

# PLAYING FAVORITES IN THE WORKPLACE: WIDESPREAD SEXUAL FAVORITISM AS ACTIONABLE DISCRIMINATION UNDER *MILLER V.* *DEPARTMENT OF CORRECTIONS*

VERONICA DIAZ<sup>\*</sup>

*A young associate just out of law school catches the managing partner's eye. She is spending a lot of time in his office. Soon the speculation begins: Were they eating dinner together? Did he have his hand on her elbow? Suddenly she is being placed on high-profile cases and given a big bonus.*

*Meanwhile, all the attorneys in the firm just watch and whisper. Then the female attorneys begin asking themselves: Am I going to have to "F" my way to the top, too?<sup>1</sup> What else is there to do? Isn't that just how the world works?*

Well, not in California, the California Supreme Court ruled last year.

## I. INTRODUCTION

In a decision that has been the subject of widespread media coverage, *Miller v. Department of Corrections*,<sup>2</sup> the California Supreme Court held that a supervisor's unwarranted favorable treatment of subordinate employees, with whom the supervisor has consensual affairs, may create a

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\* J.D. Candidate, University of California Gould School of Law, 2007; B.A., Political Science, Stanford University, 2002. I would like to thank my family and friends for supporting me with and in everything I do, and especially the staff of RLSJ for their professionalism and dedication to making this publication possible.

1. This vulgar question is included because it mirrors facts in *Miller*. See *Miller v. Dep't of Corr.*, 115 P.3d 77, 82 (Cal. 2005); see also *infra* note 33.

2. 115 P.3d 77 (Cal. 2005).

hostile work environment.<sup>3</sup> This ruling allows employees who have been adversely affected by widespread sexual favoritism to sue for sexual harassment<sup>4</sup> under the California Fair Employment and Housing Act (FEHA).<sup>5</sup>

Plaintiffs Edna Miller and Frances Mackey,<sup>6</sup> two female employees at the Valley State Prison for Women, filed a complaint<sup>7</sup> against the Department of Corrections and its director, claiming that the chief deputy warden of the prison accorded unwarranted favorable treatment to numerous subordinate female employees he was bedding. Such favoritism, the plaintiffs claimed, constituted sexual harassment and sex discrimination in violation of FEHA.<sup>8</sup> The California Supreme Court upheld their claims,

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3. The essential elements of a hostile environment claim are as follows:
    1. The defendant engaged in harassing conduct toward the plaintiff, or plaintiff personally witnessed the harassing conduct and it took place in his/her immediate work environment;
    2. Plaintiff's protected status was a motivating factor for the harassment;
    3. This conduct was unwelcome and *sufficiently severe or pervasive* that it had the purpose or effect of altering the conditions of plaintiff's employment and creating an intimidating, hostile, abusive, or offensive working environment;
    4. The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by a reasonable person in the same position as the plaintiff;
    5. The environment created was perceived by the plaintiff as intimidating, hostile, abusive, or offensive;
    - 6a. The defendant was employed by the employer as a manager, supervisor, or agent; and
    7. This environment caused plaintiff injury, damage, loss or harm.

CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 12.05 (2005) (emphasis added) [hereinafter BAJI].

Harassment based upon a protected status includes, but is not limited to: (A) verbal harassment, including epithets, derogatory comments, or slurs; (B) physical harassment, including an assault, or interference with normal work or movement; (C) visual forms of harassment including derogatory posters, cartoons or drawings; (D) unwanted or unwelcome sexual advances which condition an employment benefit upon an exchange of sexual favors. *Id.*

4. Sexual harassment is unlawful, and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. CAL. CODE REGS. tit. 2, § 7291.1(f)(1) (2006). There are two categories of sexual harassment: (1) "quid pro quo" harassment and (2) "hostile work environment" harassment. *See* 29 C.F.R. § 1604.11(a)(2)-(3) (2005).

5. The Fair Employment and Housing Commission (FEHC), the agency responsible for issuing the California FEHA regulations (codified at CAL. GOV'T CODE § 12900 et seq.), promotes and enforces the civil rights of the people of California to be free from unlawful discrimination in employment, pursuant to FEHA. FEHC Home Page, <http://www.fehc.ca.gov> (last visited Nov. 18, 2006). The California FEHA expressly prohibits sexual harassment in the workplace: "It shall be an unlawful employment practice . . . [f]or an employer . . . because of . . . sex . . . to harass an employee." CAL. GOV'T CODE § 12940(j)(1) (2005) [hereinafter FEHA].

6. Plaintiff Frances Mackey died in 2003. *Miller*, 115 P.3d at 80 n.1. The Court substituted her son, Sterling Odom, as a party in his capacity as personal representative of her estate. *Id.* The Court designated plaintiff Edna Miller as the lead plaintiff and retitled the case accordingly. *Id.*

7. Plaintiffs also filed a complaint alleging a claim of retaliation brought under the California FEHA, which is outside the scope of this Note. *See id.* at 85.

8. *Miller*, 115 P.3d at 85-87. Plaintiffs styled their claims of sexual harassment and sex discrimination as constituting one single cause of action, which the Court of Appeal and Supreme Court

relying on the Equal Employment Opportunity Commission (EEOC) policy guidelines—sexual favoritism in a workplace, when “sufficiently widespread,” could create a hostile work environment because “the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.”<sup>9</sup> The Court concluded that the evidence was sufficient to establish a prima facie case of sexual harassment.<sup>10</sup>

Over the last hundred years, the California Supreme Court has “blazed its fair share of legal trails.”<sup>11</sup> Some legal analysts believe that fifty years from now, the Court’s unanimous decision in *Miller* may well be looked back upon as yet another legal watershed originating in California.<sup>12</sup> Indeed, when the Court handed down its decision in *Miller*, the media and legal community went into a frenzy, jumping to the conclusion that the Court yet again created new legal rights and significantly expanded the scope of unlawful sexual harassment.<sup>13</sup> Some commentators viewed

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treated as such, even though the claims are distinct causes of action under the FEHA. *See id.* at 86 n.5. The courts chose to analyze plaintiffs’ claim principally under the law applicable to sexual harassment for three reasons: (1) plaintiffs based their claims on the same circumstances; (2) the thrust of their argument in the courts had been that they were subjected to sexual harassment; and (3) precedent holds that sexual harassment is a form of sexual discrimination. *See id.* (citing *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 348 (1993)).

9. *Miller*, 115 P.3d at 80; *see also id.* at 88 (citing EEOC Off. Legal Counsel, Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism No. N-915-048 (1990), in 2 EEOC Compliance Manual § 615, ¶ 3113 [hereinafter EEOC Policy Statement No. N-915-048]); *infra* notes 90-99.

10. *See Miller*, 115 P.3d at 80.

11. John H. Douglas, *Consensual Office Affairs: On-the-Job Relationships Pose Legal Risks if They Evidence Widespread Sexual Favoritism*, NAT’L L.J., Oct. 31, 2005, at S1, S1.

12. *Id.*

13. *See, e.g.*, Roberto Cenicerros, *California Supreme Court Decision Opens New Avenue for Sexual Harassment Lawsuits*, BUS. INS., July 25, 2005, § News, at 3; Maura Dolan, *Affairs at Work Subject to Suits*, L.A. TIMES, July 19, 2005, at A1; Andrew Gumbel, *Now Americans Can Sue if Their Boss Is Sleeping with Someone Else*, INDEP. (London), July 20, 2005, § Foreign News, at 26; John P. LeCrone, *California Supreme Court Expands Protections for Workers*, EMP. L. STRATEGIST, Oct. 2005, § News, at 1; *Nation in Brief*, WASH. POST, July 19, 2005, at A13; Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9 (Style Desk), at 1; *Sleeping with the Boss Is Now an Illegal Affair*, CANBERRA TIMES (Austl.), July 23, 2005, at A22; Duane Morris LLP, *Recent California Employment Cases: Instructive for Employers in All States*, DUANE MORRIS ALERTS & UPDATES, Aug. 25, 2005, <http://www.duanemorris.com/alerts/alert1945.html>; Jack Sholkoff, *Holland & Knight LLP, California Supreme Court Expands Definition of Sexual Harassment*, CALIFORNIA EMPLOYMENT ALERT, July 19, 2005, <http://www.hklaw.com/content/newsletters/caemploymentalert/caemp071905.pdf>; Farella Braun & Martell LLP, *Alert: California Supreme Court Finds That Consensual Relationship Between Co-workers May Create Hostile Work Environment for Other Employees*, THE FARELLA PERSPECTIVE, July 19, 2005, [http://www.fbm.com/index.cfm/fuseaction/publications.archive/publications\\_archive.cfm](http://www.fbm.com/index.cfm/fuseaction/publications.archive/publications_archive.cfm) (select “Employment” on drop-down menu; then follow hyperlink of article’s title next to

widespread sexual favoritism as a new cause of action, which was previously outside the scope of sex discrimination under FEHA.<sup>14</sup>

Many say, “Where California goes, other states follow.”<sup>15</sup> In light of California’s influence upon courts nationwide, the decision in *Miller* is extremely significant to sexual harassment law in the United States. Thus, it is important to address whether the *Miller* Court indeed created new legal rights where there were none and whether widespread sexual favoritism may constitute hostile-environment sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>16</sup>

This Note addresses the California Supreme Court’s decision in *Miller* and explores the legal boundaries of widespread sexual favoritism claims under Title VII. Part II introduces the facts of *Miller*.<sup>17</sup> Part III explores *Miller*’s reasoning with regard to widespread sexual favoritism, demonstrating that the Court did not create new legal rights within the boundaries of sexual harassment law.<sup>18</sup> Part IV introduces Title VII, discusses the theory by which the United States Supreme Court and the EEOC came to recognize sexual harassment as a form of sex discrimination, and reviews the various theories and rationales debating whether or not widespread sexual favoritism is a valid cause of action.<sup>19</sup> Finally, Part V concludes that, despite the potential problems associated with sexual favoritism claims, there is sufficient room in both the statutory language and United States Supreme Court precedent to recognize widespread sexual favoritism for what it is—improper and actionable discriminatory behavior.<sup>20</sup>

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“07/19/2005”); Thelen Reid & Priest LLP, *California Supreme Court Rules “Sexual Favoritism” May Constitute Unlawful Harassment*, CLIENT ALERT, Aug. 18, 2005, at 1, [http://www.thelenreid.com/resources/documents/art\\_257\[1\].pdf](http://www.thelenreid.com/resources/documents/art_257[1].pdf).

14. See sources cited *supra* note 13.

15. Chris Penttila, *In the Hot Seat: One Person’s Promotion Is Another’s Harassment Claim*, ENTREPRENEUR, Jan. 2006, at 19.

16. Title VII reads in relevant part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2000) [hereinafter Title VII].

17. See *infra* notes 21-50 and accompanying text.

18. See *infra* notes 51-116 and accompanying text.

19. See *infra* notes 117-221 and accompanying text.

20. See *infra* notes 222-232 and accompanying text.

## II. EDNA MILLER'S CASE

Plaintiff Edna Miller began working for the Department of Corrections as a correctional officer in 1983.<sup>21</sup> In 1994, while employed at the Central California Women's Facility, she learned from other employees that the male chief deputy warden, despite being married, was openly conducting simultaneous sexual affairs with his secretary, associate warden, and a Department employee.<sup>22</sup> Evidence later revealed that these affairs began in 1991 and continued until 1998.<sup>23</sup>

In February 1995, Miller was reassigned to the Valley State Prison for Women (VSPW), where the warden had also been relocated.<sup>24</sup> When the warden transferred prisons, he arranged for his three sexual partners to join him, promising and granting them unwarranted and unfair employment benefits.<sup>25</sup> For example, one was granted the power to abuse other employees who complained about the affairs,<sup>26</sup> and another was granted the privilege to directly report to the warden rather than to her immediate supervisor.<sup>27</sup>

There was evidence that advancement for women at the prison facility was not based on merit but on sexual favors.<sup>28</sup> For example, the warden pressured Miller and other employees on the personnel selection committee to transfer his secretary to VSPW and to promote her to the position of correctional counselor, despite the committee's opinion that she was not eligible or qualified.<sup>29</sup> Committee members were told by the warden to set aside their professional judgment and "make it happen."<sup>30</sup> Miller later reported, "This was . . . the first of many incidents which caused me to lose faith in the system . . . and to feel somewhat powerless because of [the warden] and his sexual relations with subordinates."<sup>31</sup>

The warden succeeded in transferring his secretary to the new facility and promoting her from clerical to correctional staff even though she

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21. *Miller*, 115 P.3d at 81; *see also supra* note 6.

22. *Miller*, 115 P.3d at 81.

23. *Id.* at 90.

24. *Id.* at 81.

25. *Id.* at 90.

26. *Id.*

27. *See id.* at 91.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* at 81 (quoting Plaintiff Miller).

lacked qualifications.<sup>32</sup> At the same time, the warden refused to permit Plaintiff Mackey to secure the on-the-job training that would have enabled her to make a similar advance.<sup>33</sup> Mackey believed that she was denied this opportunity because she was not one of the warden's sexual partners.<sup>34</sup>

On two occasions, the warden gave promotions to one of his sexual partners rather than to the more qualified Miller.<sup>35</sup> This employee enjoyed an unprecedented pace of promotion to facility captain and, eventually, to associate warden, causing outraged female employees to ask such questions as, "What do I have to do, 'F' my way to the top?"<sup>36</sup> The employee even told Miller that the promotion belonged to her because she was sleeping with the warden and announced that if she was not awarded the promotion, she would "take [the warden] down" because she "knew every scar on his body."<sup>37</sup>

The Court found that the warden viewed female employees as "sexual playthings" and that his resulting conduct conveyed this demeaning message in a manner that affected the workforce as a whole.<sup>38</sup> During at least three work-related social gatherings, various employees, including plaintiffs, observed the warden and his secretary fondling one another.<sup>39</sup> One employee reported that during one such social event, the warden had placed his arm around her and engaged in unwelcome fondling of her.<sup>40</sup>

Adding to this hostile work environment, two of the warden's sexual partners continued to brag to other employees of their power to extort benefits from the warden.<sup>41</sup> Jealous scenes between the warden's lovers occurred in the presence of Miller and other employees.<sup>42</sup> Several employees complained to internal affairs that women engaged in sexual affairs with the warden received special benefits.<sup>43</sup> During Miller's last

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32. *See id.* at 81-81. Mackey joined the Department in 1975 as a clerk, and after receiving a number of promotions, was transferred to VSPW in 1996 as a records manager, with the promise that she would continue to receive certain enhanced salary benefits related to directly handling inmates. *See id.* at 84-85. At her interview for the new position, she announced her ambition to be promoted to a position as a correctional counselor. *See id.* at 85. The warden told her if she improved the VSPW records office, he would award her such a promotion. *See id.*

33. *See id.* at 91.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

meeting with the warden to voice her complaints, he told her that one of his partners was manipulative, he was “finished” with her, and instead should have chosen Miller—a comment Miller took to mean that he should have chosen her for a sexual affair.<sup>44</sup>

Miller eventually resigned from the Department in 1998,<sup>45</sup> and at the same time, Mackey took a leave of absence due to stress and health problems.<sup>46</sup> When Mackey returned to work, she was demoted and suffered further mistreatment and humiliation.<sup>47</sup> A few months later she resigned, finding the conditions of employment intolerable.<sup>48</sup>

Miller and Mackey filed complaints with the Department of Corrections and the Department of Fair Employment and Housing, and they later filed a lawsuit.<sup>49</sup> In 2005, their case was heard by the California Supreme Court, which found their evidence sufficient to prove that the warden had created a hostile work environment at the prison.<sup>50</sup>

### III. MILLER DID NOT SIGNIFICANTLY EXPAND SEXUAL HARASSMENT LAW

When the California Supreme Court handed down *Miller* in the summer of 2005, the media and the legal community accused the Court of creating new legal rights where none existed, thereby significantly broadening sexual harassment law.<sup>51</sup> Law firms rushed to warn clients about the supposedly dire post-*Miller* situation, where any employee aware of a consensual workplace romance may be entitled to file a sexual harassment complaint, even when not personally harassed or sexually propositioned.<sup>52</sup> One commentator called the decision “groundbreaking,”<sup>53</sup> and another stated that the ruling marked a “significant change,”<sup>54</sup> arguing that California employers would be more vulnerable to employment suits after *Miller*.<sup>55</sup>

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44. *See id.*

45. *See id.* at 84.

46. *See id.* at 85.

47. *See id.*

48. *Id.*

49. *Id.* at 84-85.

50. *Id.* at 90.

51. *See* Alisa J. Baker & Richard E. Levine, *The Miller Case: Not So Tragic*, RECORDER, Aug. 19, 2005, at 4; *see also* sources cited *supra* note 13.

52. *See, e.g.,* Farella Braun & Martell LLP, *supra* note 13; Thelen Reid & Priest LLP, *supra* note 13; Duane Morris LLP, *supra* note 13; Sholkoff, *supra* note 13.

53. *Nation in Brief*, *supra* note 13.

54. Dolan, *supra* note 13.

55. *See id.*; *see also* Duane Morris LLP, *supra* note 13.

As California's judiciary has often set the stage for judicial precedents later adopted by other states,<sup>56</sup> *Miller* is potentially important not only to California employers, but also to employers in other states. A threshold matter, then, is whether *Miller* actually signifies a departure from the existing sexual harassment law. This Note thus addresses the following questions: Did *Miller* create new legal rights where none existed? And did it significantly broaden sexual harassment law?

Some commentators assert that *Miller* has departed from the existing law in four respects: (1) a claim for sexual harassment can apply now to people who have no sexual interaction whatsoever;<sup>57</sup> (2) now, even a worker who did not have an affair and did not receive unwanted sexual attention can prevail on a sexual discrimination claim in California;<sup>58</sup> (3) sleeping with the boss now can be an illegal affair because *Miller* places a blanket ban on workplace sex;<sup>59</sup> and (4) *Miller* broke new ground by expressly relying on EEOC policy guidance.<sup>60</sup> However popular these assertions may be, all four are patently incorrect. In fact, *Miller* did not create new legal rights where none existed and cannot be dismissed as a California aberration.

A. *MILLER* DOES NOT SIGNIFICANTLY EXPAND UNLAWFUL SEXUAL  
HARASSMENT BECAUSE CALIFORNIA LAW HAS LONG RECOGNIZED THAT  
NEITHER ACTUAL SEXUAL ACTIVITY NOR UNWANTED SEXUAL  
ADVANCES ARE NECESSARY TO A SEXUAL HARASSMENT CAUSE OF  
ACTION

California has long recognized that neither actual sexual activity nor unwanted sexual advances are necessary for a sexual harassment cause of action.<sup>61</sup> Thus, in this respect, nothing about *Miller* should make news. The *Miller* Court itself noted that its decision “breaks no new ground, citing earlier appellate decisions for the propositions that sexual harassment under a hostile work environment theory does not require sexual conduct, and that a plaintiff’s work environment may be affected not only by conduct directed at herself, but by the witnessed treatment of others.”<sup>62</sup>

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56. See Duane Morris LLP, *supra* note 13.

57. See Gumbel, *supra* note 13.

58. See Dolan, *supra* note 13.

59. See Gumbel, *supra* note 13; see also David Kadue & Thomas Kaufman, *A Tragedy of Manners: Flawed Reasoning Equates Workplace Sexuality with Gender Discrimination*, RECORDER, Aug. 12, 2005, at 4.

60. See Kadue & Kaufman, *supra* note 59.

61. See Baker & Levine, *supra* note 51.

62. *Id.*

Indeed, it is certainly not news that a sexual harassment claim may succeed absent sexual activity directed toward a plaintiff. In 1993, the California Court of Appeal upheld a police officer's sexual harassment claim in *Accardi v. Superior Court*,<sup>63</sup> where the officer was subjected to unreasonable and unfair work conditions, demeaning rumors, threats of bodily harm and derogatory and condescending remarks because she was a female police officer in a department that did not want any female police officers.<sup>64</sup> The male officers' harassment of her was not associated with any sexual activity whatsoever, but the Court of Appeal found that she suffered both discrimination and sexual harassment under a hostile work environment theory.<sup>65</sup>

Similarly, it is not newsworthy that a defendant's sexual conduct directed toward *someone else* in the workplace can create for a plaintiff the severe and pervasive effects necessary for a hostile environment.<sup>66</sup> In 1989, the California Court of Appeal in *Fisher v. San Pedro Peninsula Hospital* ruled that a physician's hugging, kissing, groping and pulling nurses *other than the plaintiff* onto his lap could constitute sexual harassment, if the plaintiff could show "sufficient facts to establish a nexus between the alleged sexual harassment of others, her observation of that conduct and the work context in which it occurred."<sup>67</sup>

In light of these appellate decisions, *Miller* did not break new ground on these issues but merely conformed to the existing sexual harassment law.

B. MILLER DOES NOT SIGNIFICANTLY BROADEN UNLAWFUL SEXUAL HARASSMENT BECAUSE IT HAS LONG BEEN CALIFORNIA PRACTICE TO CONSIDER EEOC POLICY GUIDELINES WITH REGARD TO SEXUAL HARASSMENT CLAIMS AND SEXUAL FAVORITISM ISSUES—GUIDELINES THAT HAVE NEVER PLACED A BLANKET BAN ON WORKPLACE SEX

The most popular misconception of the *Miller* decision is that the California Supreme Court significantly expanded unlawful sexual harassment by placing a blanket ban on workplace sex, thereby making

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63. 17 Cal. App. 4th 341 (1993).

64. *Accardi*, 17 Cal. App. 4th at 346, 350-53.

65. *See id.*; *see also* BAJI, *supra* note 3.

66. *See* Baker & Levine, *supra* note 51; *see also* BAJI *supra* note 3.

67. *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 613-14 (1989). In that case, the employee's complaint lacked specificity (it did not indicate under what circumstances she observed the sexual acts), and the court granted her leave to amend the cause of action for sexual discrimination. *See id.* at 614.

sexual affairs with one's boss illegal.<sup>68</sup> This assertion drastically misinterprets the Court's entire decision, misunderstanding the Court's conclusion regarding employer liability in *isolated* sexual favoritism cases as compared to employer liability in *widespread* sexual favoritism cases.<sup>69</sup> Moreover, many attack the Court's adherence to the EEOC policy statement that guided the Court to its conclusion.<sup>70</sup>

#### 1. The Court's Articulation of EEOC Policy Statement No. N-915-048<sup>71</sup>

The 1990 EEOC policy statement on which the Court so heavily relied in *Miller* is titled "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism" ("EEOC Policy Statement No. N-915-048").<sup>72</sup> It examines various issues of sexual favoritism and relies, in part, on a number of federal court decisions that considered harassment circumstances similar to *Miller*.<sup>73</sup>

EEOC Policy Statement No. N-915-048—and consequently *Miller*—acknowledges that not all types of sexual favoritism violate Title VII.<sup>74</sup> For example, according to the policy statement, Title VII does not prohibit *isolated* instances of preferential treatment based upon consensual romantic relationships:

An isolated instance of favoritism toward a "paramour" . . . may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman.<sup>75</sup>

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68. See *Sleeping With the Boss Is Now an Illegal Affair*, *supra* note 13; Kadue & Kaufman, *supra* note 59.

69. EEOC Policy Statement No. N-915-048, *supra* note 9; see discussion *infra* Part III.B.1.

70. See discussion *infra* Part III.B.2.

71. A deeper analysis of EEOC Policy Statement No. N-915-048 can be found in Part IV. The purpose of mentioning it now is to clarify the court's actual holding in order to show that the court did *not* place a blanket ban on workplace sex or supervisor-subordinate relationships in the workplace.

72. *Miller*, 115 P.3d at 88-90; EEOC Policy Statement No. N-915-048, *supra* note 9.

73. *Miller*, 115 P.3d at 88-90; see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986).

74. *Miller*, 115 P.3d at 88-90; EEOC Policy Statement No. N-915-048, *supra* note 9.

75. EEOC Policy Statement No. N-915-048, *supra* note 9 (footnote omitted); see also *Benzies v. Illinois Dep't of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 180 (3d Cir. 1985); *Miller*, 115 P.3d at 89.

Alternatively, sexual favoritism that is not isolated may ground a sexual harassment cause of action.<sup>76</sup> According to the policy statement, *widespread* sexual favoritism *may* constitute hostile environment harassment:

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

Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit “quid pro quo” harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.<sup>77</sup>

Following the guidance of the EEOC and using the standards adopted in prior California Supreme Court cases, *Miller* articulated that sexual favoritism in a workplace, when sufficiently widespread, could create a hostile work environment because “the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.”<sup>78</sup> The Court agreed with the EEOC that isolated instances of favoritism towards a “paramour” may not constitute sexual harassment, but widespread favoritism may constitute hostile environment harassment.<sup>79</sup>

Just as a “stray” sexually offensive comment will not support a claim of sexual harassment, the Court’s conclusion in *Miller* does not suggest that

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76. EEOC Policy Statement No. N-915-048, *supra* note 9; *see also Miller*, 115 P.3d at 89.

77. EEOC Policy Statement No. N-915-048, *supra* note 9 (citations and footnotes omitted), *quoted in Miller*, 115 P.3d at 89.

78. *Miller*, 115 P.3d at 88-89.

79. *Id.* at 94.

a discreet affair between a supervisor and a subordinate will provide a third-party employee with an actionable claim.<sup>80</sup> Thus, in no way does the Court's holding based on EEOC Policy Statement No. N-915-048 place a blanket ban on workplace sex or make sleeping with the boss an inherently illegal affair.

## 2. The Court's Adherence to EEOC Policy Statement No. N-915-048

The Court has been criticized for its adherence to EEOC Policy Statement No. N-915-048.<sup>81</sup> Some legal commentators do not consider EEOC policy guidance legal authority and interpret *Miller*'s heavy reliance on the policy statement as a departure from the existing sexual harassment law.<sup>82</sup>

David Kadue and Thomas Kaufman of *The Recorder* argue that, by claiming it was merely following federal law, the *Miller* Court "uncritically adopted the litigation position of the EEOC."<sup>83</sup> Kadue and Kaufman believe that *Miller* did not follow adequate legal authority in relying on EEOC Policy Statement No. N-915-048 because the policy is not a proper federal legal authority.<sup>84</sup> They contend that the pro-plaintiff commentary in the policy statement should not be relied on because the commentary is essentially the litigation position of the EEOC's employee-advocacy arm, adopted without the benefit of the notice-and-comment process required by administrative rule-making.<sup>85</sup> They contrast this to EEOC Guidelines in 1980 that were "duly promulgated interpretive regulations, codified at 29 C.F.R. § 1604.11," which, they maintain, is federal legal authority and therefore reliance on it is proper.<sup>86</sup>

While these critics make a strong argument by highlighting the difference between codified and uncodified EEOC policy guidelines, they critically err in not recognizing that the EEOC's administrative interpretation of Title VII, while not binding on courts, is still entitled to great deference.<sup>87</sup> In fact, past decisions have heavily relied on EEOC

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80. See Baker & Levine, *supra* note 51.

81. See sources cited *supra* note 13.

82. See, e.g., Kadue & Kaufman, *supra* note 59.

83. *Id.*

84. See *id.*

85. See *id.*

86. *Id.*

87. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.").

policy guidelines.<sup>88</sup> For decades, the United States Supreme Court has recognized that as an administrative interpretation of the Act by the enforcing agency, EEOC guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>89</sup> Thus, the United States Supreme Court has authoritatively asserted that EEOC policy guidelines constitute a body of experience and informed judgment on which other courts may properly rely.

The EEOC is comprised of five Commissioners and a General Counsel who are appointed by the president and confirmed by the Senate.<sup>90</sup> The five-member Commission is responsible for creating EEOC policy and approving most litigation.<sup>91</sup> The General Counsel is responsible for conducting EEOC enforcement litigation under Title VII.<sup>92</sup>

The EEOC was created in 1964 by Title VII.<sup>93</sup> By virtue of Executive Order 12067, the EEOC is primarily responsible for giving direction to the federal government’s equal employment opportunity efforts.<sup>94</sup> The EEOC provides this direction in various ways. For example, the EEOC develops uniform enforcement standards to apply throughout government which include standardized data collection and data sharing.<sup>95</sup> Also, the EEOC directs joint training programs, conducts investigations and ensures that EEOC policies are consistent.<sup>96</sup> The EEOC has a duty not only to enforce all federal EEO laws, but also to coordinate and lead the federal

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88. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986); *Toscano v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983); *Proskel v. Gattis*, 41 Cal. App. 4th 1626 (1996).

89. *Skidmore*, 323 U.S. at 140.

90. “Commissioners are appointed for five-year, staggered terms. The term of the General Counsel is four years. The President designates a Chair and a Vice Chair. The Chair is the chief executive officer of the Commission.” EEOC, *The Commission: The Commissioners and the General Counsel*, <http://www.eeoc.gov/abouteeoc/commission.html> (last visited Nov. 19, 2006).

91. *Id.*

92. *Id.* The General Counsel is also responsible for conducting EEOC enforcement litigation under the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. *Id.*

93. EEOC, *The Law*, <http://www.eeoc.gov/abouteeoc/35th/thelaw/index.html> (last visited Nov. 19, 2006).

94. EEOC, *Executive Order 12067*, <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-12067.html> (last visited Nov. 19, 2006). President Jimmy Carter signed Executive Order 12067 abolishing the Equal Employment Opportunity Coordinating Council and transferring its responsibilities to the EEOC. *Id.*

95. EEOC, *supra* note 93.

96. *Id.*

government's effort to eradicate workplace discrimination with regard to sex and other protected classifications.<sup>97</sup>

While performing its duties, the EEOC utilizes the special expertise of particular federal departments and agencies that also have equal employment opportunity responsibilities, and cooperates with various departments and agencies in the discharge of their respective responsibilities.<sup>98</sup> The EEOC also issues rules, regulations, policies, procedures and orders as it deems necessary to carry out its own responsibilities.<sup>99</sup> Departments and agencies are required to comply with all final rules, regulations, policies, procedures and orders of the EEOC.<sup>100</sup>

However, Kadue and Kaufman are correct in their assertion that the courts are not required to comply with EEOC Policy Statement No. N-915-048 because it is not "federal legal authority."<sup>101</sup> Although EEOC policy statements are not binding on the courts, the United States Supreme Court has declared that such statements are legitimate authority entitled to great deference.<sup>102</sup> After all, the statements not only consolidate a body of experience and informed judgment, but are also issued by the agency charged with administering Title VII.<sup>103</sup> Thus, it is reasonable to expect courts, like the *Miller* Court, to rely on such guidance.<sup>104</sup>

Furthermore, it is established California practice for courts to rely on administrative interpretations of Title VII to assist in interpreting the FEHA and its prohibition against sexual harassment.<sup>105</sup> Such a situation occurred when the *Miller* Court used EEOC guidance for a Title VII analysis to adjudicate plaintiffs' sexual harassment and sex discrimination claims under FEHA.<sup>106</sup> Thus, *Miller* did not depart from sexual harassment

97. EEOC, *supra* note 94.

98. *Id.*

99. *Id.*

100. *Id.*

101. Kadue & Kaufman, *supra* note 59.

102. See Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 553 (1994).

103. See *Miller v. Dep't of Corr.*, 115 P.3d 77, 88 (Cal. 2005).

104. In fact, EEOC Policy Statement No. N-915-048 clearly states that its purpose is to provide guidance on the extent to which an employer should be held liable for discriminating against individuals who are qualified for, but are denied, an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests.

EEOC Policy Statement No. N-915-048, *supra* note 9 (emphasis added).

105. See *Miller*, 115 P.3d at 88; *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 129-130 (1999); *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 517 (1998). Although FEHA explicitly prohibits sexual harassment of employees, while Title VII does not, both share the common goal of preventing discrimination in the workplace.

106. See *Miller*, 115 P.3d at 88-90.

authority but instead relied on an established California practice and reiterated sexual harassment law already in effect.

*Miller* is the target of much criticism, however, because many courts nationwide have not given much weight to EEOC Policy Statement No. N-915-048.<sup>107</sup> From this point of view, *Miller's* adherence to the policy statement may seem like an expansion of authority.

Federal courts of appeal have shown considerable hostility to the policy statement since its inception in 1990. No federal court of appeal has yet deemed consensual favoritism to be sufficiently widespread so as to constitute a hostile environment.<sup>108</sup>

Kadue and Kaufman have stated a hypothesis that explains why federal courts do not recognize consensual favoritism as creating a hostile environment. They state that “[g]iven the U.S. Supreme Court’s insistence that sexual harassment is simply a form of sex discrimination, it is no wonder that, until now, no appellate court had squarely adopted this EEOC litigation position.”<sup>109</sup> In other words, the United States Supreme Court’s simple approach that “no sex discrimination = no sexual harassment” has motivated courts to truncate their analysis of widespread sexual favoritism, never having to consider EEOC policies with regard to the topic.

Another reason it has taken so long for courts to grasp the concept of widespread sexual favoritism is that “the roots underlying the viability of sexual harassment claims are neither old nor deep.”<sup>110</sup> Despite the fact that the Title VII prohibition against sexual discrimination has been in effect since 1964, the United States Supreme Court only began recognizing sexual harassment as sex discrimination in the 1986 case of *Meritor Savings Bank, FSB v. Vinson*.<sup>111</sup> Thus, past experience suggests that courts “would be slow to take hold of a new branch of the sex discrimination tree.”<sup>112</sup>

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107. Douglas, *supra* note 11.

108. *Id.*; *see also, e.g.*, *Drinkwater v. Union Carbide Co.*, 904 F.2d 853 (3d Cir. 1990). In New Jersey, an employer was not liable for creating a hostile environment due to a consensual sexual relationship involving the plaintiff’s superior and co-worker because there was no evidence that such conduct was common knowledge or common place. *Drinkwater*, 904 F.2d at 861-62. The only other state Supreme Court that had considered similar claims found them viable only when the supervisor-supervisee sexual relationship was coerced. *See Erickson v. Marsh & McLennan Co.*, 569 A.2d 793 (N.J. 1990).

109. Kadue & Kaufman, *supra* note 59.

110. Mitchell Poole, Comment, *Paramours, Promotions, and Sexual Favoritism: Unfair, but Is There Liability?*, 25 PEPP. L. REV. 819, 829 (1998).

111. 477 U.S. 57 (1986).

112. Poole, *supra* note 110, at 829.

Although some commentators have called the *Miller* decision “groundbreaking,” the magnitude of this decision is highly overstated. California law already stipulates that a plaintiff may establish a hostile work environment for the purposes of a sexual harassment claim without demonstrating the existence of either sexual conduct directed at the plaintiff or even conduct of a sexual nature.<sup>113</sup> Therefore, the *Miller* Court simply followed the existing California practice and legitimate guidance from EEOC regulations on sexual favoritism.<sup>114</sup>

Barbara Lawless, a San Francisco attorney who represented both plaintiffs, declared that the case did not change existing law.<sup>115</sup> In fact, the decision in *Miller* was quite foreseeable. Nine years before *Miller*, in *Proskel v. Gattis*,<sup>116</sup> the California Court of Appeal anticipated *Miller*, warning that a romantic relationship between a supervisor and a subordinate *might* be relevant in establishing liability under a hostile work environment, sexual harassment theory.<sup>117</sup> Thus, *Miller* simply maintained California’s reputation as a pro-employee jurisdiction<sup>118</sup> without creating new legal rights for the employees.

#### IV. WIDESPREAD SEXUAL FAVORITISM MAY CONSTITUTE HOSTILE ENVIRONMENT SEX DISCRIMINATION

A major effect of *Miller* is its contribution to the current theoretical debate over whether widespread sexual favoritism may constitute hostile environment sex discrimination under Title VII. *Miller* evidences the potential of widespread sexual favoritism to become a discriminatory cause of action.

It is safe to assume that most people believe that obtaining employment or a promotion should not be conditioned on sexual conduct, but rather on unbiased assessments of that person’s work-related abilities.<sup>119</sup> With that in mind, the United States Supreme Court has held that sexual harassment is one form of sex discrimination.<sup>120</sup> However, it is

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113. See discussion *infra* Part III.A.

114. See Karen Ertel, *Warden’s Consensual Affairs Created Hostile Prison Workplace*, TRIAL: J. ASS’N TRIAL LAW. AM., Oct. 2005, at 78; discussion *infra* Part III.B.

115. Ertel, *supra* note 114, at 78.

116. 41 Cal. App. 4th 1626 (1996).

117. See *id.* at 1630. In that case, the employee’s claim was ultimately dismissed because she only proved the existence of romantic relations at the office but not favoritism. *Id.*

118. Andrew J. Ruzicho & Louis A. Jacobs, *Sexual Favoritism*, EMP. PRACS. UPDATE, Sept. 2005, at 2, 2.

119. Poole, *supra* note 110, at 820.

120. *Id.* (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986)).

sometimes difficult for courts to tell what kind of workplace conduct constitutes sex discrimination,<sup>121</sup> especially in cases of sexual favoritism.

Indeed, sexual favoritism in the workplace, which was first recognized as a potentially valid claim in the 1980s, has been “an elusive cause of action for most plaintiffs.”<sup>122</sup> For example, courts have struggled with the question of whether the prohibition against sex discrimination in Title VII is violated when a “supervisor grants preferential employment treatment to a paramour based on their intimate relationship.”<sup>123</sup>

The tension arises in part because Title VII applies only to discrimination, not conduct that might otherwise be “immoral, unethical, distasteful, or even demonstrably unfair.”<sup>124</sup> To succeed on a Title VII claim, a plaintiff must show that the act was *discriminatory*—that the action was taken *because of sex*, race, or some other protected characteristic.<sup>125</sup>

The tension also arises because the United States Supreme Court has left unanswered the question of whether sexual favoritism is an unlawful form of sex discrimination.<sup>126</sup> Thus, the United States Supreme Court provides no guidance for lower courts on how to adjudicate sexual favoritism issues. This Note questions whether widespread sexual favoritism based on consensual relationships is a form of sexual

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121. *Id.* at 820.

122. Joanna Grossman, *Can Consensual Workplace Sex Create a Hostile Environment?*, CNN.COM, July 29, 2005, <http://www.cnn.com/2005/LAW/07/29/grossman.workplace/index.html>. In most cases of sexual favoritism, a cause of action has only been recognized when the favoritism qualifies as a more overt form of sexual harassment. *See id.*

123. *Id.*

124. *Id.*; *see also* Title VII, *supra* note 16.

125. Grossman, *supra* note 122.

126. In 1987, the United States Supreme Court denied certiorari in a landmark sexual favoritism case. *See DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986) (holding that sexual favoritism was not actionable under Title VII).

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). 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 her. *See id.* at 146-47, 150. The Fourth Circuit found that, even if a superior was accepting sexual favors from a female applicant who was eventually promoted, the male applicant denied the promotion was not subject to sexual discrimination within the meaning of Title VII. *See id.* at 150.

In fact, the very link between sexual harassment and sex discrimination has not been fully analyzed by the United States Supreme Court. Each year federal and state courts entertain hundreds of sexual harassment claims under Title VII without *ever* questioning the underlying link between sexual harassment and sex discrimination. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692 (1997).

discrimination and answers the question in the affirmative, relying on a hostile environment theory.

### A. TITLE VII

A variety of laws, legal theories and administrative policies have fostered sex discrimination and sexual favoritism claims.<sup>127</sup> Title VII and its state law counterparts, however, are the most common channels for bringing claims of sexual favoritism or sexual harassment.<sup>128</sup> Indeed, plaintiffs in *Miller* brought their claims under FEHA, California's Title VII counterpart.<sup>129</sup> Although there are slight differences between FEHA and Title VII, both enactments share the common goal of preventing workplace discrimination.<sup>130</sup> In fact, California courts interpret FEHA in a manner wholly consistent with the federal courts' interpretation of Title VII.<sup>131</sup> Therefore, Title VII provides the central law under which this Note examines the issue of widespread sexual favoritism.

Title VII 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."<sup>132</sup> Congress added "sex" as a category of discrimination very late in the legislative process,<sup>133</sup> and as a result, it deprived courts of a well-developed legislative history that might assist them in interpreting what constitutes unlawful sex discrimination.<sup>134</sup> In 1977, the United States Supreme Court declared that Title VII's primary purpose is to eradicate

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127. See Poole, *supra* note 110, at 823 (citing Title VII, the Equal Pay Act of 1963, the Equal Protection Clause of the Fourteenth Amendment, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and various tort laws).

128. See *id.* at 823-24 (citing Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 161 n.30 (1991) (stating that Title VII "remains the primary basis" of remedies)).

129. See *Miller v. Dep't of Corr.*, 115 P.3d 77, 86-90 (2005); see also FEHA, *supra* note 5.

130. FEHA, *supra* note 5; cf. Title VII, *supra* note 16.

131. See *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

132. Title VII, *supra* note 16.

133. Poole, *supra* 110, at 824-25. After a relatively brief debate, the House of Representatives added "sex" to Title VII only two days before it voted on and passed the Civil Rights Act of 1964. See 110 CONG. REC. 2577-84, 2804 (1964). The Senate voted for the Act four months later without any apparent discussion or debate regarding the inclusion of "sex" to the list of Title VII categories. See 110 CONG. REC. 14,511 (1964); Poole, *supra* 110, at 824 n.27.

134. Poole, *supra* note 110, at 825; see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); Phillips, *supra* note 102, at 563-64 & n.81 (addressing whether sexual activity is inclusive in the term sex); Michael J. Levy, Note, *Sex, Promotions, and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination*, 45 HASTINGS L.J. 667, 668 (1994) (arguing that sexual favoritism is not prohibited by Title VII).

workplace discrimination “so that similarly situated employees do not receive disparate treatment simply because they are different sexes.”<sup>135</sup> However, this vague holding was not the Supreme Court’s last word on the meaning and scope of “sex discrimination” under Title VII.<sup>136</sup>

Given the lack of legislative history with regard to the scope of “sex” in Title VII, as well as a broad mandate to prevent discriminatory treatment by employers, the EEOC and some courts, like *Miller*, have come to identify sexual harassment and widespread sexual favoritism as forms of sex discrimination.<sup>137</sup>

### B. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION

In the late 1970s, courts started to acknowledge that sexual harassment created an objectionable barrier to the full and equal participation of women in the workforce,<sup>138</sup> and by 1980, the majority of courts leaned toward accepting sexual harassment claims.<sup>139</sup>

Following this movement, the EEOC in 1980 issued sexual harassment guidelines distinguishing the two primary types of sexual harassment: *quid pro quo* and *hostile work environment* harassment.<sup>140</sup> Quid pro quo sexual harassment occurs when either “(1) submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual’s employment,” or “(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”<sup>141</sup> Hostile work environment harassment occurs when “conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>142</sup>

Then, in the 1986 *Meritor* case, the United States Supreme Court sought support from EEOC guidelines and confirmed what the EEOC and most lower courts had already held over the prior decade—that sexual

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135. Poole, *supra* note 110, at 825 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977)).

136. Poole, *supra* note 110, at 825 (citing *Meritor*, 477 U.S. at 73).

137. Poole, *supra* note 110, at 825.

138. Poole, *supra* note 110, at 829; *see also* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 70 (1979).

139. Phillips, *supra* note 102, at 553.

140. *See* 29 C.F.R. § 1604.11. This Note discusses only sexual harassment based on hostile environment.

141. *Id.* § 1604.11(a)(2).

142. *Id.* § 1604.11(a)(3); *see also* BAJL, *supra* note 3.

harassment is a form of sex discrimination under Title VII, even though the statute and its legislative history are silent on the issue.<sup>143</sup>

The United States Supreme Court's confirmation that sexual harassment is a form of sex discrimination proved significant as a basis for widespread sexual favoritism claims. It demonstrated the judiciary's willingness to read Title VII's definition of sex discrimination broadly, and set precedent for a court to rely on EEOC policy guidelines to help interpret Title VII.<sup>144</sup>

### C. THE DEBATE OVER THE ACTIONABILITY OF "WIDESPREAD SEXUAL FAVORITISM"

In 1980, six years before *Meritor*, the EEOC added sexual favoritism to its list of illegal forms of sex discrimination.<sup>145</sup> Then in 1990, EEOC chair and future United States Supreme Court Associate Justice, Clarence Thomas, approved EEOC Policy Statement No. N-915-048, discussed in Part III of this Note.<sup>146</sup> While the policy provides guidance as to three forms of sexual favoritism, this Note is concerned with only one: widespread sexual favoritism. *Accordingly, in reviewing EEOC guidelines, is it possible for hostile environment sex discrimination to occur in a case of widespread sexual favoritism?*

Widespread sexual favoritism should be actionable if its causes and effects are sufficiently similar to those of traditional sexual harassment or sex discrimination, or if its causes and effects are within the scope of Title VII's prohibitions.<sup>147</sup> Courts, scholars and the EEOC have commented on whether either of these situations exist,<sup>148</sup> and this Note summarizes many of the arguments made.

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143. Poole, *supra* note 110, at 830-31; *see also* *Meritor Sav. Bank, FSB v Vinson*, 477 U.S. 57, 63-67 (1986); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 343 (1990); Christine Godsil Cooper, *Sexual Harassment: Preventive Steps for the Healthcare Practitioner*, 2 ANNALS HEALTH L. 1, 12 (1993) (noting that by 1977 courts recognized sexual harassment as a form of sex discrimination).

144. Poole, *supra* note 110, at 831-32 (citing *Meritor*, 477 U.S. at 65).

145. 29 C.F.R. § 1604.11(g).

146. EEOC Policy Statement No. N-915-048, *supra* note 9.

147. Poole, *supra* note 110, at 846.

148. *Id.*

### 1. Widespread Sexual Favoritism May *Not* Constitute Hostile Environment Sex Discrimination

There are at least four arguments for rejecting widespread sexual favoritism claims. Some of these arguments are based on strictly limiting the meaning of “sex” in Title VII to “gender,” and others rely on public policy rationales.

#### a. Argument #1: “Sex” only means “gender” under Title VII

Under EEOC Policy Statement No. N-915-048, employees exposed to widespread sexual favoritism in the workplace can establish a hostile work environment claim only when this widespread sexual favoritism implicitly conveys the message that managers view women as “sexual playthings,” thereby creating an atmosphere demeaning to women, or when managers themselves communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct.<sup>149</sup>

While a supervisor’s sexual conduct may be immoral, unethical, distasteful or unfair, Title VII applies only to discrimination.<sup>150</sup> To succeed on a Title VII claim, a plaintiff must show that the act was discriminatory and done “because of sex.”<sup>151</sup> If the definition of “sex” under Title VII was not limited to gender but included sexuality or sexual conduct, it would be much easier to justify making sexual favoritism claims actionable.<sup>152</sup> However, “sex” plainly means “gender” under Title VII because the relevant, although weak, legislative history stresses gender at every opportunity and lacks any discussion of sexuality or sexual conduct.<sup>153</sup> Even adamant opponents of the Title VII amendment adding “sex” acted on the premise that “sex” was limited to “gender.”<sup>154</sup>

The Second Circuit focused on this issue in *DeCintio v. Westchester County Medical Center*,<sup>155</sup> noting that the word “sex” in Title VII appeared within a list of categories and, in the context of the statute, could only logically denote “membership in a class delineated by gender.”<sup>156</sup> The

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149. EEOC Policy Statement No. N-915-048, *supra* note 9.

150. *See* Grossman, *supra* note 122; *see also* Title VII, *supra* note 16.

151. *See id.*

152. Phillips, *supra* note 102, at 563.

153. *See id.* at 563-64 (citing various sources within the legislative record).

154. *See id.* at 564 (citing 110 CONG. REC. 2577-78, 2581-82, 2584 (statements of Rep. Celler, Rep. Green, and Rep. Roosevelt)).

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

156. *See id.* at 306; *see also* Title VII (listing protected categories).

*DeCintio* Court also cited other courts' refusals to extend the definition of "sex" beyond gender-based discrimination.<sup>157</sup>

b. Argument #2: Congress meant only to provide equality for women

Under EEOC Policy Statement No. N-915-048, if favoritism based upon the granting of sexual favors is widespread in a workplace, *both male and female* colleagues who do not welcome the conduct can establish a hostile work environment claim.<sup>158</sup> However, Congress meant only to provide equality for women, so widespread sexual favoritism claims exceed the scope of Title VII.

The Eighth Circuit, in *Sommers v. Budget Marketing, Inc.*,<sup>159</sup> noted that it is "generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women."<sup>160</sup> One supporter of Title VII's sex amendment also claimed the reason for the amendment was to provide "equal opportunity in employment for women. No more—no less."<sup>161</sup> Therefore, if equality for women in the workplace is the limited intent of Title VII's sex discrimination provision, then widespread sexual favoritism claims, by which not only women but also men can be victims, exceed the scope of Title VII.

c. Argument #3: There is no hostile environment sex discrimination in widespread sexual favoritism

Under EEOC Policy Statement No. N-915-048, if favoritism stemming from sexual favors is widespread in a workplace, both male and female colleagues who do not welcome the conduct can establish a hostile work environment violation pursuant to Title VII.<sup>162</sup> Both men and women who object to sexual conduct in the workplace can establish Title VII claims if the conduct is "sufficiently severe or pervasive as to alter the conditions of their employment and create an abusive working environment."<sup>163</sup>

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157. See *DeCintio*, 807 F.2d at 306-07 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) and quoting *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) as precedent regarding traditional definition of "sex").

158. See EEOC Policy Statement No. N-915-048, *supra* note 9.

159. *Sommers*, 667 F.2d at 748.

160. *Sommers*, 667 F.2d at 750.

161. 110 CONG. REC. 2583 (1964) (statement of Rep. Kelly).

162. EEOC Policy Statement No. N-915-048, *supra* note 9.

163. *Id.* (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); see also *BAJI*, *supra* note 3 for standards governing the determination of whether a work environment is "hostile." EEOC Policy Statement No. N-915-048 makes clear that the EEOC will evaluate the totality of the circumstances on a case-by-case basis, employing the objective perspective of a "reasonable person" in the context in which the challenged conduct took place. *Id.* at 3223 n.11. Some factors that could be

In so stating, the EEOC maintains that *men and women* can be equally victimized by widespread sexual favoritism. According to EEOC Policy Statement No. N-915-048, sexual discrimination is analogous to other types of discrimination—for instance, if supervisors regularly make racial, ethnic or sexual jokes in the workplace, “[e]ven if the targets of the humor ‘play along’ and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them.”<sup>164</sup> A hostile work environment can therefore be created for both sexes, even non-targets of the sexual conduct, because both sexes can find the offensive conduct sufficiently severe or pervasive to alter the conditions of their employment and create an abusive working environment.<sup>165</sup>

Thus, because both men and women can be victims, the victim’s sex (meaning “gender”) does not have a causal connection to the discriminatory acts of the employee, and widespread sexual favoritism is not actionable.<sup>166</sup>

d. Argument #4: Liability would inject the courts into private and consensual relationships

In *Miller*, the defendants warned the court that, by finding sexual favoritism violative of Title VII, the Court would be injecting itself into private consensual relationships that occur in the workplace—a major locus of individuals’ social life.<sup>167</sup> The defendants insisted that courts should be reluctant to allow sexual favoritism claims with respect to an individual’s personal privacy and should instead treat sexual favoritism as merely a matter of personal preference.<sup>168</sup> To bolster their position, the defendants claimed that FEHA was not intended to regulate sexual relationships in the workplace or to establish a civility code governing that venue.<sup>169</sup>

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considered in determining whether a hostile environment is established are the number of incidents of favoritism, the egregiousness of the incidents, and whether or not other employees in the office were made aware of the conduct. *Id.*

164. EEOC Policy Statement No. N-915-048, *supra* note 9; EEOC Decision No. 71-969, E.E.O.C. Dec. (CCH 1973) ¶ 6193 (deciding on Dec. 24, 1970, that a supervisor’s habitual use of racial epithet in referring to African American employees created a discriminatory work environment for Caucasian plaintiffs); EEOC Compl. Man. (CCH 2005), § 615.3(a)(3) ¶ 3102 (noting through Examples (1) and (2) that sexual harassment of females may create a hostile work environment for other male and female employees).

165. EEOC Policy Statement No. N-915-048, *supra* note 9.

166. Poole, *supra* note 110, at 847.

167. See *Miller v. Dep’t of Corr.*, 115 P.3d 77, 94 (2005).

168. See *id.*

169. *Id.*

## 2. Widespread Sexual Favoritism *May* Constitute Hostile Environment Sex Discrimination

These four arguments against recognizing widespread sexual favoritism as sexual discrimination are persuasive. However, they fail to provide an irrefutable legal basis for rejecting widespread sexual favoritism claims as hostile environment sex discrimination under Title VII.<sup>170</sup> As such, no jurisdiction is prevented from recognizing sexual favoritism claims in this manner by constitutional or federal law.<sup>171</sup> In fact, the arguments for allowing sexual discrimination claims based on widespread sexual favoritism are numerous and far more convincing.

### a. Argument #1: “Sex” can mean more than “gender” under Title VII

Even if opponents of the Title VII sex amendment primarily contemplated “sex” as being limited to “gender,”<sup>172</sup> their commentary or intent is not binding on the courts.<sup>173</sup> Judges may weigh non-binding sources as they see fit and, indeed, may even look to the dictionary to define “sex.”<sup>174</sup>

One commentator noted that “sex” has two plainly acceptable meanings: one being gender, the other being sexuality or sexual conduct.<sup>175</sup> Not all legislators were unaware of the various interpretations of sex and sex discrimination.<sup>176</sup> Some members of Congress argued that “sex discrimination was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.”<sup>177</sup> Thus, different types of claims could arise under the umbrella of sex discrimination.

Further, Title VII’s legislative history does not logically entail rejecting sexuality as an additional forbidden criterion.<sup>178</sup> Although

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170. See Poole, *supra* note 110, at 852.

171. See *id.*

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

173. See Poole, *supra* note 110, at 852.

174. 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”).

175. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.25(a) (1st ed. 1988) (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).

176. See Poole, *supra* note 110, at 852.

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

178. See Phillips, *supra* note 102, at 564.

nothing in the scant legislative history requires a broader reading of Title VII, nothing specifically rejects it either.<sup>179</sup>

In fact, many feminist legal scholars have theorized that “sexual harassment violates Title VII *because it is sexual*.”<sup>180</sup> Susan Estrich criticizes the strict “because of” formula of sex discrimination.<sup>181</sup> According to Professor Estrich, “what makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is *sexual*.”<sup>182</sup> The fact that the conduct is sexual in nature is not just an accidental aspect of the harm, but rather, is situated at the core of what makes the conduct sex discrimination.<sup>183</sup> For many feminist theorists, “the sexual aspect of sexual harassment does all the hegemonic work and has the effect and purpose of sexualizing women workers by reducing their humanity generally, and their status as workers specifically, to objects of male sexual pleasure.”<sup>184</sup>

*Meritor* demonstrated this potential when the United States Supreme Court judicially read hostile environment sexual harassment claims into Title VII coverage. Like the *Meritor* Court, most courts are willing to infer, if not conclude, that in cases where the plaintiff alleges hostile conduct of a *sexual* nature, the conduct was *based upon sex* simply from the sexual nature of the conduct.<sup>185</sup>

In a few cases, courts have been willing to find that sexual conduct can rise to the level of sex discrimination specifically because the sexual conduct “is disproportionately more offensive or demeaning to one sex.”<sup>186</sup> In *Robinson v. Jacksonville Shipyards, Inc.*,<sup>187</sup> female shipyard workers claimed that their workplace, saturated with photos of naked women and other sexually graphic material, created a sexually hostile work environment, even though many of the sexual materials were not directed

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179. *See id.*

180. Franke, *supra* note 126, at 714 (emphasis added).

181. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 819-20 (1991).

182. *Id.* at 820 (emphasis added).

183. Franke, *supra* note 126, at 715.

184. *Id.* For other feminists who share Estrich’s perspective, see Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202-08 (1989); Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 427 (1994-95); MACKINNON, *supra* note 138, at 179 (1979).

185. *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (“[S]exual behavior directed at women will raise the inference that harassment is based on their sex.”).

186. *See, e.g., Robinson*, 760 F. Supp. at 1522-23.

187. 760 F. Supp. 1486 (M.D. Fla. 1991).

at them individually.<sup>188</sup> The *Robinson* Court ruled in their favor, concluding that the graphic material, sexual comments and sexual joking “sexualize[d] the work environment to the detriment of all female employees” and created and contributed to a sexually hostile work environment.<sup>189</sup> The court held that “this framework provides an evidentiary basis for concluding that a sexualized working environment is abusive to a woman *because of her sex*.”<sup>190</sup>

*Robinson*’s “disproportionately more offensive or demeaning” standard could mean that “all sexual conduct in the workplace creates a sexually hostile and discriminatory work environment for women because it sexualizes the workplace.”<sup>191</sup> However, courts have construed the standard in a more limited fashion by holding that not all sexual conduct is demeaning to women, only sexual conduct which depicts women as sex objects, sexually ridicules them, insults them, or suggests sexual violence toward women.<sup>192</sup>

The link between hostile environment sexual harassment and widespread sexual favoritism is evidenced by cases like *Miller*, in which the warden’s widespread favoritism toward subordinate employees with whom he engaged in sexual conduct implicitly conveyed a message that he viewed women as “sexual playthings,” thereby creating an atmosphere demeaning to women.<sup>193</sup> The demeaning atmosphere in *Miller* is comparable to the hostile work environment depicted in *Robinson* because the widespread sexual conduct by the warden and the men at the shipyards, respectively, conveyed a message to women that their superiors and colleagues viewed them as sexual objects.<sup>194</sup> Thus, hostile environment sex discrimination can occur due to widespread sexual favoritism, as Estrich theorized and the *Robinson* Court stated, the reason being that a sexualized working environment is abusive to a woman *because of her sex*.

b. Argument #2: Widespread sexual favoritism claims help provide equality for women

Although much of Title VII’s legislative history indicates that its goal was to provide equality for women in the workplace, this does not preclude courts from finding that other expressions of sex discrimination, including

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188. *See id.* at 1523.

189. *See id.*

190. *See id.* at 1505 (emphasis added).

191. *See Franke, supra* note 126, at 721.

192. *See id.* at 721-22.

193. *See Miller v. Dep’t of Corr.*, 115 P.3d 77, 80 (2005).

194. *See id.; Robinson*, 760 F. Supp. at 1523.

widespread sexual favoritism, are within the scope of Title VII prohibitions.<sup>195</sup> Indeed, the United States Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.*<sup>196</sup> that cases of male-on-male sexual harassment are actionable as a form of sex discrimination under Title VII.<sup>197</sup> Writing for a unanimous court, Justice Scalia declared that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex.”<sup>198</sup> In so declaring, Scalia reconfirmed the Supreme Court’s stance in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, maintaining that Title VII protects men as well as women.<sup>199</sup>

Furthermore, even if Title VII’s goal is to provide for the equality of women in the workplace, sexual favoritism claims advance such a goal.<sup>200</sup> For example, if a female supervisor promoted her male subordinate lover instead of more qualified female employees, “the statutory ideal of equal treatment of women in the workplace is . . . not advanced unless a sexual favoritism claim is allowed.”<sup>201</sup> In a more common case like *Miller*, a male supervisor promotes his female paramours instead of other more qualified female employees, implicitly conveying a message that managers view women as “sexual playthings” and thereby creating an atmosphere demeaning to women.<sup>202</sup> If courts were to dismiss these widespread sexual favoritism suits, the statutory ideal of equal treatment of women in the workplace is not advanced. As such, widespread sexual favoritism claims help provide equality for women.

c. Argument #3: Victimizing both men and women does not avoid liability

Although EEOC Policy Statement No. N-915-048 notes that both sexes are disadvantaged in a widespread sexual favoritism case, it is worth noting that the nature of the discrimination certainly varies depending on the victim’s gender.<sup>203</sup>

For example, when a supervisor’s sexual conduct is directed toward women, women are in a different position than men in a widespread sexual

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195. See Phillips, *supra* note 102, at 564.

196. 523 U.S. 75 (1998).

197. See Poole, *supra* note 110, at 853; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

198. *Oncale*, 523 U.S. at 79.

199. 462 U.S. 669, 682 (1983).

200. See Poole, *supra* note 110, at 853.

201. *Id.*

202. *Miller v. Dep’t of Corr.*, 115 P.3d 77, 80 (2005).

203. See Poole, *supra* note 110, at 854.

favoritism case.<sup>204</sup> While both sexes can find their employment conditions altered by a hostile work environment, women who do not engage in sexual behavior with the supervisor are, *because of sex*, worse off. If favoritism based upon the granting of sexual favors is widespread in the workplace and a message is conveyed that the managers view *women* as “sexual playthings,” the atmosphere becomes demeaning *to women*. When managers also communicate a message that the way for *women* to get ahead in the workplace is by engaging in sexual conduct, or that sexual solicitations set a prerequisite to their fair treatment, the atmosphere becomes demeaning *to women*. *Miller* is a clear example of a widespread sexual favoritism case that evinces how egregious these incidents can be.

Like the analogy made above, co-workers of any sex can claim that the offensive conduct, which communicates a bias against protected class members, creates a hostile work environment. However, women are worse off than they would otherwise be because the atmosphere further demeans them in particular. Thus, victimizing both sexes does not avoid liability altogether.

d. Argument #4: It is not the relationship, but the effect on the workplace, that is relevant

The *Miller* Court found that the defendants’ concerns about regulating consensual relationships were not well-founded because “it is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard.”<sup>205</sup> The court supported its finding by noting that it did not discuss the interactions between the warden and his three subordinate lovers, which were truly private, but only the interactions that were public—those interactions that had an effect on the work environment.<sup>206</sup> Indeed, a hostile environment sexual harassment claim is concerned with just that—the creation of a hostile work environment, not with the actual consensual relationships the supervisor has with his or her subordinates.<sup>207</sup>

Moreover, the *Miller* Court held that FEHA “clearly contemplates some intrusion into personal relationships” because it already recognizes that “sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon an asserted quid pro quo.”<sup>208</sup>

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204. *See id.* This argument assumes the supervisor in question is not bisexual.

205. *Miller*, 115 P.3d at 94.

206. *Id.*

207. *See BAJI, supra* note 3.

208. *Miller*, 115 P.3d at 94.

e. Argument #5: Sexual favoritism is sexist

The final argument supporting the proposition that widespread sexual favoritism can constitute hostile environment sex discrimination is based on understanding widespread sexual favoritism, like traditional sexual harassment, as a *discriminatory wrong*.<sup>209</sup>

Professor Katherine Franke, author of *What's Wrong with Sexual Harassment?*, argues that the discriminatory wrong of sexual harassment, between parties of the same or different sex, should be understood as a technology of sexism.<sup>210</sup> Sexual harassment is sex discrimination because of the gender norms it reflects and perpetuates.<sup>211</sup> According to Franke, “the sexism in sexual harassment lies in its power as a regulatory practice that feminizes women and masculinizes men, render[ing] women sexual objects and men sexual subjects.”<sup>212</sup> In other words, sexual harassment is a practice of sex discrimination precisely because it polices hetero-patriarchal gender norms in the workplace.<sup>213</sup> In fact, the first group known to have used the term “sexual harassment” was the Working Women United (WWU), whose members conducted “Speak-Out on Sexual Harassment” in May 1975 and in which they defined sexual harassment as “the treatment of women workers as sexual objects.”<sup>214</sup>

According to the theory Franke develops, if a “technology” is a manner of accomplishing a task or the specialized aspect of a particular field, then sexual harassment is both the manner of accomplishing sexist goals and the specialized instantiation of a sexist ideology.<sup>215</sup> “Sexual harassment is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects.”<sup>216</sup>

The sexist practice inherent in sexual harassment is why widespread sexual favoritism, like that displayed in *Miller*, may constitute hostile environment sex discrimination under Title VII. Widespread sexual favoritism can also be understood as a technology of sexism because of the

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209. See Franke, *supra* note 126, at 693.

210. *Id.*

211. *Id.*

212. *Id.* at 691.

213. *Id.* at 772.

214. See Dierdre Silverman, *Sexual Harassment: Working Women's Dilemma*, *QUEST: FEMINIST Q.*, Winter 1976–77, at 15, 15.

215. Franke, *supra* note 126, at 693–94.

216. See *id.*

gender norms it reflects and perpetuates. The sexism inherent in widespread sexual favoritism, like sexual harassment, lies in its power as a regulating tool that feminizes women and masculinizes men, rendering women as sexual objects and men as sexual subjects.

*Miller* relies heavily on *Broderick v. Ruder*,<sup>217</sup> a case in which a staff attorney at the Securities and Exchange Commission claimed that two of her supervisors had engaged in sexual relationships with two subordinates who later received promotions, cash awards and other job benefits.<sup>218</sup> Another supervisor allegedly promoted a staff attorney with whom he socialized extensively and to whom he was noticeably attracted.<sup>219</sup> There was also an incident in which her supervisor became drunk at an office party, untied the plaintiff's sweater and kissed her.<sup>220</sup> The *Broderick* Court found that the supervisors' conduct "created an atmosphere of hostile work environment" which was offensive to the plaintiff and several other witnesses.<sup>221</sup>

As in *Miller*, the widespread sexual favoritism depicted in *Broderick* implicitly conveyed a message that management viewed women as "sexual playthings" and that the way for women to get ahead in the workplace was by engaging in sexual conduct. Indeed, the sexual harassment inherent in widespread sexual favoritism, as argued by Franke, is a disciplinary practice that promotes gender norms that envision women as feminine, heterosexual objects, and men as masculine, heterosexual subjects, thereby perpetuating this technology of sexism.

### 3. Summary of Positions

In sum, for each argument against the recognition of widespread sexual favoritism as a cause of action, there is United States Supreme Court and lower court precedent, federal statutory and regulations language, or scholarly commentary rebutting the negative arguments.<sup>222</sup> Although some of the negative arguments may be persuasive, none of these arguments actually provide an irrefutable legal rationale for rejecting widespread sexual favoritism as hostile environment sex discrimination under Title

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217. 685 F. Supp. 1269 (D.D.C. 1988).

218. See *Broderick*, 685 F. Supp. at 1274-75, 1278.

219. See *id.* at 1274.

220. See *id.* at 1273.

221. See *id.* at 1275.

222. Poole, *supra* note 110, at 860.

VII.<sup>223</sup> The arguments for concluding that widespread sexual favoritism may constitute hostile environment sex discrimination are simply stronger.

## V. CONCLUSION

For a majority of people, “[w]ork is work, and sex is sex, and never the twain shall meet.”<sup>224</sup> However, the realities of the modern workplace show that work and sex do meet—quite often, in fact. For example, a recent survey conducted in 2005 by Vault, Inc. found that 58% of employees had dated someone at work, up from 46% two years earlier.<sup>225</sup> The survey found that, among the 600 respondents, 14% had dated a boss or supervisor, while 19% dated a subordinate.<sup>226</sup> Another 2005 survey, by Careerbuilder.com, found that, among 1300 respondents, 75% believed that employees should be able to date anyone they wish at work.<sup>227</sup> Many believe that longer workdays and the increasing numbers of women in the work force have made the office as much a social environment as it is a work environment.<sup>228</sup>

However, office romances are leading to new legal battles, as evidenced by the widespread media coverage surrounding the California Supreme Court’s ruling last summer in *Miller*. On the one hand, the decision is one of the first cases in which a court has adopted the EEOC’s theory of widespread sexual favoritism as hostile environment sex discrimination,<sup>229</sup> and for good reason, as discussed above. This alone is likely to encourage plaintiffs to come forward with their widespread sexual favoritism claims.

On the other hand, it is important not to overstate the significance of *Miller*. After all, the EEOC guidelines it cites to are not new, and the decision itself is binding only in California.<sup>230</sup> California’s highest court

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223. *Id.* at 852.

224. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063 (2003).

225. The results of the survey were cited in Greg A. Klawitter, Morrison Foerster LLP, *Three California Supreme Court Decisions: Not All Good News*, MORRISON FOERSTER EMP. L. COMMENT., Aug. 2005, at 5, 7, available at <http://www.mofo.com/docs/PDF/ELC0805.pdf>.

226. *See id.*

227. *See id.*

228. *See* Penttila, *supra* note 15; 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).

229. *See* Jonathan A. Segal, *Dangerous Liaisons: Romantic Relationships Between Supervisors and Subordinates Can Involve Thorny Legal and Employee Relations Problems*, HR MAG., Dec. 2005, at 104, 106.

230. *Id.*

did nothing more than apply EEOC Policy Statement No. N-915-048 to the facts.<sup>231</sup>

For some, however, recognizing sexual favoritism as a valid cause of action under Title VII is like “launching a missile to kill a mouse.”<sup>232</sup> The concern is that decisions like *Miller* are going to provide “the slippery slope for other supposedly less egregious forms of discrimination to enter the courtroom.”<sup>233</sup> However, these arguments merely cloud the true issues, such as the consequences of dismissing widespread sexual favoritism claims.

Ignoring widespread sexual favoritism claims would allow employers and managers to perpetuate gender norms and stereotypes in the workplace at the expense of both sexes, thereby undermining the very goal Title VII was intended to secure—equality in the workplace.<sup>234</sup> Thus, courts in both California and beyond need to recognize widespread sexual favoritism for what it is: improper and actionable hostile environment sex discrimination.

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231. *Id.* at 104.

232. Poole, *supra* note 110, at 866-867 (quoting J. Blackmun’s dissent in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1036 (1992)).

233. *Id.*

234. *Id.* at 868.