

The Paramour's Advantage: Sexual Favoritism and Permissibly Unfair Discrimination

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Abstract Despite the prevalence of sexual favoritism in the workplace, there is much debate over whether this phenomenon rises to the level of prohibited discrimination and harassment. While the United States Supreme Court has not yet involved itself in adjudicating issues of sexual favoritism, the Equal Employment Opportunity Commission, however, has issued guidelines. The California Supreme Court recently addressed the “sexual favoritism as sexual harassment/discrimination” issue and, absent better guidance from the federal courts, the California decision provides interesting insights for the legal and business communities. This article explores key issues involving workplace romances, sexual favoritism, and Title VII’s prohibition of sexual harassment as an illegal form of discrimination based on sex. We use the recent California Supreme Court decision in *Miller* to illustrate the legal and managerial challenges facing policy makers and management practitioners. We conclude with a discussion of policy alternatives for creating a discrimination- and harassment-free workplace while effectively managing workplace romances and instances of sexual favoritism.

Keywords Sexual favoritism · Sexual harassment · Title VII · Workplace romance · Paramour

Introduction

Consider the not too uncommon workplace romance where a supervisor has a consensual sexual relationship with a subordinate, and the subordinate ultimately enjoys preferential treatment (e.g., promotions, salary increases) while similarly skilled, or even more deserving, coworkers do not enjoy the fruits of such favoritism. Are the “less favored” coworkers victimized by illegal discrimination? If the supervisor in question has had a series of consensual relationships over the years, and these paramours all enjoyed similar favoritism in the workplace, does such behavior

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create a hostile work environment for the coworkers who did not (and were never given the opportunity to) participate in the manager's liaisons? What if multiple managers engaged in such behavior?

While sexual favoritism is nothing new in the workplace, there is much debate over whether this phenomenon rises to the level of prohibited discrimination and harassment. The United States Supreme Court has heretofore not involved itself in adjudicating issues of sexual favoritism in the workplace. The Equal Employment Opportunity Commission (EEOC), however, has issued its *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990a) (hereafter "Policy Guidance"), but even this has been subject to considerable interpretation. Recently, the California Supreme Court addressed the "sexual favoritism as sexual harassment/discrimination" issue in the case of *Miller v. Department of Corrections* (hereafter, "*Miller*"),¹ and absent better direction from the federal courts, this 2005 California decision provides interesting issues for the legal and business communities to ponder regarding the circumstances under which sexual favoritism is deemed a violation of Title VII.

Using the EEOC Policy Guidance and the *Miller* case as means for provoking discussion, this article explores key issues involving sexual favoritism and Title VII's prohibition of sexual harassment as an illegal form of discrimination based on sex. Sexual favoritism might never be a major issue if not for the prevalence of workplace romances. Because workplace romance is a natural precursor to sexual favoritism, we first briefly review the extent and nature of romantic liaisons in contemporary organizations. After examining Title VII's prohibitions against workplace discrimination based on sex, we explore one of the more common forms of prohibited discrimination—sexual harassment. We then address how sexual favoritism arising from workplace liaisons may be viewed as a form of sexual harassment, thereby potentially creating significant liability for employers.

Next, three general types of sexual favoritism are identified, and their possible relationships to Title VII prohibitions are discussed. We find that some forms of sexual favoritism (those that closely parallel traditional sexual harassment models) are clearly prohibited. There exists a rather large gray area once behavior cannot be readily identified as belonging to either of the traditional definitions of sexual harassment. We use the recent California Supreme Court decision in *Miller* to illustrate the legal and managerial conundrums that continue to challenge policy makers and management practitioners. Given the still unsettled reach of sexual harassment law into the modern workplace, and particularly how it pertains to sexual favoritism, managers might wonder whether the current state of the law requires a "sanitized" workplace in order to insulate the firm from liability arising from Title VII claims. Is it desirable, or even possible, to desexualize the modern workplace, and will employers ultimately will be forced to assume the role of "relationship police?" For these managers, we conclude with a discussion of the challenges of finding effective policy alternatives for creating a discrimination- and harassment-free workplace while effectively managing workplace romances and instances of sexual favoritism.

The foundations of favoritism: Workplace romances

Workplace romances are the genesis of, and precursors to, sexual favoritism. While academic interest in workplace romance is a relatively recent phenomenon (beginning in the 1970s), it is probably true that workplace romances always could be found wherever workplaces exist.

¹ The case was initially designated *Mackey v. Department of Corrections*. Francis Mackey, along with Edna Miller, were the plaintiffs. Prior to the California Supreme Court undertaking the case, Mackey died. As a result, Miller became the lead plaintiff/appellant.

