U.S.C. § 2000e-2(m) (1994).

211. See *id.*

212. See Phillips, *supra* note 5, at 570-71 (citing 42 U.S.C. § 2000e-2(a)(1)).

213. See *id.*

214. See *id.* at 570.

215. See *id.* at 571.

216. See 29 C.F.R. § 1604.11(a), (g) (1997). The relevant text for subsection (a) states:

Unwelcome sexual advances, requests for sexual favors, and . . . conduct of

an element of coercion which is not present in consensual relationships found in sexual favoritism cases.²¹⁷

8. Sexual Favoritism is Analogous to Non-Actionable Nepotism

Because sexual favoritism is not truly discrimination based upon gender, it is “more akin to nepotism,” and if a supervisor “favors a “close friend,” other men and women do not” have a valid claim.²¹⁸ This rationale naturally relies upon the premise that sex discrimination is based solely upon gender and that sexual favoritism does not meet that criteria.²¹⁹ This rationale also assumes that nepotism is not actionable.²²⁰

9. Sexual Favoritism is Not a Sufficiently Immoral Act

One major assumption about the law is that it “cannot eliminate all forms of employment discrimination and therefore should focus on its worst manifestations.”²²¹ In deciding what is “worst,” ethicists judge the morality of sexual favoritism from several different perspectives.²²²

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

29 C.F.R. § 1604.11(a). Subsection (g) reads, “[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.” 29 C.F.R. § 1604.11(g).

217. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307-08 (2d Cir. 1986); *Levy*, *supra* note 14, at 673; see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding that sexual harassment “must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment”) (alteration in original) (quoting *Henson v. Dandee*, 682 F.2d 897, 904 (11th Cir. 1982)).

218. See *Casey & Tuschman*, *supra* note 6, at 53 (quoting *Ayers v. AT&T*, 826 F. Supp. 443, 445 (S.D. Fla. 1993)). In *Ayers*, an employee claimed that her supervisor transferred her to a less desirable store so that the supervisor could make room to hire his younger girlfriend. *Ayers*, 826 F. Supp. at 444.

219. See *id.*

220. For a brief discussion of nepotism and the problems that might arise when employers hire or promote their spouses, see *Manemann*, *supra* note 14, at 612 n.4.

221. *Phillips*, *supra* note 5, at 572-73 (citing Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 203 (1992)).

222. See *Phillips*, *supra* note 5, at 573.

One perspective is that the moral worth of an act is based upon the act's consequences.²²³ Although sexual favoritism is likely to have a negative impact in the workplace, "it does not denigrate classes of people" the way traditional race, religion, or gender discrimination cases do.²²⁴

Another perspective is that the relatively low probability of the act's occurrence tempers its significance.²²⁵ Because sexual favoritism often threatens workplace morale and efficiency, employers "arguably have an incentive to penalize such relationships without prodding from the law."²²⁶ Thus, "it might be safer to leave workplace sexual favoritism unregulated."²²⁷

A final perspective is that an act's moral standing is based in part upon the "innate nature of the act or the motives that underlie it."²²⁸ In traditional race, national origin, or sex discrimination cases, the prejudice is directed at "immutable traits."²²⁹ In sexual favoritism cases, however, the attractiveness of the subordinate in the eyes of the superior can change even if her gender does not.²³⁰ Further, the victims of sexual favoritism cases are not made victims because the employer believes they are intellectually, physically, or morally inferior people as is often the case in traditional race, sex, national origin, or religion discrimination cases.²³¹

Because sexual favoritism is arguably less immoral than other forms of discrimination, recognizing sexual favoritism claims could be the camel's nose under the Title VII tent.²³² The whole camel, therefore, might include liability for a host of other upsetting acts such as discrimination based upon "sexual orientation, transsexuality, and appear-

223. *See id.* (noting that this perspective is called a "consequentialist" theory).

224. *See id.* at 574.

225. *See id.* (noting that this perspective comes from a "meritocratic" standpoint).

226. *See id.* at 574-75 & n.124.

227. *Id.* at 575.

228. *Id.* at 573 (noting that this perspective is called a "deontological" theory).

229. *See id.* at 575.

230. *See id.* at 575-76.

231. *See id.* at 576. Additionally, "[un]like some forms of sex discrimination . . . sexual favoritism is not the product of misogyny or of the view that (competence aside) women simply should not perform certain social functions." *See id.*

232. *See id.*

ance.²³³ Presumably, the public and courts are not interested in granting new protections in these cases.²³⁴

B. Sexual Favoritism is Sex Discrimination

Although persuasive to some, none of the aforementioned arguments, whether taken individually or together, actually provide an irrebuttable legal rationale for rejecting sexual favoritism claims under Title VII.²³⁵ No jurisdiction is prevented from recognizing sexual favoritism claims by constitutional or federal law. Further, there are at least ten arguments for making sexual favoritism actionable.

