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Sex, Promotions, and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination

by
MICHAEL J. LEVY*

Introduction

In 1988, David, a branch manager of a local bank, began dating Theresa, one of the bank's tellers. After dating for several months, the relationship between the two became quite serious. In 1989, an assistant branch manager position opened up in the bank. Five tellers applied for the position, including David's girlfriend Theresa. Because all five applicants were equally qualified, David, the sole person in charge of promotions, faced a tough decision. Taking his relationship with Theresa into account, David awarded the promotion to her.

Upon hearing of the decision, Patty and Peter, two of the tellers who were not selected, sought the assistance of an attorney. With the help of the attorney, the two sued David, Theresa, and the bank under Title VII of the Civil Rights Act of 19641 (Act), alleging they were victims of sexual favoritism. This Note considers whether Patty and Peter should succeed in their claim.

Title VII makes it 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."2 In claims of sexual favoritism, plaintiffs allege denial of a promotion for which they were qualified,

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* J.D. Candidate, 1994; B.S. 1990, California Polytechnic State University, San Luis Obispo. Neat Allen Sawyer, J.D. Candidate, 1994, made significant contributions to this Note by co-authoring the discussions relating to the meaning of "sex" in Title VII. To him, I am indebted. I would also like to thank Professor Eileen Scallen for her thoughtful review and insightful ideas. Finally, great thanks to Julius Erolin, J.D. Candidate, 1994, for his never-ending role as a devil's advocate on the subject of this Note.


[667]
because the decision maker chose an applicant with whom he was involved in a consensual, romantic relationship. According to plaintiffs in sexual favoritism suits, the decision maker's selection violates Title VII because the plaintiffs are being discriminated against based on their "sex."

Sexual favoritism claims are problematic, however, because the meaning of the word "sex" in Title VII is unclear. The legislative history of Title VII provides little illumination as to the intended definition of the word. Given its ambiguity, circuit courts have come to vastly different interpretations of the word "sex" in cases where plaintiffs allege sexual favoritism. Since the early 1980s, six reported cases seeking Title VII relief for sexual favoritism have been decided. The plaintiffs were successful in the first three cases, but the claimants in

3. In this Note, the decision maker will be referred to as a male, and the favored applicant will be referred to as a female, for two reasons: (1) grammatical convenience, and (2) because all of the reported Title VII sexual favoritism cases as of the date of this Note involve a male supervisor and a female employee. See DeCintio v. Westchester County Medical Ctr., 807 F.2d 304 (2d Cir. 1986) (male program administrator hired a woman he was romantically involved with as assistant chief), cert. denied, 484 U.S. 825 (1987); King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985) (male chief medical officer at jail hired a woman he was romantically involved with as supervisory forensic-clinical nurse); Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988) (male SEC supervisor discriminated against female staff attorney); Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Penn. 1988) (male plant manager accused of sex discrimination against female unit supervisor); Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986) (male employer sexually harassed waitress working in his restaurant); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983) (male supervisor awarded promotion to a woman with whom he had a sexual encounter).

4. As the Supreme Court noted in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the word "sex" was added to Title VII shortly before passage of the Act, leaving the courts with "little legislative history to guide [them] in interpreting the Act's prohibition against discrimination based on 'sex.'" Id. at 63-64. The Meritor Savings Bank Court noted, however, that the legislative history did include opposition to the inclusion of the prohibition against "sex" within Title VII. Id. Opponents of the inclusion argued that sex discrimination was sufficiently different from other types of discrimination to deserve separate legislative treatment. Id. (citing 110 Cong. Rec. 2577 (1964) (containing statement of Representative Celler quoting letter from United States Department of Labor, in opposition to the amendment), and 110 Cong. Rec. 2584 (1964) (containing statement of Representative Green, pointing to the inconsistency of members who voted for this amendment but against comparable worth)). Besides this argument, which was defeated, little legislative history was left to help define the scope of the Act's prohibition against "sex" discrimination. Id. at 64.

5. Compare King, 778 F.2d at 880 ("[U]nlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination.'" (quoting Bundy v. Jackson, 641 F.2d 934, 942-43 (D.C. Cir. 1981))) with DeCintio, 807 F.2d at 306 ("[S]ex . . . logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.").

6. See King, 778 F.2d at 880; Priest, 634 F. Supp. at 576; Toscano, 570 F. Supp. at 1199.
the next two cases were denied relief. In the final case, the court found for the plaintiff on a separate sexual harassment claim and did not reach the sexual favoritism question.

In 1990, following the decisions denying relief, the Equal Employment Opportunity Commission (EEOC) released a policy guidance for employers rejecting Title VII relief for sexual favoritism claims where the underlying relationship was isolated, consensual, and romantic. Professor Joan E. Van Tol has criticized the recent decisions and the EEOC for not recognizing sexual favoritism as a distinct form of sexual harassment under Title VII.

While the current trend rejects sexual favoritism claims under Title VII, the law is still very much uncertain. First, the two cases denying relief for sexual favoritism are only controlling for lower courts within their jurisdiction. Second, neither the Supreme Court nor Congress has spoken on the viability of sexual favoritism claims. Finally, although courts follow the EEOC Policy Guidance, it is not binding on them. Thus, while the current legal trend does not endorse claims of sexual favoritism, the debate over the legitimacy of such claims is very much alive.

The purpose of this Note is to show how Van Tol's criticism of the current legal trend is misplaced and why courts should continue to hold that sexual favoritism is not covered by Title VII. Based on the language of Title VII, the EEOC Policy Guidance and the court decisions denying relief have correctly stated that claims of sexual favoritism do not give rise to Title VII relief. Unlike other forms of sexual

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7. DeCintio, 807 F.2d at 308 (denying relief where promotion requirements changed allegedly to permit only hirer's paramour to apply); Miller, 679 F. Supp. at 501 (following DeCintio in holding that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination).

8. Broderick, 685 F. Supp. at 1277; see also infra text accompanying notes 116-121.


11. The 1990 EEOC Policy Guidance (as well as the 1980 Guidelines codified in the Code of Federal Regulations, see infra text accompanying note 17) is an administrative interpretation of Title VII by the EEOC, the agency in charge of enforcing the Act, to provide guidance to the courts and those employers covered under Title VII. The guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by Congress and are, therefore, "not controlling upon the courts by reason of their authority." General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). However, the guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. at 142.

12. See infra Part III.
harassment, an isolated instance of a supervisor giving preferential treatment to a person with whom he is romantically involved in a consensual relationship, while perhaps unfair, is not gender-based discrimination.\textsuperscript{13} Thus, the purpose of this Note is not to refute that instances of sexual favoritism have a negative impact on the workplace,\textsuperscript{14} but rather to argue that with regard to sex discrimination Title VII was enacted only to eradicate gender-based discrimination from the workplace.\textsuperscript{15}

Part I of this Note provides the background for analysis of sexual favoritism claims. The background unfolds in the following four Subparts: (1) the early development of EEOC policy regarding sexual harassment under Title VII; (2) the Supreme Court's acceptance, in \textit{Meritor Savings Bank v. Vinson},\textsuperscript{16} of the idea that Title VII relief should be available for sexual harassment that leads to noneconomic injury; (3) the six reported sexual favoritism cases—from the early cases which granted relief, to the more recent cases that have dismissed such claims; and (4) the issuance of EEOC policy guidelines rejecting sexual favoritism as a Title VII cause of action. Part II of this Note examines Professor Van Tol's arguments which lead her to conclude that sexual favoritism should be recognized as a distinct form of sexual harassment under Title VII. Part III refutes Professor Van Tol's arguments and explains the reasons why the EEOC and several courts have rejected, and should continue to reject, causes of action for sexual favoritism.

\section{I. Background}

\subsection{A. Early Development of EEOC Policy}

In 1980, the EEOC issued guidelines identifying two distinct types of “sexual harassment” qualifying as sexual discrimination prohibited by Title VII.\textsuperscript{17} Although differing situationally, both types of sexual harassment involve the same prohibited conduct, which includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”\textsuperscript{18}

The first type of sexual harassment is “quid pro quo” harassment. Quid pro quo harassment arises in the following two contexts: (1) when submission to the prohibited conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;\textsuperscript{19} and

\begin{itemize}
\item \textsuperscript{13} See infra Part III.C.1.
\item \textsuperscript{14} Van Tol, supra note 10, at 162-65.
\item \textsuperscript{15} See infra Part III.
\item \textsuperscript{16} 477 U.S. 57 (1986).
\item \textsuperscript{17} 29 C.F.R. § 1604.11(a) (1993).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. § 1604.11(a)(1).
\end{itemize}
(2) when submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting the individual. 20

In either context, quid pro quo harassment can be explicit or implicit. An explicit quid pro quo type of harassment occurs when employment decisions are made for or against an employee because the employee granted or denied specific requests for sexual favors by the employer. An implicit quid pro quo type of liability arises where the employee was never specifically asked to sleep with the boss, yet all women who have done so are given job benefits. 21 Thus, with an implicit quid pro quo type of harassment the employees are given the implicit message that they must sleep with the supervisor as a term or condition of employment. Since both types of quid pro quo harassment concern the tangible, economic barriers erected by sexual discrimination, they are explicitly prohibited under Title VII as discrimination, which affects the “compensation, terms, conditions, or privileges of [an individual’s] employment.” 22

The second type of sexual harassment identified by the EEOC in the Code of Federal Regulations concerns harassment that leads to a “hostile work environment.” 23 This type of harassment occurs when the prohibited conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 24

B. Noneconomic Injury Can Be Actionable Under Title VII

Although the hostile work environment type of harassment, unlike quid pro quo harassment, involves noneconomic injuries and would thus appear to be outside the purview of Title VII, the Supreme Court in Meritor Savings Bank v. Vinson 25 explicitly adopted the EEOC’s view that this type of harassment violates Title VII. 26 To be actionable, however, the Court held that the sexual harassment “must

20. Id. § 1604.11(a)(2).
21. See Priest v. Rotary, 634 F. Supp. 571, 576 (N.D. Cal. 1986) (finding that employees who reacted favorably to supervisor’s sexual advances were given job benefits).
23. 29 C.F.R. § 1604.11(a)(3).
24. Id.
26. Id. at 64. In Meritor Savings Bank, petitioner argued that Title VII only prohibits discrimination resulting in an economic injury since the Act specifically prohibits discrimination with respect to “compensation, terms, conditions, or privileges” of employment. Thus, petitioner claimed, discrimination affecting the “purely psychological aspects of the workplace” were not covered under Title VII. Id. (quoting Petitioner’s Brief at 30-31, 34, Meritor Savings Bank (No. 84-1979)). The Supreme Court swiftly rejected this argument. See infra notes 37-40 and accompanying text.
be sufficiently severe or pervasive "to alter the conditions of [the vic-
tim's] employment and create an abusive working environment." 27

The facts of Meritor Savings Bank illustrate the type of conduct needed to establish a hostile work environment sexual harassment claim. In Meritor Savings Bank, plaintiff Vinson, a bank teller, alleged that the vice-president of the bank had sexually harassed her continually during the four years she worked at the bank. 28 The harassment, which ensued soon after Vinson began working at the bank, started when the vice president propositioned her to have sex. 29 Out of fear of losing her job, she ultimately agreed. 30 Thereafter, according to Vinson, the vice president repeatedly made demands for sexual favors. Vinson and the vice president had sexual intercourse forty to fifty times over the next several years. 31 Vinson also alleged that defendant had touched and fondled her and other women employees, exposed himself to her, and even forcibly raped her on several occasions. 32 Defendant denied the allegations of sexual activity, fondling, and demands for sexual intercourse. 33

The district court denied relief without resolving the conflicting testimony, holding that even if plaintiff and defendant did have a sexual relationship, it was voluntary and unrelated to plaintiff's employment at the bank. 34 On appeal, the District of Columbia Circuit Court of Appeals reversed and remanded the case, holding that Vinson properly alleged a hostile work environment claim that the district court had failed to consider. 35 The court further held that if defendant had made plaintiff's toleration of sexual harassment a condition of employment, "her voluntariness had no materiality whatsoever" as to whether a quid pro quo claim would lie. 36

The Supreme Court granted certiorari to defendants. The Court's decision could have been limited to simply reversing the district court's decision on the quid pro quo harassment claim, since defendant had conditioned job benefits on submission to his sexual advances. However, the Court also chose to address plaintiff's hostile work environment claim, accepting the EEOC's view that this theory of liability was actionable under Title VII. 37 The Court noted that

27. Meritor Savings Bank, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
28. Id. at 60.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id. at 61.
34. Id.
35. Id. at 62.
36. Id.
37. Id. at 66.
plaintiff's "allegations in this case—which include not only pervasive
harassment but also criminal conduct of the most serious nature—are
plainly sufficient to state a claim for 'hostile environment' sexual har-
assment." In recognizing the hostile work environment theory,
thereby giving aggrieved employees another possible claim for sexual
harassment, the Court noted, "Title VII affords employees the right to
work in an environment free from discriminatory intimidation, ridic-
cule and insult." The Court remanded the case to the district court
for a determination of the veracity of plaintiff's allegations in support
of either her quid pro quo or hostile work environment claims.

C. Third Party Claims of Sexual Favoritism in the Courts

In addition to providing for quid pro quo and hostile work envi-
ronment claims, the Code of Federal Regulations also allows for sex-
ual harassment claims by third parties. Section 1604.11(g) of Title 29
states, "Where employment opportunities or benefits are granted be-
cause of an individual's submission to the employer's sexual advances
or requests for sexual favors, the employer may be held liable for un-
lawful sex discrimination against other persons who were qualified for
but denied that employment opportunity or benefit." It is through
this language in Section 1604.11(g) that third parties have made claims
of sexual favoritism under Title VII.

However, claims of sexual favoritism should not be actionable
under Title VII through Section 1604.11(g) because in such cases the
underlying employer-employee relationship is consensual and there-
fore does not involve discrimination based on gender. The underlying
relationship in a sexual favoritism case is one that is consensual in the
sense that the participants want to be with each other and are in-
volved in a relationship with no employment strings attached. A cog-
nizable claim of sexual harassment under Section 1604.11(g), however,
could involve a relationship which is voluntary in the sense that the
employee is not in the relationship against her will, yet is nonconsen-
sual because the employee is "submitting" to sexual advances in re-
turn for employment benefits. Thus, for purposes of this Note, use of
the term "sexual favoritism" automatically assumes that the underly-
ing sexual relationship is consensual, and distinct from any other ex-
isting claims of sexual harassment.

38. Id. at 67.
39. Id. at 65.
40. Id. at 73.
41. 29 C.F.R. § 1604.11(g) (1993).
42. Id.
Three early cases, *Toscano v. Nimmo,* 43 *King v. Palmer,* 44 and *Priest v. Rotary,* 45 relied on Section 1604.11(g) in allowing claims for sexual favoritism. However, such reliance in these three cases can be undermined as improper, 46 *dicta,* 47 and unnecessary. 48 These cases are discussed in turn below. This Part then discusses the three remaining reported Title VII sexual favoritism cases.

(1) Toscano v. Nimmo

In *Toscano v. Nimmo,* the trial court determined the correct outcome of the case, but in so doing incorrectly relied on Section 1604.11(g); this section is inapplicable to the facts of *Toscano* because the sexual favoritism stemmed from a consensual relationship. Plaintiff Toscano applied for a promotion at the Veterans' Administration Hospital in Elsmere, Delaware. 49 Toscano was one of five individuals 50 deemed qualified for the position by the hospital's personnel department. 51 The promotion eventually went to a woman with whom the decision maker had had a sexual encounter. 52 Toscano sued alleging that in order for a woman to be selected for the promotion it was necessary for that woman to grant sexual favors, a condition not imposed on men. 53 However, rather than establishing that she had refused specific requests for sexual favors, 54 Toscano instead offered evidence showing that the supervisor intended to reward those employees who granted him sexual favors. 55 The evidence accepted by the trial court included: (1) that at the beginning of the affair between the favored woman and the supervisor, the supervisor had questioned her regarding her career goals at the hospital; 56 (2) that the supervisor had propositioned two other female employees; 57 (3) that he had telephoned the plaintiff to tell her about a sexual encounter he had just

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46. See *Toscano,* 570 F. Supp. at 1197; *infra* notes 49-63 and accompanying text.
47. See *King,* 598 F. Supp. at 65; *infra* notes 64-75 and accompanying text.
48. See *Priest,* 634 F. Supp. at 571; *infra* notes 76-84 and accompanying text.
50. The written opinion fails to specify the ratio of men to women with regard to the five individuals seeking the promotion. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1198-99.
55. *Toscano,* 570 F. Supp. at 1199.
56. *Id.* at 1200.
57. *Id.* at 1199-1200.
had with the favored woman and to tell her that he planned to pro-
mote this woman because she was “very good in making him feel
good”; 58 and (4) that the supervisor had placed his hands on the plain-
tiff, and another woman, in a suggestive manner and had made sug-
gestive remarks. 59 Citing Section 1604.11(g) for support, the trial
court held that the plaintiff had stated a viable cause of action under
Title VII. 60

While the trial court correctly held that the supervisor had vio-
lated Title VII, the court erred by relying on Section 1604.11(g).
Plaintiff Toscano never established a Title VII violation supported by
Section 1604.11(g) because the section hinges on the underlying rela-
tionship being nonconsensual 61 and there was no evidence suggesting
that the relationship between the supervisor and the favored woman
was coercive. While the court’s reasoning may have been flawed, ulti-
mately the court’s holding in Toscano was correct because the facts
presented established a Title VII violation under an implicit quid pro
quo theory. 62 Since the consent of the favored woman is irrelevant to
a claim of implicit quid pro quo harassment, the plaintiff need only
show that the granting of sexual favors was made a condition to get-
ting the promotion. 63 As the four findings above show, there was sub-
stantial evidence that the supervisor had conditioned the promotion
on the receipt of sexual favors.

(2) King v. Palmer

The second case, King v. Palmer, involved a claim by plaintiff
King for Title VII relief based on the denial of a promotion while
serving as a nurse at the District of Columbia jail. The promotion
went to a less qualified nurse who was having a sexual relationship
with the doctor in charge of the promotion. 64 The district court noted
that the plaintiff’s claim was different from the traditional sexual har-
assment suit in that the plaintiff did not assert she was the target of
the defendant’s sexual conduct. 65 However, the court stated, the “the-
ory of the violation is the same: ‘sex [was] for no legitimate reason a
substantial factor in the discrimination.’” 66 The court relied on both

58. Id. at 1201.
59. Id. at 1200.
60. Id. at 1199.
61. For further discussion of Title VII liability under Section 1604.11(g), see infra text
accompanying notes 94-106, 125-126.
quo theory of liability, see supra text accompanying notes 19-22.
63. See 29 C.F.R. § 1604.11(a)(1); EEOC Policy Guidance, supra note 9, at D-1.
65. Id.
66. Id. at 66-67 (quoting Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981)).
Section 1604.11(g) and the year-old Toscano decision in holding that the plaintiff had made a prima facie case of sexual discrimination. Nevertheless, the court ultimately found for the defendant because the plaintiff had failed to produce direct evidence of an “explicit sexual relationship” between the supervising doctor and the favored employee.

On appeal, the District of Columbia Circuit Court of Appeal held that the district court had improperly required the plaintiff to produce direct evidence of a consummated sexual relationship between the doctor and the promoted nurse, and remanded the case for an appropriate remedy. The court of appeal agreed “with the District Court’s conclusion and its rationale: that unlawful sex discrimination occurs whenever sex is ‘for no legitimate reason a substantial factor in the discrimination.’”

Although the language of King suggests that the court was embracing Title VII relief for claims of sexual favoritism based on a consensual relationship, this language is dicta. The court noted at the outset, the “parties agree that Ms. King’s allegation, based as it is on the sexual relationship between Ms. Grant and [defendant] Dr. Smith, presents a cognizable cause of action under statutes prohibiting sex discrimination in employment.” Thus, since both parties agreed that sexual favoritism was a viable cause of action under Title VII, the issue was not before the court. Further, in denying a rehearing en banc and a request by the government for an extension of time to file a brief as amicus curiae to address concerns that the panel’s decision “may represent a significant expansion of Title VII coverage,” six judges emphasized that the applicability of Title VII to the facts before them was not raised on appeal. “Because the point was not before the panel on appeal, there was no occasion to address the issue en banc.” Thus, although Van Tol praises the District of Columbia Circuit Court of Appeal for recognizing the plaintiff’s genuine sexual favoritism claim, the issue was not resolved because the sexual favoritism claim was never raised on appeal by the defendant.

67. Id. at 67.
68. Id. at 68.
70. Id. at 880 (quoting Bundy, 641 F.2d at 942-43).
71. Id. (emphasis added).
72. The opinion does not specify which government agency sought the rehearing en banc. Id. at 883.
73. Id.
74. Id.
75. This case represents a genuine sexual favoritism case in the sense that it is the only reported decision allowing Title VII relief where (1) the underlying relationship was consensual and romantic, and (2) the supervisor made no sexual advances towards other employees (i.e., the event was isolated).
Priest v. Rotary

In the third case, Priest v. Rotary, the plaintiff was fired from her job as a waitress at a coffee shop owned by the defendant. She took issue with her firing and sued her employer for sexual harassment. The district court found that during her employment the plaintiff and other female employees were subjected to various instances of unwelcome sexual advances by the defendant. Those who objected to his conduct either quit their jobs for fear that the conduct would continue or were fired, as was the case with plaintiff and a co-worker. Those employees who did not reject the defendant's advances, including the woman with whom defendant was having a sexual relationship, were given preference in shift assignments, station assignments, and vacation benefits, and were excepted from cleanup duties. Based on these findings, the court held for the plaintiff on over twenty different grounds. In its discussion the court cited Toscano in holding that defendant violated Title VII by giving preferential treatment to the woman with whom he was romantically involved.

Although this case may appear to involve sexual favoritism, and the court used language regarding preferential treatment, it is noteworthy that defendant's conduct fell within both of the traditional forms of sexual harassment. First, the defendant created a severely hostile and offensive work environment through the numerous sexual advances made upon the various female employees. Second, the defendant granted job benefits to those female employees who endured his sexual advances and misconduct, forming an implicit quid pro quo claim of harassment. By doing so, the defendant sent a clear message to female employees, including plaintiff, that they must accede to his sexual advances to avoid termination from employment. Unlike the paradigm case involving a claim for sexual favoritism, in which the defendant gives preferential treatment to only the one woman with whom he is romantically involved, the defendant in Priest

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77. Unwelcome sexual advances by defendant against plaintiff included (1) placing his hands on plaintiff's breasts, (2) trying to kiss her on the neck, (3) rubbing his body against plaintiff, (4) unzipping the front of her uniform, and (5) exposing his genitals to both plaintiff and a co-worker. Id. at 574-75.
78. Id. at 575-76.
79. Id. at 576.
80. Id. at 581-82.
81. Id.
82. See supra text accompanying notes 19-24.
83. Id. at 524-25; see 29 C.F.R. § 1604.11(a)(3) (1993) (prohibiting hostile work environment discrimination).
84. Id. at 576; see 29 C.F.R. § 1604.11(a)(1) (1993) (prohibiting quid pro quo harassment). For further discussion of this type of Title VII liability, see supra text accompanying notes 19-22.
gave job benefits to any female employee who tolerated his sexual misconduct. Thus, the court need not have discussed sexual favoritism as the factual findings more aptly supported an implicit quid pro quo claim of harassment.

(4) DeCintio v. Westchester County Medical Center

Soon after the Toscano, Priest, and King decisions the Second Circuit Court of Appeals decided DeCintio v. Westchester County Medical Center and rejected the view that sexual favoritism is covered by Title VII.

In DeCintio, seven male respiratory therapists sued the Westchester County Medical Center claiming sexual discrimination when promotion requirements were created to disqualify them for the position of Assistant Chief Respiratory Therapist. The plaintiffs alleged that their supervisor, in order to ensure that the woman with whom he was romantically involved was given the promotion, only considered those applicants who were certified by a specific professional organization. Since the favored woman was the only applicant who had the certification, the plaintiffs alleged the requirement was pretextual.

At trial, the district court found that defendant had violated both the Equal Pay Act and Title VII. On appeal, the Second Circuit reversed both claims. In rejecting the Title VII claim, the court of appeals refused to follow King to the extent that King "can be interpreted as recognizing Title VII claims for non gender-based sex discrimination" because that interpretation would extend Title VII protection too broadly.

Noting the limited legislative history available to guide in interpreting the scope of the Act's definition of "sex," the Second Circuit looked to the other categories afforded protection under Title VII for

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86. Id. at 308.
87. Id. at 305.
88. Id.
89. Id. at 306. The plaintiffs had originally filed a complaint with the EEOC based on the same allegations, but the EEOC referred their complaint to the New York State Division on Human Rights to review the merits of the case. Following an investigation by the state, the complaint was dismissed for lack of credible evidence that the certification requirement was pretextual. The EEOC then adopted this finding. Id. Plaintiffs tried again by filing a suit in the district court alleging violations of both Title VII and the Equal Pay Act. Id.
91. DeCintio, 807 F.2d at 306.
92. Id. at 308.
93. Id. at 307.
94. See supra note 4 and accompanying text.
guidance in interpreting the scope of the word “sex” under Title VII. Since the other categories refer to a person’s status as a member of a particular race, color, religion, or nationality, “sex” when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.

To support this interpretation, the court cited Trans World Airlines v. Hardison, in which the Supreme Court noted that “[t]he emphasis of both the language and the legislative history of [Title VII] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.” Therefore, the Second Circuit reasoned that the proscribed differentiation under Title VII must be a distinction based on a person’s sex, and not on a person’s sexual affiliations. Since the court in King had implicitly recognized a Title VII suit alleging discrimination premised on a voluntary romantic relationship, the court viewed this interpretation of the word “sex” as improper and refused to adopt it. “We can deduce no justification for defining ‘sex,’ for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement.”

In dismissing the claim, the Second Circuit rejected the plaintiff’s reliance on Section 1604.11(g), which the court in King cited for support, because it found that “[t]he word ‘submission’ . . . clearly involves a lack of consent and implies a necessary element of coercion or harassment.” The court further reasoned:

[The defendant’s] conduct, although unfair, simply did not violate Title VII . . . . [The plaintiffs] were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for the promo-
tion: No one but [the favored woman] could be considered for the appointment because of [her] special relationship to [the defendant].\textsuperscript{104}

To accept the plaintiffs' interpretation of Title VII prohibitions against sex discrimination would "involve the EEOC and federal courts in the policing of intimate relationships. Such a course, founded on a distortion of the meaning of the word 'sex' in the context of Title VII, is both impracticable and unwarranted."\textsuperscript{105} Additionally, the court noted the EEOC's indication that "sexual relationships between co-workers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."\textsuperscript{106}

(5) Miller v. Aluminum Co. of America

Following the lead of the DeCintio case, the district court in Miller v. Aluminum Co. of America\textsuperscript{107} rejected a Title VII sexual favoritism claim. In Miller, plaintiff was demoted from unit supervisor to product technician.\textsuperscript{108} After a year, the company decided to terminate one of its two product technician positions.\textsuperscript{109} Citing poor performance, the company told plaintiff she would be terminated at the end of the year.\textsuperscript{110} Plaintiff sued under Title VII, claiming that the other product technician was favored because of her romantic relationship with the plant manager.\textsuperscript{111} The district court granted summary judgment for the defendant because plaintiff failed to prove either that job benefits were conditioned upon submission to the manager's sexual advances,\textsuperscript{112} or that the relationship between the manager and plaintiff's co-worker was nonconsensual.\textsuperscript{113}

Following DeCintio, the court held that preferential treatment based on a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination for purposes of Title VII.\textsuperscript{114} "Male employees[ ] shared with the plaintiff the same disad-

\textsuperscript{104} Id. at 308.
\textsuperscript{105} Id.
\textsuperscript{106} Id. (citing Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25,024 (1980)).
\textsuperscript{108} Id. at 497.
\textsuperscript{109} Id. at 498.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} This would form the basis of a claim under a quid pro quo theory of liability. For further discussion of this type of Title VII violation, see supra text accompanying notes 19-22.
\textsuperscript{113} A nonconsensual underlying relationship is required for a claim supported by Section 1604.11(g). For further discussion of this type of liability, see infra text accompanying notes 130-131.
\textsuperscript{114} Miller, 679 F. Supp. at 501.
vantage relative [to the favored woman]: none could claim the special place in [the supervisor's] heart that [the favored woman] occupied. Favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII.\textsuperscript{115}

(6) Broderick v. Ruder

A more recent Title VII claim of sexual favoritism arose in \textit{Broderick v. Ruder}.\textsuperscript{116} Plaintiff Broderick was a staff attorney with the Securities and Exchange Commission.\textsuperscript{117} She argued that numerous instances of sexual misconduct created a hostile work environment.\textsuperscript{118} Although the evidence showed that Section 1604.11(g) was violated because preferential treatment was given to those who submitted to sexual advances, the plaintiff had only asserted claims for hostile work environment sexual harassment and wrongful retaliation in her pleadings.\textsuperscript{119} The district court acknowledged that a hostile work environment claim is actionable under Title VII, and recognized in dicta that Title VII is also violated when preferential treatment is afforded to those employees who submit to sexual advances.\textsuperscript{120} Despite citations to \textit{King}, \textit{Toscano}, \textit{Priest}, and Section 1604.11(g), the court finally based its decision solely on the fact that the sexual conduct was so pervasive that it created a hostile work environment that "affected the motivation and work performance of those who found such conduct repugnant and offensive."\textsuperscript{121}

(7) Summary

Although four of the six reported decisions involving claims centered on preferential treatment granted relief to the plaintiff, only one, \textit{King}, contained facts where the supervisor favored the woman with whom he was allegedly involved in a consensual and romantic relationship.\textsuperscript{122} The other three cases correctly granted relief to the plaintiff, but for reasons not supporting a claim of sexual favoritism in which the challenged relationship is consensual and free of coercion. The \textit{DeCintio} and \textit{Miller} decisions correctly denied relief to the plaintiff where a consensual romantic relationship with a supervisor existed and where that supervisor did not harass other employees.

\textsuperscript{115} Id.
\textsuperscript{117} Id. at 1270.
\textsuperscript{118} Id. at 1273.
\textsuperscript{119} Id. at 1270.
\textsuperscript{120} Id. at 1277 (citing King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985); Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986); Toscano v. Nimmo, 570 F. Supp. 1197, 1199 (D. Del. 1983); 29 C.F.R. § 1604.11(g) (1993)).
\textsuperscript{121} Id. at 1278.
\textsuperscript{122} See supra text accompanying notes 64-75.
D. **EEOC Policy Guidance**

Subsequent to these six decisions, the EEOC issued its 1990 Policy Guidance on employer liability for sexual favoritism. In addressing sexual favoritism, the EEOC split the subject into three categories: (1) isolated instances of favoritism, (2) favoritism based on coerced sexual conduct, and (3) widespread instances of favoritism.

Adopting the rationale of the *DeCintio* and *Miller* decisions, the EEOC took the position that situations under the first category (i.e., isolated instances of preferential treatment based upon consensual and romantic relationships) were not prohibited under Title VII. The EEOC determined that while sexual favoritism may be unfair, it does not violate Title VII because both men and women are disadvantaged for reasons other than gender.

Where the favoritism is based upon the second category—coerced sexual conduct—two forms of liability under Title VII may arise. The first form of liability is implicit quid pro quo harassment, where an employer requires female employees to grant sexual favors in order to advance in the workplace, and such a condition is not imposed on men. In this case, female employees who were qualified for benefits, but were denied them, could recover if they established that sexual relations were made a condition for receiving the benefit. The second form of Title VII liability for favoritism based upon coercive sexual conduct is derivative quid pro quo harassment. This form of liability arises where the supervisor is interested in only one woman, the one whom he coerced and thereafter promoted. In this case, both male and female employees have standing to challenge the favoritism derivatively, asserting injury based on the discrimination leveled against the one woman who was coerced.

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124. *Id.* at D-1 to D-2.
125. *Id.* at D-1.
126. *Id.*
127. *Id.* at D-1 to D-2.
128. *See 29 C.F.R. § 1604.11(a)(1) (1993).* The EEOC cited *Toscano* as a case involving implicit quid pro quo liability because, although the favored employee consented to the relationship with her supervisor, there was evidence that the supervisor also made propositions and unwelcome sexual advances to other women. Thus, the granting of sexual favors was an implicit condition to receiving job benefits. *EEOC Policy Guidance*, supra note 9, at D-1.
129. *EEOC Policy Guidance*, supra note 9, at D-1.
130. *See 29 C.F.R. § 1604.11(g) (1993).*
131. *EEOC Policy Guidance*, supra note 9, at D-1 to D-2 (citing *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 307-08 (2d Cir. 1986) ("[P]laintiffs' claims of favoritism were rejected not because of lack of standing, but because the woman who received..."))
In the third category—where favoritism based upon the granting of sexual favors is widespread in the workplace—the EEOC took the position that both male and female employees may sue under a hostile work environment theory of harassment. These claims would be valid regardless of whether the conduct is directed towards the complaining employees or whether the favored employees were coerced.

E. Summary

The Code of Federal Regulations outline two types of harassment actionable under Title VII: quid pro quo harassment and hostile work environment harassment. These two types of harassment have created little controversy. However, a third situation, where employment benefits are given to one in a consensual relationship with an employer has created a split in the circuit courts. Early cases dealing with this situation referred to Section 1604.11(g) in allowing claims of sexual favoritism. However, more recent cases have generally allowed liability premised on Section 1604.11(g) only where the underlying relationship is coercive. The 1990 EEOC Policy Guidelines support this view.

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132. The favorable treatment was not coerced into submitting to sexual advances.
133. Id. at D-2.
134. See id.; 29 C.F.R. § 1604.11(g) (1993).
135. id.
136. DeCintio v. Westchester County Medical Ctr., 807 F.2d 304 (2d Cir. 1986) (male program administrator hired a woman he was romantically involved with as assistant chief), cert. denied, 484 U.S. 825 (1987); Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Penn. 1988) (male plant manager accused of sex discrimination against female unit supervisor).
II. Van Tol Article

In a 1991 article, Professor Joan E. Van Tol argues that sexual favoritism should be actionable under Title VII as a distinct form of sexual harassment. Professor Van Tol asserts that the "theoretical bases for sexual favoritism and sexual harassment are so similar that preferential treatment in the workplace based on sexual favoritism" should be treated as a form of employment discrimination for purposes of Title VII. Van Tol premises her argument on the fact that sexual harassment, including sexual favoritism, is cognizable under Title VII as sexual discrimination because in the employment context harassment involves the expression of power based on sex. As support, Van Tol refers to the Supreme Court's *Meritor Savings Bank* decision, arguing that the Court, in allowing Title VII protection against a hostile work environment, sought to expand Title VII's protective ambit. Van Tol argues the post-*Meritor Savings Bank* cases and the EEOC have taken an overly restrictive view of sexual harassment. Requiring the underlying relationship to be coercive, Van Tol posits, ignores the impact of consensual sexual relationships on the workforce and places an unfair burden on the plaintiff. Moreover, Van Tol argues linking sexual favoritism to hostile work environment harassment ignores the effects of isolated instances of favoritism in the workplace. Instead, the courts and the EEOC need to recognize that sexual favoritism is a form of sexual discrimination prohibited by Title VII.

A. Professor Van Tol's Premise

Van Tol begins her Article with an analysis of three distinct perspectives on sexual harassment in the workplace: the feminist, the organizational, and the legal perspective. After detailing these three divergent perspectives, Van Tol concludes that while they result in different definitions of sexual harassment, "one factor remains constant in the definitions—the concept of power." Van Tol argues that since "sex discrimination occurs when 'sex is for no legitimate reason a substantial factor in the discrimination," then "sexual harassment

139. Van Tol defines sexual favoritism as "the preferential treatment of an employee because that employee granted sexual favors to the employer." *Id.* at 162 (emphasis added). To the extent that the use of the word "grant" connotes that the employer conditioned job benefits on the "granting" of sexual favors, which would form an implicit quid pro quo claim under § 1604.11(a)(1), her definition is broader than that of this Note. This Note solely explores claims of favoritism in which the underlying relationship is consensual and romantic and no conditions have been placed on the favored employee.
140. Van Tol, *supra* note 10, at 156.
141. *Id.* at 159-60.
142. *Id.* (quoting Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981)).
is sex discrimination because the expression of power is, for no legitimate reason, based on sex.”143 This leads Van Tol to the conclusion that sexual favoritism is a form of sexual harassment prohibited by Title VII because it also involves the expression of power based on sex in the employment arena. Preferential treatment of sexually compliant workers imposes a sexual standard that undermines the integrity of the workplace.144 Thus, “sexual favoritism is sex discrimination when the preferential treatment of a sexually compliant worker disadvantages those otherwise qualified workers who refuse to ‘trade in sexual currency.’”145

B. Professor Van Tol’s Interpretation of Meritor Savings Bank

Professor Van Tol maintains that the Supreme Court’s Meritor Savings Bank decision lends support to her argument that sexual harassment should be expanded to include sexual favoritism in the workplace. She notes that the Court in Meritor Savings Bank employed a two-step analysis to define sexual harassment, first examining the type of conduct involved, and then determining the effect of this conduct.146 In applying this first step to sexual favoritism, the Meritor Savings Bank Court included the types of conduct that the EEOC had already determined to be actionable under Title VII.147 Because of this, Van Tol argues that “[n]either the tone nor the language of the Court’s holding indicated an intention to exclude other acts of sexual misconduct in the workplace which might violate Title VII.”148 As for the second step—the effects of the sexual misconduct on the workplace—Van Tol argues that the Court could have restricted its analysis to the more common quid pro quo theory of sexual harassment, but “chose instead to recognize the validity of the plaintiff’s hostile environment claim and thus give victims of sexual harassment an additional avenue of recourse.”149 Since the Court’s language never showed an intention to exclude other acts of sexual misconduct, and because the effects resulting from sexual favoritism are just as offensive as the hostile work environment harassment recognized in Meritor Savings Bank, Van Tol argues that the decision supports an

143. Id. at 161.
144. Id. at 161-62.
145. Id. at 162.
146. Id. at 177 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).
147. For a discussion of the types of conduct provided for by the EEOC and codified at § 1604.11, see infra text accompanying notes 17-27, 41-42.
148. Van Tol, supra note 10, at 177.
149. Id. at 178 (citing Jill W. Hencken, Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law, 34 VILL. L. REV. 1243, 1263 (1989)).
expansion of sexual harassment which recognizes sexual favoritism as a violation of Title VII.\footnote{150}{Id. at 177-78.}

C. Professor Van Tol's Criticism of the 1990 EEOC Policy Guidance and the DeCintio and Miller Decisions

Van Tol criticizes the DeCintio and Miller decisions and the EEOC Policy Guidance, asserting that they misinterpret the Court's decision in Meritor Savings Bank and take too narrow a view of sexual harassment.\footnote{151}{Id. at 177.} Van Tol posits that because of this misinterpretation of the Meritor Savings Bank decision, the EEOC and the DeCintio and Miller decisions\footnote{152}{DeCintio v. Westchester County Medical Ctr., 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987); Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Penn. 1988).} erroneously recognized only those sexual favoritism claims which arise either under a derivative quid pro quo or hostile work environment theory of liability.\footnote{153}{Van Tol, supra note 10, at 178. For a discussion of the EEOC's treatment of sexual favoritism claims as either derivative quid pro quo or hostile work environment theories of liability, see supra text accompanying notes 123-133.}

(1) The Exclusion of Consensual Relationships from Title VII Liability

According to Van Tol, limiting sexual favoritism claims to the derivative quid pro quo theory of liability, thereby requiring the underlying relationship to be nonconsensual, ignores the impact that consensual sexual relationships can have on the workplace.\footnote{154}{Id. at 178. In her Article, Van Tol cited a study showing office romances to be widespread, and that these romances lead to the perception that supervisors involved in relationships tend to favor their paramour over other employees. In addition, over two-thirds surveyed agreed that these relationships caused "much gossip," and one-third said these relationships created complaints and gripes and caused hostilities. Id. at 162-65 (citing Robert E. Quinn, Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations, ADMIN. SCI. Q., Mar. 1977, at 30, reprinted in Sexuality in Organizations: Romantic and Coercive Behaviors 38, 42 (Dail Am Neugarten & Jay M. Shafritz eds., 1980)). The purpose of this Note is not to refute that instances of sexual favoritism have a negative impact on the workplace, but rather to argue that with regard to sex discrimination Title VII was enacted only to displace gender-based discrimination from the workplace.}
their sexuality to advance in the workplace.\textsuperscript{155} Van Tol concludes that sexual harassment should be “prohibited by Title VII regardless of the nature of the underlying relationship”:\textsuperscript{156}

It is the imposition of a sexual standard, not the nature of the relationship from which the standard originates, which should give rise to a claim of sexual favoritism. It is the use of this sexual standard to the disadvantage of other equally qualified workers which is the gravamen of the sexual favoritism claim.\textsuperscript{157}

(2) Plaintiffs Are Unfairly Burdened

Van Tol also argues that the derivative quid pro quo interpretation of Section 1604.11(g) outlined by the EEOC and the DeCintio and Miller courts (i.e., an interpretation of “submission” allowing third parties to recover only where an individual has been coerced by an employer’s sexual advances or requests for sexual favors), is “re-pugnant” because it requires a plaintiff to prove both the existence of a sexual relationship between the decision maker and the promoted employee, and coercion of the promoted employee.\textsuperscript{158} Proof of coercion, she argues, is virtually impossible for a third party plaintiff without the cooperation of the promoted employee, and it is “unlikely that a worker who has been advantaged by a workplace relationship would provide evidence of coercion.”\textsuperscript{159} Furthermore, according to Van Tol, inquiring into the details of the underlying relationship forces the EEOC and the courts to do what the court in DeCintio refused to allow—“the policing of intimate relationships.”\textsuperscript{160}

(3) The Unnecessarily Restrictive Interpretation of Section 1604.11(g)

In addition, Van Tol argues that this restrictive interpretation of Section 1604.11(g) is not required. She notes that the supplementary information accompanying the final amendments to the Code of Federal Regulations refers to the “question of whether a third party who was denied an employment benefit would have a charge cognizable under Title VII where the benefit was received by a person who was granting sexual favors to their mutual supervisor.”\textsuperscript{161} According to Van Tol, “the common meaning of the word grant does not connote

\begin{enumerate}
\item[155.] Van Tol, supra note 10, at 178-79.
\item[156.] Id. at 179.
\item[157.] Id.
\item[158.] Id.
\item[159.] Id.
\item[160.] Id. (citing DeCintio v. Westchester County Medical Ctr., 807 F.2d 304, 308 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987)). For a further discussion of the DeCintio decision, see supra text accompanying notes 85-106.
\item[161.] Id. at 180 (quoting 45 Fed. Reg. 74,676-77 (1980)).
\end{enumerate}
coercion"; thus the restrictive interpretation of Section 1604.11(g) emphasized by both the DeCintio and Miller courts and the EEOC Policy Guidance is unjustified. Instead, Van Tol asserts that the provisions of Section 1604.11(g) could “apply equally to underlying relationships which are not coercive.”163 To support this contention, Van Tol notes that the EEOC previously opined that “section 1604.11(g) applies with equal force to a situation in which the acquiescence of the other female to her employer’s request for sexual favors was consensual, as in this case. Section 1604.11(g) draws no distinction between ‘unwelcome’ as opposed to consensual behavior.”164 The above interpretation, according to Van Tol, is more consistent with the “avowed purpose of subsection (g), which is to create a ‘balance of protection of all persons in the workplace’ and ‘afford protection for persons who are not involved in the situation but who, nevertheless, are adversely affected by the sexual conduct of others.’”165

(4) The Linking of Sexual Favoritism with Hostile Work Environment Sexual Harassment

Finally, Professor Van Tol denounces the EEOC’s linking of sexual favoritism claims to Meritor Savings Bank’s hostile work environment theory of liability.166 By employing the hostile work environment standard and requiring that there be widespread favoritism, she argues, the EEOC fails to recognize that even an isolated instance of favoritism can affect a condition of employment within the meaning of Title VII.167 The Meritor Savings Bank standard is appropriate in cases of environmental sexual harassment, but is misplaced in a case of sexual favoritism where workers can be directly disadvantaged by a single act of sexual favoritism.168 As Van Tol notes, “The type of harm alleged in most cases of sexual favoritism is more akin to a quid pro quo claim of harassment in which there is ‘economic or tangible discrimination.’”169

162. Id. Van Tol notes that the definition of “grant” is “to agree or assent to.” Id. at 180 n.159 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 989 (3d ed. 1981)).
163. Id. at 180.
165. Id. (quoting Sex Discrimination in the Workplace: Hearings Before the Committee on Labor and Human Resources, 97th Cong., 1st Sess. 341, 342 (1981) (testimony of J. Clay Smith, Acting Commissioner of the EEOC)).
166. Id.
167. Id.
168. Id. at 180-81.
169. Id. at 181 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).
D. Summary

In summary, Van Tol believes that sexual favoritism is a form of sexual harassment cognizable under Title VII because it involves the expression of power based on sex as a factor in an employment decision. