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A decade and a half ago, the Equal Employment Opportunity Commission issued a Policy Guidance statement (EEOC 1990) dealing with potential employer liability under Title VII (42 United States Code § 2000e-1 *et seq.*) for "sexual favoritism," what is sometimes called the "paramour problem." The EEOC statement identifies three different situations:

- isolated instances of favoritism toward a "paramour";
- favoritism based upon coerced sexual conduct; and
- widespread favoritism.

The Policy Guidance suggests that no potential liability in the first situation exists but might be liability in the second and third, and is not limited to the "target" alone, but also to other employees, including those who neither engaged in sexual activity with a superior nor were asked to do so. These are sometimes referred to as "bystanders."

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This article examines the principal theories presented by both plaintiffs and defendants in cases involving alleged paramour favoritism in the context of the EEOC policy statement. A brief examination of the relatively sparse case law on the subject follows. The occasion for this re-examination is a recent California decision (*Miller v. Dep't of Corrections*, 2005) interpreting a state law similar to Title VII in a way favorable to plaintiffs in the third situation outlined above that may provide a springboard for further development. The article concludes with a tentative evaluation of the current state of doctrinal development, possible implications for managers, and policy issues that remain unresolved.

The Parties' Basic Theories

The statutory language on which claims of sex discrimination, including sexual harassment, is based is notoriously open to different interpretations:

> *42 U.S.C. § 2000e-2 (a):* It shall be an unlawful employment practice for an employer—(1)... 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....

The EEOC policy statements indicate how it intends to apply the statute in administering the statute—in making probable cause determinations, for instance—and at times have received deferential treatment by the courts.

Isolated Instances of Paramour Favoritism

The 1990 Policy Guidance states:

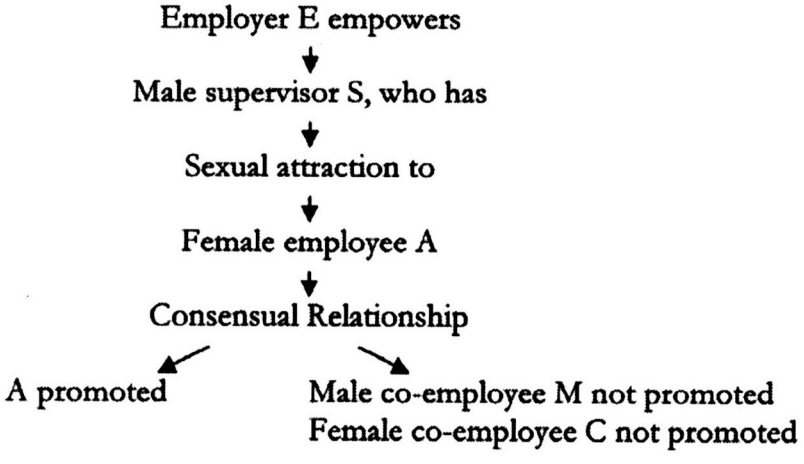
> It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. [Such treatment] . . . does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their gender. 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 (EEOC 1990 at 1,2).

Plaintiffs, and plaintiff's counsel, complain that the EEOC view of things is flawed. A plaintiff, after all, starts from the point of view of a person who has lost out on some job benefit, a promotion being a prime illustration. Suppose a male has lost out to a woman paramour of a male supervisor. He understandably asks "why?" and when he looks at the chain of events, he sees "sex"—in the form of sexual activity or a consensual sexual relationship—as a major explanation. Little wonder that he would view this as "sex-based" discrimination (see Figure 1).

One can, of course, change genders and sexual preferences around. A female supervisor who gives preferential treatment to a male paramour would present the same problem, as would a homosexual supervisor who discriminated in favor of his or her paramour of the same gender. For the sake of consistency and ease of presentation, however, this article will stick with the male supervisor pattern.

The EEOC, however, insists that the attraction of Supervisor to A is not the kind of sexual preference that constitutes discrimination based upon sex within the meaning of Title VII for two reasons. S has committed no wrong so far as A is concerned, since she entered into the relationship willingly. Moreover, because almost all

Figure 1



women co-workers (such as C), as well as all men co-workers (such as M), are disadvantaged equally by the supervisor's preference for A, no wrongful discrimination occurs. Since no unlawful preference is present at the beginning of the chain, one need not go further in the analysis.

Favoritism Based upon Coerced Sexual Conduct

What if "wrongful conduct" is present in the chain? The EEOC 1990 statement suggests a difference if the relationship between Supervisor S and Employee A is not wholly consensual. The statement outlines two situations in which liability might be possible. The first is relatively straightforward:

> If a female employee is coerced to 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. Thus, in order for a woman to have obtained the benefit, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men (EEOC 1990 at 2).

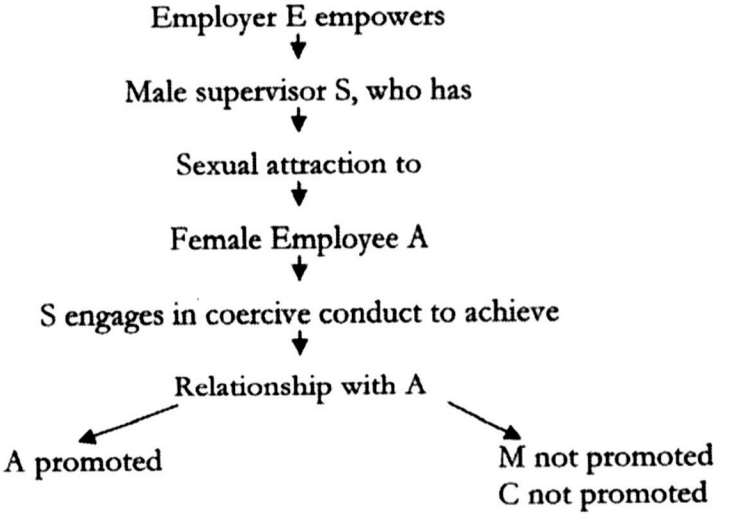
This would appear to be a restatement of the basic quid pro quo theory of liability (in which the plaintiff establishes "the only way I can get a promotion is to give sexual favors to a supervisor") but rephrased to make it clear that a plaintiff can make out such a case based upon circumstantial evidence without needing to establish that she was directly "propositioned" by her supervisor.

The second situation that the Policy Guidance addresses is more complex. The reasoning is:

> [A] supervisor may have been interested in only one woman and, thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced(EEOC 1990 at 2).

The reasoning can be set forth in diagram fashion (see Figure 2).

Figure 2



Here, wrongful conduct in the form of S's making sexual favors a quid pro quo for preferential treatment is present. Therefore, the Policy Guidance suggests all those injured "as a result of" S's wrongful conduct, not just A, should be entitled to a remedy.

Defendants challenge this. First is the question of the strength of the causal link between the Title VII wrong and the harm to M and to C. The immediate cause of S's promoting A rather than M or C is the same as before, his special relationship with A. The quid pro quo coercion is relatively remote from the harm to M and C. Moreover, looking at the case from a defendant's perspective, surely it is still significant that female co-worker C is disadvantaged just as much as male co-worker M. So far as the promotion itself is concerned, S is being just as much an "equal opportunity discriminator" in this situation as in the former.

In addition, problems of proof are likely to exist. Once A has given in to S's persuasion and entered into a relationship with him, the odds that she will join with M and C in asserting claims against the employer are not great. Without A's participation and her testimony about the nature and importance of S's coercive tactics, the likelihood that M and C might succeed must be low.

Widespread Favoritism

The EEOC position on this situation is that if

> 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 (EEOC 1990 at 2,3).

The reasoning here is that the widespread granting of employment benefits based upon sexual favors conveys a message "that the managers view women as 'sexual playthings' . . ." This can be sufficiently "severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment'" (EEOC 1990 at 2,3). A single case is offered as direct support. (*Broderick v. Ruder* 1988)

Opponents of this position urge that the EEOC's approach involves assumptions that are unsupported. If the sexual activity of male supervisor and female co-worker is in fact consensual, why should their conduct be regarded as sending a message that is demeaning to women? Is not the real message that the female co-worker made a free adult choice to engage in the activity, just as free and adult as the choice made by the male supervisor? Moreover, allowing recovery in this situation may reward the exchange of gossip and innuendo among employees, based upon conduct that is not unlawful, conduct that the parties are privileged to engage in as consenting adults.

Judicial Reactions

Isolated Instances of Favoritism

At the time the EEOC announced its position on individual instances of paramour favoritism, the division of opinion on the topic between the United States Courts of Appeals for the District of Columbia, and for the Second Circuit was relatively clear. Both cases involved promotion opportunities. The D.C. Circuit endorsed the view that favoring a paramour over another better qualified employee violates Title VII. In its opinion in the case, the court noted that the parties did not seriously dispute that the case,

> based as it is on the sexual relationship between Ms. Grant [the paramour] and Dr. Smith [an administrator]

> presents a cognizable cause of action under statutes prohibiting sex discrimination in employment. . . . We agree with the District Court's conclusion and its rationale: that unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination'" (*King v. Palmer* 1985 at 880).

The Second Circuit refused to apply Title VII to an almost identical claim of unfair denial of promotion in a medical facility. The opinion in *DeCintio v. Westchester County Medical Center* states that the plaintiffs

> were not prejudiced because of their status as males; rather, they were discriminated against because Ryan [the supervisor] preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for promotion: No one but Guagenti [the paramour] could be considered for the appointment because of Guagenti's special relationship to Ryan. Appellees' proffered interpretation of Title VII prohibitions against sex discrimination would involve the EEOC and federal courts in the policing of intimate relationships. Such a course, founded on a distortion of the meaning of the word 'sex' in the context of Title VII, is both impracticable and unwarranted" (*DeCintio v. Westchester County Medical Center* 1986 at 308).

The one difference is that plaintiffs in the Second Circuit case were male, in the D.C. Circuit case plaintiff was a female, but the quoted language makes it clear the Second Circuit would have dismissed a case brought by a female just as quickly. The division was both clear cut and well known; it was the subject of comment in journals at the time (Manneman, 1989). The EEOC acknowledged in the 1990 Policy Guidance that it was taking a position antithetical to that of the D.C. Circuit (EEOC 1990 fn. 5).

Why would the agency make the choice it did? Any answer must be speculation to some degree, but a likely reason would be the increasing tendency of the federal courts during the 1980's to treat "sex" in Title VII as meaning "gender." Claims based upon sexual orientation, for example, were rejected by various circuits (*DeSantis v. Pacific Tel. & Tel. Co.* 1979). In their opinions in *Price Waterhouse*, (*Price Waterhouse v. Hopkins* 1989) members of the Supreme Court emphasized the importance of gender stereotypes in defining the reach of the statute. Even so, as Professor Michael Phillips argues in a 1994 article, (Phillips, 1994) it is possible to construct a "but for" argument that paramour favoritism is in some sense sex discrimination. Since 1990, however, virtually all courts to address the question have decided to accept the position taken by the EEOC and the Second Circuit. For the most part, this is explained on the basis that "when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender" (*Ackel v. National Communications, Inc.* 2003 at 382). Professor Phillips offers another rationale for rejecting these claims: The language of Title VII, while not helpful in many cases, in fact dictates this outcome, because it forbids discrimination based upon "such individual's sex," and the "individual" referred to is clearly the plaintiff. In these cases, however, it is not the plaintiff's gender that matters, but that of the target of the supervisor's affections.

This refusal to find paramour favoritism unlawful has persisted in cases in which the harm done to a plaintiff is exceedingly clear. In a 2004 decision involving an Ivy League institution, (*McDowell v. Cornell University*, 2004) the plaintiff alleged that he had been hired as director of Athletic Communications at the university, and that his assistant was to be a woman already on the staff. He soon learned that his assistant had

had a romantic relationship with the plaintiff's superior, the director of Athletics. The assistant refused to communicate with the plaintiff, reporting only to those above him. She allegedly made decisions without his consent, and otherwise made it very difficult for him to do his work. After he complained about the situation, he began to receive unfavorable performance reviews and was forced to resign. One can hardly imagine a more clear-cut causal link between sexual relationship and adverse employment consequences. Nonetheless, the district court, citing the early Second Circuit precedent, rejected the claim outright.

Net result: The courts deny recovery not because plaintiffs failed to prove that they have been subject to an adverse employment action, nor because plaintiffs fail to demonstrate that that harm flows from a supervisor's conduct, but rather because that supervisor's conduct is not unlawful.

Recovery by Non-targeted Employees When Coercion Is Present

When the conduct of a supervisor is wrongful, the EEOC Policy Guidance suggests that liability may exist when an adverse employment action flows from that conduct. By and large, the courts have not been eager to adopt this position.

Consider, for example, the case of Karen Myers, one of the plaintiffs in an action brought by four women employees against their television station employer. The other three employees alleged that the station's president and general manager made direct sexual advances to each of them, and that one had in fact succumbed to his desire to establish a sexual relationship. Ms. Myers, on the other hand, did not claim that the president/general manager had asked her for sexual favors, but rather alleged that she experienced an unwanted transfer from one position to another because he wanted to award her former job to the plaintiff who had given in to his pressure to have sexual relations with him. The Fifth Circuit allowed the claims of the other three plaintiffs to go forward, but dismissed Myers' claim. The court refused to recognize a distinction between those cases in which the paramour relationship was consensual, and that in which it was established through unlawful pressure. The opinion reasons,

> [A]ny discrimination suffered by Myers with respect to her transfer was based not on her gender but instead on the fact that she happened to occupy a position in which Hardesty [the station's president and general manager] allegedly wished to place Gross [the paramour who had allegedly been subjected to unwelcome advances]. Similarly, the fact that Myers may have been terminated for complaining about favorable treatment received by Gross is unrelated to Myers' gender (*Ackel v. National Communications, Inc.*, 2003 at 382).

Some federal circuits have adopted prudential standing rules (in cases not directly involving the paramour problem) that would preclude male plaintiffs from raising claims of discrimination against women (*Childress v City of Richmond*, 1998).

Finally, some courts have indicated a distrust of claims in which the quality of evidence presented does not meet a certain threshold. The Second Circuit opinion in the *Leibovitz* case summarizes its reasoning thus:

> [Plaintiff's] claim rests on emotional trauma allegedly suffered due to her belief that other women in other parts of her workplace were harassed and that the defendant was not vigorously investigating those complaints. We hold that Title VII's prohibition against hostile work environment discrimination affords no claim to a person who experiences it by hearsay

(*Leibovitz v. New York City Transit Authority*, 2001 at 182).

In this case, the court reversed an award of damages by a jury that had specifically found the defendant liable because it "was deliberately indifferent to sexual harassment generally." Interestingly, in this case, the charge to the trial jury stated that a verdict for the plaintiff was proper only if "her workplace was so permeated with discriminatory sexual behavior that was so severe or pervasive that it altered the conditions of her employment and created an abusive working environment for her." The rejection of Ms. Liebovitz's claim undermined the optimism felt by one commentator who had praised the outcome in the district court: "As more bystander victims bring meritorious claims against their employers, the bystander injury sexual harassment theory may be one day as commonplace as the traditional hostile environment theory . . ." (O'Connor, 1999 at 544).

Each of these cases clearly fits the second category discussed in the EEOC Policy Guidance: wrongful conduct by an employer (either through coercion by a "proxy," such as the TV station general manager, or by failing to pursue claims of discrimination in the way suggested by the Supreme Court's *Faragher* (*Faragher v. City of Boca Raton*, 1998) and *Ellerth* (*Burlington Indus., Inc. v. Ellerth*, 1998) decisions). The fact situation in *Liebovitz* also closely resembles the pattern discussed in the final section of the Policy Guidance: hostile environment discrimination based upon "widespread sexual favoritism" to which this article turns next.

Widespread Sexual Favoritism

The third category in the EEOC Policy Guidance statement overlaps the second, but differs from it in that the favoritism need not be based upon coerced favors; and the harm must be of the "hostile environment" sort. The standard for the latter is drawn from the Supreme Court's decision in *Forklift Systems*. To succeed in a "hostile environment" case, a plaintiff must prove that the defendant engaged in conduct "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive . . ." She must also prove that she "subjectively perceive[d] the environment to be abusive" (*Harris v. Forklift Systems, Inc.*, 1993 at 302).

As shown in the prior subsection, the courts have not generally been receptive to claims by non-targets or bystanders. Either standing is denied because the harm was done to persons of a different gender, or the claim is denied because the plaintiff found the environment abusive through "hearsay" only, not through being personally harassed or directly observing the harassment of another.

A few months ago, however, the California Supreme Court found potential liability in a case of widespread favoritism. (*Miller v. Department of Corrections*, 2005) The facts alleged in the case were, to say the least, unusually sympathetic to such a holding, but even so, the intermediate court of appeal had held against the plaintiffs, for reasons that parallel the outcome in the cases already discussed. Plaintiffs in *Miller* were correctional officers in the California prison system. They worked from time to time under the supervision of one Lewis Kuykendall. Kuykendall allegedly had affairs with three different women who were also employees in the system: Bibb, Brown, and Patrick. One plaintiff complained about these relationships as "inappropriate" as early as 1994, with little apparent impact. At various times, two of the paramours bragged to plaintiffs about their hold over Kuykendall because of their relationship; one of the paramours received promotions in competition with a plaintiff who had superior qualifications, and thereafter

> made [plaintiff's] work life miserable by frequently countermanding her orders, undermining her authority, reducing her

> supervisorial responsibilities, making unjustified criticisms of her work, and threatening her with reprisals when she complained . . . (*Miller vs. Department of Corrections*, 2005).

Plaintiffs also alleged in this case that another employee at the relevant prisons told them that his wife, also a co-employee, found the atmosphere to be an "impossible environment . . . to work in." Kuykendall himself allegedly applied significant pressure to one of the plaintiffs when she served on an interviewing committee considering the candidacy of one of the paramours for promotion, and that he responded to plaintiffs' complaints about the situation by withdrawing disability accommodations she had enjoyed. One plaintiff alleged that a lesbian supervisor had reacted negatively to plaintiff's declining her dinner invitations. She also presented proof that her complaints to the internal affairs division of the system were not kept confidential, as had been pledged, but were clearly known both to Kuykendall and to the paramours. Plaintiffs then sued under the state Fair Employment and Housing Act. (CALIF. GOVT. CODE §12900 *et seq.*)

The trial court awarded summary judgment to the defendant employer. The Court of Appeals affirmed, stating that

> plaintiffs have demonstrated unfair conduct in the workplace by virtue of Kuykendall's preferential treatment of his various sexual partners; however, beyond the fact of those relationships and the preferential treatment, plaintiffs have not shown a concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex. Plaintiffs were not themselves subjected to sexual advances, and were not treated any differently than male employees . . . . hence the trial court correctly concluded there is no evidentiary basis for plaintiffs' various sex discrimination and harassment claims (*Miller vs. Department of Corrections*, 2005).

The California Supreme Court reversed in this case following a review of the case history. The court's opinion devotes several pages to reviewing the extent to which the state law being applied has been interpreted to track doctrines developed under Title VII. The court then turns specifically to the 1990 EEOC Policy Guidance statement, recognizing that the plaintiffs' claim was essentially a claim of "widespread sexual favoritism," and treats the Policy Guidance as persuasive of how the law should be applied. The court then turns to several arguments by defendants:

(1) The core of plaintiffs' complaint is simply preferential treatment. This the court rejects quickly, noting how much more was involved: bragging, public fondling, improper solicitation of favors, and the like;

(2) A reasonable person in the position of the plaintiffs would not have found the environment to be hostile. Thus the court finds it to be an issue that should go to a jury; and

(3) Courts should not take these cases since they involve acts that are

> private and consensual and that occur within a major locus of individual social life for both men and women—the workplace. According to defendants, social policy favors rather than disfavors such relationships, and the issue of personal privacy should give courts pause before allowing claims such as those advanced by plaintiffs to proceed.

The court responds, first, that the focus of the claim is not "the relationship but its effect on the workplace. . . . Moreover, the FEHA already clearly contemplates some intrusion into personal relationships," referring to quid pro quo liability cases (*Miller vs. Department of Corrections*, 2005).

Questions for the Future

Finally, then, is another case that the EEOC could cite in full support of its position on "widespread sexual favoritism." Admittedly, a state statute, not Title VII, was involved, but the opinion in the case relies heavily on federal precedent. The facts, too, are notably stark, but not much more so really than in the *Ackel* case in which summary judgment for the employer over a non-target was affirmed. One pair of obvious inquiries, then, must be will other plaintiffs emerge, once *Miller* is widely discussed, with similar claims and will the courts be willing to entertain them?
Some reason to think the answer to each may be "yes" exists. Romantic relationships in the workplace are very common indeed. Some surveys indicate that as many as half of employees will date someone from work (Navarro, 2005; Pierce & Aguinis, 2001). It is likely that both the reality and also perceptions of favoritism are likely to occur in many of these situations and that many co-workers will be either offended or in some other way adversely affected by them. Thus, a possible pool of plaintiffs seems to be available.

What about judicial response? It could well be that *Miller* will turn out to be an instruction manual for plaintiff's counsel. Surely any attorney approached to take on a widespread favoritism case in New York will spend time analyzing the differences between *Liebovitz* and *Miller*: the personal observation of the relationship in *Miller*, the sorts of adverse employment treatment, and the like.

Powerful arguments for defendants remain, however, some of which failed in *Miller* but may well be more warmly received elsewhere. Consider, for example, the argument that the workplace is the "locus of social relationships" for many and that forming relationships there is at least nobody else's business than the parties, or even that society is aided by these relationships. After all, once people are out of school, where do they meet anyone? Do we really expect all of them to meet in church or at symphony concerts? Would we rather have them meet in a bar?

The immediate practical problems posed for management by the decision in California are significant, but not insurmountable, particularly in a workplace that has set up a functioning program for handling discrimination complaints, including complaints of harassment. The basic point to keep in mind is that it is not the relationship itself that is the employer's concern; it is the impacts of that relationship on the conduct of the business that matters. One potential negative impact is lower productivity, resulting either from assigning the favored worker to do tasks he or she cannot do well, or from upsetting other workers so that they perform below capacity. Another is the possibility of legal liability, with the consequent loss of time to preparation for trial, negative publicity, and the requirement to pay damages. If such an action is brought, its core theory of recovery is almost certain to be based upon the law developed under Title VII. As the recent California decision illustrates, state laws that touch on discrimination issues are generally interpreted in ways that follow Title VII jurisprudence.

Such impacts can generally be avoided. It is pointless, in this writer's view, to believe that management can—or should—forbid consensual relationships from forming in the workplace; they are going to happen, and any rule that forbids such relationships is simply going to be the object of laughter. Other options have both plusses and minuses. Consider the first negative impact just

mentioned: reducing productivity by assigning the wrong worker to a task. A formal policy that no individual should supervise or have the power to reward a fellow worker who is that individual's romantic partner is one possibility. Such a policy has the same good and bad features generally found in anti-nepotism policies. Another problem, however, that is not present in the case of nepotism is such a policy calls for the individual in question to reveal a relationship that he or she may prefer—for good reason or bad—to keep private.

Fortunately, many of the problems associated with paramour favoritism should be controlled by general principles of good management. If a supervisor recommends promotion of a less than competent person, existing human resources systems should sound an alarm; if they do not, a flaw in those systems is present. Identifying rogue supervisors is not always easy, of course, particularly if the supervisor in question has created an atmosphere in which employees fear retribution. Nonetheless, whatever review systems have been put in place to detect improper self-dealing in general should be effective in detecting paramour favoritism as well. The problem of workers upset by what they regard as improper favoritism is little different from the same sort of problem resulting from any other suspected discrimination. The longer such resentment festers, the more likely it is to affect work. What will help? While no answer will fit every situation, it seems likely that a broadly stated set of guidelines will help most of the time. A good starting point is a statement that the employer does not seek to encourage or discourage romantic relationships. Second, the statement should indicate that if a worker believes he or she has not been fairly treated because of such a relationship, he or she can follow two avenues. One is to speak to the manager involved directly (with, of course, credible assurances against reprisal). The other, to be used if the disgruntled worker is reluctant to follow the first, or has already protested to the manager directly without result, is to consult the same person to whom that worker would take any other discrimination complaint.

Whether that person should be based in HR or elsewhere depends on the circumstances of the firm, but in most larger firms, HR would seem the natural place. Powers (1999) offers two useful illustrations of such guidelines. Announcing such a policy is one thing. Making it work is another. One essential is that the person who receives such complaints has been properly trained and has sufficient skill and clout to follow up on it. Good training in handling discrimination complaints has been available for years. Clout is another matter. In the bulk of the cases discussed here, the offending individual supervisors were not at all subtle about what they were doing. Complaints were made, investigations performed—but no meaningful action was taken. Once sexual favoritism has become truly widespread and is practiced by senior management, the ability of a human resources manager to change the corporate culture may be limited.

A program of effective complaint handling will also protect the employer from most liability for hostile environment sexual harassment, the Supreme Court has ruled (*Faragher v. City of Boca Raton*, 1998). If the offending supervisor, in fact, has taken a tangible adverse employment action against a worker because that worker refused to begin or continue a romantic relationship, then the immediate victim may recover (*Burlington Industries, Inc. v. Ellerth*, 1998). Even in that sort of case, however, such a system is worth having because it is likely to serve as an "early warning system" that a situation is getting out of hand.

Society in general, and the courts more immediately, face a difficult policy issue: To what extent should society treat any form of "preference" for one employee over another, not based strictly upon credentials, as wrong? Several of the cases referred to

here speak of paramour favoritism as "unfair," as have commentators (Poole 1998), with little or no further analysis of that claim. The clear assumption is that we are a meritocracy and that is what we ought to be. Is that so obvious, really? How far are we truly ready to take meritocracy? Suppose two candidates for a job both present perfectly adequate credentials indicating they can do the work. One is a nephew, the other a stranger. The stranger's credentials are only slightly stronger than the nephew's. Do we as a society really condemn choosing the nephew? What if not a nephew, but a spouse? But then comes the tough one: what if not a spouse, but a lover? In the minds of some, at least, a moral dimension no doubt begins to enter in (Poole 1998). Should we think of other truly "committed" relationships as equivalent to that of spouses? If not, is that for moral reasons or (to the extent one can differentiate) religious ones?

The arguments on both sides of the "let's not meddle" issue are also powerful. As the California Supreme Court says, the law does indeed look into all sorts of personal relationships in a variety of cases. Sexual favors can serve as sources of "undue influence" in more than one circumstance. But should we encourage searching out this sort of evidence by rewarding those who gossip and gasp?

Then is the question of whether the standard for determining whether a "hostile environment" has proved to be workable. Justice Scalia commented at length in his concurrence in *Harris v. Forklift Systems* that "hostile...does not seem to me a very clear standard," while at the same time admitting he had nothing better to offer given the breadth of the statutory language. Clearly the *Liebovitz* and *Ackel* courts were affected by a conviction that this standard of liability must be kept under tight control in order to leave businesses free from undue burdens of litigation.

At all events, the recent decision in *Miller* has brought back attention to an area of intense concern to many workers, and to policy makers. What had been a relatively quiet backwater of discrimination law may become something very different indeed.

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