1. "Sex" Can Plainly Mean More Than "Gender"

Even if most sponsors and opponents of the sex amendment to Title VII primarily spoke of sex discrimination as being a gender issue,²³⁶ their commentary is suggestive but not controlling upon the courts.²³⁷ Judges are free to turn to their own dictionaries for a plain meaning definition of sex.²³⁸ One commentator noted that sex has two plainly acceptable meanings: one being gender and the other being sexuality or sexual conduct.²³⁹ Further, not all legislators were unaware of the multiple interpretations sex and sex discrimination could have. Some members of Congress argued that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.²⁴⁰ This concern implies that different or unique types of claims could arise under the umbrella of sex discrimination.²⁴¹ *Meritor* evidenced this potential when it judicially read sex-

233. See *id.* at 574 (citing *PLAYER*, *supra* note 14, at § 5.25(c)(2), (d) (1)-(2)).

234. See *id.*

235. See *id.* at 564.

236. See *supra* notes 25-31, 190-93 and accompanying text (discussing Title VII's legislative history).

237. See Phillips, *supra* note 5, at 564 (noting that "the legislative history's preoccupation with gender does not logically entail the rejection of sexuality as an additional forbidden criterion").

238. See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 145 (4th Cir. 1996) (Murnaghan, J., dissenting) (noting that in light of the dearth of legislative history addressing the issue, the court should turn to the dictionary for a definition of "sex").

239. See *PLAYER*, *supra* note 14, § 5.25(a), at 239 (citing *WEBSTER'S NEW COLLEGIATE DICTIONARY* 1062 (1976) and arguing that courts merely divine a definition of sex when they narrowly construe sex as gender).

240. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986) (citing 110 CONG. REC. 2577, 2584 (1964) (statements of Rep. Celler and Rep. Green)).

241. See Terry Nicole Steinberg, *Rape on College Campuses: Return Through Title XI*, 18 J.C. & U.L. 39, 55 (1991) (noting that under the "umbrella" of Title VII, rape

ual harassment claims under a hostile environment theory into Title VII coverage.²⁴² Sexual favoritism could be another such cause of action.

2. Sexual Favoritism Claims Help Provide Equality for Women

Although much of the legislative history indicates that the goal of providing equality for women in workplace was one reason why sex discrimination was added to Title VII,²⁴³ this history is not dispositive on the issue of whether other manifestations of sex discrimination, including favoritism, are actionable under Title VII.²⁴⁴ Indeed, the Supreme Court recently held in *Oncala v. Sundowner Offshore Services, Inc.*,²⁴⁵ that cases of male-on-male sexual harassment are actionable as a form of sex discrimination under Title VII.²⁴⁶

Further, even if the goal of Title VII is to provide for equality of women in the workplace, sexual favoritism claims promote such a goal. For example, if a female supervisor promoted her male paramour instead of any number of better qualified female employees, the statutory ideal of equal treatment of women in the workplace is arguably not advanced unless a sexual favoritism claim is allowed. In a presumably more common case, a male supervisor promotes his female paramour instead of other better qualified female employees.²⁴⁷ Dismissing a sexual favoritism suit in such a scenario does not create equal opportunities for all women, but undermines the principle of equality in the workplace by implicitly adding sexual standards to job descriptions.²⁴⁸

could be considered sex discrimination).

242. See *id.* at 73; *supra* notes 77-88 and accompanying text (discussing *Meritor*).

243. See *supra* notes 194-95 and accompanying text.

244. Phillips, *supra* note 5, at 564.

245. 118 S. Ct. 998 (1998). Justice Scalia, writing for a unanimous court, stated that nothing in Title VII necessarily bars "a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.* at 1001-02.

246. *Id.* at 1002-03.

247. See Van Tol, *supra* note 5, at 166 (noting that in most sexual favoritism cases a female worker receives preferential treatment and the victims are usually other qualified women).

248. See *id.* at 161 (asserting that *power* is the one consistent factor throughout all sexual discrimination claims and concluding that the use of power to obtain sexual favors undermines the integrity of the workplace).

3. Victimized Both Men and Women does Not Avoid Liability

The *DeCintio* court and the EEOC both concluded that in cases of sexual favoritism men and women face “exactly the same predicament”²⁴⁹ and are “equally disadvantaged”²⁵⁰ by an employer’s discriminatory behavior. It is worth noting that although both sexes are disadvantaged, the nature of the discrimination will certainly vary depending on the victim’s gender.

The employees of the gender not subject to a supervisor’s sexual interest are in a different position from those of the gender that does arouse the sexual interest of supervisor.²⁵¹ The employees of the gender not targeted by the amorous behavior have a relatively obvious sex discrimination claim.²⁵² On the other hand, employees of the gender that garners a supervisor’s sexual interest (except for the actual paramour) have the basis of an implied quid pro quo sexual harassment claim.²⁵³ The EEOC and some courts, however, have made an arbitrary decision to avoid recognizing the validity of these separate claims by lumping them together under the single designation of non-actionable sexual favoritism.²⁵⁴

Even if it is true that men and women are equally disadvantaged in sexual favoritism cases, the court in *King v. Palmer*²⁵⁵ understood that the scope and invidiousness of sex discrimination could include such a situation. The *King* court clearly expressed this view in writing that “unlawful sex discrimination occurs whenever sex is “for no legitimate reason a substantial factor in the discrimination.”²⁵⁶

4. Congress’s Failure to Amend Title VII is Not Dispositive

Although Congress did not pass any of the numerous bills that would have explicitly amended Title VII to include antidiscrimination language

249. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986).

250. See *EEOC Policy II*, *supra* note 158, at D-1.

251. This argument presumes that the supervisor in question is not bisexual. See *supra* notes 150-52 and accompanying text.

252. In a traditional sex discrimination case, the gender not chosen for favoritism can make out a prima facie case with relative ease. Compare the elements of a prima facie case of disparate treatment analysis under Title VII at *supra* notes 36-39 and accompanying text with the situation above.

253. See *Phillips*, *supra* note 5, at 554.

254. See, e.g., *DeCintio*, 807 F.2d at 306-08; *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1985); *EEOC Policy II*, *supra* note 158, at D-1.

255. 778 F.2d 878 (D.C. Cir. 1985).

256. *Id.* at 880 (quoting the D.C. District Court’s holding in the case below, 598 F. Supp. 65, 66-67 (D.D.C. 1984) (quoting *Bundy v. Jackson*, 641 F.2d 934, 942-43 (D.C. Cir. 1981)) (internal quotations omitted).

regarding homosexuals, transsexuals, and effeminate men, this fact has no logical bearing upon the viability of sexual favoritism cases.²⁵⁷ If such evidence was compelling, then Congress's defeat of the original sex amendment to Title VII that limited discrimination based "solely" upon sex²⁵⁸ would be equally compelling in favor of allowing sexual favoritism claims.

5. Title VII Should Be Broadly Construed

To fulfill Title VII's role as a remedial statute, the Supreme Court has determined that it should be interpreted broadly, and courts "must avoid interpretations . . . that deprive victims of discrimination of a remedy."²⁵⁹ As has already been admitted even by the *DeCintio* court, sexual favoritism is an "unfair" form of discrimination.²⁶⁰ In light of sexual favoritism's harmful and unfair effect on otherwise qualified employees, the mandate to interpret Title VII broadly should supersede, or at least countervail, the doctrine of judicial restraint.²⁶¹

Reliance upon the EEOC policy guidance statements for additional proof of the reasonableness of the doctrine of judicial restraint is misplaced. First, the EEOC's guidelines are not binding upon the courts.²⁶² Second, what appears in the Code of Federal Regulations is merely one administration's interpretation of Title VII.²⁶³ Further, as explained earlier, the guidelines that relate to sexual favoritism claims have not been static.²⁶⁴ Nor does the executive branch always repre-

257. See Phillips, *supra* note 5, at 564-65.

258. See Manemann, *supra* note 14, at 646 (citing *Barnes v. Costle*, 561 F.2d 983, 991 (D.C. Cir. 1977) and *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975) (en banc)).

259. See *id.* at 645 & n.241 (quoting *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981) (holding that even when there is not a member of the opposite sex in a higher paying but equal job, a plaintiff may bring an equal pay for equal work claim under Title VII)).

260. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986) (holding that despite the unfair nature of the supervisor's acts, sexual favoritism is non-actionable).

261. See *supra* notes 202-07 and accompanying text for the judicial restraint argument against recognizing sexual favoritism claims.

262. See Levy, *supra* note 14, at 669 & n.11 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

263. See *id.*

264. A comparison of 1980 guidelines with the 1990 guidelines reveals substantial revision. Compare *supra* notes 97-100 and accompanying text with *supra* notes 157-

sent the sentiments of the people it governs when it writes policy guidelines. Judge Richard Posner of the Seventh Circuit concluded that when attitudes toward sexual propriety change, a court “‘must decide, in light of information not available to the promulgators of the [statute or constitutional construction], what the rule should mean in its new setting.’”²⁶⁵ Assuming that most people do not want their employment opportunity held hostage to the sexual preferences of an employer or the sexual attractiveness of an inferior employee, the viability of sexual favoritism claims under Title VII should not be in doubt.

Finally, courts need not disregard all EEOC guidelines when broadly construing Title VII to allow sexual favoritism cases. There is only one EEOC guideline that lobbies directly against sexual favoritism claims.²⁶⁶ If that guideline was ignored in the same way the Court sidestepped other EEOC policy statements in *Meritor*,²⁶⁷ sexual favoritism claims could be recognized by liberally interpreting the EEOC’s other policy statements.²⁶⁸

6. Title VII’s 1991 Amendments Support Sexual Favoritism Claims

Given the premise that gender is a motivating factor in sexual favoritism cases, section 703(m),²⁶⁹ which forbids discriminatory practices motivated by gender, seems to recognize sexual favoritism claims under Title VII.²⁷⁰ The argument that section 703(a) requires that the discriminatory motivation be directed at the victim instead of the paramour²⁷¹ is too one-sided. Using this section 703(a) argument in a racial setting leads to unacceptable results. For example, it seems inconceivable that an employer could escape liability by claiming that his refusal to hire a highly qualified African-American because of her race was really just a

72 and accompanying text. Nor has the EEOC been consistent with its policy statements even when appearing before the Supreme Court. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68, 70-71 (1986) (noting that the EEOC’s brief as amicus curiae directly contradicted its own guidelines).

265. See Manemann, *supra* note 14, at 648-49 nn.255, 258 (quoting Richard Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, NEW REPUBLIC, Sept. 28, 1987, at 23).

266. See *supra* notes 157-72 and accompanying text (describing the EEOC’s 1990 policy statement disallowing sexual favoritism claims under Title VII).

267. See *supra* notes 77-88 and accompanying text (discussing *Meritor*).

268. See *supra* notes 163-82 and *infra* notes 269-81 and accompanying text (discussing the potential liberalism of EEOC guidelines).

269. See *supra* notes 173-82 and accompanying text for a discussion of the 1991 amendment to Title VII.

270. See Phillips, *supra* note 5, at 569 (citing 42 U.S.C. § 2000e-2(m) (Supp. III 1991)).

271. See *supra* notes 209-15 and accompanying text (discussing why § 703(m) does not support sexual favoritism claims).

lawfully motivated desire to help an incompetent white person when the employer has also made it clear that whites will always be hired over non-whites. The discrimination coin is two-sided, and merely choosing to look at the beneficiary's side does not eliminate the victim's side. Because the test for unlawful discrimination is a motivating factor test instead of a but-for test,²⁷² sexual favoritism claims should be more readily recognized by the courts.

7. Sexual Favoritism Has Coercive Effects

The *DeCintio* court claimed that the submission to language within the EEOC guidelines on sexual harassment and sexual favoritism requires the employer to make coercive sexual demands upon an employee before liability attaches to the act.²⁷³ This holding, however, overlooks the supplemental information accompanying the final amendments to the EEOC guidelines, which uses the words "granting sexual favors to their mutual supervisor" when referring to cognizable actions under Title VII.²⁷⁴ It can just as easily be argued that granting does not imply coercion.²⁷⁵

Even if some level of coercion is required, the average case of sexual favoritism still meets this requirement.²⁷⁶ Whether an employer demands sex from an employee as a precondition to a promotion or the employer merely promotes his consensual paramour, all better qualified employees passed over for promotion receive the same message: they must "use' or 'surrender' [their] sexuality" in order to be promoted.²⁷⁷ Even the advantaged paramour is arguably under some level of coercion. One feminist theory states that all sexual affairs between supervisors and subordinates are "inherently coercive"²⁷⁸ or, at best, "inherently suspect."²⁷⁹ At least one circuit court has accepted this theory of

272. See *supra* notes 173-81 and accompanying text (discussing the rejection of a but-for test).

273. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307-08 (2d Cir. 1986) (citing 29 C.F.R. § 1604.11(g) (1986)).

274. See *Van Tol*, *supra* note 5, at 179-80 (quoting 45 Fed. Reg. 74,676-77 (1980)).

275. See *id.* at 180.

276. See *id.* at 178-79.

277. See *id.* (citing *Chamallas*, *supra* note 171, at 856).

278. See *Van Tol*, *supra* note 5, at 160 n.27.

279. See *Phyllis Coleman, Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95, 96 (1988). *Coleman* asserts that "an employee states a *prima facie* case when she alleges a sexual relationship com-

inequitable power relationships. In *Snider v. Consolidation Coal Co.*,²⁸⁰ the Seventh Circuit held in favor of a Title VII plaintiff in a sexual harassment case by relying heavily upon the testimony of an expert witness who claimed that a sexual relationship between a supervisor and a subordinate could never “be truly consensual and voluntary” and that over ninety-five percent of the victims of coerced sexual relationships never complain nor “report the problem due to a fear of reprisal or loss of privacy.”²⁸¹

8. Sexual Favoritism is not Analogous to Nepotism

The fallacy of comparing cases of nepotism to sexual favoritism is somewhat obvious. Kinship is largely an accident of birth, whereas paramour selection is not. Employees cannot make their lineage available to an employer, but employees can make their sexuality available to the employer. It is this mutable element that underlies sexual favoritism and makes it so repugnant to its victims.

9. Sexual Favoritism is a Sufficiently Immoral Act

There is some merit to the consequentialist’s argument “that sexual favoritism is morally indistinguishable from the types of discrimination that Title VII clearly does proscribe.”²⁸² From an injury-in-fact perspective, however, the qualified employee who was denied a job benefit does not care whether the unqualified employee who got the job benefit consented to or was coerced into a sexual affair. Even if the motivations behind sexual favoritism and the consequences of sexual favoritism are morally distinguishable from other acts of sexual discrimination, there is an inherent immorality in dismissing a sexual favoritism claim because of the fatalist or apologist viewpoint that it is impossible to eliminate all forms of employment discrimination.²⁸³ When courts

menced during an employer-employee relationship.” *Id.* at 137.

280. 973 F.2d 555 (7th Cir. 1992).

281. *See id.* at 558-60. In *Snider*, a male superintendent denied coercing a sexual relationship from Snider, although he admitted to having consensual sex with nine of his seventeen female employee subordinates. *See id.* at 557.

282. *See Phillips, supra* note 5, at 573-74; *supra* notes 223-24 and accompanying text (discussing the consequentialist’s view).

283. For the same reason, the slippery-slope argument against recognizing sexual favoritism is also weak. Whether recognizing sexual favoritism would necessarily open the door to other types of sex-based discrimination claims such as those brought by homosexuals, transsexuals, or effeminate men is unknown. However, some of these questions and even the viability of sexual favoritism claims themselves might have been obliquely answered in *Oncala v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998). In *Oncala*, the Court noted that “male-on-male sexual harassment in the

turn a blind eye to obvious victims of an employer's arbitrary criteria for providing job benefits to unqualified persons, the public's faith in the law and judiciary is shaken.

10. Sexual Favoritism is Actionable "Sex-Plus" Discrimination

Sex-plus discrimination is based upon the theory that employers "can legally discriminate on the basis of gender *plus* other factors," but only in a very limited way.²⁸⁴ For example, courts have upheld employers' rules that require men to have short hair but allow women to keep theirs long²⁸⁵ or that say only men must wear ties on the job.²⁸⁶ On the other hand, courts have denied employers the right to establish maximum weight requirements for female flight attendants²⁸⁷ or to prohibit female flight attendants from wearing glasses.²⁸⁸ What separates the hair cases from the weight cases is the level of sex appeal being forcibly interjected into job descriptions. Sex appeal is the driving factor in the weight and eyeglasses cases.²⁸⁹ As in the weight and eyeglass cases, sexual favoritism cases are based upon otherwise qualified employees being denied job benefits because they fail to generate the requisite sex appeal. Sexual favoritism, therefore, should also be recognized as unlawful sex-plus discrimination.²⁹⁰

workplace was assuredly not the principle evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils . . . sexual harassment must extend to sexual harassment of any kind that meets the statutory requirement." *Id.* at 1002.

284. See Manemann, *supra* note 14, at 643-44.

285. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092-93 (5th Cir. 1975) (en banc).

286. See *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977). For other examples of legitimate sex-plus discrimination cases, see Manemann, *supra* note 14, at 644 n.235.

287. See *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 610 (9th Cir. 1982).

288. See *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 790 (D.D.C. 1973), *aff'd in part and vacated on other grounds*, 567 F.2d 429, 437 (D.C. Cir. 1977) (affirming the district court's finding of statutory infringement under Title VII).

289. See, e.g., *Gerdom*, 692 F.2d at 604. In *Gerdom*, Continental Airlines gladly admitted as much by disclosing that the height to weight ratios were designed "to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'" See *id.* Continental did not even offer the pretense that the weight restrictions on its "girls" were necessary from an ergonomics or other physical capacity standpoint. See *id.*

290. See *PLAYER*, *supra* note 14, § 5.25(d)(2), at 251 & n.68 (noting that sexual favoritism cases discriminate based upon gender plus either an employee's consent to

C. Summary of Positions

For each argument against the recognition of sexual favoritism as a cause of action, there is Supreme Court and lower court precedent; federal statutory and regulations language; or scholarly commentary rebutting the negative arguments. Any question regarding the practical enforceability of a sexual favoritism claim can be eliminated by the adoption of a clear set of elements that identifies only injurious and discriminatory cases of sexual favoritism and does not reach innocuous office romances. Creating such a cause of action is relatively simple and does not involve using any standards of review not already used by the courts in discrimination cases.

VI. A PROPOSED CAUSE OF ACTION FOR SEXUAL FAVORITISM CASES

In order to be actionable, sexual favoritism claims should establish, by a preponderance of the evidence, the four elements of a *prima facie* case of disparate treatment discrimination as set out in *McDonnell Douglas Corp. v. Green*.²⁹¹ These elements are: (1) membership in a protected class; (2) the plaintiff applied for and was qualified for the employment job offered;²⁹² (3) the employer rejected the plaintiff; and (4) other applicants with the same or lesser qualifications subsequently were considered for or received the benefit offered.²⁹³ These elements have some flexibility and can be modified to fit the facts of each case.²⁹⁴

a sexual relationship or the employee's sex appeal and as such provide grounds for a sex-plus discrimination suit).

291. 411 U.S. 792, 802 (1973).

292. Some circuit courts have held that a victim of a traditional quid pro quo sexual harassment claim must prove a tangible loss in job benefits in order to prevail. See Paul, *supra* note 22, at 340-41; Phillips, *supra* note 5, at 554 & n.38 (citing post-*Meritor* cases from the Second and Seventh Circuits). The split among circuits will be decided by the Supreme Court in 1998. See Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997) (en banc), cert. granted sub nom., Burlington Indus., Inc., 118 S. Ct. 876 (Jan. 23, 1998) (97-569). However, when sexual harassment is based upon a hostile work environment theory, the victim need not prove a loss of tangible job benefits. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-65 (1986). In hostile work environment cases, the Court also ruled that the plaintiff need not suffer actual psychological harm but perceive as a "reasonable person" would that the work environment was abusive. See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993); see also *Meritor*, 477 U.S. at 66-67. This Comment's suggested form of actionable sexual favoritism is based upon injuries that are akin to quid pro quo claims where a tangible economic benefit must be lost or denied.

293. See *McDonnell Douglas*, 411 U.S. at 802; Manemann, *supra* note 14, at 617.

294. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6 (1980); *McDonnell Douglas*, 411 U.S. at 802 n.13.

Plaintiffs always have a gender and are presumed to be injured in sexual favoritism cases because of an employer's gender-based action. This Comment, therefore, assumes that men and women always qualify as being part of a protected class when discussing sexual favoritism.

The second through fourth elements are completely consistent with sexual favoritism cases. These elements, however, are not always met by the plaintiffs. For example, the Ninth Circuit, in *Candelore v. Clark County Sanitation District*,²⁹⁵ noted that even though a younger woman might have been having a sexual affair with Ms. Candelore's supervisors, Candelore was not qualified for, nor applied for any of the benefits conferred upon the younger woman.²⁹⁶

Within the prima facie framework, causation is the plaintiff's major obstacle. Assuming Title VII sex discrimination claims necessitate a gender-based action by the employer leading to a disparate treatment of an employee, sexual favoritism claims can still meet this causal element by using the motivating factor test added to Title VII in 1991.²⁹⁷ There are three basic prongs that I propose will help prove that sex-based considerations motivated the employer. The first prong is that the plaintiff must show that a sexual relationship existed between the beneficiary and the supervisor or employer.²⁹⁸ As the *King* court noted, this relationship need not involve sexual intercourse to be a sexual relationship upon which favoritism is based.²⁹⁹

The second prong of the motivating factor (causation) test is that the plaintiff must show that the supervisor was capable of, or instrumental in, conferring the benefits in question.³⁰⁰ Obviously, if a supervisor is

295. 975 F.2d 588 (9th Cir. 1992).

296. See *id.* at 590-91 (holding that "[b]ecause Candelore failed to identify employment benefits or opportunities that she was entitled to but did not receive, she has not stated a prima facie case of discrimination under Title VII").

297. See *supra* notes 173-82 and accompanying text for an analysis of this amendment as codified at 42 U.S.C. § 2000e-2(m) (1995).

298. See *King v. Palmer*, 778 F.2d 878, 881-82 (D.C. Cir. 1985). The plaintiff can rely upon circumstantial evidence alone when proving the discriminatory intent. See *Aikens*, 460 U.S. at 714 n.3; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

299. See *King*, 778 F.2d at 882.

300. This prong is often noticed by courts. See, e.g., *id.* at 821 n.4, 882 (emphasizing that the direct influence of the supervisor on his paramour's promotion was a key element in proving a violation of Title VII); *Ayers v. AT&T Co.*, 826 F.Supp. 443, 446 (S.D. Fla. 1993) (holding that in order for a Title VII sexual harassment claim under a quid pro quo theory to apply, there must be a supervisor or employee capable of affecting the plaintiff's job status).

powerless in terms of influencing promotions or other benefits, the causation factor is not met. An office romance between equals or between people that are incapable of conferring job benefits upon each other is not actionable under a sexual favoritism claim.

The third prong of the motivating-factor test is a showing that the beneficiary of the alleged sexual favoritism was no more qualified for the benefit received than was the plaintiff.³⁰¹ This third prong is really the fourth element of the prima facie case. In *Candelore*, the female employee who was unqualified to receive the benefits in question also failed to offer any evidence that the alleged beneficiary was unqualified for the benefits received.³⁰² As upset as the female employee was about "the isolated incidents of sexual horseplay . . . [that] took place over a period of years," such concerns had potential to be addressed only through a sexual harassment claim under a hostile work environment theory, and not as a sexual favoritism claim.³⁰³

While the motivating factor test might be viewed as a low causal threshold, it is really a highly set bar to spurious suits that could injure innocuous office romances. Further, this test is consistent with Supreme Court precedent that allows employers some element of personal bias not based upon sex if the applicants' qualifications are otherwise objectively equal.³⁰⁴

Should the plaintiff meet the required burdens described above, the plaintiff will have demonstrated a sexual favoritism claim deserving of a remedy. The remedies should be consistent with other Title VII remedies, and therefore be adaptable to the factual settings of the case.³⁰⁵

301. See Manemann, *supra* note 14, at 658-61.

302. See *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992).

303. See *id.*

304. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1980) (noting that the only restriction upon an employer's personal bias among equally qualified individuals is that the bias cannot be based upon unlawful criteria). This Comment suggests that sexual favoritism is not an unlawful criteria unless the beneficiary is unqualified whereas the plaintiff is qualified.

305. For an example of the remedies available in a sexual favoritism case, see *King*, 778 F.2d at 882-83 n.7.

VII. EMPLOYER LIABILITY FOR SEXUAL FAVORITISM AND
SEXUAL HARASSMENT CLAIMS AND HOW TO AVOID THEMA. *Employers' Liability*

Even if sexual favoritism is not recognized as an actionable form of sex discrimination, a romantic relationship "between a supervisor and subordinate may quickly turn from 'consensual' to 'harassment' on nothing more than the say-so of one of the participants, leaving the employer to suffer the consequences."³⁰⁶ Even if a plaintiff's case is weak, artful pleading by victims of sexual favoritism can skirt around the *DeCintio* line of cases and can force employers to defend themselves in sexual harassment suits that create bad publicity and cause morale problems at the office.³⁰⁷ To lay the foundation for a hostile work environment theory or implied quid pro quo claim, a plaintiff must only allege that the sexual favoritism was not a singular event or that the relationship was not purely consensual.³⁰⁸ For example, in *Trautvetter v. Quick*,³⁰⁹ a male school principal had a consensual sexual affair with one of his female teachers, a relationship the teacher herself "actively pursued."³¹⁰ Despite these facts, the teacher brought a sexual harassment suit under Title VII and appealed the summary judgment against her to the circuit court.³¹¹ The principal and school district ultimately "prevailed, but after much litigation and no little embarrassment."³¹²

306. See Casey & Tuschman, *supra* note 6, at 53.

"While he was on the D.C. Circuit Court of Appeals, Judge Bork, joined by Scalia and Starr, made this very point. In the same case which the Supreme Court ultimately decided as the landmark sexual harassment case of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), . . . Judge Bork wrote: 'sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it.'"

Id. at 54 (quoting *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir.), *reh'g denied*, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, Scalia, and Starr, J., dissenting)).

307. See *id.* at 54 n.14 (citing *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 1122 (C.D. Ill. 1994)).

308. See *supra* notes 159-72 and accompanying text (discussing EEOC guidelines for valid sex discrimination claims).

309. 916 F.2d 1140 (7th Cir. 1990).

310. See *id.* at 1142-46, 1154.

311. See *id.* at 1141-42.

312. See Casey & Tuschman, *supra* note 6, at 52-55.

Embarrassment to employers arises not only because of claims by subordinates. In December 1997, only nine days before the highly anticipated public opening of the much acclaimed Getty Museum in Brentwood, California, the public caught wind of the dirty laundry once closeted by the museum staff.³¹³ The curator of drawings, a married man, filed a sexual harassment and discrimination suit when a female subordinate threatened to ruin him for ending his affair with her.³¹⁴ The curator further claimed that his two female supervisors rejected his complaints and instructed him to give his ex-lover favorable performance evaluations.³¹⁵ Surely, the Getty Museum would have preferred its opening day press to be about other events.