Workplace romance has been variously defined as “a relationship between two members of the same organization that is perceived by a third party to be characterized by sexual attraction” (Quinn, 1977, p. 30); as “mutually desired romantic relationships between two people at work in which some element of sexuality or physical intimacy exists” (Foley & Powell, 1999, p. 1043); and as “those relationships that occur between men and women working together that are: (a) characterized by mutual sexual attraction, and (b) made known to others through the participants’ actions (Mainiero, 1986, p. 750). Paul and Townshend (1998) modified Mainiero’s earlier definition by referring to simply “relationships between people. . . whether or not they are made known to others” (p. 25; cf. Powell & Mainiero, 1990). In our opinion, while these (and other) definitions have much in common and generally express the common-sense notion of what constitutes a workplace romance, we would agree that these romances need not be heterosexual (cf., Pierce, Byrne, & Aguinis, 1996); moreover, while romances could conceivably exist without the knowledge of third parties, it is precisely this knowledge that exacerbates the risks associated with these relationships.

The prevalence of workplace romances should not be surprising given the sexual integration of the workforce and the workplace’s role as a major locus of social life for men and women (Pierce *et al.*, 1996). Two decades ago, Gutek (1985) reported that as many as 80% of American workers acknowledged having different types of social-sexual experiences on the job. In that same year, Dillard and Witteman (1985) found that almost 75% of the subjects interviewed claimed that they either observed or participated in workplace romantic relationships. Schaefer and Tudor (2001), as well as Pierce and Aguinis (2001), cite more recent statistics indicating that little has changed over the last twenty years.

The Bureau of National Affairs (1988) identified three different kinds of problematic workplace relationships: nepotism, office romance, and sexual harassment. Pierce and Aguinis (1997) recognized that, because workplace romances and sexual harassment both contain a sexual component, it does not make sense to treat them as independent phenomena. We couldn’t agree more. Moreover, Pierce and Aguinis distinguished “lateral romances” (i.e., between two romantically involved employees of the same organizational status) from “hierarchical romances” (i.e., between employees occupying different rungs of the organizational ladder, and particularly when these liaisons involve formal, direct reporting relationships). Because it is generally recognized that the hierarchical romance is more problematic by virtue of its potential for unfairness, our discussion of sexual favoritism necessarily assumes the existence of a hierarchical romance.

Gender discrimination, sexual harassment, and sexual favoritism

The legal and managerial issues arising from sexual favoritism can be better understood by first examining the nature of sexual harassment, and sexual harassment must be viewed within the context of gender discrimination. The evolving law of sexual favoritism owes its existence to the development of the law of sexual harassment, which in turn derives from the interpretation and application of the law prohibiting workplace discrimination. We turn now to an overview of these interrelated issues.

Gender discrimination

Four decades ago Congress addressed the issue of discrimination in the workplace via the Civil Rights Act of 1964. Title VII of this landmark legislation prohibited discrimination based on race, color, religion, sex, or national origin. Unfortunately, while there is little ambiguity surrounding words like “race,” “color,” “religion,” or “national origin,” there is virtually no legislative history

that informs us of Congress's intent about the meaning of the word "sex" (but see Bird, 1997). Even the common and simplifying assumption that "sex" is synonymous with "gender" fails to remove the ambiguity arising from Congress's last-minute inclusion of the word "sex" in Title VII. Without guidance from Congress, the federal courts have been given the responsibility by default for interpreting Congress's intent. Indeed, sexual harassment law owes its very existence to judicial interpretations of the meaning of Title VII's prohibition of discrimination based on "sex."

Reasonable people would probably agree that the denial of workplace opportunities and benefits to women (or men)—based *solely* on the fact that they are women (or men)—unambiguously constitutes gender discrimination. This is precisely identical to discrimination based on race (e.g., denying opportunities and benefits to Asians based solely on the fact that they are Asian), or discrimination based on religion (e.g., denying opportunities and benefits to Muslims based solely on the fact that they are Muslims). Since the passage of the Civil Rights Act of 1964, this sensible view of discrimination has been extended over the intervening decades to include instances of "harassment," whereby members of a protected class (based on race, religion, sex, etc.) are subjected to uncivil, disrespectful treatment that ultimately alters the conditions of their working environment. When gender is the nexus of such harassing behavior, the courts have determined that "sexual harassment" is an unlawful form of discrimination for which employers can be held liable.

Sexual harassment

Sexual harassment has been recognized as a violation of Title VII for nearly thirty years. The first instances of sexual harassment recognized by the courts involved the trading of sexual favors for employment benefits (e.g., *Barnes v. Costle*, 1977). Catherine MacKinnon, in her 1979 landmark study of the sexual harassment phenomenon, labeled this type of behavior "quid pro quo" harassment—"in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity" (p. 32)—and the term was first used by federal appellate courts in the case of *Henson v. City of Dundee* (1982). This form of harassment involves not only the power imbalance between supervisors and subordinates, but also the concepts of sexual desire and sexual attraction. When the denial of tangible job benefits is conditioned upon the exchange of sexual favors, the courts have held that employers are strictly liable for the quid pro quo harassment perpetrated by supervisors.

