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## Miller v. Department of Corrections: The Application of Title VII to Consensual, Indirect Employer Conduct

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## NOTES

### *Miller v. Department of Corrections: The Application of Title VII to Consensual, Indirect Employer Conduct*\*

#### *I. Introduction*

Sexual favoritism is a relatively new term of art that refers to a situation in which an employee, often a female, receives promotions, awards, or other preferential treatment by an employer, typically a male, with whom the employee is involved in a sexual relationship. When an employer favors his paramour in making employment decisions, other employees who may have higher qualifications are often overlooked. Enraged by these seeming inequities and searching for a remedy, these disenfranchised employees have recently resorted to Title VII<sup>1</sup> as the vehicle for challenging the employer's action. Such lawsuits have been referred to as "sexual favoritism" actions.

As noted in an Equal Employment Opportunity Commission (EEOC) policy statement approved by now-Justice Thomas of the United States Supreme Court, sexual favoritism is unfair.<sup>2</sup> The principle of "best person for the job" is a strongly-held notion in America, and allowing considerations of sexual activity to creep into the decision-making process is intrinsically unfair to all parties involved. Nevertheless, stating that sexual favoritism is unfair begs rather than answers the question: should there be liability under Title VII? Many employment decisions are unfair, but not all unfair employment practices give rise to liability under Title VII. For example, suppose that instead of awarding the promotion to his paramour, an employer promoted a close friend with whom he frequently played cards and watched sports. Although this situation may also be intrinsically unfair, it would not fall within the ambit of Title VII's protections. Title VII was simply not intended as a cure-all for every improper employment decision.

Whether sexual favoritism exceeds mere unfairness to an actionable degree under Title VII is a topic that has produced disagreement among courts and academics. This note will explore the California Supreme Court's most recent decision on the issue of sexual favoritism, *Miller v. Department of*

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\* The author would like to thank Professor Rick Tepker for his helpful insights throughout the process of writing this note.

1. 42 U.S.C. §§ 2000e to 2000e-16 (2000).

2. EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII (Notice No. N-915.048), [8 Fair Emp. Prac. Man.] Lab. Rel. Rep. (BNA) 405:6817 (Jan. 12, 1990) [hereinafter EEOC Policy Guide].

*Corrections.*<sup>3</sup> Part II of this note provides an overview of Title VII's prohibition on sexual harassment and discusses how other courts and the EEOC have handled sexual favoritism claims. Part III of this note then delves into the factual background of the *Miller* case. Part IV argues that *Miller* is not a revolutionary decision and demonstrates this by fitting *Miller* within the existing and recognized Title VII framework.

## *II. The Road to Miller: Title VII and the Hostile Work Environment Claim*

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>4</sup> As the U.S. Supreme Court has noted, Title VII focuses on eliminating discrimination in the workplace and ensuring that similarly situated employees are not treated differently due to certain immutable traits.<sup>5</sup>

The prohibition on sex discrimination was added to Title VII with little congressional consideration and little indication of what was to be included within the category.<sup>6</sup> Nevertheless, the legislative history on the meaning of the term "sex discrimination," though scant, seems to indicate that the drafters were focused on discrimination based on gender differences.<sup>7</sup> As a result, many courts were reluctant at first to recognize sexual harassment as a form of sexual discrimination because such discrimination was based on sexual activity and not gender.<sup>8</sup>

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

4. 42 U.S.C. § 2000e-2(a)(1).

5. *Trans World Airlines v. Hardison*, 432 U.S. 63, 71-72 & n.6 (1977).

6. *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (noting that "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity"), *superseded by statute*, Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076; Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 563 n.80 (1994) (noting only a brief discussion by the House of Representatives on the meaning of the term "sex" in Title VII, and the absence of any Senate discussion on the issue). In fact, as some commentators have noted, the prohibition against sex discrimination may have been added solely for the purpose of undermining the passage of the 1964 Civil Rights Act, because even supporters of the Act felt that sex discrimination was sufficiently unique to support separate treatment from other forms of discrimination. *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166- 67 (1971); Mary C. Manemann, Comment, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 638 (1989).

7. Phillips, *supra* note 6, at 563-64.

8. *See generally* Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988) (describing

Although the meaning of sex discrimination was unclear at first, the Supreme Court later interpreted and applied the term in *Meritor Savings Bank v. Vinson*, concluding that sexual harassment is a type of sex discrimination that can form the basis for an action under Title VII.<sup>9</sup> In the two decades following the Supreme Court's landmark decision in *Meritor*, courts have grappled with the scope and meaning of sexual harassment under Title VII, with the circuits often taking divergent positions on whether certain conduct falls within the ambit of Title VII's protections.

#### A. Categories of Harassment

Specifically, the Court has recognized two distinct forms of sexual harassment that are actionable under Title VII — the so-called quid pro quo sexual harassment, and hostile or abusive work-environment harassment.<sup>10</sup> Although these labels are not explicitly contained in the statutory text of Title VII,<sup>11</sup> the Supreme Court has noted that the distinctive labels given to these two forms of sexual harassment are helpful in distinguishing between “cases in which threats are carried out and those where they are not or are absent altogether.”<sup>12</sup> The labels, however, have limited utility beyond this distinction.<sup>13</sup>

Quid pro quo<sup>14</sup> harassment is manifest under two related conditions. First, an individual is subject to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. Second, either the individual's submission to this conduct is an explicit or implicit term or condition of the individual's continued employment, or employment decisions affecting the individual are made on the basis of the individual's submission to or rejection of this conduct.<sup>15</sup> Most courts have held that a plaintiff must show a tangible job detriment of an economic nature in order to prevail on a quid pro quo claim.<sup>16</sup>

As the Federal Regulations make clear, quid pro quo harassment may consist of either express or implied conduct.<sup>17</sup> Express quid pro quo is self-

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courts' early refusal to recognize sexual harassment as actionable Title VII sexual discrimination).

9. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

10. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

11. *Id.* at 752.

12. *Id.* at 751.

13. *Id.*

14. Literally, “something for something.” BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

15. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2006).

16. See Phillips, *supra* note 6, at 554 n.38 (discussing cases that required a tangible job detriment).

17. 29 C.F.R. § 1604.11(a) (providing that sexual harassment occurs, inter alia, when

explanatory and occurs, for example, when an employer explicitly threatens an employee with termination unless she engages in sexual conduct with the employer. Implicit quid pro quo, on the other hand, is more difficult to define. As the EEOC defines it, implicit quid pro quo harassment examines whether the employer's conduct communicates to an employee that her submission to sexual conduct will form the basis for an employment decision.<sup>18</sup> Stated another way, implicit quid pro quo harassment occurs when an employer implicitly demands sexual favors in return for job benefits.<sup>19</sup>

Hostile or abusive work-environment harassment, by contrast, occurs when discriminatory intimidation, ridicule, or insult is sufficiently severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment.<sup>20</sup> The Supreme Court has identified both an objective and a subjective element of hostile work environment claims. First, the conduct must be severe or pervasive enough to create an *objectively* hostile or abusive work environment, such that a reasonable person would find the environment hostile or abusive.<sup>21</sup> Second, the victim must *subjectively* perceive the environment to be abusive.<sup>22</sup> In other words, the court must look at whether the complained-of conduct would reasonably be perceived, and is actually perceived, as hostile or abusive.<sup>23</sup>

One type of claim that has frequently arisen in the context of sexual harassment claims is the so-called "sexual favoritism" claim.<sup>24</sup> Although the United States Supreme Court has not dealt directly with a sexual favoritism claim, several courts of appeals and lower courts have done so. As discussed in the following parts, these courts analyzed the actions in different manners and reached seemingly inconsistent positions.<sup>25</sup>

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"submission to [sexual] conduct is made either *explicitly or implicitly* a term or condition of an individual's employment" (emphasis added)).

18. EEOC Policy Guide, *supra* note 2, at 405:6820.

19. *Id.* at 405:6818-6819.

20. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986).

21. *Harris*, 510 U.S. at 21.

22. *Id.* at 21-22.

23. *Id.* at 22.

24. *See, e.g.*, EEOC Policy Guide, *supra* note 2, at 405:6817.

25. This article uses the generic term "sexual favoritism" to refer to any situation where an employer and a subordinate engage in sexual conduct while the subordinate concurrently receives some form of job benefit. As discussed *infra* Part IV, this author believes that the issue is not as simple as looking to whether sexual favoritism is actionable under Title VII. Instead, several distinct situations may arise when sexual favoritism exists in the workplace, and only by analyzing the effects of the conduct and the totality of the workplace situation can one determine whether there is a violation of Title VII. Thus, the remainder of Part II should not be read as setting forth inconsistent positions among the circuit courts of appeals with regard

*B. Courts Refusing to Extend Title VII Protections to Sexual Favoritism Claims*

The U.S. Court of Appeals for the Second Circuit was the first court of appeals to hear and to reject a cause of action based on sexual favoritism.<sup>26</sup> In *DeCintio v. Westchester County Medical Center*, seven male respiratory therapists brought a Title VII action for sexual discrimination, claiming that they were unfairly disqualified for a promotion because the administrator wanted to promote a female with whom he was having a consensual, romantic relationship.<sup>27</sup> The circuit court reversed the trial court and held that a promotion awarded in preference to an employer's paramour does not violate Title VII.<sup>28</sup> In refusing to recognize this as a cognizable Title VII claim, the court held that the preference was based on a "sexual liaison" or "sexual attraction," and not based on a gender difference.<sup>29</sup> Because Title VII was only meant to prevent discrimination based on gender-based differences and not sexual affiliation, the court held that the employer did not violate Title VII.<sup>30</sup> Moreover, the court noted that recognition of such a claim would allow the EEOC and the courts to police private, intimate relationships.<sup>31</sup>

Other federal courts have agreed with the reasoning of the Second Circuit's decision in *DeCintio* and have held that sexual favoritism is not actionable sexual harassment. For example, in *Miller v. Aluminum Company of America*, a Pennsylvania federal district court refused to find merit in a Title VII claim based upon sexual favoritism.<sup>32</sup> In *Miller*, the female plaintiff was demoted from the position of unit supervisor to product technician, and was replaced by a male.<sup>33</sup> After her demotion, the plaintiff was one of only two product technicians employed at the defendant's plant.<sup>34</sup> The other product technician, a female, was involved in a relationship with the plant manager.<sup>35</sup> The plant's management decided to fire one of the two product technicians, and Miller was

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to whether sexual favoritism is actionable. Instead, this author believes that the cases illustrate the different effects that sexual favoritism has on the workplace and how courts have fit these cases within the Title VII framework.

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

27. *Id.* at 305-06.

28. *Id.* at 308.

29. *Id.* at 306.

30. *Id.* at 308.

31. *Id.* at 306-08.

32. 679 F. Supp. 495, 497 (W.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988).

33. *Id.*

34. *Id.*

35. *Id.*

subsequently terminated, ostensibly due to her poor work performance.<sup>36</sup> Miller sued for sexual discrimination and argued that she was discriminated against because her supervisor gave preferential treatment to his paramour.<sup>37</sup> The court found that the affair was consensual and that the manager did not engage in a practice of extracting sexual favors from female employees in exchange for employment benefits.<sup>38</sup> Relying on the Second Circuit's decision in *DeCintio*, the court found that preferential treatment based on a consensual relationship between a supervisor and an employee is not actionable gender-based discrimination as a matter of law.<sup>39</sup>

The U.S. Court of Appeals for the Eleventh Circuit similarly refused to extend Title VII protections to a sexual favoritism claim in *Womack v. Runyon*.<sup>40</sup> In *Womack*, a male employee of the United States Postal Service filed an action for sexual discrimination under Title VII after he was denied a promotion to the position of carrier supervisor.<sup>41</sup> A review board unanimously agreed that the plaintiff was the most qualified applicant seeking the promotion, but the postmaster instead awarded the promotion to a female candidate with whom the postmaster was involved in a consensual sexual relationship.<sup>42</sup> Relying on opinions by a majority of courts<sup>43</sup> and the EEOC,<sup>44</sup> the *Womack* court held that a single instance of preferential treatment based on a consensual relationship between a supervisor and an employee was not within the scope of Title VII's protections.<sup>45</sup>

Moreover, in *Schobert v. Illinois Department of Transportation*,<sup>46</sup> the U.S. Court of Appeals for the Seventh Circuit refused to recognize a Title VII claim based upon sexual favoritism. In *Schobert*, two male maintenance workers

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36. *Id.* at 498.

37. *Id.*

38. *Id.* at 501.

39. *Id.*

40. 147 F.3d 1298 (11th Cir. 1998).

41. *Id.* at 1299.

42. *Id.*

43. In support of the contention that a majority of courts have rejected the sexual favoritism cause of action, the *Womack* court cited *Taken v. Oklahoma Corp. Commission*, 125 F.3d 1366 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995); *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986); *Keenan v. Allan*, 889 F. Supp. 1320 (E.D. Wa. 1995); and *Thomson v. Olson*, 866 F. Supp. 1267 (D.N.D. 1994). See *Womack*, 147 F.3d at 1300. The court dismissed *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), as unpersuasive because the parties in *King* did not challenge the application of Title VII on appeal. See *Womack*, 147 F.3d at 1300.

44. EEOC Policy Guide, *supra* note 2, at 405:6817-:6821.

45. *Womack*, 147 F.3d at 1301.

46. 304 F.3d 725 (7th Cir. 2002).

filed a Title VII action after Tame Roth, the single female employed at the worksite, received preferential treatment from supervisors.<sup>47</sup> The plaintiffs claimed that Roth engaged in sexual conduct with supervisors, such as sitting on one supervisor in a suggestive manner and taking off her shirt in the presence of another.<sup>48</sup> The plaintiffs claimed that Roth received special treatment from supervisors because Roth was not required to perform the more difficult, dangerous, or otherwise undesirable tasks assigned to other employees.<sup>49</sup> The *Schobert* court, relying on *DeCintio*, held that Title VII does not forbid employers from showing favoritism to employees because of personal relationships as long as the favoritism is not based on a prohibited classification.<sup>50</sup> Because any favoritism had the same impact on both male and female employees in the workplace, the court held that the plaintiffs' claims were not cognizable under Title VII.<sup>51</sup> The Seventh Circuit recently reaffirmed this position in *Preston v. Wisconsin Health Fund*,<sup>52</sup> refusing to extend Title VII protections under conditions similar to *Schobert*.

Finally, in *Taken v. Oklahoma Corporation Commission*,<sup>53</sup> the U.S. Court of Appeals for the Tenth Circuit rejected a sexual favoritism claim. The plaintiffs complained that they were not selected for a promotion because the person who made the promotion decision was romantically involved with the woman selected.<sup>54</sup> After first noting that the plaintiffs did not prove a hostile work environment claim, the court held that a claim for sexual harassment under Title VII cannot prevail when it is based solely on voluntary romantic affiliations rather than gender differences.<sup>55</sup> The *Taken* court held that favoritism, unfair treatment, and unwise business decisions are not in violation of Title VII unless the decisions are based on a prohibited classification.<sup>56</sup>

### C. Courts Finding a Title VII Violation

Contrary to the cases discussed above, several federal courts have found that sexual favoritism can form the basis of a cognizable claim under Title VII. The U.S. District Court for the District of Delaware was the first court to recognize sexual favoritism as actionable sexual harassment in *Toscano v.*

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47. *Id.* at 727.

48. *Id.*

49. *Id.*

50. *Id.* at 733.

51. *Id.*

52. 397 F.3d 539 (7th Cir. 2005).

53. 125 F.3d 1366 (10th Cir. 1997).

54. *Id.* at 1368.

55. *Id.* at 1370.

56. *Id.*



*Nimmo*.<sup>57</sup> Toscano, a female hospital employee, brought a Title VII action after her supervisor, Segovia, promoted another female employee, Donna Nelson, with whom Segovia was having a sexual affair.<sup>58</sup> Toscano presented evidence that Segovia made sexual advances toward several women under his supervision, including Toscano.<sup>59</sup> Specifically, Segovia telephoned Toscano at home, sang her a love song, and suggestively placed his hands on Toscano during work hours while making suggestive remarks.<sup>60</sup> Although Toscano and Nelson were among five applicants qualified for the promotion, Segovia ultimately awarded the job to Nelson, and Toscano brought suit.<sup>61</sup> Relying on regulations issued by the EEOC,<sup>62</sup> the court for the District of Delaware found that granting sexual favors was made a condition to receiving the promotion, and that this practice constituted sexual harassment in violation of Title VII.<sup>63</sup>

The U.S. Court of Appeals for the District of Columbia's *King v. Palmer*<sup>64</sup> decision, however, represents the seminal case that is repeatedly referred to as recognizing a cause of action for sexual favoritism. The plaintiff in *King*, a female nurse employed by the District of Columbia Department of Corrections (DOC), sued the DOC for sex discrimination in violation of Title VII.<sup>65</sup> King's application for a promotion was denied and another female nurse, Grant, was awarded the position notwithstanding evidence that King had an excellent work record and outstanding credentials while Grant had a poor work record, including unprofessional behavior and dishonesty.<sup>66</sup> King introduced evidence that Dr. Smith, the Chief Medical Officer at the DOC, was engaged in a romantic relationship with Grant.<sup>67</sup> King's evidence indicated that Dr. Smith and Ms. Grant frequently took long lunches together, engaged in physical contact in the workplace, were seen kissing outside of work, stayed out together all night on occasion, and that Dr. Smith frequently called Ms. Grant at home and once wired her a substantial sum of money when Ms. Grant and her boyfriend were arrested.<sup>68</sup> King argued that Dr. Smith preselected Grant for the promotion and did not give serious consideration to any other

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57. 570 F. Supp. 1197 (D. Del. 1983).

58. *Id.* at 1198-99.

59. *Id.* at 1199.

60. *Id.* at 1199-1200.

61. *Id.* at 1198.

62. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(g) (2006).

63. *Toscano*, 570 F. Supp. at 1199.

64. 778 F.2d 878 (D.C. Cir. 1985).

65. *Id.* at 878.

66. *Id.* at 879.

67. *Id.*

68. *Id.*

applicant.<sup>69</sup> The D.C. Circuit found that King carried her burden of proof for sex discrimination under Title VII, finding direct evidence of a sexual relationship between the selecting official and the employee selected for the promotion.<sup>70</sup> The court attached utmost importance to the fact that the promotion was awarded because of this sexual relationship, and found that the defendant's explanations for the promotion were mere pretext.<sup>71</sup> The D.C. Circuit remanded the case for entry of judgment in favor of King.<sup>72</sup>

Relying on this circuit precedent, the District Court for the District of Columbia later ruled that sexual favoritism was actionable as a hostile work environment claim under Title VII. In *Broderick v. Ruder*,<sup>73</sup> a female staff attorney for the Securities and Exchange Commission (SEC) sued for sex discrimination and introduced evidence that persons in supervisory positions at her office engaged in conduct that created a sexually hostile work environment.<sup>74</sup> Specifically, Broderick introduced evidence that two supervisors were engaged in sexual relationships with their secretaries and that these secretaries received promotions, cash awards, and other job benefits.<sup>75</sup> Furthermore, Broderick pointed to evidence that one supervisor awarded promotions to a female attorney to whom he was "noticeably attracted."<sup>76</sup> While the court relied on the pervasive nature of the sexual conduct that occurred between management and other employees, the court concluded that Broderick was herself harassed by at least three of her supervisors.<sup>77</sup> Finding that Title VII is violated when an employer bestows preferential treatment upon female employees who submit to sexual advances or conduct of a sexual nature when such conduct is common knowledge in the workplace, the court found that Broderick established a prima facie case of hostile work environment sexual harassment.<sup>78</sup>

#### *D. The EEOC Position on Sexual Harassment*

As the agency charged with enforcement of Title VII,<sup>79</sup> the EEOC has similarly taken a position on the issue of whether sexual favoritism is actionable under Title VII. Accordingly, the EEOC has issued policy guidance

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69. *Id.*

70. *Id.* at 882.

71. *Id.*

72. *Id.*

73. 685 F. Supp. 1269 (D.D.C. 1988).

74. *Id.* at 1270, 1273-75.

75. *Id.* at 1274-75.

76. *Id.* at 1274.

77. *Id.* at 1278.

78. *Id.* at 1277-78.

79. *See* 42 U.S.C. § 2000e-5 (2000).

on sexual favoritism claims that was approved by now-Justice Thomas when he served as the EEOC Chairman.<sup>80</sup> This policy statement cites and relies upon regulations issued by the EEOC.<sup>81</sup> It should be noted at the outset, however, that the United States Supreme Court has held that EEOC regulations are not controlling authority, although courts and litigants may properly resort to them for guidance.<sup>82</sup> Because the EEOC policy statement is an interpretation of a nonbinding regulation, the statement's precedential value appears to be rather low.<sup>83</sup> Despite this, the policy statement's value lies in its reliance on previous Title VII cases and the persuasive categorical approach it sets forth for dealing with sexual favoritism claims.

*1. First EEOC Category: Isolated Instances of Favoritism Toward a Paramour*

This policy statement divides sexual favoritism actions into three distinct categories: isolated instances of favoritism towards a paramour, favoritism based upon coerced sexual conduct, and widespread favoritism.<sup>84</sup> In the first category, isolated instances of favoritism towards a paramour, the policy statement discusses an isolated, *consensual* romantic relationship.<sup>85</sup> Citing

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80. See EEOC Policy Guide, *supra* note 2, at 405:6817.

81. *Id.* (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(g) (1989)). Section 1604.11(g), originally promulgated by the EEOC in 1980, now provides that “[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.” 29 C.F.R. § 1604.11(g). As the first authority to discuss this type of action, this regulation could be viewed as the impetus for the entire body of sexual favoritism case law but, nevertheless, was not recognized by any federal court until *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983).

82. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); see also *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (noting that Congress did not confer authority upon the EEOC to establish regulations and, accordingly, EEOC regulations are entitled to “consideration” but may be given less weight than other administrative regulations that have been given the force of law by Congress); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (noting that the “EEOC Guidelines are not administrative ‘regulations’ promulgated pursuant to formal procedures established by the Congress” but are nonetheless “entitled to great deference” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971))).

83. See David Kadue & Thomas Kaufman, *A Tragedy of Manners: Flawed Reasoning Equates Workplace Sexuality with Gender Discrimination*, RECORDER (S.F., Cal.), Aug. 12, 2005, at 4 (arguing that the EEOC policy statement is not a sound legal authority because it is merely the proponent litigation position of the EEOC, and because it was not subject to standard notice and comment requirements that generally apply to administrative rules).

84. EEOC Policy Guide, *supra* note 2, at 405:6817-:6819.

85. *Id.* at 405:6817.

*DeCintio* as a case exemplifying this first category,<sup>86</sup> the EEOC's position is that such conduct may be unfair but does not violate Title VII because the parties are not disadvantaged by any reasons related to gender.<sup>87</sup>

Whether a case involving only one instance of sexual favoritism is actionable is another matter that has produced disagreement among some academics.<sup>88</sup> Notwithstanding this disagreement, the majority of the cases that have addressed a situation of isolated sexual favoritism have refused to hold that Title VII was violated.<sup>89</sup> The EEOC apparently agrees with this interpretation.<sup>90</sup>

## 2. *Second EEOC Category: Favoritism Based on Coerced Sexual Conduct*

The second EEOC category deals with favoritism based upon *coerced* sexual conduct.<sup>91</sup> This category would include a situation in which an employee is coerced and submits to an employer's unwelcome sexual advances in exchange for job benefits.<sup>92</sup> In such a situation, the coerced employee clearly can recover under Title VII — this is the classic *quid pro quo* case.<sup>93</sup>

Within this category, however, the EEOC also explains how other employees in the workplace may recover for *quid pro quo* harassment. If the coerced employee is female, other female employees may also recover if they establish two conditions. First, the female employees must show that they were qualified for the benefit.<sup>94</sup> Second, the employees must establish that sex was generally made a condition for receiving that job benefit — that is, women were required to perform sexual favors in exchange for job benefits while men were not.<sup>95</sup> Furthermore, coercive sexual conduct can create a cause of action

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86. *Id.* at 405:6818 (citing *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986)). For a discussion of the *DeCintio* case, see *supra* text accompanying notes 26-31. As noted above, *DeCintio* involved a single instance of favoritism, occurring when a job benefit was awarded to the subject of a consensual office affair. See *DeCintio*, 807 F.2d at 306.

87. EEOC Policy Guide, *supra* note 2, at 405:6817.

88. Compare Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153 (1991), and Manemann, *supra* note 6, with Phillips, *supra* note 6, at 585-89, and Mitchell Poole, Comment, *Paramours, Promotions, and Sexual Favoritism: Unfair, but Is There Liability?*, 25 PEPP. L. REV. 819 (1998).

89. See *supra* Part II.B.

90. EEOC Policy Guide, *supra* note 2, at 405:6817.

91. *Id.* at 405:6819.

92. *Id.*

93. See discussion *supra* text accompanying notes 14-19; see also EEOC Policy Guide, *supra* note 2, at 405:6818 n.7.

94. See EEOC Policy Guide, *supra* note 2, at 405:6818.

95. See *id.* To illustrate this situation, the EEOC discusses *Toscano v. Nimmo*, 570 F. Supp.

for both male and female employees, even though they were not themselves harassed.<sup>96</sup> Thus, even if an employee cannot prove that sex was a *general* condition to employment benefits,<sup>97</sup> other employees who were qualified for the benefit have standing in a quid pro quo sexual harassment action.<sup>98</sup> In support of this position, the EEOC rationalizes that other employees are injured as a result of discrimination levelled against the coerced employee.<sup>99</sup>

### 3. Third EEOC Category: Widespread Favoritism

The EEOC's third category covers widespread favoritism and cites *Broderick v. Ruder* as a case illustrating this category.<sup>100</sup> This category includes situations in which sexual favors are commonly exchanged for job benefits.<sup>101</sup> The statement concludes that both male and female employees who find such conduct objectionable can recover under a hostile work environment theory,<sup>102</sup> without regard to whether the conduct was coerced and without regard to whether they were the objects of the conduct.<sup>103</sup> In support of this conclusion, the statement argues that such conduct implies that managers view women as "sexual playthings" and that this conduct creates a work environment that is demeaning to women.<sup>104</sup> The statement further concludes that widespread favoritism may also give other female employees a cause of action for implied quid pro quo sexual harassment, because such

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1197 (D. Del. 1983). *See id.* As *Toscano* makes clear, an employer's widespread sexual conduct may constitute *circumstantial evidence* that sex was a condition to receiving the job benefit. *See Toscano*, 570 F. Supp. at 1199. That is, the employer makes sexual advances toward several female employees, and those who respond favorably receive job benefits. Thus, the message is *implicit* that sex is exchanged for benefits, the classic quid pro quo case. For a discussion of another case supporting this proposition, *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825 (N.D. Ill. 1994), *see infra* text accompanying notes 112-14.

96. EEOC Policy Guide, *supra* note 2, at 405:6819.

97. This would be the case, for example, when the employer only favors (and coerces) one specific employee. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 405:6820 (citing *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988)). For a discussion of the *Broderick* case, *see supra* text accompanying notes 73-78.

101. EEOC Policy Guide, *supra* note 2, at 405:6819.

102. The statement notes that the conduct must be sufficiently severe or pervasive such that it alters the conditions of employment and creates an abusive environment. *Id.* (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). The EEOC also suggest some factors that are relevant to the hostile environment analysis, such as "the number of incidents of favoritism, the egregiousness of the incidents, and whether or not other employees in the office were made aware of the conduct." *Id.* at 405:6819 n.11.

103. *Id.* at 405:6819.

104. *Id.*

conduct communicates the message that the only way for females to get ahead or receive fair treatment is to engage in sexual conduct with managers.<sup>105</sup>

#### 4. Analysis of the EEOC Approach

The EEOC policy statement's categorical approach to sexual favoritism is appealing because it demonstrates how the seemingly inconsistent case law on sexual favoritism can actually be reconciled.<sup>106</sup> *DeCintio* and cases refusing to extend Title VII protection can be reconciled with cases finding a Title VII violation, as *DeCintio* and its progeny involve the first EEOC category, a single instance of sexual favoritism. Thus, the seemingly contradictory cases do not appear inconsistent with the *DeCintio* line when viewed in light of their facts. In *Toscano*, although there was only one instance of favoritism, the court found evidence of direct sexual advances made toward the plaintiff.<sup>107</sup> Similarly, the *Broderick* court noted that the plaintiff was harassed by at least three of her supervisors.<sup>108</sup> For this reason, the EEOC policy statement argued that *Broderick* could be a case of quid pro quo harassment.<sup>109</sup> Moreover, *King* is distinguishable because the parties actually stipulated that the relevant facts, which involved only one instance of favoritism, could support a cause of action for sexual harassment, even though neither party raised or argued this point on appeal.<sup>110</sup> These subtle distinctions show how these "sexual favoritism" cases are, in fact, consistent in that the unique facts of each case can be reconciled while still preserving a consistent rule of law in the area of sexual harassment.

Moreover, the EEOC's position that widespread favoritism can create implied quid pro quo harassment draws support from previous decisions. Implied quid pro quo claims have been addressed and recognized in several

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105. *Id.* at 405:6820.

106. Some courts and academics have referred to *DeCintio* and its progeny as inconsistent with or contrary to cases such as *King*. See, e.g., *Knadler v. Furth*, No. C04-01220, 2005 WL 2789223, at \*2 (N.D. Cal. Oct. 26, 2005) (mem.); *Manemann*, *supra* note 6, at 614, 625-39.

107. *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199-1200, 1205 (D. Del. 1983).

108. *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988).

109. EEOC Policy Guide, *supra* note 2, at 405:6820.

110. *King v. Palmer*, 778 F.2d 883, 883 (D.C. Cir. 1986) (Bork, J., concurring), *denying rehearing en banc* 778 F.2d 878 (D.C. Cir. 1985); *King v. Palmer*, 778 F.2d 878, 880 (D.C. Cir. 1985), *reh'g denied*, 778 F.2d 883 (D.C. Cir. 1986) (en banc). The court noted that the parties stipulated that the facts could state a cause of action for sexual harassment. *King*, 778 F.2d at 880. As discussed by Judge Bork, the United States expressed concern about the result in this case and how it could constitute an expansion of Title VII. *King*, 778 F.2d at 883 (Bork, J., concurring). Judge Bork, however, noted that the issue was not raised, briefed, or argued on appeal. *Id.*

courts.<sup>111</sup> For example, in *Piech v. Arthur Anderson & Co.*, a federal district court refused to dismiss a Title VII quid pro quo claim in which the plaintiff alleged that submission to sexual favors was a condition to receiving tangible employment benefits, as evidenced by the fact that a promotion was awarded to an employee who was romantically involved with a manager.<sup>112</sup> The *Piech* court distinguished this quid pro quo claim from *DeCintio*, because the plaintiff in *Piech* was not alleging that she was passed over because the manager favored his paramour.<sup>113</sup> Rather, the plaintiff alleged that it was necessary for women to grant sexual favors in order to advance within the workplace, the quintessential quid pro quo claim.<sup>114</sup>

Against this backdrop of sometimes confusing and seemingly inconsistent authorities, the California Supreme Court faced a new twist on the same sexual harassment problem — should a cause of action lie where widespread, albeit consensual, conduct permeates the workplace but is not specifically directed toward the plaintiffs?

### III. Miller: A Pervert with a Badge and a Prerogative

#### A. Factual Background

The facts in *Miller v. Department of Corrections* are troubling and read somewhat like a deviant workplace soap opera. The plaintiffs in *Miller*, two female employees of the California DOC, sued the DOC and Lewis Kuykendall, warden of a women's prison, for sex discrimination and sexual harassment in violation of the California Fair Employment and Housing Act (FEHA).<sup>115</sup> The lead plaintiff, Edna Miller,<sup>116</sup> was hired by the DOC in

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111. See, e.g., *Dirksen v. City of Springfield*, 842 F. Supp. 1117 (C.D. Ill. 1994); *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825 (N.D. Ill. 1994). For a more thorough discussion of the implied quid pro quo claim, see Phillips, *supra* note 6, at 585-89.

112. *Piech*, 841 F. Supp. at 829-30.

113. *Id.* at 829.

114. *Id.*

115. *Miller v. Dep't of Corr.*, 115 P.3d 77, 81 (Cal. 2005). See generally California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (West 2005). Although the California FEHA recognizes separate causes of action for sexual discrimination and sexual harassment, see CAL. GOV'T CODE § 12940(a)-(c), (j), the California Court of Appeals and the California Supreme Court analyzed these two causes of action under the rules applicable to sexual harassment, noting that sexual harassment is a form of sexual discrimination, much as it is under Title VII. *Miller*, 115 P.3d at 87.

116. Plaintiff Frances Mackey was originally the lead plaintiff in this case, but Miller was substituted as lead plaintiff by the California Supreme Court after plaintiff Mackey died in 2003. *Miller*, 115 P.3d at 80 n.1. The court substituted the personal representative of Mackey's estate, her son, for her as a party in the case. *Id.*

1983.<sup>117</sup> During Miller's employment at the Central California Women's Facility (CCWF), Kuykendall served as the chief deputy warden of the prison.<sup>118</sup> While employed at the CCWF, Miller learned from other DOC employees that Kuykendall was engaged in sexual affairs with Kathy Bibb, Kuykendall's secretary, and Debbie Patrick, an associate warden.<sup>119</sup> Miller later learned from Cagie Brown, another DOC employee, that she too was sexually involved with Kuykendall.<sup>120</sup> In 1995, Miller was transferred to the Valley State Prison for Women (VSPW), to which Kuykendall had been previously transferred to serve as warden.<sup>121</sup> Kuykendall allegedly caused his three paramours — Bibb, Brown, and Patrick — to be transferred to the VSPW after Kuykendall became the VSPW warden.<sup>122</sup>

Miller alleged that she experienced several negative consequences due to Kuykendall's various affairs. First, Miller was part of a committee that evaluated a promotion application for Bibb, one of Kuykendall's lovers.<sup>123</sup> The committee rejected Bibb's application, but Bibb was nevertheless promoted after Miller and the committee were informed that Kuykendall "wanted them to 'make it happen.'"<sup>124</sup> This incident caused Miller "to lose faith in the system . . . and to feel somewhat powerless because of Kuykendall and his sexual relations with subordinates."<sup>125</sup> Additionally, Miller learned that Patrick, another of Kuykendall's paramours, was transferred to the VSPW to be with Kuykendall and was given "unusual privileges" after this transfer.<sup>126</sup>

Finally, the most serious consequences to Miller flowed from Kuykendall's affair with Brown. Kuykendall allegedly secured Brown's transfer to the VSPW,<sup>127</sup> and soon thereafter, Brown and Miller competed for a promotion.<sup>128</sup> Miller was better qualified for the promotion by virtue of her rank, education, and experience, but Brown told Miller that Kuykendall, who served on the

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117. *Id.* at 81.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 90.

123. *Id.* at 81. At the time of this evaluation, Bibb was still employed at the CCWF. *Id.* As part of Bibb's promotion, Bibb would be transferred to the VSPW, the location to which Kuykendall was transferred. *Id.*

124. *Id.* A subsequent DOC internal affairs investigation found that Kuykendall's involvement in Bibb's promotion was unethical due to the personal relationship between Kuykendall and Bibb. *Id.* at 82.

125. *Id.* at 81.

126. *Id.* at 82.

127. *Id.*

128. *Id.*



interviewing panel, would award Brown the promotion or “she would ‘take him down’ with her knowledge of ‘every scar on his body.’”<sup>129</sup> Brown ultimately received the promotion, a decision that struck the other members of the interviewing panel as unfair because Miller was more qualified and because the panel had recommended that the promotion be awarded to Miller.<sup>130</sup> Brown later secured two more promotions, again with the help of Kuykendall serving on the interviewing panels.<sup>131</sup> As a result of these promotions, Brown enjoyed a position of authority over Miller and made work life miserable for her because Miller made known her objection to the inappropriate relationship between Kuykendall and Brown.<sup>132</sup>

Frances Mackey, the other plaintiff in the action, also suffered adverse employment consequences at the hands of Kuykendall and his paramours. Mackey was hired by the DOC in 1975 as a clerk and received several subsequent promotions, including a transfer to the VSPW as a records manager.<sup>133</sup> Mackey desired a promotion to the position of correctional counselor and was told by Kuykendall that she would receive this promotion if she improved the VSPW records office.<sup>134</sup>

Mackey alleged that Kuykendall’s affairs severely impacted her employment in several respects. First, Brown believed that Mackey had complained about Brown’s affair with Kuykendall; as a result of this belief, Brown caused Mackey’s enhanced salary benefits to be withdrawn, verbally abused Mackey, and interfered with Mackey’s job in various respects.<sup>135</sup> Furthermore, Mackey demonstrated that Kuykendall promoted Bibb, another female employee with whom he was sexually involved, notwithstanding the fact that Bibb was unqualified for the promotion.<sup>136</sup> Mackey claimed that this promotion, coupled with the fact that Warden Kuykendall refused to provide Mackey with the necessary training she needed to secure her own promotion, conveyed to her the message that she was not promoted because she was not sexually involved with Kuykendall.<sup>137</sup>

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129. *Id.*

130. *Id.* As with Bibb, the DOC internal affairs investigation also concluded that Kuykendall’s involvement in Brown’s promotion was unethical due to the sexual relationship between Kuykendall and Brown. *Id.*

131. *Id.*

132. *Id.* at 82-84, 90.

133. *Id.* at 84-85.

134. *Id.*

135. *Id.*

136. *Id.* at 91.

137. *Id.*

*B. The Court's Analysis and Rationale*

In short, plaintiffs claimed that their refusal to engage in a sexual affair with Kuykendall caused them to be disadvantaged in their employment. Further, they claimed that Kuykendall's actions led them to believe that the only way to secure promotions and other employment benefits in the prison was to engage in sexual conduct with Kuykendall. The court emphasized that the DOC employees were well aware of Kuykendall's sexual affairs and that the employees viewed these affairs as unethical and as creating a hostile work environment.<sup>138</sup> Some DOC employees were outraged that Kuykendall's paramours received special employment benefits, and expressed their outrage with statements such as "what do I have to do, 'F' my way to the top?"<sup>139</sup> The court summed up the work environment created by Kuykendall as one in which female employees were treated as sexual playthings who could only gain advancement by engaging in sexual conduct with Kuykendall.<sup>140</sup>

The court's discussion, however, is wholly devoid of any direct sexual advances that Kuykendall made toward the plaintiffs. The only statement that could be construed as a direct sexual advance was one statement made by Kuykendall to Miller.<sup>141</sup> When Miller complained to Kuykendall about Brown's abusive actions, Kuykendall agreed and stated that he was "finished" with Brown and that he should have chosen Miller.<sup>142</sup> Miller alleged that she took this statement to mean that Kuykendall should have chosen Miller for a sexual affair, an interpretation the court deemed to be "reasonable."<sup>143</sup> Furthermore, although Kuykendall did not make any direct sexual advances toward Mackey, Mackey, like other DOC employees, believed that she was not promoted because she was not Kuykendall's sexual partner.<sup>144</sup>

After engaging in a lengthy discussion about the prison work environment, the California Supreme Court held that the trial court erroneously dismissed the plaintiffs' complaints, finding that the evidence created "at least a triable issue of fact on the question whether Kuykendall's conduct constituted sexual favoritism widespread enough to constitute a hostile work environment."<sup>145</sup> The court held that under California law, a hostile work environment may be

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138. *Id.* at 82.

139. *Id.*

140. *Id.* at 91-92.

141. *Id.* at 84, 91.

142. *Id.* at 84.

143. *Id.* at 84, 91.

144. *Id.* at 85, 91.

145. *Id.* at 91.

established without proof that coercive sexual conduct or even conduct of a sexual nature was directed toward the plaintiff.<sup>146</sup>

#### IV. Miller — A Revolution or Reliable Jurisprudence?

At first blush, *Miller*'s proposition and reasoning might seem revolutionary in that the court recognized a potential cause of action for women who were not sexually involved with a supervisor and who were never personally subjected to any direct sexual advances or requests for sexual favors. Indeed, some have expressed strong disagreement with the *Miller* decision,<sup>147</sup> while others have labeled the decision a potential "legal watershed" with dire consequences for employers.<sup>148</sup> Moreover, in the wake of *Miller*, some cases have already interpreted the opinion as "validating the 'paramour' theory" and as an expansion of Title VII.<sup>149</sup> Nevertheless, the *Miller* Court's rationale and holding are surprisingly unremarkable and draw on the sexual harassment jurisprudence of the U.S. Supreme Court, various federal courts of appeals and state decisions, and policy guidelines issued by the EEOC.<sup>150</sup>

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146. *Id.* at 92.

147. *See, e.g.*, Kadue & Kaufman, *supra* note 83.

148. John H. Douglas, *Consensual Office Affairs: On-the-Job Relationships Pose Legal Risks if They Evidence Widespread Favoritism*, NAT'L L.J., Oct. 31, 2005, at S1 (stating that *Miller* may be another legal watershed arising in California). *But see* Alisa J. Baker & Richard E. Levine, *The Miller Case: Not So Tragic*, RECORDER (S.F., Cal.), Aug. 19, 2005, at 4 (exploring the merit of claims that the *Miller* decision had drastically altered sexual harassment law in a manner that would have dire consequences for employers).

149. *Knadler v. Furth*, No. C04-01220, 2005 WL 2789223, at \*2 (N.D. Cal. Oct. 26, 2005) (mem.). *But see* *Koanui v. Cenvo Corp.*, Civ. No. 04-6326-TC, 2005 WL 2465813, at \*3 n.1 (D. Or. Oct. 5, 2005) (interpreting *Miller* properly by referencing the "sufficiently widespread" requirement).

150. As noted, the plaintiffs' claim was brought under FEHA, a state statutory scheme comparable to Title VII that was enacted to prevent workplace discrimination. *See* CAL. GOV'T CODE § 12940 (West 2005). California state courts have frequently relied on federal Title VII jurisprudence in interpreting FEHA, and the *Miller* decision is no exception. *See, e.g.*, *Miller*, 115 P.3d at 88; *Beyda v. City of Los Angeles*, 26 Cal. Rptr. 2d 547, 555 (Ct. App. 1998); *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116, 120 n.5 (Ct. App. 1993). It is important to note, however, that FEHA specifically contains an explicit prohibition on sexual harassment, while Title VII's prohibition on sexual harassment has merely been inferred by the United States Supreme Court. *Compare* § 12940(j)(1), *with* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-66 (1986). The California Supreme Court has held that, because of these differences in the language of Title VII and FEHA with regard to sexual harassment, California courts should give "little weight to the federal precedents in this area." *State Dep't of Health Servs. v. Superior Court*, 79 P.3d 556, 562 (Cal. 2003). Notwithstanding this limitation, recognized just two years earlier by the same California Supreme Court, the *Miller* court proceeded to analyze the case under federal Title VII jurisprudence. *See Miller*, 115 P.3d at 88.

Specifically, the *Miller* court placed much emphasis on the EEOC's policy statement on sexual favoritism.<sup>151</sup> The court noted that this policy statement "reflects the position of a great majority of federal courts."<sup>152</sup> In support of this contention, the *Miller* court cited cases from several courts of appeals adopting the reasoning embodied in this policy statement.<sup>153</sup> Further, the court quoted express language from the statement and relied heavily upon its reasoning.<sup>154</sup> Thus, *Miller* should be analyzed by fitting the case within the EEOC's different sexual harassment categories.

*A. Analyzing Miller Within the EEOC's Categorical Framework*

As noted above, the EEOC policy statement divides sexual favoritism into three categories: isolated instances of favoritism towards a paramour, favoritism based upon coerced sexual conduct, and widespread favoritism.<sup>155</sup> Clearly, *Miller* is not a case involving the first category set forth in the EEOC policy statement, isolated incidents of sexual favoritism. Warden Kuykendall was engaged in affairs with three subordinate employees and granted favorable treatment to each of these subordinates.<sup>156</sup> Because *Miller* involves more than a single incident of favoritism, the case falls outside of the first category set forth in the EEOC policy statement. Thus, cases such as *DeCintio* are inapposite in analyzing the claims in *Miller*. Furthermore, *Miller* is not a case involving the second EEOC category, favoritism based upon coerced sexual conduct. The *Miller* plaintiffs did not allege that any of Kuykendall's relationships with the three subordinates were coerced. Instead, *Miller* falls within the third EEOC category, widespread favoritism. Nevertheless, the facts in *Miller* are unique from other Title VII cases involving allegations of sexual favoritism, and *Miller* presents a strong case to support the EEOC's position with regard to widespread favoritism.

The facts in *Miller* are unique from prior third category cases in two main respects. First, the plaintiffs were not subjected to any direct sexual advances.<sup>157</sup> Second, the case involves more than just an isolated instance of

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151. See, e.g., *Miller*, 115 P.3d at 88-90, 92-93.

152. *Id.* at 89 n.8.

153. *Id.* (citing *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998); *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986)).

154. See *id.* at 91-92.

155. See *supra* Part II.D.

156. *Miller*, 115 P.3d at 90.

157. As already noted, the only statement that could have been construed as a sexual advance upon either of the two plaintiffs was Kuykendall's statement to Miller that he should have chosen Miller over Brown. See *supra* text accompanying notes 141-43. Miller interpreted

favoritism. Thus, due to the lack of coercive conduct and the numerous instances of favoritism, *Miller* fits squarely within the third EEOC category, perhaps more so than any other previous case. When the EEOC discussed this third category, it pointed to *Broderick v. Ruder*;<sup>158</sup> *Broderick*, however, does not fully fit within the third EEOC category as some harassing conduct was directed toward the *Broderick* plaintiff.<sup>159</sup> As such, the conduct in *Broderick* was not entirely indirect. In short, *Miller* presents a much better case for the third EEOC category because the sexual conduct was not coercive, the plaintiffs were not the subjects of any sexual or harassing conduct, and the employer's conduct was not an isolated incident.

### *B. Reevaluating the EEOC's Third Category in Light of Miller*

When the facts in *Miller* are scrutinized in light of the position set forth in the EEOC policy statement, it becomes clear that the *Miller* court truly breaks no new ground in sexual harassment jurisprudence. The numerous affairs between Warden Kuykendall and prison employees, coupled with the favoritism shown to those employees, created a situation that the EEOC describes as "widespread favoritism." The EEOC policy statement argues that such widespread favoritism is actionable under Title VII, because it may create both implied quid pro quo harassment and hostile work-environment harassment.<sup>160</sup>

#### *1. Miller as a Hostile Work Environment Case*

If one simply removes the red-herring title of "sexual favoritism" and analyzes *Miller* as a straightforward hostile work environment claim, it becomes clear that the court reached the correct result within the established framework. The *Miller* court held that a reasonable jury could conclude that the conduct at the prison created a hostile work environment that was sufficiently severe or pervasive so as to adversely alter the conditions of the plaintiffs' employment.<sup>161</sup> In support of this conclusion, the court cited evidence such as the abuse that the plaintiffs suffered at the hands of Kuykendall's paramours, the jealous scenes that occurred between Bibb and Brown, the paramours' bragging about the control that they wielded over Kuykendall, Kuykendall's actions in securing undeserved job benefits for his paramours, Kuykendall's admissions that he could not prevent Brown from

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this statement to mean that Kuykendall should have chosen Miller for a sexual affair, and the court found that this interpretation was reasonable. *Miller*, 115 P.3d at 84, 91.

158. EEOC Policy Guide, *supra* note 2, at 405:6820.

159. *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988).

160. EEOC Policy Guide, *supra* note 2, at 405:6819-:6820.

161. *Miller*, 115 P.3d at 92.

abusing Miller because of Kuykendall's sexual relationship with Brown, and the fact that the sexual conduct was flaunted and indiscreet.<sup>162</sup> These negative consequences came as a direct result of Kuykendall's sexual conduct, making it difficult to fathom a more clear-cut hostile work environment case.

Moreover, it is incomprehensible that our court system could accept the creation of a hostile work environment by widespread sexual jokes, comments, posters, and the like,<sup>163</sup> but not by widespread sexual conduct — whether consensual or not — between supervisors and employees. Furthermore, the fact that this conduct was not directed at the plaintiffs is immaterial.<sup>164</sup> Thus, by analyzing the *Miller* decision under the existing and recognized hostile work environment category, *Miller* is clearly not a revolutionary case in the area of sexual harassment.

## 2. *Miller as a Case of Implied Quid Pro Quo Case*

Although the *Miller* court's analysis relies upon the hostile work environment category, it also appears that the facts could establish a valid claim for implied quid pro quo sexual harassment.<sup>165</sup> It is plain to see how Kuykendall's "conduct [and] statements[] implie[d] that job benefits w[ould] be conditioned on an employee's endurance of his sexually-charged conduct . . . [and] advances."<sup>166</sup> In this regard, the plaintiffs' allegations concerning favoritism in the workplace are best seen as *circumstantial evidence* of quid pro quo harassment.<sup>167</sup> Based upon the situation at the prison, one could reasonably infer that Kuykendall was soliciting sexual favors in return for job benefits — after all, the women who acceded to Kuykendall's advances were the ones who received job benefits, a fact which led several employees to conclude that engaging in sexual affairs was the only way to advance at the prison. This is classic quid pro quo language — employment benefits are exchanged for sexual favors.

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162. *Id.* at 92-93.

163. For examples of this classic hostile work environment claim, see *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); *Huffman v. City of Prairie Village*, 980 F. Supp. 1192, 1198 (D. Kan. 1997).

164. In support of this point, the *Miller* court briefly discussed another California state court decision, which found that a hostile work environment sexual harassment claim has merit even where the harassing conduct is directed toward employees other than the plaintiff. *Miller*, 115 P.3d at 92 (citing *Beyda v. City of Los Angeles*, 76 Cal. Rptr. 2d 547, 551 (Ct. App. 1998)).

165. *See supra* text accompanying note 160. As noted above, implied quid pro quo has been recognized in the Federal Regulations and in several federal decisions. *See supra* notes 17, 111-14 and accompanying text.

166. *Priest v. Rotary*, 634 F. Supp. 571, 581-82 (N.D. Cal. 1986).

167. *See Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 830 (N.D. Ill. 1994); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983).

*Conclusion*

In light of *Miller*'s adherence to existing and recognized forms of sexual harassment under Title VII, it is inappropriate to label the decision as a watershed. *Miller* does not pave the way for a flat ban on workplace relationships. Perhaps the *Miller* court responded to this criticism best: "it is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard."<sup>168</sup> Although one instance of sexual favoritism might not be enough, much like one "stray comment" does not create a hostile work environment, there must be some limit on how permeated the workplace can become with sexual conduct before the protections of Title VII will apply. The *Miller* court simply held that a reasonable jury could find in this case that this line had been crossed.

The issue only becomes conflated when one labels *Miller* as a "sexual favoritism" case. One preferable solution might be for courts to expunge the term "sexual favoritism" from their vocabulary altogether. After all, the existing categories of sexual harassment are already suited to provide relief to plaintiffs who must deal with prevalent sexual conduct in the workplace. If courts simply constrain their analysis to the existing and recognized quid pro quo and hostile work environment categories, disadvantaged parties can obtain relief while still maintaining a consistent approach to handling sexual harassment claims.

*Stephen Dacus*

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168. *Miller v. Dep't of Corr.*, 115 P.3d 77, 94 (Cal. 2005).