If bad press and high litigation costs are not enough to encourage employers to consider implementing anti-sexual favoritism and harassment programs, the possibly exorbitant legal liability should be. The Civil Rights Act of 1991 which amended Title VII added remedies for intentional sex discrimination by providing for jury trials, expert witness fees, and punitive damages.³¹⁶ These penalties, coupled with other Title VII penalties, can lead to large awards for plaintiffs and their attorneys in sexual harassment claims. For example, in November 1995, Janet Dumas was ordered reinstated with accrued benefits, and Tyson Foods, Inc. was ordered to pay \$69,000 in compensatory damages plus \$8,000,000 in punitives.³¹⁷ Further, the court enjoined Tyson Foods and all of its officers, agents, supervisors and employees "from maintaining the existence of a sexually hostile work environment for the female employees of the Blountsville plant."³¹⁸ According to some commentators, this single incident is part of a larger trend of high-priced damage awards for sexual harassment.³¹⁹

The Court in *Meritor Savings Bank v. Vinson*³²⁰ held that employers might be held vicariously liable for their supervisors' acts even if the employer did not have actual notice of the alleged events and the plaintiff suffered no economic harm.³²¹ It is this added uncertainty for

313. See Ann W. O'Neill, *A Fly in the Getty Punch Bowl*, L.A. TIMES, Dec. 7, 1997, at B1.

314. See *id.*

315. See *id.*

316. See Casey & Tuschman, *supra* note 6, at 53, 56 n.1 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 102, 113, 105 Stat. 1071 (1991) (codified in part at 42 U.S.C. § 2000e-5(k) (1995))).

317. See Goldstein, *supra* note 153, at 105 (citing Dumas v. Tyson Foods, Inc., Civil Action No. 93-C-2688-W (N.D. Ala. 1995)).

318. *Id.*

319. See *id.* (citing Christine Whitesell Lewis et al., *The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment*, 55 ALA. LAW. 33 (1994)).

320. 477 U.S. 57 (1986).

321. See *id.* at 68-73.

employers that makes their position even more precarious. Not surprisingly, risk management becomes a factor, and insurance companies have found sexual harassment insurance a lucrative business.³²² Such insurance is the fastest growing kind of insurance coverage in the United States in the 1990s with many companies spending up to \$100,000 per year on it.³²³

B. How Employers can Avoid Liability

As is clear from the above, sexual favoritism should be discouraged because it invites a multitude of legal and business problems for employers.³²⁴ Although employers can sometimes insulate themselves from legal damages by purchasing insurance policies, employers still have an incentive to avoid liability altogether.³²⁵

The EEOC guidelines for sexual harassment claims identify ways in which an employer can limit liability for the acts of its employees and supervisors.³²⁶ In general, these guidelines and the courts' interpretations of them recommend that an employer "(1) implement a written sexual harassment policy that encourages meritorious claims; (2) promptly and effectively investigate all claims;" (3) remedy all problems; and (4) monitor subsequent events to confirm that the remedy is effective.³²⁷ Employers fail to meet these four requirements the follow-

322. See *More Firms Insuring for Harassment*, L.A. TIMES, Jan. 24, 1998, at D1.

323. See *id.*

324. See Casey & Tuschman, *supra* note 6, at 55; Rachael A. Hetherington & Barbara Childs Wallace, *Recent Developments in Sexual Harassment Law*, 13 MISS. C. L. REV. 37, 84 (1992).

325. Not all legal liability is insurable. Generally, intentional torts are excluded from liability coverage either under the policy itself or as a matter of public policy established by the courts. See KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 87-88 (2d ed. 1995). Some states, including California, as a matter of public policy, also preclude insurers from paying an insured's punitive damages regardless of what the insurance contract purports to cover. See *id.* at 75-88.

326. See 29 C.F.R. § 1604.11(d)-(f) (1997). An employer can avoid liability for conduct between its employees if "it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). Employers "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII." 29 C.F.R. § 1604.11(f).

327. See *Potts v. BE & K Constr. Co.*, 604 So. 2d 398 (Ala. 1992); Cooper, *supra* note 78, at 24; Goldstein, *supra* note 153, at 108-09 (citing *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); Hetherington & Wallace, *supra*

ing ways: making unfulfilled promises to investigate, demoting the victim, advising that a slander suit could result from the complaint,³²⁸ advising the complainant to "tell [the harasser] you have herpes,"³²⁹ and advising the complainant to avoid notifying the EEOC.³³⁰

Although the dos and especially the do nots of creating and abiding by an effective anti-sexual harassment policy may seem obvious, one easy way to ensure that sexual favoritism claims do not get raised or turn into sexual harassment cases is to institute no-dating policies among employees. Judicial precedent supports allowing employers to enforce no-dating policies, especially as between supervisors and subordinates.³³¹ Such prohibitions, however, must be uniformly enforced. In *Zentiska v. Pooler Motel, Ltd.*,³³² the defendant employer lost a sexual discrimination case when it was revealed that the area director who was involved with hiring and firing decisions was not terminated when he dated and eventually married an employee.³³³ Of course, no-dating policies should be part of a larger anti-sexual harassment policy.

VIII. CONCLUSIONS

For some, recognizing sexual favoritism as a valid cause of action under Title VII would be like "launching a missile to kill a mouse."³³⁴

note 324, at 85-89); Joe A. Simmons, *Sexual Harassment—Prophylactic Measures*, 19 OHIO N.U. L. REV. 661, 666-68 (1993).

328. See Cooper, *supra* note 78, at 24 n.119 (citing Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992)).

329. *Id.* (quoting Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989)).

330. See *id.* (citing Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987)).

331. See, e.g., Casey & Tuschman, *supra* note 6, at 55, 56 n.29 (citing Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1993)). In *Sarsha*, the court held that Sears was allowed "to enforce a no-dating policy . . . against supervisors, who by virtue of their managerial positions are expected to know better . . ." *Sarsha*, 3 F.3d at 1042. *But see* Pasch v. Katz Media Corp., No. 94 Civ. 8554 (RPP), 1995 WL 469710 (S.D.N.Y. Aug. 8, 1995) (holding that New York Labor Law section 201-d prohibits employers from enforcing no-dating rules because dating is a "legal recreational activity"); Seth Howard Borden, Note, *Love's Labor Law: Establishing a Uniform Interpretation of New York's "Legal Recreational Activities" Law to Allow Employers to Enforce No-Dating Policies*, 62 BROOK. L. REV. 353, 353-55 (1996).

332. 708 F. Supp. 1321 (S.D. Ga. 1988).

333. See *id.* at 1322-23, 1325. Of added interest is that the female employee plaintiff was initially terminated for dating her manager even though the manager was aware of the no-dating policy and the female employee was never informed of the policy. See *id.* at 1323. Such results are all-too-common. As one researcher found, when such drastic actions as termination are taken, "females were twice as likely to be terminated as males." See Van Tol, *supra* note 5, at 166 & n.57 (citing Quinn, *supra* note 5, at 50). In *Zentiska*, however, the female was quickly rehired and the manager was later terminated for his relationship with the plaintiff, whom he eventually married. See *Zentiska*, 708 F. Supp. at 1323, 1325.

334. With apologies for borrowing Justice Blackmun's now-famous dissent in *Lucas*

Making sexual favoritism cases actionable would also provide the slippery slope for other supposedly less egregious forms of discrimination to enter the courtroom.³³⁵ These arguments, however, merely cloud the true issues.

In this age of anti-affirmative action, most people (at least in California)³³⁶ believe it is wrong to grant preferential treatment to less qualified applicants on the arbitrary basis of race, sex, ethnicity, or national origin.³³⁷ If this concern about the less-qualified applicant is to be consistently applied, then the courts and legislatures should extend the principle to cases where the different, but no less provocative, arbitrary criteria of sexual preferences and performances control job opportunities. Admittedly, it may be easier from an evidentiary standpoint to identify cases where less qualified non-whites are the beneficiaries of employer preferences than it is to spot cases where less qualified lovers get the job; but the injuries to the qualified applicants are exactly the same in both situations. Further, when comparing the beneficiaries of sexual favoritism to the beneficiaries of an affirmative action program, it can be argued easily that less social good is achieved by promoting the paramour instead of the non-white.

Courts and the EEOC have already admitted that sexual favoritism is an unfair form of discrimination even though they have yet to make it actionable.³³⁸ This is an irony that needs fixing, and courts have the

v. South Carolina Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting) (noting that in its majority decision on Fifth Amendment takings standards, "the Court launches a missile to kill a mouse").

335. See *supra* notes 199-201 and accompanying text (discussing Congress's failure to expand VII to "affectional or sexual orientation" cases); *supra* notes 232-34 and accompanying text (discussing the possibility of "transexuality" or even "appearance" claims).

336. California citizens voted in favor of a statewide anti-affirmative action proposal called the California Civil Rights Initiative (Proposition 209), Assembly Constitutional Amendment No. 2, 1995-96 Reg. Sess. (1994). See Allen R. Kamp, *Anti-Preference in Employment Law: A Preliminary Analysis*, 18 CHICANO-LATINO L. REV. 59, 59 n.1 (1996). California governor Pete Wilson, in signing an executive order ending affirmative action for female and minority business owners seeking state contracts, said: "From now on, the state will award contracts . . . based solely on the basis of merit." See Jenifer Warren, *Wilson Abolishes Affirmative Action in State Contracts*, L.A. TIMES, Mar. 12, 1998, at A1.

337. See CAL. CONST. art. 1, § 31(a) (West 1997).

338. See *supra* notes 7, 145 and accompanying text (noting that courts have not recognized sexual favoritism claims as actionable while simultaneously recognizing its unfairness).

authority to do such fixing.³³⁹ Ignoring sexual favoritism claims results largely in perpetuating female stereotypes in the workplace at the expense of qualified candidates of both genders, thereby destroying the very concept Title VII was intended to secure—equality in the workplace for equal job skills.³⁴⁰ Courts should recognize sexual favoritism for what it is: improper and actionable sex discrimination.

MITCHELL POOLE

339. See *supra* notes 68, 259-68, 283 and accompanying text (discussing the courts' ability to construe Title VII broadly).

340. See, e.g., Chamallas, *supra* note 171, at 856-57; Van Tol, *supra* note 5, at 181-82 (noting that "[t]he use of a sexual standard focuses on employees' sexuality rather than their abilities; it devalues the worker's real worth, fosters resentment towards women, and reinforces the insidious stereotypical notion that women can 'sleep their way to the top'").