ARE YOU SIMPLY SLEEPING YOUR WAY TO THE TOP OR CREATING AN ACTIONABLE HOSTILE WORK ENVIRONMENT?: A CRITIQUE OF *MILLER V. DEPARTMENT OF CORRECTIONS* IN THE TITLE VII CONTEXT

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"Love Your Job? What About Your Boss?"[1]

INTRODUCTION

In today's work-obsessed and job-focused culture with ever increasing time being spent at work,[2] office romances are commonplace.[3] A recent *New York Times* article indicated that fifty-eight percent of workers had dated a coworker[4] and, perhaps more shockingly, that fourteen percent had dated a superior and nineteen percent had dated a subordinate.[5] While consensual

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[1] Title of a NEW YORK TIMES article discussing the *Miller* case and its implications for workplace romance. Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9, at 1.

[2] *See* 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; Alyce H. Rogers, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687, 687 (1997) (discussing the influx of women in the workplace and its impact on the rise of workplace relationships).

[3] *See* Paul C. Buchanan, *Love, or Harassment?*, BUS. L. TODAY, Sept./Oct. 2001 at 8, *available at* http://www.abanet.org/buslaw/blt/bltsept01_buchanan.html; Navarro, *supra* note 1; Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 162–63 (1991) (stating that workplace dating among supervisors and subordinates is frequent).

[4] Navarro, *supra* note 1.

[5] *Id.*; *see also* Billie Wright Dziech, Robert W. Dziech II & Donald B. Hordes, *'Consensual' or Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL'Y 83, 87 (1999) (quoting a 1996 American Management Association survey as finding that "[t]wenty-seven percent [of employees] reported having had romantic relationships with colleagues. Of these, twenty-seven percent described the 'romantic partner' as a subordinate, seven percent as a superior, and

sexual relationships in the workplace are certainly not illegal[6] and not generally a target of workplace litigation,[7] substantial risks can arise when those relationships are between subordinates and supervisors.[8] One potential risk is sexual favoritism,[9] which occurs when a supervisor provides preferential job benefits to a subordinate with whom he is having a sexual relationship.[10] The concept of sexual favoritism puts a twist on traditional sexual harassment claims that might arise from a workplace consensual relationship by expanding the claim beyond those actually in the relationship to other individuals in the workplace who claim they were affected by the relationship.[11] Courts and commentators have consistently disagreed over whether workplace sexual favoritism that arises from a supervisor's consensual sexual relationship with another employee constitutes an actionable sexual harassment claim.[12]

five percent as the 'boss.' ").

[6] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (explaining that Title VII is not a "civility code" and not intended to make the workplace "asexua[l]" or to prohibit socializing in the workplace).

[7] Alan Orantes Forst, *Love Beneath the (Docket) Sheets: Office Romance and Sexual Discrimination Law*, 73 FLA. B.J. 24, 31 (March 1999) (stating that "[e]mployers and their attorneys need not fear Title VII liability based merely on a consensual personal relationship (sexual or otherwise) between a supervisor and subordinate"). *But see* Alison J. Chen & Jonathan A. Sambur, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA LAB. & EMP. L.J. 165, 165–67 (1999) (asserting that a relationship is consensual only so long as both sides believe that it is—it can quickly turn into a non-consensual situation).

[8] Buchanan, *supra* note 3, at 8 (stating that "50 percent of sexual-harassment lawsuits arise out of workplace relationships that started out as consensual," and that "workplace romances can lead to other legal complications as well, including perceptions of favoritism . . . and conflicts of interest").

[9] *See* Mitchell Poole, *Paramours, Promotions and Sexual Favoritism: Unfair, But Is There Liability?*, 25 PEPP. L. REV. 819, 822 (1998) (explaining that "[c]ases of sexual harassment actionable under Title VII . . . are not always so easy to distinguish from nonactionable cases of sexual favoritism, and employers are at risk because of this vagary").

[10] *See* Van Tol, *supra* note 3, at 162. Generally sexual favoritism arises from a consensual sexual relationship between a co-worker and a supervisor. *Id.*

[11] The more typical sexual harassment claim that arises from a consensual workplace relationship is a subordinate in a relationship which she claims she was coerced into by the superior. A sexual favoritism claim, by contrast, is brought by a co-worker of those in the relationship who claims she was disadvantaged in the workplace due to the supervisor's favoritism towards his lover. *See* Van Tol, *supra* note 3, at 161–62 (arguing that "sexual favoritism is another form of sexual harassment" and that preferential treatment "undermines the integrity of the workplace").

[12] *See* Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual*

Recently, in *Miller v. Department of Corrections,*[13] the California Supreme Court unanimously held that consensual sexual relationships that result in favoritism in the workplace may constitute sexual harassment of employees who were *not* so favored.[14] While this holding was touted as significantly expanding the landscape of sexual harassment law,[15] the narrow analysis employed by the *Miller* court appears to present substantial barriers to victims of sexual favoritism and to depart from the Supreme Court's teachings on sexual harassment in the Title VII context.

In *Miller*, a situation arose that the court deemed "outrageous"[16] and commentators labeled "soap opera" worthy.[17] The events[18] occurred at prison facilities run by the state's Department of Corrections. Plaintiffs Miller and Mackey were correctional officers. Beginning in 1994, Miller heard from other employees that the warden of the prison (Kuykendall) was having a consensual sexual relationship with three different women subordinates (Patrick, Brown, and Bibb).[19] During the time that the relationships occurred, Patrick, Brown, and Bibb received various job benefits ranging from desirable transfers,

Favoritism, 51 WASH. & LEE L. REV. 547, 559 n.68, 561 nn.73 & 74 (1994) (detailing the many holdings of the various federal courts regarding sexual favoritism); Michael J. Levy, Note, *Sex, Promotions and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination*, 45 HASTINGS L.J. 667, 668 (1994); discussion *infra* Part II.

[13] 115 P.3d 77 (Cal. 2005).

[14] *Id.* at 90.

[15] *See* discussion *infra* notes 43–51 and accompanying text (discussing the media attention and legal community reaction to *Miller*).

[16] *Miller*, 115 P.3d at 91.

[17] David L. Hudson Jr., *Sexual Hijinks Can Create Hostile Work Environment*, ABA JOURNAL E-REPORT (July 29, 2005); *see also* Mike McKee, *Court Equates Favoritism with Discrimination*, THE RECORDER, July 19, 2005 (stating that "[t]he decision comes out of a case that has all the tawdry elements of a cheap, made-for-TV movie"); Stephen C. Tedesco & Jamie M. Harding, *Employers Face Greater Risk from Workplace Romance: California Supreme Court Rules that Office Affairs May Give Rise to Sexual Favoritism Claims*, ASAP: Littler Mendelson Newsletter, Aug. 2005, *available at* http://www.littler.com/collateral/12824.pdf (noting lurid details of the case, including disputes between the lovers and the women "squabbl[ing]" over the man at the workplace).

[18] The events and facts from *Miller* will be discussed in some detail. This is because, following the Supreme Court's guidance that sexual harassment claims must be determined on a case-by-case basis, such cases are analyzed in a heavily fact-specific manner. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (noting that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

[19] *Miller*, 115 P.3d at 81.

promotions for which there were better qualified candidates, special assignments, and work privileges.[20] While the warden was the individual working behind the scenes to effectuate the transfers and promotions, the three women bragged to coworkers about their power over the warden.[21] Brown was able to win numerous promotions over Miller even though Miller had a higher rank, superior education, and greater experience.[22] Within a year and a half, Brown was promoted to the position of associate warden. Other employees were outraged at the pace of her promotions and complained that to achieve higher-ranking positions they would have to "F [their] way to the top."[23]

Things got worse for Miller when Yamamoto, a female chief deputy warden who was also rumored to be engaged in a sexual relationship with Brown, began "interfer[ing] with [plaintiff's] duties" including countermanding her orders, imposing upon her additional onerous duties and threatening her with reprisals.[24] When Miller complained to the warden, he did nothing to discipline Yamamoto and indicated that he was unable to help Miller due to his relationship with Brown and Brown's relationship with Yamamoto.[25]

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[20] *Id.* at 82. The warden sat on the interview committees when these women were up for promotions and, in one instance when the committee failed to select the warden's lover, he told the members to "make it happen." *Id.* at 81.

[21] *Id.* at 81–82. In one instance, plaintiff Miller competed for a promotion against one of the warden's lovers (Brown). The lover announced to plaintiff that the warden would be forced to give her the promotion or else "she would 'take him down' with her knowledge of 'every scar on his body.' " *Id.* at 82.

[22] *Id.* at 82. Plaintiff was afraid of complaining about the relationships because she had witnessed adverse employment actions taken against two other employees who had complained about the warden's affairs. *Id.*

[23] *Id.* Brown's promotion to associate warden made her Miller's direct supervisor. *Id.* The warden had again sat on the interview committee that determined Brown's promotion. *Id.* The Internal Affairs investigator encountered several employees who believed that persons who had sexual affairs with Kuykendall received special employment benefits. *Id.* One of the warden's lovers even admitted that "there were widespread rumors that sexual affairs between subordinates and their superior officers were 'common practice in the Department of Corrections' and that there were rumors that employees . . . secured promotion in this way." *Id.*

[24] *Id.* at 83. At one point, according to an internal affairs report, apparently angered that plaintiff had spoken to internal affairs about the situation, Brown imprisoned and assaulted Miller in her office and Yamamoto refused to do anything about it. *Id.*

[25] *Id.* at 83–84. At this point the warden also indicated to Miller that his relationship with Brown was "finished" and that he should have chosen her. *Id.* at 84.

Plaintiff Mackey's allegations of harassment, while not as severe as Miller's, were numerous. Mackey suffered verbal abuse in front of other employees, a decrease in pay and interference with her duties at the hands of Brown, who was angered that Mackey was considering complaining about Brown's relationship with Kuykendall.[26] In addition to the specific actions and statements aimed at Miller and Mackey, there was also evidence of activities that affected the workplace in general: employees witnessed the warden and one of his lovers fondling each other and at various times the three women were seen fighting over the warden in emotional scenes at work.[27]

Plaintiffs eventually complained to internal affairs about the situation.[28] Their complaint and statements to internal affairs (which were apparently leaked) angered everyone involved in the sexual relationships and, as a consequence, plaintiffs were subjected to additional ostracism and harassment.[29] In one instance, Brown followed Miller home after an angry confrontation at work, resulting in a court order that required Brown to stay away from Miller.[30] Suffering from increasing stress[31] and humiliation at work, Miller and Mackey resigned from the Department in August of 1998 and the winter of 1999, respectively.

Plaintiffs filed complaints with the California Fair Employment and Housing Authority in March of 1999 alleging, among other things, that the warden's sexual favoritism constituted discrimination and harassment.[32] Defendants moved for summary judgment. The trial judge determined the evidence of the warden's sexual favoritism did not constitute

[26] *Id.* at 85. Mackey also feared adverse job action if she complained about the relationship because she had witnessed the termination of another woman who had complained about the "improper affair." *Id.* She also witnessed Brown physically assault Miller after she complained about the affair. *Id.*

[27] *Id.* at 83.

[28] *Id.* Internal Affairs conducted an investigation and determined that "[b]oth relationships [the warden-Brown relationship and the Brown-Yamamoto relationship] were viewed by staff as unethical from a business practice standpoint and one [*sic*] that created a hostile working environment." *Id.* at 82.

[29] *Id.* at 84–85. Apparently, even inmates at the prison thought that Miller was attempting to have the warden fired. Miller and Mackey both suffered adverse job actions (reduction in responsibilities, denial of work experience needed to be promoted and suspension of disability accommodations). *Id.*

[30] *Id.* at 84.

[31] *Id.* Mackey also had health problems as a result of the stress. *Id.* at 85.

[32] *Id.* at 85.

discrimination or harassment and awarded summary adjudication to the defendants.[33] "The Court of Appeals affirmed, concluding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, nonfavored employees."[34] The Court of Appeals found that the plaintiffs had not stated an actionable hostile work environment claim because, although they had "demonstrated unfair conduct in the workplace," the preferential treatment of the lovers did not rise to a "concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex."[35]

The unanimous Supreme Court of California reversed the rulings of the lower courts and held that "an employee may establish an actionable claim of sexual harassment . . . by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[36] In so holding, the court relied almost exclusively on Equal Employment Opportunity Commission ("EEOC") policy guidance regarding employer liability for sexual favoritism.[37] Following the standard recommended by the EEOC, the court stated that "an employee may establish an actionable claim of sexual harassment . . . by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[38] The court then applied this standard to the facts of *Miller* and concluded that the "evidence proffered by [the] plaintiffs, viewed in its entirety, established a prima facie case of sexual harassment under a hostile-work-environment theory."[39]

The court found that the plaintiffs were able to show "far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner";

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[33] *Id.* at 85–86.
[34] *Id.* at 86.
[35] *Id.*
[36] *Id.* at 90. As discussed *infra* note 52, *Miller* was decided under California state law but this Comment expands the court's analysis and explores *Miller*'s impact on Title VII sexual harassment claims.
[37] *Id.* at 88–90.
[38] *Id.* at 90.
[39] *Id.*

the plaintiffs demonstrated the impact of widespread favoritism on the work environment and that this had created an atmosphere that was "demeaning to women."[40] The court rejected the defendant's contention that recognition of a sexual favoritism cause of action would result in regulation of personal relationships because the court found that it "is not the relationship, but its effect on the workplace, that is relevant."[41] The court reasoned that the negative effect on the non-favored employees and work environment that resulted from the warden's affairs diminished concerns the court may have had about intruding on the privacy of the relationships.[42]

The *Miller* decision received a great deal of media attention, including a *New York Times* article,[43] a lengthy analysis piece on CNN.com,[44] and a mention in *The Economist*, which heralded the decision as providing "a new definition of sexual harassment."[45] The decision was deemed a "victory" for women[46] and for "the unloved" workers who "can no longer be treated as second class citizens because they are not putting out."[47] Both defense and plaintiff law firms rushed to classify the case as "groundbreaking,"[48] "sound[ing] [an] alarm" to employers[49] and as "a ruling that significantly expanded the law on sexual harassment in the workplace."[50] The general consensus seemed

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[40] *Id.* at 93. The court detailed the facts in Miller that it believed amounted to widespread favoritism: admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, Kuykendall's admission that he could not control Brown because of his sexual relationship with her, and the Department's internal affairs report which confirmed the favoritism. *Id.*

[41] *Id.* at 94.

[42] *Id.*

[43] Navarro, *supra* note 1.

[44] Grossman, *supra* note 2.

[45] *Employment Law: When Sex Is Unfair*, THE ECONOMIST, July 23, 2005, at 46.

[46] Kim Curtis, *High Court Agrees Women Harassed*, MONTEREY COUNTY HERALD (July 19, 2005); Hudson, *supra* note 17.

[47] Navarro, *supra* note 1.

[48] Curtis, *supra* note 46 (citing Phil Horowitz of the California Employment Lawyers Association who classifies the decision as "groundbreaking").

[49] *California Ruling on Workplace Romance Sends Employers Scrambling for Cover*, JACKSON LEWIS LEGAL UPDATE, Aug. 8, 2005, *available at* http://www.jacksonlewis.com/legalupdates/article.cfm?aid=827.

[50] Navarro, *supra* note 1; *see also Workplace Romance May Create Hostile Work Environment for Other Employees*, JACKSON LEWIS LEGAL UPDATE, July 22, 2005, *available at* http://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=818 (characterizing the decision as a "significant expansion of sexual harassment law"

to be that *Miller* had huge implications for employees and employers, including ending sexual relationships between coworkers and forcing employers to closely police employee relationships in order to avoid *Miller*-like liability.[51]

The media and legal community recognized that *Miller* was "groundbreaking" in its proclamation that a consensual sexual relationship between a boss and a subordinate could create a sexual harassment claim for another group of employees. This Comment argues that from the viewpoint of a Title VII sexual harassment claimant,[52] the narrow analysis the *Miller* court used in arriving at its holding was not at all "groundbreaking" and, in fact, creates numerous barriers for victims[53] of sexual favoritism. Further the *Miller* court's focus on the narrow guidelines issued by the EEOC as the way in which a sexual favoritism claim should be analyzed significantly disadvantages Title VII claimants.

This Comment explains that while the *Miller* court came to the correct conclusion that sexual favoritism can be grounds for an actionable hostile environment sexual harassment claim, the court's analysis of the issue and use of narrow EEOC guidelines in arriving at that conclusion was not only unnecessary in light of current sexual harassment jurisprudence but will likely be fatal to Title VII plaintiffs if later courts follow *Miller* and similarly analyze sexual favoritism claims. Thus, while *Miller* is

and "groundbreaking"); Jack Sholkoff, *California Supreme Court Expands Definition of Sexual Harassment; Court Imposes New Duties on Employers To Monitor Effects of Consensual Relationships Between Employees*, HOLLAND & KNIGHT NEWSLETTERS & ALERTS, July 19, 2005, *available at* http://www.hklaw.com/Publications/Newsletters.asp?IssueID=591 (stating that *Miller* "dramatically increase[s] the potential breadth of sexual harassment law").

[51] *See* Navarro, *supra* note 1.

[52] *Miller* was decided under the California Fair Employment and Housing Act (FEHA). This Comment, however, will analyze the *Miller* court's approach as applied to a Title VII sexual harassment claim. As the *Miller* court itself noted, both the FEHA and Title VII use "comparable" language and "share the common goal of preventing discrimination in the workplace." *Miller*, 115 P.3d at 88. As discussed *infra* Part II, application of sexual favoritism claims in the Title VII arena presents a clear and ongoing challenge for claimants and thus is the issue explored in this Comment. Analysis of *Miller* in light of the FEHA or other state law protections is not covered within the scope of this Comment, but is both an important and interesting area for further exploration.

[53] Please note that throughout this paper when referring to "victims" female pronouns will be used. This is to reflect the most common reported situation of the harassed subordinate being female to the male. *See* Phillips, *supra* note 12, at 549 & n.7; Poole, *supra* note 9, at n.5.

viewed by many as providing a new basis of relief for plaintiffs, the road for such plaintiffs includes many obstacles. This Comment explores these obstacles erected by the *Miller* court's analysis and provides a recommendation for overcoming such barriers to sexual favoritism claims in the Title VII arena.

Part I of this Comment provides an overview of sexual harassment claims under Title VII and discusses the history of the Supreme Court's sexual harassment jurisprudence. Part II of this Comment examines the debate over whether sexual favoritism in the workplace is a form of sexual harassment and discusses how courts and the EEOC have historically treated such claims. Part III of this Comment will critique the analysis of the *Miller* court in arriving at its holding. This part argues that the *Miller* court's reliance on the EEOC's narrow "widespread" favoritism standard creates numerous problems for plaintiffs who wish to bring sexual favoritism claims under Title VII. This "widespread" favoritism standard has the effect of translating *Miller* into an aberration rather than groundbreaking case law because *Miller*'s egregious facts allow defense attorneys and courts to easily limit *Miller* to its facts.

Part IV explains that the *Miller* court erred in applying the EEOC's "widespread" favoritism standard rather than deciding the case under the Supreme Court's definition of an actionable hostile environment sexual harassment claim. The Supreme Court's current sexual harassment jurisprudence is seemingly open to a claim of sexual favoritism without the additional use of the confining EEOC guidelines on sexual favoritism.

Part V recommends that subsequent courts disregard the EEOC's "widespread" favoritism standard and assess sexual favoritism claims under the Supreme Court's current Title VII sexual harassment precedent. This part also examines sexual favoritism claims under the Supreme Court's hostile work environment standard. This part concludes with arguments against potential criticisms of this recommendation.

I. DEFINING SEXUAL HARASSMENT UNDER TITLE VII

The short history of sexual harassment in American jurisprudence is one challenge to plaintiffs who wish to bring a previously unrecognized or largely rejected claim. Sexual

harassment is an ill-defined "legal term of art."[54] Much of the law is ambiguously defined and standards are constantly being shifted and reworked.[55] Future plaintiffs who bring a sexual favoritism claim will likely struggle to assess where (if at all) their claim will fit within the legal system's ever changing ideas about sexual harassment.

A. *Sexual Harassment, Title VII and the EEOC*

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[56] There has been much discussion and disagreement over what constitutes discrimination because of sex[57] and unfortunately, there is little legislative history to assist in interpreting Title VII's prohibition against sex discrimination.[58] Courts and commentators began grappling with whether sex-based harassment constituted sex discrimination in the 1970s.[59] Initially some lower courts rejected the idea that sexual harassment was a form of sex discrimination finding that the harassment was "morally objectionable" but not discrimination.[60] By the 1980s, however, obstacles to claims of sexual discrimination based on sexual harassment had eroded.[61]

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[54] Van Tol, *supra* note 3, at 156.

[55] *See* Phillips, *supra* note 12, at 547. Confusion abounds over the definition of sexual harassment in popular culture as well. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2083 (noting that "[t]he press has uncritically characterized everything from consensual sex to forcible rape under the common label of 'sexual harassment' ").

[56] 42 U.S.C. § 2000e-2(a) (2000).

[57] Mary C. Manemann, *The Meaning of 'Sex' in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 639 (1989).

[58] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (lamenting that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex' "). The prohibition against sex discrimination was added hastily and many commentators have discussed the theory that "sex" was actually added by legislators who wished to defeat the entire Act. *See* Manemann, *supra* note 56, at 638–39.

[59] *See generally* GWENDOLYN MINK, HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN (2000) (discussing sex-based harassment and sex discrimination).

[60] Phillips, *supra* note 12, at 551.

[61] *See id.* at 556.

Following the trend of the courts, the EEOC in 1980 also formally recognized sexual harassment as a form of sex-based discrimination and issued policy guidelines explaining the elements of sexual harassment under Title VII.[62] The EEOC's guidelines state that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" violates Title VII under certain employment scenarios.[63] Employers can be deemed liable for sexual harassment based on either a quid pro quo or hostile work environment theory.[64] In quid pro quo sexual harassment (literally "something for something"),[65] tangible job benefits from the employer are conditioned upon the employee performing sexual acts.[66] Quid pro quo harassment is of the explicit or implicit "sleep with me or you're fired" variety.[67] Hostile environment sexual harassment typically occurs when inappropriate behavior causes the workplace to become sexually charged. For example, "unwelcome sex-related inquiries, jokes, slurs, propositions, touchings, and other kinds of abuse directed at an employee by either a supervisor or a fellow worker" constitute hostile environment sexual harassment.[68] The EEOC guidelines helped provide a framework for the lower courts and were quite influential. Lower courts received some much needed guidance from the Supreme Court in 1986, which further helped to define the unclear concept of sexual harassment.

B. *Sexual Harassment and the Supreme Court*

In the 1986 landmark case of *Meritor Savings Bank v. Vinson*,[69] the Supreme Court recognized sexual harassment as an

[62] 29 C.F.R. § 1604.11(a) (2004) (defining sexual harassment under Title VII). The Supreme Court has indicated that while the EEOC Guidelines are not binding on the courts, they can be looked to for guidance. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

[63] 29 C.F.R. § 1604.11(a).

[64] *Id.* The employer can be liable for sexual harassment on either the quid pro quo or hostile work environment theory. *See infra* notes 64–67 and accompanying text.

[65] *See* Manemann, *supra* note 57, at 649.

[66] *See id.*

[67] G. Roger King, *Sexual Harassment Claims in the New Millennium: A Litigator's Point of View*, 27 OHIO N.U. L. REV. 539, 540 (2001).

[68] Phillips, *supra* note 12, at 555.

[69] 477 U.S. 57 (1986).

unlawful form of discrimination under Title VII.[70] While the facts of *Meritor* likely could have substantiated a sexual harassment claim based upon the quid pro theory of sexual harassment, the Court instead used the case as an opportunity to definitively endorse the concept that hostile work environment sexual harassment violates Title VII.[71] The Court's rationale for viewing hostile or abusive work environment harassment as discrimination was grounded in the fact that such harassment "which creates a hostile or offensive environment for members of one sex is . . . [an] arbitrary barrier to sexual equality at the workplace."[72]

After Meritor, hostile environment claims "became a fixture of sexual harassment jurisprudence"[73] The Supreme Court has only revisited sexual harassment on four other occasions, with two of the four cases dealing primarily with employer liability for supervisor and employee harassment of other employees.[74] However, in two cases, *Harris v. Forklift Systems, Inc.*[75] and *Oncale v. Sundowner Offshore Services, Inc.*,[76] the Court provided further guidance as to what constitutes hostile environment sexual harassment.

In *Harris,* the Court considered the definition of a hostile work environment in a case where the lower court had ruled that the victim could not maintain an actionable claim without proof that the harassing conduct "seriously affect[ed] plaintiff's psychological well-being."[77] The unanimous Supreme Court rejected this argument, stating that, "Title VII comes into play before the harassing conduct leads [the victim] to a nervous breakdown."[78] The Court held that psychological injury to the victim was not a requirement of a hostile work environment claim, and that Title VII barred conduct that was severe or pervasive enough to create an objectively and subjectively hostile

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[70] *Id.* at 73.

[71] *Id.* at 64–66.

[72] *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

[73] MINK, *supra* note 59, at 40.

[74] Burlington Indus. v. Ellerth, 524 U.S. 742, 746–47 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

[75] 510 U.S. 17 (1993).

[76] 523 U.S. 75 (1998).

[77] *Harris*, 510 U.S. at 22.

[78] *Id.*

work environment,[79] which is "determined only by looking at all the circumstances."[80] Thus, *Harris* is cited for the proposition that a hostile environment sexual harassment claim has both an objective and subjective component: The victim must prove that a reasonable person would believe that the harassing conduct made the work environment hostile and that the victim herself subjectively believed it to be hostile.[81] In *Oncale*,[82] the most recent case which developed and defined the concept of sexual harassment, the Court unanimously held that same-sex harassment is an actionable form of sex discrimination.[83] The Court took an expansive view in *Oncale* stating that Title VII's protections "must extend to sexual harassment of any kind that meets the statutory requirements."[84]

II. HISTORY OF SEXUAL FAVORITISM

Courts and commentators have consistently disagreed over whether victims of workplace sexual favoritism that arises from a supervisor's consensual sexual relationship with another employee have cognizable sexual harassment claims.[85] Commentators also disagree over what the Title VII basis would be for such claims if they were recognized.[86] It appears that the hostile environment jurisprudence is the best fit[87] since the favoritism alleged may disadvantage both individuals or groups of non-favored employees, as well as negatively impact the entire work environment.

A. History of Sexual Favoritism in the Federal Courts

Prior to *Miller*, the overwhelming majority of previous rulings throughout the federal circuits had consistently held that consensual sexual relationships in the workplace do *not* constitute discrimination based upon sex or sexual harassment, but rather reflect the "personal preference" of a supervisor to

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[79] *Id.* at 22–23.
[80] *Id.* at 23.
[81] *See* King, *supra* note 67, at 540.
[82] 523 U.S. 75 (1998).
[83] *Id.* at 82.
[84] *Id.* at 80.
[85] *See* discussion *infra* Part II.A.
[86] *See generally* Manemann, *supra* note 57, at 645–51 (examining the different ways that a sexual favoritism claim may "fit" under Title VII).
[87] *Id.* at 651; *see also* Van Tol, *supra* note 3, at 177–78.

engage in relations with one employee over another.[88] The courts acknowledged that it is "unfair"[89] for a supervisor to provide job benefits to a subordinate with whom he is in a sexual relationship while denying benefits to other employees; yet the courts refused to recognize such a situation as rising to a level where it creates a cause of action on behalf of the non-sexually favored employees.[90] Courts have used various means to exclude sexual favoritism from the protection of Title VII. In the leading case of *DeCintio v. Westchester County Medical Center*,[91] the Second Circuit relied on a narrow definition of the word "sex" in Title VII to hold that consensual sexual relationships do not constitute sex discrimination. The *DeCintio* court's rationale was that because an employee of the opposite sex could have suffered the same negative impacts from the supervisor's sexual favoritism, the non-favored employee was not disadvantaged based upon gender.[92]

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[88] *See, e.g.*, DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986).

[89] *Id.*

[90] *Id.*; *see also* Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 382 (5th Cir. 2003) (reasoning 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"); Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002) (stating that "Title VII does not, however, prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protegé, an old friend, a close relative or a love interest, that special treatment is permissible"); Womack v. Runyon, 147 F.3d 1298, 1299–1301 (11th Cir. 1998) (follwing *DeCintio* and affirming dismissal of claim on issue of "whether preferential treatment based on a consensual relationship between a supervisor and an employee constitutes a cognizable sex discrimination cause of action under Title VII"); Taken v. Okla. Corp. Comm'n., 125 F.3d 1366, 1370 (10th Cir. 1997) (explaining that "[f]avoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on a prohibited classification"); Becerra v. Dalton, 94 F.3d 145, 149–50 (4th Cir. 1996) (holding that "even accepting as true the fact that the commanding officer was accepting sexual favors . . . this conduct does not amount to sexual discrimination against [plaintiff] under Title VII"); Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (emphasizing that "A co-worker's romantic involvement with a supervisor does not by itself create a hostile work environment."); Alberto v. Bank of Am., No. C-94-1283-VRW, 1995 U.S. Dist. LEXIS 13520, at *8–14 (N.D. Cal. Sept. 15, 1995) (describing the uneven split among the circuits who do not find sexual favoritism actionable and the one circuit who seems to support the cause of action).

[91] 807 F.2d 304 (2d Cir. 1986).

[92] *See id.* at 308. The logic apparently is: if a male supervisor prefers female X, a male employee is disadvantaged in the same way as other female employees–the supervisor only prefers female X, not any of the other employees whether male or

While the large majority of federal courts follow the logic of *DeCintio* in holding that sexual favoritism is not actionable under Title VII,[93] several district court decisions have held that sexual favoritism may violate Title VII.[94] These few opinions that favor recognition of a sexual favoritism claim, do so because they deem the "theoretical underpinnings"[95] of such a claim to be no different than a Title VII sexual harassment claim. However, other courts, including *DeCintio*,[96] have either flat-out rejected (or distinguished) these pro-sexual favoritism claim cases.

It is important to note that although *DeCintio* was decided in the same year as *Meritor Savings Bank v. Vinson*,[97] in which the Supreme Court recognized hostile work environment sexual harassment claims,[98] the *DeCintio* court did not examine the possibility of a sexual favoritism claim in light of *Meritor*.[99] Several courts that have considered sexual favoritism claims within the context of a hostile work environment have indicated that sexual favoritism may contribute to a hostile environment.[100] The large majority of courts, however, continue to follow *DeCintio*'s holding and narrow definition of what constitutes sex discrimination under Title VII and do not consider the possibility that sexual favoritism could rise to the level of hostile work environment sexual harassment.[101] One commentator has stated that this "erroneously narrow view" regarding the doctrine of sexual favoritism, embodied by the EEOC, and utilized by the courts following *DeCintio*, reflects a misinterpretation of *Meritor*;[102] however, neither the EEOC nor the majority of federal courts seem willing to revisit their rejection of sexual favoritism.

female. Thus sexual favoritism in the workplace, while "unfair," is not discrimination based on sex: both non-favored female and non-favored male employees are equally disadvantaged.

[93] *See* Phillips, *supra* note 12, at 559–60 n.68.

[94] *See id.* at 561 n.74.

[95] Toscano v. Nimmo, 570 F. Supp. 1197, 1199 (D. Del. 1983).

[96] *See DeCintio*, 807 F.2d at 307.

[97] 477 U.S. 57 (1986).

[98] *Id.* at 66.

[99] *See DeCintio*, 807 F.2d at 306–07 (acknowledging *Meritor*, but not considering the hostile environment framework in analysis).

[100] *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 859–62 (3d Cir. 1990); Broderick v. Ruder, 685 F. Supp. 1269, 1277–78 (D.D.C. 1988).

[101] *See* Phillips, *supra* note 12, at 559.

[102] *See* Van Tol, *supra* note 3, at 177.

B. EEOC Guidelines on Sexual Favoritism

In 1990, the EEOC issued its Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism [the "EEOC Guidelines"].[103] The purpose of the policy was 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."[104] The guidelines state explicitly that the EEOC believes that "[n]ot all types of sexual favoritism violate Title VII."[105]

The EEOC Guidelines define three instances of favoritism, only two of which are deemed to violate Title VII. The first instance involves "isolated instance[s] of favoritism toward[s] a 'paramour.' "[106] Under this category of favoritism, the "charging party" loses a promotion that he or she was qualified for because the employee that obtained the promotion was involved in a consensual sexual relationship with their supervisor.[107] The EEOC would deem this situation "an isolated instance of favoritism," which, though "unfair," is not a violation of Title VII.[108] Thus, this "isolated" category of favoritism mirrors the Second Circuit's holding in *DeCintio*.

The second category of favoritism is "[b]ased [u]pon [c]oerced [s]exual [c]onduct," which the EEOC states "[m]ay [c]onstitute [q]uid [p]ro [q]uo [h]arassment" in violation of Title VII.[109] This circumstance arises when the relationship between the favored coworker and the supervisor was not consensual; for example, where the non-favored employee's supervisor "regularly harassed the [favored] co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about his 'conquest.' "[110] Given these facts, the non-

[103] EEOC OFFICE OF LEGAL COUNSEL, EEOC NOTICE NO. 915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), *available at* http://eeoc.gov/policy/docs/sexualfavor.html.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See id.* (providing an example of "isolated" favoritism).

[108] *Id.*

[109] *Id.*

[110] *See id.* (providing an example of favoritism based upon coerced sexual conduct).

favored employee may be able to establish a violation of Title VII by showing that the promotion was conditioned upon granting sexual favors to the supervisor. The gravamen of this category is that the underlying supervisor-subordinate relationship was coerced rather than consensual, the former which the EEOC deems "substantially the same as a traditional sexual harassment [claim]."[111]

Under the EEOC's third category, "[w]idespread [f]avoritism [m]ay [c]onstitute [h]ostile [e]nvironment [h]arassment" in violation of Title VII.[112] The EEOC explains that supervisors who are engaged in "widespread sexual favoritism" send the message that the way for women to get ahead in the workplace is to have sex with supervisors, which in turn sends the message that supervisors view women as "sexual playthings."[113] The example that the EEOC provides of widespread favoritism is where a non-favored employee loses a promotion she was qualified for because the employee who obtained the promotion was engaged in a sexual relationship with their supervisor.[114] However, this differs from the first "isolated favoritism" category that is not actionable under Title VII, because in this instance, supervisors and other management personnel "regularly solicited sexual favors from subordinate employees and offered job opportunities to those who complied."[115] Aside from these examples, the EEOC provides no other guidance as to what level of favoritism would be deemed "widespread" (and thus actionable) versus "isolated" (and thus not actionable).

C. The Underlying Debate About Whether Sexual Favoritism Should Be Recognized

The federal court cases, discussed above in Part II.A, reflect the main problem that arises for the courts, plaintiffs, and employers when facing a sexual favoritism claim: not all sex-related activity in the workplace is illegal.[116] The majority of the Circuits seem more comfortable with employing a narrow reading

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[111] *See id.*
[112] *Id.*
[113] *Id.*
[114] *See id.*
[115] *Id.*
[116] *See* Henry L. Chambers, Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 733 (2002) (noting that "welcome conduct does not cause sexual harassment harm").

of Title VII rather than expanding the statute's protections to sexual favoritism claims that derive from a consensual sexual relationship.[117] *Miller*, with its emphasis on wholly consensual sexual activity that the court held resulted in sexual harassment of employees *uninvolved* in the sexual relationship, illustrates the complex and murky line between what is deemed acceptable workplace behavior, as opposed to behavior that creates a hostile work environment for which an employer can be held civilly liable.[118] It is perhaps because of this unclear boundary that courts and legal scholars have consistently disagreed about whether sexual favoritism in the workplace that results from a consensual relationship can give rise to an actionable sexual harassment claim on behalf of the non-favored employee.[119] The EEOC attempted to assist courts and parties by issuing its Policy Guidelines on Sexual Favoritism; however, these guidelines employ the same narrow analysis of the *DeCintio* court[120] and place many limits on potential recognition of sexual favoritism claims.

Between the federal courts' rejection of sexual favoritism claims and the EEOC's attitude, which severely narrows the probable basis for such a claim[121] to only those situations where the favoritism is "widespread" or based on a "coerced" relationship, it seemed as if sexual favoritism had little potential for recognition as a prohibited form of sexual harassment. The *Miller* court dove head first into this complex area of law when it declared that sexual favoritism in the workplace may establish a claim of sexual harassment under a hostile work environment

[117] *See* DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307–08 (2d Cir. 1986) (expressing concerns about the implications of a reading of Title VII that encompasses actionable sexual favoritism).

[118] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67–68 (1986) (defining actionable sexual harassment under Title VII).

[119] *See, e.g.*, Knadler v. Furth, No. C 04-01220 CRB, 2005 U.S. Dist. LEXIS 21278, at *16–18 (N.D. Cal. Sept. 9, 2005) (describing discord among the courts). *Compare* Levy, *supra* note 12, at 668–69 (agreeing with the trend of not allowing sexual favoritism claims to be covered by Title VII), *and* Phillips, *supra* note 12, at 549–50 (arguing that sexual favoritism that is not factually linked to sexual harassment, does not fall under the protections of Title VII), *with* Manemann, *supra* note 57, at 615 (concluding that sexual favoritism violates Title VII), *and* Van Tol, *supra* note 3, at 156 ("[P]referential treatment in the workplace based on sexual favoritism should be actionable under Title VII as a form of employment discrimination.").

[120] *See* Levy, *supra* note 12, at 682.

[121] *See* Van Tol, *supra* note 3, at 155.

theory,[122] thus giving victims of workplace sexual favoritism hope for redress and renewing questions about the viability of sexual favoritism as an actionable Title VII claim.

III. *MILLER*'S RELIANCE ON THE "WIDESPREAD" FAVORITISM STANDARD

Given the strong historical rejection by the federal courts of recognizing sexual favoritism as an actionable claim, the *Miller* court deserves kudos for its courage to reverse the rulings of the two lower courts and reject decades of precedent that by in large deemed sexual favoritism as nothing more than "unfair." The *Miller* court, however, created a sizable challenge for victims of a hostile work environment created by sexual favoritism, especially in the Title VII context, due to its analysis and use of the "widespread" favoritism standard.

A. The Miller *Court's Use of the EEOC's Widespread Favoritism Standard*

The *Miller* court began its opinion by stating that it agreed with the Supreme Court that "to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex."[123] However, after stating the Supreme Court's accepted hostile work environment standard, the court then moves to a verbatim recitation of the EEOC Guidelines. The *Miller* court does not explain why these guidelines are necessary in evaluating Miller's or Mackey's claim of sexual harassment[124] or how the EEOC Guidelines fit within the Supreme Court's sexual harassment jurisprudence. After discussing the EEOC Guidelines and the EEOC's recommendation of the "widespread" favoritism concept, the

[122] *See* Miller v. Dep't of Corr., 115 P.3d 77, 90 (Cal. 2005).

[123] *Id.* at 87 (citing Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 851 (Cal. 1999), relying upon Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

[124] A read of the *Miller* opinion truly is perplexing in this sense. The *Miller* court cites the Supreme Court but then immediately moves onto discussing the EEOC Guidelines without making any connection between why, given the Supreme Court's sexual harassment jurisprudence, the EEOC Guidelines should even be considered.

Miller court announced the standard it felt should be employed in a sexual favoritism based hostile work environment claim:

> Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment . . . by demonstrating that *widespread sexual favoritism* was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.[125]

In addition to embracing the "widespread" favoritism standard, the *Miller* court describes the difference between an actionable sexual favoritism based hostile work environment claim and a non-actionable claim in the following manner:

> [A]lthough an *isolated* instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor . . . conduct[ed] a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is *sufficiently widespread* it may create an actionable hostile work environment.[126]

The *Miller* court's analysis clearly distinguished the two "poles" of the EEOC's sexual favoritism framework: "isolated" and "widespread."[127] While it is clear from the *Miller* court's perspective that liability for all office romances turns on the fine distinction between "isolated" sexual favoritism, which is not actionable, and "widespread" sexual favoritism, which creates a hostile work environment,[128] the court's opinion does not explain why it finds these two distinctions relevant to a discussion of an actionable hostile work environment.

The Miller court's use of this "widespread" favoritism standard is perplexing. It adopts the EEOC recommended requirement of "widespread" favoritism, but does not explain why the *Miller* court felt that sexual favoritism based hostile work environment claims required a standard different from the Supreme Court's requirements for sustaining an actionable hostile work environment claim (which the *Miller* court had cited with approval at the outset of its opinion). Further, the *Miller*

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[125] *Miller*, 115 P.3d at 90 (emphasis added).

[126] *Id.* at 80 (emphasis added).

[127] See *supra* Part II.B for a detailed discussion of the EEOC's Sexual Favoritism Guidelines and the standard promulgated thereunder.

[128] *See* Tedesco & Harding, *supra* note 17 (noting that the "widespread" events in *Miller* make it a unique case).

court does not discuss why the obscure fifteen-year-old EEOC Guidelines spurred the court to insert "widespread sexual favoritism" as an additional element into the Supreme Court's accepted hostile work environment framework. This would seemingly be a necessary explanation since the 1990 EEOC Guidelines, which are based on a 1986 Second Circuit case, reflect none of the Supreme Court's latest thinking on sexual harassment.[129]

B. The Miller *Court's Problematic "Widespread Favoritism" Standard*

While *Miller*'s outcome may have been "groundbreaking," the analysis the court employed to reach its holding leaves much to be desired from the plaintiff's perspective. The *Miller* court's advocacy of analyzing sexual favoritism claims under the narrow "widespread" favoritism standard makes plaintiff success unlikely. The "widespread" favoritism standard allows a claim's outcome to turn upon an independent, ambiguous determination of whether the conduct was "widespread." An additional obstacle is that *Miller*'s egregious circumstances allow defense attorneys and courts working under the "widespread" favoritism standard to easily limit the case to its facts which will likely have the effect of casting the case as an aberration.

1. "Widespread" Is Too Narrow To Provide Meaningful Guidance

Commentators state that the narrowness of the EEOC Guidelines "all but killed any life the sexual favoritism cause of action had,"[130] and "signals . . . [the EEOC's] intention to narrow the scope of an employer's liability for sexual favoritism."[131] One commentator even asserts that "voluntary trading in sexual currency is for the most part accepted by the . . . [EEOC]."[132] The reason for this negative view is that under the EEOC's "widespread" favoritism standard, adopted by the *Miller* court,

[129] Heavy reliance on the fifteen-year-old EEOC guidelines, which do not encompass the state of the art thinking on sexual harassment, certainly seems to present nothing new in terms of a standard by which a sexual favoritism claim becomes actionable.

[130] Poole, *supra* note 9, at 841.

[131] Van Tol, *supra* note 3, at 155.

[132] Poole, *supra* note 9, at 822.

sexual favoritism would be found actionable in so few cases that the majority of sexual favoritism victims would not be able to maintain a claim.[133]

As discussed previously,[134] the EEOC Guidelines counsel that sexual favoritism should only be found if such favoritism is either based on a coerced (non-consensual) relationship or is "widespread."[135] Under the Guidelines, "Title VII does not prohibit *isolated* instances of preferential treatment based upon consensual romantic relationships. . . . [It] may be unfair, but it does not discriminate against women or men in violation of Title VII."[136] The EEOC's policy effectively adopted the Second Circuit's 1986 *DeCintio* holding that deemed preferential sexual favoritism resulting from consensual relationships "unfair"[137] but not a violation of Title VII.[138]

Scholarly thinking indicates that the EEOC recognized that *DeCintio*'s very narrow holding, essentially eliminating sexual favoritism as an actionable Title VII claim, did not coalesce with the Supreme Court's more expansive and accepting policy regarding hostile work environment claims expressed in *Meritor*.[139] Presumably, the EEOC was not free to ignore the Supreme Court entirely. Recognizing this, the EEOC employed *DeCintio*'s narrow view as the gravamen of the Guidelines; however, as a nod to *Meritor*, the EEOC added grounds for maintaining a sexual favoritism claim under the stringent standards of either "a coerced sexual relationship" or "widespread" favoritism that creates a hostile work environment.[140] In practice this means that courts must

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[133] *See id.* at 821–22.

[134] *See* discussion *supra* Part II.B.

[135] It is very interesting to note that the EEOC Chairman at the time the Sexual Favoritism Guidelines were released was Clarence Thomas, who is not a proponent of an expansive view of workplace sexual harassment. *See* MINK, *supra* note 59, at 32.

[136] EEOC OFFICE OF LEGAL COUNSEL, *supra* note 102 (emphasis added).

[137] DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986).

[138] *Id.*

[139] Levy, *supra* note 12, at 686; *see also* Van Tol, *supra* note 3, at 155 (discussing EEOC adoption of *DeCintio*).

[140] In discussing the EEOC's obligation to pay lip service to the Supreme Court's recognition of hostile environment sexual harassment claims, Poole explained:

> The EEOC . . . apparently recognized that this [*DeCintio*-based] policy was not fully compatible with the Supreme Court's holding in *Meritor*, where sexual activity or conduct can be highly correlated to gender and result in unlawful discrimination. The EEOC, therefore, recognized two limited

determine whether the facts of a consensual sexual favoritism case fit into the narrow category of "widespread" favoritism and if not, the case must be dismissed. There is no middle ground for actionable claims.

Given the choice between "widespread" or "isolated" favoritism, it is likely that the result in most situations will be that the court will deem the favoritism "isolated" since the bar to prove "widespread" favoritism is extremely high[141] and courts historically have not favored sexual favoritism claims.[142] Since a plaintiff in a sexual favoritism case cannot prevail upon a showing of favoritism that is anything less than "widespread," one commentator has noted that "the prospects for attacking sexual favoritism as work environment sexual harassment look dim."[143]

The "widespread" favoritism standard fails to "recognize that in some instances even an isolated case of sexual favoritism can be sufficiently abusive to affect a 'term, condition or privilege' of employment within the meaning of Title VII."[144] The EEOC's guidance that sexual favoritism can only exist in two narrow situations, with no remedy in between, does not provide realistic or meaningful guidance and fails to recognize that sexual favoritism that is not sufficiently "widespread" may still result in an objectively hostile or abusive work environment under Title VII.[145]

> forms of "sexual favoritism" claims. One form of actionable sexual favoritism is based upon explicit or implicitly coerced sexual conduct. The other form of actionable sexual favoritism arises when sexual favoritism is widespread in the workplace.

Poole, *supra* note 9, at 842.

[141] *See* EEOC OFFICE OF LEGAL COUNSEL, *supra* note 102.

[142] Considering that the strong majority of courts reject sexual favoritism as actionable, it is likely that those courts, when given the chance between deeming facts "widespread" or "isolated," would gravitate towards "isolated" so that the sexual favoritism would not be actionable.

[143] Phillips, *supra* note 12, at 594.

[144] Van Tol, *supra* note 3, at 180 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

[145] The *Miller* court's standard does not consider that most victims of sexual favoritism will fall between "widespread" and "isolated" since there is a continuum of conduct that constitutes sexual harassment. *See* Diane Gentry, Essay, *Title VII Limitations—Keeping the Workplace Hostile*, 9 CARDOZO WOMEN'S L. J. 393, 393, 404–05 (2002) (discussing the concept that harassment occurs on a continuum).

2. "Widespread" Ignores Actual Harm to Plaintiffs

As one commentator notes, " 'widespread' has the potential of being vague" and the difference between an "isolated" sexual favoritism claim, which is not actionable, and a "widespread" sexual favoritism claim, which is actionable, is de minimis.[146] The "widespread" favoritism requirement focuses on the apparent number of instances of favoritism rather than on the harm that the favoritism caused the victim[147] and provides little guidance to plaintiffs or courts as to what level of sexually-charged conduct equals "widespread" favoritism.

The following example, proffered by one commentator, illustrates the vague and ambiguous nature of the "widespread" favoritism standard and its propensity to ignore actual harm to sexual favoritism victims when applied. The difficulty with the "widespread" favoritism standard can be demonstrated by asking about its application to a small field office with only one supervisor and four employees.[148] Presumably, a situation with "widespread" sexual favoritism assumes an environment where there are many employees and many supervisors. In the small field office situation, could an employee show a hostile environment claim based on "widespread" sexual favoritism if the supervisor sleeps with two different employees over a period of several years? It seems that this is a situation where other employees, simply because of the small size of their work environment, could be particularly affected by detrimental job treatment due to workplace sexual favoritism, since the employees have little room for growth and are very dependant upon the one supervisor for advancement. However, we do not know whether this scenario possibly constitutes "widespread"

[146] *See* Poole, *supra* note 9, at 843.

[147] The EEOC guidelines provide nothing other than the assertion that actionable sexual favoritism must be "widespread." Thus, we do not know the exact number of instances required or even what the ballpark number of instances of favoritism would be to have an actionable claim. Even with this ambiguity, however, it is apparent that there is a focus on the quantity of instances of favoritism. *See* EEOC OFFICE OF LEGAL COUNSEL, *supra* note 102.

[148] *See* Poole, *supra* note 9, at 843 ("Conceivably, a practice or pattern of improper behavior in work environments could occur when, in a small office, only one promotion per year is possible but the supervisor's new paramour gets it for two consecutive years . . . . [T]he difference between isolated instances and widespread cases of actionable sexual favoritism is rather small."). Of course, Title VII only applies to employers with 15 or more employees. Nevertheless, this situation could arise in a small field or branch office of a larger employer.

favoritism. In fact, it would seem that because of the extended time period over which the conduct occurred and the low number of individuals involved, the favoritism would be deemed "isolated" no matter how much damage resulted to the non-favored employees.

This example illustrates the difficulty with a standard that is essentially based on numbers of instances rather than an assessment of the degree of damage to the victim. With such a vague, ambiguous standard it is possible for a court to deem any case, on its facts, more "isolated" than "widespread" no matter what harm the victim suffered due to the supervisor's sexual favoritism of another employee.

3. "Widespread" Easily Allows Both Defendants and Courts To Distinguish *Miller*

While sexual harassment is often "subtle,"[149] the use of a standard that demands facts which show "widespread" favoritism ignores this. Reliance on the requirement of "widespread" favoritism makes it likely that the legacy of *Miller*, rather than being groundbreaking, will permit courts to decide that the facts of subsequent cases must be as outrageous as those of this case in order to constitute "widespread" sexual favoritism. Defense law firms have already taken note of the "extreme" facts of *Miller*.[150] One devastating consequence of the "widespread" requirement is that defendants will be able to easily argue that the facts of their case do not add up to the level of workplace sexual activity and favoritism seen in *Miller* and distinguish their case as not meeting the "widespread" favoritism standard.

In reality, it is unlikely that many work environments will rise to the "outrageous" level of *Miller*,[151] with a supervisor providing blatant job benefits to three different sexual partners

[149] Gentry, *supra* note 145, at 393.

[150] *See* Ron Brand, *Favoring a Paramour May Be Sexual Harassment*, LABOR LETTER (Fisher & Phillips LLP, Irvine, Cal.), Oct. 2005, at 3, *available at* http://laborlawyers.com/CM/Labor%20Letter/eLLoctoberr2005.pdf (stating that "[t]he facts in the Miller case were a bit extreme"); Foley & Lardner, *Employer Liability for Customer Harassment of its Employees*, MONDAQ BUS. BRIEFING, Aug. 1, 2005, *available at* 2005 WLNR 12137662 ("The facts of this case are seamy and outrageous and it is difficult to sort out the retaliatory and exploitive acts of the women who were sleeping with Kuykendall from the conduct that might constitute sexual harassment.").

[151] *See* Foley & Lardner, *supra* note 150.

and then one of those sexual partners becoming a bi-sexual partner of yet another supervisor who significantly alters the working conditions of the plaintiff. Compared to the pronounced facts of *Miller*, a court may easily, or even automatically, find a situation to be an "isolated" instance of sexual favoritism rather than actionable "widespread" favoritism. The court in the Northern District of California, which considered a sexual favoritism claim in the wake of *Miller*, was able to do exactly that.[152] Drawing on the numerous federal circuits that reject sexual favoritism claims[153] and viewing *Miller* as only applying to situations where the sexual favoritism was as widespread as it was at the Department of Corrections,[154] the district court dismissed the plaintiff's claim out of court without much consideration. As illustrated by this recent post-*Miller* case, if courts are left with the idea that the "soap-opera" worthy facts of *Miller* must exist in order for an actionable sexual favoritism claim to arise, then *Miller* actually means very little in terms of a change in the law.

IV. *MILLER*'S UNNECESSARY AND IMPROPER USE OF THE "WIDESPREAD" STANDARD UNDER CURRENT SUPREME COURT JURISPRUDENCE

The most curious aspect of the *Miller* court's use of the "widespread" standard is that it was entirely unnecessary. Current Supreme Court jurisprudence appears open to sexual favoritism claims under the Court's current hostile work environment approach. An examination of the three Supreme Court rulings[155] that provide definitions of hostile environment sexual harassment show the Court's propensity to treat Title VII claims broadly and do not indicate acceptance of an additional limitation to a plaintiff's ability to bring a sexual harassment claim.

[152] *See* Knadler v. Furth, No. C 04–01220 CRB, 2005 U.S. Dist. LEXIS 21278, at *21–22 (N.D. Cal. Sept. 9, 2005) (declining to apply *Miller* to a sexual favoritism claim and stating that "[t]he facts here do rise to the levels seen in *Miller*").

[153] *See id.* at *16–18 (detailing other circuits which have similarly declined to find sexual favoritism as creating an actionable Title VII hostile work environment claim).

[154] *See id.* at *21–22; *supra* note 152.

[155] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

A. *The Court's Policy on Sexual Harassment Claims*

Even as the Supreme Court has struggled to define sexual harassment,[156] it has asserted a consistent policy regarding hostile environment sexual harassment claims: Title VII "evinces a congressional intent 'to strike at the *entire spectrum* of disparate treatment of men and women' in employment."[157] In rejecting attempts to read Title VII narrowly and exclude behavior from being considered sexual harassment, the Court has explained that, "statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils . . . ."[158] In its sexual harassment jurisprudence, the Court has never endorsed a narrow view of either the behavior that may be considered sexual harassment[159] or the level of injury required by plaintiffs to prove they were victims of sexual harassment.[160] This all stems from the fact that the Court respects Title VII as a remedial statute and to effectuate this goal, the Court interprets Title VII broadly to provide victims of discrimination with a remedy.[161]

In *Oncale*,[162] which extended the definition of sexual harassment to include same-sex harassment, the Court simply stated that Title VII should be read to include "sexual harassment of any kind that meets the statutory" definition.[163] The Court used this expansive language even though it

[156] Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 792 (2002) (stating that "[p]art of the ambiguity in [sexual harassment law] may well stem from the nature of the legal standards developed by the courts").

[157] *Oncale*, 523 U.S. at 78; *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64 (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (emphasis added).

[158] *Onacle*, 523 U.S. at 79 (holding that Title VII covers same-sex sexual harassment even though same sex harassment was not likely the conduct Congress was targeting by enacting Title VII).

[159] *See* Poole, *supra* note 9, at 855.

[160] *See Harris*, 510 U.S. at 21–22 (rejecting the idea that victims of hostile environment sexual harassment must prove that they sustained psychological injury).

[161] *See* Poole, *supra* note 9, at 855 ("To fulfill Title VII's role as a remedial statute, the Supreme Court has determined that it should be interpreted broadly, and courts 'must avoid interpretations . . . that deprive victims of discrimination of a remedy.' ") (quoting Mary C. Manemann, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 645 (1989)).

[162] 523 U.S. 75 (1998).

[163] *Id.* at 80.

acknowledged that same-sex harassment was not likely the reason that Congress enacted Title VII.[164] The Court does not seem to advocate unyielding judicial restraint in sexual harassment cases. Instead, the Court empowers lower courts to use their power to stop harassment that creates hostile work environments in the hopes of ameliorating the negative job impacts that result for the victims.[165]

B. The Supreme Court's Hostile Work Environment Standard

To effectuate the remedial nature of Title VII and its goal of workplace equality,[166] the Supreme Court has been careful to craft a standard that allows for the broadest justice in sexual harassment cases. In *Harris v. Forklift Systems, Inc.*,[167] the Court gave clear guidance on how lower courts should evaluate hostile environment claims.[168] The Court stated that the test of whether a work environment is hostile or abusive "is not, and by its nature cannot be, a mathematically precise test" and "can be determined only by looking at all the circumstances."[169] The Court listed factors for the lower courts to weigh in making a determination of whether a work environment is hostile: the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.[170] The Court instructed that "no single factor is required."[171]

By not allowing one specific factor to control in making the determination of whether a hostile work environment exists, the Supreme Court ensures that each allegation of harassment is evaluated on a case-by-case basis by balancing all of the relevant

[164] *Id.* at 79.

[165] *See Harris*, 510 U.S. at 22 ("A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

[166] *See id.*

[167] 510 U.S. 17 (1993).

[168] *See id.* at 22–23.

[169] *Id.*

[170] *Id.* at 23.

[171] *Id.* In this framework, the court was specifically chastising the lower court which had stated that the effect of the hostile or abusive work environment on the employee's psychological well-being was the controlling factor in determining whether the employee could maintain a hostile work environment action. *See id.*

facts and circumstances. Under this method of analysis, no particular absolute indicates that a hostile environment exists.[172] This approach was further embraced in *Oncale*,[173] where the Court emphasized the need to view the social impact of questioned behavior on the workplace within the "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[174] The flexible,[175] multi-faceted approach embraced by the Supreme Court in determining whether a hostile work environment exists seems to starkly contrast with the *Miller* court's rigid, single-determinant "widespread" favoritism standard.

C. Miller*'s "Widespread" Standard Rebuts the Supreme Court's Teachings*

The Supreme Court details the various factors that should be considered in determining whether a hostile work environment exists and specifically instructs that no one factor is controlling.[176] In contrast to the Supreme Court's teachings, the *Miller* court's standard in evaluating whether a hostile environment existed at the correctional facility relies on one controlling factor: whether sexual favoritism was "widespread."[177] By requiring "widespread" conduct prior to allowing a hostile environment claim to proceed, the *Miller* court's approach effectively rejects the flexible balancing approach of the Supreme Court where "no single factor" controls.[178]

Under *Miller*, if a plaintiff is unable to prove that favoritism is "widespread," then the harassment will not rise to a level of "severe" and "pervasive," and thus, will not be an actionable

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[172] *See* Beiner, *supra* note 156, at 793 ("Far from being inappropriate in this setting, it seems to make sense for harassment to be judged on a case-specific basis, considering the entire context in which the harassment occurs.").

[173] 523 U.S. 75 (1998).

[174] *Id.* at 82.

[175] *See* Manemann, *supra* note 57, at 617, 658 (discussing the Court's insistence that the "required elements for a prima facie case are flexible and depend on the facts of a particular situation").

[176] *See Harris*, 510 U.S. at 23.

[177] *See* Miller v. Dep't of Corr., 115 P.3d 77, 90 (Cal. 2005).

[178] *See Harris*, 510 U.S. at 23.

hostile work environment claim.[179] In *Harris*, one of the factors the Supreme Court stated, that could indicate that an environment is hostile or abusive, was the frequency of the conduct.[180] While frequency may be analogous to "widespread" conduct, the Supreme Court insists upon examining *all* of the factors and circumstances of a given case to determine if an actionable hostile work environment exists[181]—the frequency or widespread nature of the conduct should only be one piece of the puzzle.[182]

V. THE RECOMMENDED STANDARD FOR SEXUAL FAVORITISM CLAIMS

The Supreme Court standard for determining whether a hostile environment exists provides many advantages over the *Miller* court's more rigid and ambiguous "widespread" standard. Sexual favoritism that meets the Supreme Court's requirements creates no less hostile work environment than any other type of sexual harassment and, therefore, should be measured by the Supreme Court's standard.

A. *Look to the Leader: Use the Supreme Court's Hostile Environment Sexual Harassment Standard for Sexual Favoritism Claims*

This Comment asserts that a sexual favoritism based hostile environment sexual harassment claim should be evaluated under the standards of the Supreme Court's Title VII jurisprudence. Under the Supreme Court's definition of a hostile environment that violates Title VII, a plaintiff is required to prove the following elements: (1) the harassment was "sufficiently 'severe or pervasive' as to 'alter the conditions of employment' "; (2) the harassment was "both objectively and subjectively offensive"; and (3) the harassment was "because of sex, and not some other, unprotected reason."[183] As discussed in Part IV, these elements are established by looking at all the circumstances and factors–

[179] *See Miller,* 115 P.3d at 90.

[180] *See Harris*, 510 U.S. at 23.

[181] *See id.*

[182] *See id.*

[183] *See* King, *supra* note 67, at 540–41 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)) (consolidating the Supreme Court hostile environment standard from *Meritor, Harris*, and *Oncale*).

one of which may include "widespread" conduct, but unlike under the *Miller* court's analysis, this factor would not be controlling or a "make or break" requirement.

B. The Supreme Court Standard Applied to Sexual Favoritism Claims

Application of the Supreme Court's standard to the facts of *Miller* illustrate that the "widespread" favoritism standard is unnecessary. Under the Supreme Court's approach, the *Miller* court would have reached the same holding that sexual favoritism may create an actionable hostile work environment. However, the Supreme Court's standard eliminates the undesirable aspects of the ambiguous and narrow "widespread" favoritism approach and provides a more realistic avenue for plaintiff redress.

Examining the allegations of the plaintiffs in *Miller* indicates that they would succeed in establishing that a hostile environment existed if the facts of their case were considered properly under the Supreme Court's factors:[184]

1) Frequency. The conduct was frequent because the plaintiffs' lives at work were impacted by sexual favoritism of the warden and its repercussions on an almost daily basis, sometimes multiple times per day. This frequent conduct extended over a period of several years.

2) Severity. The conduct was severe in that it resulted in harassment that not only ostracized the plaintiffs and affected their ability to perform and advance at work, but also created stress that resulted in plaintiffs having to resign. Additionally, the severity may be considered increased due to the fact that plaintiffs complained about the behavior to supervisory staff and Internal Affairs and instead of remedying the situation, it became more severe.

3) Physical Threats or Humiliation. The conduct was physically threatening in that one of the warden's lovers physically assaulted plaintiff-Miller when she spoke out about the favoritism and on another occasion followed Miller home, necessitating the issuance of a restraining order. Additionally,

[184] The Court examines: the frequency of the conduct, its severity, whether the conduct was physically threatening or humiliating (or a mere offensive utterance), and whether the conduct unreasonably interferes with an employee's work performance. *See Harris*, 510 U.S. at 23.

plaintiff-Mackey was constantly humiliated in front of other employees and suffered health problems as a result of her work environment.

4) Unreasonable Interference with an Employee's Work Performance. The conduct interfered greatly with the plaintiffs' work performance and their ability to advance in their careers. The non-sexually favored plaintiffs were unable to go about their day-to-day job duties due to the interferences created by the warden and associate warden's sexual favoritism. Their jobs were purposefully made harder by their supervisors who punished them for complaining about the warden's sexual favoritism by forcing them to perform onerous duties outside the scope of their position.

Although "no single factor is required,"[185] the egregious facts of *Miller* meet all of the Supreme Court's factors. Thus, under the balancing approach employed by the Court to determine if the conduct at issue was severe and pervasive, these facts would likely give rise to an actionable hostile work environment. This application of *Miller*'s facts to the Supreme Court approach demonstrates that a hostile work environment based upon sexual favoritism can be established under the Court's existing standard. This exercise also illustrates that under the Court's factors whether the favoritism is "widespread" or not has no bearing on the harmfulness of conduct that a non-sexually favored employee may be subjected to. Use of the Supreme Court's standard recognizes this harm and allows the victim a greater chance at redress because there is no controlling "widespread" favoritism requirement.

C. Advantages of Using the Supreme Court Standard for Sexual Favoritism Claims

Unlike the *Miller* court's "widespread" favoritism requirement, the Supreme Court's totality of the circumstances standard provides sexual favoritism victims with redress and addresses the harm to the work environment. The Supreme Court's approach allows the entire context in which the harassment occurs to be considered.[186] In contrast, the more

[185] *See id.*

[186] *See* Beiner, *supra* note 156, at 793.

"mathematically precise test"[187] of "widespread" favoritism requires an examination of the number of consensual relationships that create a certain number of instances of sexual favoritism. Under the "widespread" favoritism approach, negative impacts on the work environment would *only* be considered if the favoritism was first found to reach the "widespread" threshold.

A variety of negative externalities stem from sexual harassment including adverse psychological, job-related, and health effects.[188] This harassment equally impacts and disadvantages employees, whether they are victims of direct sexual harassment or sexual favoritism.[189] Both groups of victims are sent the message that the only way to advance in the workplace is to use one's sexuality[190] by "trading in sexual currency"[191] for job benefits. When sexual favoritism exists in the workplace, this perpetuates employees being measured by a "sexual standard"[192] rather than on their ability to perform their job. In *Miller*, this "sexual standard" furthered the idea held by employees at the correctional facility that the only way to get ahead at work was to sleep your way to the top.[193] Considering this, victims of workplace sexual favoritism and victims of direct

[187] *See Harris*, 510 U.S. at 22.

[188] Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training By the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 147 (2001); *see also* Van Tol, *supra* note 3, at 165 (discussing studies on office dating in general: "[t]he negative impact[s] . . . outnumbered the positive impact[s] . . . . [The negative impacts include] gossip, complaints and gripes, hostilities, distorted communication, damage to the image or reputation of the workplace, and redistributed work").

[189] *See* Van Tol, *supra* note 3, at 179. Victims of sexual favoritism can demonstrate the same adverse impacts in their work environment as direct victims of sexual harassment. For example, in *Miller* both plaintiffs indicated that they left their jobs because of the stress of the harassment and ostracism they encountered at work. *See* Miller v. Dep't of Corr., 115 P.3d 77, 81–85 (Cal. 2005). Additionally, plaintiff-MacKey suffered from related stress-induced health problems. *Id.* There can certainly be no question that the plaintiffs in *Miller* suffered from adverse job impacts including interference with job duties, loss of pay benefits and inability to obtain promotions they were qualified for since those promotions were instead granted to the supervisor's sexual partner. *Id.*

[190] *See* Van Tol, *supra* note 3, at 178–79.

[191] *See* Poole, *supra* note 9, at 822.

[192] *See* Van Tol, *supra* note 3, at 179.

[193] *See Miller*, 115 P.3d at 82 (stating that employees at the correctional facility thought that the only way to get ahead was to " 'F' [their] way to the top" after seeing the warden consistently promote his lovers over other more qualified applicants).

sexual harassment exist in the same hostile work environment for Title VII purposes.[194] It follows then that sexual favoritism plaintiffs should be able to prove that their work environment was hostile under the Supreme Court test for a hostile work environment that balances all of the relevant factors and harms,[195] rather than requiring victims of sexual favoritism to shoulder the additional burden of proving a vague,[196] undefined,[197] and most likely unachievable[198] "widespread" favoritism standard.

D. Anticipated Criticisms of Using the Supreme Court's Hostile Environment Standard for Sexual Favoritism Claims

1. The Sexual Favoritism Victim Is Not Directly Harassed and Therefore Should Be Subject to Miller's Heightened "Widespread" Favoritism Standard

Use of the Supreme Court's hostile environment standard in sexual favoritism claims without the additional "widespread" favoritism requirement imposed by the *Miller* court will likely be criticized on the theory that the nature of a sexual favoritism claim requires a different level of analysis than a "typical" hostile environment claim. Critics will assert that since a plaintiff in a sexual favoritism claim was not "directly" sexually harassed[199] there is need for a heightened "widespread" standard to eliminate frivolous suits. This criticism is unfounded based on Supreme Court precedent and the EEOC's Sexual Discrimination Guidelines that indicate so-called "indirect" sexual harassment victims do not require a heightened standard if they are victims of a hostile work environment.

The Supreme Court's jurisprudence on hostile work environments does not appear to place any such limit on a claim or require the plaintiff to be "directly" harassed. Hostile

[194] *See* Van Tol, *supra* note 3, at 178–79.

[195] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[196] *See* Poole, *supra* note 9, at 843.

[197] *See* EEOC OFFICE OF LEGAL COUNSEL, *supra* note 102 (providing no workable criteria by which to determine what constitutes "widespread" versus "isolated" favoritism).

[198] *See* discussion *infra* Part III.

[199] *See* discussion *supra* Part V.C (arguing that sexual favoritism victims and "direct" sexual harassment victims experience the same negative effects and are both equally victims of sexual harassment).

environment claims do not deal with quid pro quo situations where the victim is propositioned for sex in exchange for job benefits, which could be considered a true "direct" harassment claim.[200] The goal of recognizing a hostile work environment claim is to eliminate work environments where sex-based hostility "detract[s] from employees' job performance, discourage[s] employees from remaining on the job or keep[s] them from advancing in their careers."[201]

The nature of a hostile work environment claim, as recognized by the Supreme Court, embodies the Court's view of Title VII's intent to strike at the *entire spectrum* of disparate treatment of men and women in employment.[202] Within this broad "entire spectrum" and considering that Title VII is a remedial statute,[203] it would seem that the Court would find room for a hostile environment based on sexual favoritism if the plaintiff was able to otherwise establish the elements of the claim.[204] It is also interesting to note that the EEOC Guidelines on Sex Discrimination (which are separate from the guidelines on sexual favoritism) provide that an employee who is denied an employment opportunity or benefit, because his or her employer grants that opportunity or benefit to another employee who "subm[its] to the employer's sexual advances or requests for sexual favors," may have a viable claim of unlawful sex discrimination.[205] This indicates that the EEOC itself embraces

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[200] *See* King, *supra* note 67, at 540–41.

[201] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[202] *See id.* at 21.

[203] *See* Manemann, *supra* note 57, at 664.

[204] In *Oncale*, the Court found room in Title VII for a same-sex harassment claim via a broader reading of the statute. *See* Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 82 (1998).

[205] *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2004). In analyzing the treatment of a hostile environment sexual harassment claim brought by an indirect victim, Manemann explained that:

> [C]ourts have indicated that employees need not be targeted with sexual harassment themselves to have a hostile environment claim of sex discrimination, if the harassment is sufficiently pervasive. The use of this 'third party' hostile environment theory in situations of sexual harassment is supported by other hostile environment claims under Title VII. In addition, the EEOC Guidelines on Sex Discrimination provide that a qualified employee who is denied an employment opportunity or benefit because his or her employer grants that opportunity or benefit to another employee who 'submi[ts] to the employer's sexual advances or requests for sexual favors' may have a viable claim of unlawful sex discrimination.

Manemann, *supra* note 57, at 653.

the possibility that an employer's actions regarding one employee can be the grounds for a Title VII claim on behalf of another employee.

2. The "Widespread" Favoritism Standard Is Appropriate Because Title VII Is Not a Civility Standard

The Supreme Court itself has counseled that Title VII should not be read as a "general civility code for the American workplace."[206] Consensual sexual relationships in the workplace are "inevitable" and are not automatically a violation of Title VII.[207] The law does not require "asexuality nor androgyny in the workplace"[208] and the Supreme Court has been careful to warn that courts and juries are not to "mistake ordinary socializing in the workplace" as sexual harassment.[209] The criticism of sexual favoritism being deemed an actionable form of hostile environment sexual harassment is that it will push Title VII towards a civility code by requiring employees to remain "asexual" in the workplace and employers to vigilantly police personal relationships to ensure that they do not become liable for sexual favoritism claims.[210] In order to avoid these consequences, critics of using the Supreme Court's hostile environment standard in instances of sexual favoritism will likely insist that the higher "widespread favoritism" barrier is required to ensure that employer and court responses to sexual favoritism in the workplace do not convert Title VII into a civility code.

This criticism fails to recognize that sexual favoritism, as an actionable hostile environment sexual harassment claim under the Supreme Court's standards, will not contort Title VII into a civility code or require increased employer policing of intimate relations. As with any conduct in the workplace, if sexual favoritism impacts the workplace in ways that meet the

[206] *See Oncale*, 523 U.S. at 80–81.

[207] *See* Manemann, *supra* note 57, at 660.

[208] *Oncale*, 523 U.S. 75 at 81.

[209] *Id.*; *see also* Schultz, *supra* note 55, at 2090–94 (discussing the "sanitization" of the workplace due to fears about sexual harassment claims).

[210] *See* Buchanan, *supra* note 3, at 8 (stating that employers feel they are assuming the role of "surrogate parents" to their employees); Chen & Sambur, *supra* note 7, at 184–88 (discussing ways in which employers are trying to balance the privacy of their employees with the employers' needs to avoid liability for sexual harassment).

requirements of an actionable hostile environment, then the plaintiff will be entitled to redress. Ensuring that employees are protected from "direct" sexual harassment as well as sexual harassment via sexual favoritism is consistent with Title VII goals[211] and protects employees from a sexually charged hostile working environment; it does not promise a civilized or sanitized workplace.[212] Under the Supreme Court's standard, employers are not required to do any increased monitoring of employee relationships; they will just need to be prepared to take action on claims that sexual favoritism has resulted in a hostile work environment, which under current federal precedent has never been deemed actionable. This has allowed employers to more or less ignore the hostile environment and detrimental job impacts created by a supervisor's sexual preferences.[213] Under the Supreme Court's standard, employers will simply be required to fold into their current sexual harassment training and protocols the awareness that sexual favoritism in the workplace will not be tolerated. This does not mean that consensual relationships will not be tolerated; it just means that, like any other conduct, they will not be tolerated if they rise to a level in which they create a hostile work environment.

In contrast to the Supreme Court standard, the use of the "widespread" favoritism standard may very well result in policing of intimate relationships. One commentator has indicated that the sexual favoritism standards urged by the EEOC (and embraced by the *Miller* court) will create an increased policing and monitoring of workplace relationships by both employers and other employees.[214] For instance, under the "widespread" favoritism standard, employers will need to closely monitor to tally up the various ongoing consensual relationships and ensure they don't approach the "widespread" marker. In addition, other employees not involved in the relationship who feel they are victims of favoritism and believe that they can only raise a valid claim if the favoritism is "widespread" will devote time and

[211] *See* Van Tol, *supra* note 3, at 156.

[212] *See* Schultz, *supra* note 55, at 2090–94 (describing the sanitized workplace created by fear of sexual harassment litigation).

[213] *See, e.g.*, Forst, *supra* note 7, at 31 (providing an overview of sexual favoritism litigation and then asserting: "Employers and their attorneys need not fear Title VII liability based merely on a consensual personal relationship (sexual or otherwise) between a supervisor and subordinate.").

[214] *See* Van Tol, *supra* note 3, at 179.

energy to monitoring these intimate relationships to determine if they amount to the "widespread" level. Further, if employees think that sexual favoritism will not be taken seriously unless it is "widespread," this may have a deterrent effect on employee reporting of sexual favoritism. Instead of reporting the behavior to the employer in the first instance for resolution, employees may wait until they believe that the favoritism has reached the "widespread" level. Employers would prefer to be apprised of any potential misconduct from the beginning, rather than at the point where employees have deemed it "widespread."

Concerns about sexual favoritism in the workplace create morale problems and resentment among workers;[215] thus, if an environment of sexual favoritism is allowed to fester until the non-favored employees deem it "widespread," it may damage the work environment. Employers benefit from being able to manage sexual harassment issues in the workplace immediately,[216] but the "widespread" marker may result in unnecessary delay in reporting problems to employers. Employers and employees both benefit from a standard that simply includes sexual favoritism in the gamut of what employers need to monitor to ensure they are complying with Title VII's prohibition against hostile environment sexual harassment rather than attempting to gauge sexual favoritism based upon the ambiguous "widespread" standard. Use of the Supreme Court standard has the benefit of focusing on a positive work environment, free from sexually harassing behavior rather than on a determination of "widespread" versus "isolated." The Supreme Court standard is also familiar to employers and their counsel and has likely driven the employer's current sexual harassment monitoring protocol.[217] Use of this standard does not require any additional "policing" by employers or any behavioral changes in the workplace beyond the bounds of what is already prohibited under Title VII and thus does not pose the problem of impermissibly contorting Title VII into a civility code.

[215] Kathleen M. Hallinan, Note, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 COLUM. J.L. & SOC. PROBS. 435, 436 (1993).

[216] *See* Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1578 (1999).

[217] *See id.* at 1521 (noting that employers are paying increasing attention to ways that they can decrease their liability for sexual harassment claims).

CONCLUSION

Following the Supreme Court's standard for what constitutes an actionable hostile work environment in sexual favoritism cases considers and balances all of the relevant facts and circumstances. In contrast, the *Miller* court's standard relies on an ambiguous and hard to reach "widespread" favoritism requirement. The Supreme Court's standard for sexual favoritism claims overcomes several barriers to *Miller*'s current analysis of sexual favoritism. The *Miller* "widespread" favoritism standard ignores the actual harm to plaintiffs and instead focuses on adding up enough instances of favoritism to determine if they are "widespread" rather than "isolated." The "widespread" favoritism standard combined with the egregious facts present in *Miller* allow defendants to distinguish *Miller* and argue that sexual favoritism does not exist in cases where the facts presented are less outrageous. The *Miller* court did a disservice to plaintiffs by ignoring the teachings of the Supreme Court and inserting this "widespread" requirement into what a plaintiff must show to prove an actionable hostile work environment claim.

As the *Miller* court held, sexual favoritism creates an actionable hostile work environment sexual harassment claim. Sexual favoritism in the workplace creates an environment in which victims are denied job benefits and feel their only way to advance is through "sleeping their way to the top." A sexual favoritism claim that meets the requirements of the Supreme Court's hostile work environment standard should have grounds for redress without facing the obstacles presented by *Miller*'s "widespread" favoritism standard. In order to realistically provide sexual favoritism victims with a means of relief, this Comment urges future courts considering sexual favoritism claims to look to the Supreme Court's hostile work environment framework rather than analyzing the claim under the problematic "widespread" favoritism standard embraced by the *Miller* court.