In 1980, the EEOC issued its Guidelines on Discrimination Because of Sex that, while not legally binding, were influential in guiding later court rulings in gender discrimination cases. The EEOC defined unlawful sexual harassment in violation of Title VII as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (29 C.F.R. § 1604.11(a)). The first and second elements of the definition elaborate on the notion of quid pro quo harassment, and the third element captures the essence of "hostile environment" harassment.

In 1986 the United States Supreme Court, in *Meritor Savings Bank v. Vinson*, forever altered the sexual harassment landscape by ruling that unwelcome behavior, even though it may be consensual, is a form of prohibited gender discrimination that need not involve demands for sexual favors. Following the EEOC's approach, the definition of sexual harassment was extended beyond quid pro quo coercive exchanges to include prohibited behavior that was severe or

pervasive enough to create an “abusive” or “hostile” work environment. In contrast to quid pro quo harassment, a hostile or abusive environment does not require the denial (or threat of denial) of any tangible job benefits; rather, the severity and pervasiveness of the harassment was viewed as negatively altering the conditions of employment (and thus was a form of discriminatory behavior). The *Meritor* decision prompted the EEOC in 1990 to update its guidance on defining sexual harassment and establishing employer liability (EEOC, 1990b).

The Supreme Court once again refined the law of sexual harassment in the late 1990s by finding that, while employers are “vicariously liable” for hostile environment harassment (i.e., harassment not associated with tangible employment benefits) conducted by supervisors, employers could assert an “affirmative defense” against liability. In the companion cases, *Burlington Industries, Inc. v. Ellerth* (“*Ellerth*”) and *Faragher v. City of Boca Raton* (“*Faragher*”), both decided on the same day in 1998, new standards for imposing employer liability for sexual harassment emerged. To better implement Title VII’s objectives of encouraging employers to craft anti-harassment policies and for employees to utilize the available grievance mechanisms, the court established a two-pronged affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise” (*Ellerth*, p. 765). Such a defense incorporates the common law doctrine of “avoidable consequences,” which states that the aggrieved party should mitigate damages, and therefore is entitled to only those damages that could not reasonably have been avoided. In *Faragher*, the Court adopted the two-prong affirmative defense articulated in *Ellerth* as a way to balance vicarious liability with “Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees. . .” (p. 807).

Sexual favoritism

With the prevalence of workplace romance, it is inevitable that romances will end, and some of them will end badly. Spurned lovers, frustrated expectations, and failed relationships, especially between superiors and subordinates, provide fertile ground for typical claims of sexual harassment. Sexual favoritism in the workplace, however, exists when a romantic relationship between superior and subordinate leads to decisions, actions, or benefits that adversely affect the employment opportunities of other employees. Thus, sexual favoritism involves the discriminatory granting of a workplace benefit or opportunity; in contrast, sexual discrimination typically involves the withholding of opportunities or benefits based on a person’s gender. When workplace romance involves sexual favoritism, what remains is the question of whether (or to what extent) the existence of such favoritism can be used as the basis for a claim of sexual harassment by employees who are *not directly involved* in the paramour relationship. Whether sexual favoritism remains a permissible form of discrimination, or whether it rises to the level of a prohibited form of sexual discrimination, is a question that can only be addressed within the context of the definition of sexual harassment.

In 1980, the EEOC initially recognized the phenomenon of sexual favoritism as a form of unlawful discrimination based on sex by stating: “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” (29 C.F.R. § 1604.11(g)). Subsequently, several “paramour cases” arose within the federal court system. After the Supreme Court’s decision in 1986 in the *Meritor* case—whereby the “hostile work environment” definition of sexual harassment was first enunciated by the Court—the

EEOC found it prudent to revise its guidelines in light of the *Meritor* decision. In 1990, the EEOC (then headed by Clarence Thomas, later appointed an Associate Justice of the Supreme Court) promulgated its Policy Guidance and identified three types of sexual favoritism: isolated favoritism, favoritism resulting from coercion, and widespread favoritism.

Isolated favoritism

Without defining precisely what it meant by “isolated,” the EEOC Policy Guidance stated that “an isolated instance of favoritism toward a ‘paramour’ (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.” Thus, the EEOC currently condones a form of permissibly unfair discrimination in cases of isolated sexual favoritism on the presumption that such isolated instances do not affect the conditions of employment to a sufficiently significant degree to violate Title VII. Under these circumstances, an isolated instance of preferential treatment based upon consensual romantic relationships does not expose the employer to liability.

Favoritism involving coerced sexual conduct

Using the well-established principles underlying the quid pro quo form of sexual harassment, the EEOC acknowledged that “if a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit.” The employee’s quasi-voluntary acceptance of favored status stemming from the coercive quid pro quo arrangement does not immunize the employer from liability for this kind of favoritism. Moreover, both men and women who were qualified for but who were denied the job benefit in question could challenge this kind of favoritism based on the theory that they were injured due to the discrimination suffered by the employee who was coerced into providing sexual favors. Thus, non-favored employees may have a derivative or implicit quid pro quo claim against the employer.

Widespread favoritism

Even if an employee who was granted favorable treatment willingly bestowed the sexual favors (and who might have even welcomed them), EEOC Policy Guidance states that “if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them.” Under these circumstances, the EEOC recognized that a not-so-subtle message is conveyed to the workplace that managers consider women as “sexual playthings.” (In a footnote to the Policy Guidance, the EEOC points out that, while female pronouns are used to refer to individuals throughout the document, the recommendations also cover those situations where men are the subjects of the offending behavior. Although the Policy Guidance is not explicit on the issue, we make the assumption that it applies to non-heterosexual expressions of favoritism.) Following the Supreme Court’s ruling in *Meritor*, the key to this variety of favoritism is whether the offending conduct is “sufficiently severe or pervasive” to alter the conditions of [their] employment and create an abusive working environment.”

California confronts sexual favoritism

The California Supreme Court, in its recent ruling in *Miller v. Department of Corrections*, addressed the issue of whether sexual favoritism constitutes unfair and illegal discrimination. In particular, the court was asked to come to a conclusion about how permissibly unfair discrimination arising from isolated favoritism should be distinguished from illegal discrimination arising from widespread favoritism. The case will undoubtedly be instructive for policymakers and management practitioners alike because it reversed two lower court rulings that, upon hearing the same set of facts, drew an entirely different boundary between permissible and illegal favoritism. Because the California Supreme Court has traditionally relied heavily on federal case law involving Title VII issues, should a similar question ever reach the United States Supreme Court, we are confident that the reasoning used by the California Supreme Court will be seriously considered by the nation's highest court.

The *Miller* soap opera

Almost half of the lengthy *Miller* decision is devoted to a review of the facts that led Edna Miller and Frances Mackey, both employees within California's correctional system, to bring sexual harassment charges against their employer. Without reconstructing the sordid and titillating details, suffice it to say that examples of power, politics, and sexual intrigue embodied in every soap opera ever written can be found within the recounting of the California case of *Miller v. Department of Corrections*.

A chief deputy warden (later promoted to warden) within the state's correctional system had a series of consensual affairs with at least three subordinates over a period of several years. These subordinates were the beneficiaries of sexual favoritism that resulted in the granting of numerous employment benefits, including promotions and more favorable working conditions. The liaisons were generally known throughout the workplace, and they were not merely items of speculation or gossip—an internal affairs investigation would later substantiate virtually all allegations of sexual favoritism. As the California Supreme Court noted, the workplace was characterized by “bragging, squabbling, fondling”; heterosexual, homosexual, and bisexual activities; both welcomed and unwelcomed sexual propositions; verbal and physical assaults; whistle blowing and retaliation; as well as a host of other forms of inappropriate, uncivil, demeaning, selfish, and sexually motivated behavior. Miller and Mackey sued claiming sexual favoritism trumped merit-based promotions and led to other forms of harassment thereby creating a hostile working environment sufficiently abusive and pervasive as to constitute illegal sexual harassment.

The issues

The trial court and lower appellate court both ruled against Miller and Mackey, finding that they had not made an adequate showing that the conduct was sufficiently severe and/or pervasive. On appeal, the California Supreme Court, however, overturned these decisions on the basis that there indeed existed evidence sufficient to establish a prima facie case of sexual harassment. The California Supreme Court chastised the lower appellate court for failing to understand the principle that even in the absence of coercive behavior, certain conduct creates a work environment so demeaning to women that it constitutes an actionable hostile work environment. Arguing from the EEOC's Policy Guidance, the California Supreme Court agreed that isolated instances of favoritism involving consensual workplace romances ordinarily would not constitute sexual harassment. It noted, however, that widespread favoritism could have the deleterious effect of transforming certain groups of employees into “sexual playthings,” thereby conveying the

demeaning message that the not-so-mythical Hollywood “casting couch” provided a vehicle for advancement within the organization.

To address concerns about the wisdom of regulating private and consensual relationships, the California Supreme Court argued that it was not the relationship itself, but rather its effect on the workplace, that becomes the relevant legal standard. Moreover, while “the presence of mere gossip is insufficient to establish the existence of widespread sexual favoritism,” the court found it hard to dismiss the evidence of favoritism that included “admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and [the warden’s] admission that he could not control [one of his paramours] because of his sexual relationship with her,” all of which was confirmed in the Department of Corrections’ own internal affairs investigation.

By its ruling in *Miller*, the California Supreme Court took full advantage of the typology of sexual favoritism developed in the EEOC’s 1990 Policy Guidance. Its decision to reverse the lower courts’ rulings, and to find in favor of Miller and Mackey, was constructed solidly on the principle that a “hostile environment” form of sexual harassment may occur due to widespread sexual favoritism. We can only hope that the sexual favoritism and its egregious effects uncovered in the *Miller* case does not reflect the “normal” or more common instances of sexual favoritism that are a fact of working life in some (if not many) organizations. The California Supreme Court could not address the facts in *Miller* in any other way; unfortunately, however, the facts did not allow for a more thorough analysis of the subtle differences between “isolated” and “widespread” sexual favoritism. Neither the EEOC Policy Guidance, nor the *Miller* decision, offers adequate assistance for determining the boundary between permissible and illegal sexual favoritism. What is the true determining factor that separates “isolated” favoritism, whereby a paramour does have an unfair advantage that is nevertheless permissible, and “widespread” favoritism, whereby the paramour’s advantage is both unfair and illegal because of the pervasiveness of such advantages within the organization? Are these distinctions even relevant?

Fine-tuning the sexual favoritism typology

Public policy makers and management practitioners alike have an interest in designing a policy framework whereby the rights of employees to not be discriminated against are safeguarded while simultaneously protecting organizations from liability arising from non-meritorious claims of sexual favoritism. Indeed, some commentators believe that all forms of sexual favoritism should be prohibited under Title VII (e.g., Poole, 1998; Van Tol, 1991), while others are more skeptical (e.g., Levy, 1994; Phillips, 1994). While the *Miller* decision takes a major step toward defining the relationship between sexual favoritism and sexual harassment, the California Supreme Court’s reliance on the EEOC Policy Guidance leaves critical issues unresolved, especially because those guidelines contain areas of substantial ambiguity including, for example, (1) the distinction between “isolated” and “widespread” favoritism, which both involve consensual, hierarchical romances; and (2) the distinction between coerced favoritism and widespread favoritism that creates a hostile environment for non-paramour co-workers, which both involve some form of unwelcomeness. Moreover, burden of proof issues arise when trying to distinguish among the various forms of favoritism.

“Isolated” versus “widespread” favoritism

The EEOC’s Policy Guidance states “Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships.” The EEOC also acknowledges that an

isolated instance of favoritism toward a paramour (or a friend or spouse) may be “unfair,” yet not discriminatory in violation of Title VII, since both women and men are equally disadvantaged on the basis of something other than gender. In contrast, the Policy Guidance states “if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment.” These two statements provide no clarification as to the dividing line between “isolated” and “widespread,” either in terms of the number of paramours or the number of managers who are engaged in such preferential behavior. What also remains unclear is whether “isolated” allows for multiple instances of preferential treatment directed toward one person, or whether it limits the number of separate manifestations of preferential treatment directed toward that person.

Rather than clarifying the meaning of “isolated” and “widespread,” the EEOC’s choice of language actually creates additional areas of ambiguity. For example, is “isolated” favoritism limited to a single relationship with only one paramour, or could it also apply to serial relationships with multiple paramours? And would it apply to a small number of simultaneous relationships, or must the relationships be non-overlapping? If they must be non-overlapping, is there some necessary time required between relationships that would preserve their “isolated” nature? In a relatively large organization that employs many managers, moreover, can more than one manager engage in an isolated instance of favoritism without such behavior being classified as widespread? With respect to the number of paramours whom an individual manager might have over a particular period of time, one would suspect that there comes a point where reasonable people would agree that instances of favoritism can no longer be considered isolated. Similarly, the number of managers who engage in sexual favoritism is surely a major factor in distinguishing between “isolated” and “widespread” favoritism. Finally, the size of the organization necessarily affects one’s definition of widespread—what may be considered widespread in a small organization might be viewed as isolated in a large organization.

Returning to the *Miller* case, for example, the warden had at least three paramours over a period of years, and the record suggests that at least two of these relationships were overlapping. Moreover, the chief deputy warden at the facility was engaged in her own sexual liaisons with subordinates. One of the paramours in this soap opera “acknowledged that affairs between supervisors and subordinates were common in the Department and were widely viewed as a method of advancement.” Unfortunately, the *Miller* decision provides very little guidance in addressing the isolated-versus-widespread definitional conundrums.

Given the egregious and embarrassing, almost implausible, set of facts in *Miller*, it is rather interesting to note that neither the trial court nor the Court of Appeal—both fully knowledgeable of the isolated-versus-widespread dichotomy created by the EEOC Policy Guidance—saw these instances of favoritism as sufficient to create a hostile environment based on the necessity of showing “widespread” favoritism. Because these lower courts did not find a concerted pattern of harassment sufficiently pervasive to have altered the conditions of the plaintiffs’ employment, we can only assume that these courts were not troubled by either the number of paramours involved or the number of managers engaged in sexual favoritism, especially given the size of the California Department of Corrections. The on-going ambiguity in determining the practical differences between favoritism that is “isolated” and favoritism that is “widespread” creates a serious dilemma for attorneys, policymakers, and managers alike.

Unwelcome “coercive” and “hostile environment” favoritism

The law of sexual harassment requires that harassing actions be unwelcome in order for them to be deemed illegal discrimination under Title VII—welcome conduct, the legal theory goes,

causes no harm (and therefore is not actionable). Moreover, the requirement that conduct be unwelcome serves to protect both the putative harasser and the employer—it requires that the employee provide notice to the alleged harasser that the conduct in question is offensive (thus providing the alleged harasser with an opportunity to voluntarily cease the harassing behavior).

Coerced favoritism

The EEOC Policy Guidance defines coerced favoritism in the following way: “If a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit.” Clearly, coerced favoritism involves behavior that is not willingly consensual (i.e., sexual favors are grudgingly and not willingly traded for a job benefit). The fact that an employee agrees to trade sexual favors alone is not conclusive regarding the question of the consensual nature of the exchange; rather, a more telling question would be: Would the employee being “propositioned” have been predisposed to accepting (or even initiating) such an arrangement before the quid quo pro offer was made? Under this rather unconventional scenario—where the subordinate either propositions (or is predisposed to proposition) a supervisor to trade sexual favors for a job benefit—the element of coercion as it is commonly understood would seem to disappear. Moreover, under this unconventional set of facts, wouldn’t a qualified co-worker be entitled to claim the existence of an implicit quid pro quo sexual harassment because the job benefit was conditioned upon the uncoerced granting of sexual favors?

Hostile environment favoritism

If favoritism is widespread within the organization (i.e., not considered an “isolated” instance), co-workers of either gender who find such conduct unwelcome can claim the existence of a hostile work environment even if the objectionable conduct was not directed toward them and regardless of whether the paramour welcomed the favoritism and willingly bestowed the sexual favors. In this case, offended co-workers claiming the existence of a hostile work environment are reacting against a workplace in which co-workers of a certain gender are reduced to “sexual playthings.” This demeaning aspect of corporate culture can be offensive to co-workers of either gender and, if these co-workers can demonstrate that the discrimination is sufficiently severe and pervasive to alter the conditions of their employment, the resulting abusive environment is illegal under Title VII.

Burden of proof issues

The burden of proof that sexual favoritism exists—either in its coerced form or in its hostile environment-creating form—lies squarely on the shoulders of those complaining co-workers who are offended by the paramour’s advantage. When coerced favoritism is at issue, these co-workers should be prepared to show that (1) the paramour received job benefits that were denied others, (2) the benefits were conditioned on the provision of sexual favors, (3) the exchange of sexual favors for job benefits was coerced (and unwelcome), and (4) co-workers were qualified for but failed to receive the benefit in favor of the paramour. While the first and fourth elements of proof might be obvious, the second and third elements are likely to be much more difficult to prove.

In the case of hostile environment-creating favoritism, the paramour’s advantage can be countered only if the co-workers can demonstrate that (1) sexual favors in return for job benefits

is taking place in the workplace, (2) the granting of sexual favors is unwelcome from the perspective of the co-workers, (3) sexual favoritism is an element of corporate culture that transcends isolated instances (i.e., widespread), and (4) their conditions of employment were altered because of the severity and pervasiveness of this abusive aspect of the corporate culture. Of these elements, the third and fourth would be the most problematic for co-workers seeking to establish a violation of Title VII.

The requirement that conduct be “unwelcome” in both coercive favoritism and hostile environment favoritism is problematic because of the difficulty in measuring precisely the degree to which conduct is unwelcome. In the larger context of sexual harassment law, the element of unwelcomeness has come under recent criticism (see, e.g., Chambers, 2002). For example, the inclusion of the unwelcome requirement implies that all behavior is welcome unless and until objections are raised. Or, as Chambers argues, “that message allows and, in some respects, encourages the sexualization of a workplace up to the level where an employee will complain about the conduct and allows the sexualization of a workplace up to the level at which an individual employee no longer will or can tolerate it” (Chambers, 2002, p. 783). Thus, rather than placing the burden on the harasser to refrain from engaging in offending behavior, the burden lies squarely on the shoulders of those who do not welcome the behavior. Nevertheless, absent policy changes removing the “unwelcome” requirement from sexual harassment law, the concept remains an essential element to be proven in all claims of sexual favoritism. Given the welcome-unwelcome continuum, the degree to which actionable sexual favoritism was unwelcome will be an important evidentiary issue for establishing the damages arising from the altered conditions of employment.

Managing sexual favoritism: Challenges and policy alternatives

Workplace romances create organizational dynamics somewhat akin to the interaction between the irresistible force and the immovable object. Because the workplace serves both social and economic purposes, social interaction leading to workplace romance will continue to be a fact of organizational life. At the same time, however, these romances may occur between superiors and subordinates which, in turn, creates the possibility for sexual favoritism, with the attendant danger that such favoritism may rise to the level of sexual harassment based either on a claim of coercion or a hostile work environment. The employer’s natural desire to limit or avoid economic liability for illegal discrimination arising from sexual harassment exists simultaneously with the natural desire of employees to seek social (and perhaps romantic) relationships with fellow workers while having their privacy protected.

Management challenges

Contemporary managers must necessarily build organizations, both structurally and culturally, in a way that recognizes (and appropriately balances) the economic objectives and social realities of the modern workplace. Thus, in addition to spending considerable time and energy formulating and implementing competitive strategy designed to create economic value within industries inhabited by intelligent and hungry competitors, managers must also give ample attention to such organization-building questions as:

- With respect to workplace romance, what is the best way to balance employee privacy rights with the employer’s right to manage the workplace in a way that ensures high productivity and economic value creation?

- To what extent can (or should) we “manage” sexual favoritism that will inevitably arise? Put another way, what organizational policies are required, if any, to effectively address instances of sexual favoritism in the workplace?

In answering these and similar questions, management faces an interesting dilemma about the degree to which it will seek to “sanitize” the workplace in furtherance of the goal of eliminating sexual harassment. On one end of the continuum, managers may try to create a desexualized workplace free of sexual harassment through the aggressive creation and application of antiharassment policies. At the other end of the continuum there exists another alternative that is conceptually bold, intellectually enlightened, and philosophically idealistic: accept the reality of a sexualized workplace, but make it free of sexual harassment by aggressively creating and applying policies that focus on greater gender equality and better integration of the workforce (Schultz, 2003). Current management practice tends to follow the former approach but, in our opinion, the latter approach offers a better long-term likelihood of accomplishing the equal opportunity and antidiscrimination objectives embodied in Title VII.

To their credit, and especially after the *Ellerth/Faragher* decisions, organizations have been more aggressive in establishing anti-harassment policies as a first line of defense against claims of discrimination based on sex. The question that managers must ask is whether these policies are adequate to effectively address the realities of the contemporary workplace in which romance is a fact of working life. For limiting the risks associated with what might be called traditional forms of sexual harassment (i.e., quid pro quo and hostile environment harassment) not involving consensual and reciprocated romance, existing (and broadly written) sexual harassment policies arguably continue to serve a useful and important purpose. To the extent that they are formulated and applied to drive discrimination from the workplace, these policies are absolutely essential; to the extent that they are formulated and applied to drive sexuality and romance from the workplace, they are misguided, inappropriate and, ultimately, ineffective.

Policy alternatives

To address the multiple legal causes of action that could arise from workplace romances, a number of policies currently in use apply one or more sanitizing approaches (see, e.g., Chen & Sambur, 1999; Lenzo, 2003). For example, firms may take a “monastic,” zero-tolerance approach to workplace romance by prohibiting all dating between co-workers regardless of station in the organizational hierarchy (Borden, 1996). An extension of this would be to prohibit spouses as well (Wolkenbreit, 1997). Alternatively, firms may take a “military” approach by either prohibiting fraternization between superiors and subordinates altogether, or by establishing a “don’t ask, don’t tell” policy based upon keeping secrets. Alternatively, some organizations could employ a “date-and-tell” approach requiring superiors to reveal that they are in an intimate relationship with a subordinate (Kramer, 2000). An absolute prohibition against dating, in our opinion, is impractical to enforce and would potentially undermine the morale and productivity of the workforce. A prohibition focused on only superiors and subordinates is more reasonable and legally defensible, but it might still have an adverse effect on employee morale due to perceptions of privacy infringement. The “don’t ask, don’t tell” approach requires a level of secrets-keeping, discretion, and confidentiality that may be difficult to maintain. Employers might also purchase employment practice liability insurance to protect themselves from claims of sexual harassment, wrongful termination, and other illegal employment practices (Kramer, 2000).

Perhaps the most innovative development in managing workplace romance between superiors and subordinates involves consensual relationship agreements, otherwise commonly known as

“love contracts” (see, e.g., Chen & Sambur, 1999; Kramer, 2000; Schaefer & Tudor, 2001). Utilizing a written agreement whereby both parties to the relationship agree that the relationship is consensual, the employer seeks to avoid future liability if (or when) the relationship ends. By documenting the consensuality of the relationship, these agreements seek to overcome any future claim that the conduct was unwelcome, thus minimizing the employer’s risk of a viable sexual harassment claim. This legal mechanism also serves the important purpose of providing notice to employers that the potential of sexual favoritism exists, or could be perceived to exist by co-workers, thus motivating the employer to more closely monitor the workplace for early signs of inappropriate favoritism arising from the relationship. While the notion of a “love contract” might first strike someone as being rather bizarre tool created by lawyers for the benefit of lawyers, it does reflect a rather civil, honest, and up-front approach to managing inevitable romances between superiors and subordinates.

Toward a workable paramour policy

Human resource managers probably already know (but may be unwilling to admit) that policies seeking to desexualize the workplace are, for all practical purposes, unworkable and undesirable. Policies aimed at sanitizing the workplace—relying as they do on intrusions into private lives, rumors and gossip, and innuendo—while easy to establish, are difficult, if not impossible, to enforce. The modern workplace has been characterized as a “natural dating service” (Jones, 1999), and it will remain a primary venue for individuals to search for romantic partners, be they life partners or one-night stands—attempting to desexualize the workplace is not only futile, it is undesirable.

In our opinion, the existence of romantic relationships and paramours in the workplace can be successfully managed through the creation and application of policies that effectively balance the employer’s interest in stimulating economic productivity with the employee’s interest in preserving individual privacy. A workable approach to effectively managing the inevitable romantic relationships—including (and perhaps especially) the paramour’s advantage—will require something more than simply relying on the firm’s existing sexual harassment policy. A new policy—the firm’s “paramour policy”—must be developed that minimizes the firm’s exposure to liability arising from sexual favoritism while preserving the employees’ freedom to pursue social-sexual relationships with other members of the organization. A formal written policy should be preferred to an informal, unwritten policy. Moreover, it should focus exclusively on superior-subordinate relationships (i.e., no other form of “dating” policy is required, or desired).

The firm’s paramour policy must begin with *definitions*, *explanations*, and *examples* of acceptable (i.e., legal) and unacceptable (i.e., illegal) forms of sexual favoritism following the EEOC guidelines currently in effect, and these must be specifically tailored to fit organizational factors such as size, structure, and culture (see, e.g., Foley & Powell, 1999). In particular, the policy must clearly distinguish between legally permissible “isolated” instances of sexual favoritism from illegal (and liability-creating) favoritism, be it of the “coercive” variety akin to quid pro quo sexual harassment, or of the widespread variety akin to hostile environment harassment. Of course, the firm should forcefully discourage sexual favoritism of all kinds, but it must do so while acknowledging that the federal agency in charge of establishing guidelines accepts that isolated instances of uncoerced favoritism—while unfair—do not violate Title VII antidiscrimination provisions. An effective policy would include *conflict of interest provisions* that require superiors to *recuse* themselves from making decisions that bestow (or could potentially bestow) economic benefits (e.g., promotions and raises) or non-economic benefits (e.g., work schedules, team assignments) on the paramour. While Phillips (1994) was correct when

he pointed out that “Title VII never was intended to rectify every employment-related injustice or to establish the Perfectly Meritocratic Workplace” (p. 597), we believe that the paramour policy should express the firm’s commitment to a merit-based system of incentives and rewards. Moreover, employees will find it easier to comply with the policy’s conflict of interest and recusal provisions if it also requires *written disclosure* by the paramours of the existence of a consensual paramour relationship, but the firm need not go so far as to require the signing of “love contracts,” which may be perceived as by some as heavy-handed, embarrassing, and demoralizing.

The paramour policy must contain provisions facilitating its implementation and enforcement. Because the issue of sexual favoritism is so intricately linked to the perceptions of coworkers, an effective policy must provide employees with a *process for reporting concerns* about perceived instances of sexual favoritism occurring in the workplace. The policy must express the employer’s commitment to *preserve confidentiality* for those employees providing written disclosure of romantic relationships, as well as for those employees reporting what is perceived to be inappropriate behavior. Full implementation of the policy requires *periodic and on-going training* for all employees. Special training sessions should be offered to supervisory personnel regarding the legal and economic risks and consequences to the firm (and to the participants) for impermissible paramour relationships. To be most effective, all policies must contain reasonable *enforcement mechanisms* that are fairly applied to all employees, superiors and subordinates alike. Sanctions, ranging from a letter of reprimand for minor violations to dismissal for multiple or egregious violations, should be commensurate with the potential risk and harm to the organization arising from the inappropriate behavior.

Conclusion

The *Miller* case decided by California’s Supreme Court is the latest high-profile example of the complexities of sexual harassment law and the interpretation of Title VII. Surprisingly, and perhaps ironically, the federal regulations, federal case law, and now a leading state supreme court recognize that a supervisor may grant employment benefits to a paramour without running afoul of Title VII as long as the instances of sexual favoritism are isolated. When sexual favoritism is widespread within an organization, or when sexual favors are coerced from the subordinate, the current state of the law holds employers liable for sexual harassment based on hostile environment and implicit quid pro quo theories of sex discrimination. Under certain circumstances, the paramour’s advantage is real and, while recognizably unfair, is a permissible form of workplace discrimination. While the EEOC might at some future date choose to revise its Policy Guidance on sexual favoritism by either clarifying the boundary between isolated and widespread favoritism, or perhaps even declaring that all sexual favoritism—whether isolated, widespread, or coerced—is a form of illegal discrimination based on sex, we doubt that such specificity will be forthcoming.

Faced with the reality of a sexualized workplace where sexual favoritism will inevitably occur, managers have an important choice to make—they can either seek to create and enforce policies with the intent of sanitizing the workplace of sexual (or romantic) activity, or they can work to create an organizational culture that both minimizes the firm’s exposure to legal liability for sexual harassment while recognizing that employees will naturally mix business with pleasure. Care must be taken that the organization’s existing sexual harassment policy be supplemented with provisions, such as those described above, which address effectively the sexual favoritism phenomenon. Cupid’s presence in the workplace, particularly when hierarchical romances are involved, can be managed without resorting to tactics that would require management to

become the equivalent of “romance police.” There is no reason why civility, mutual respect, and workplace romance cannot coexist if organizations adopt and enforce enlightened policies and procedures.

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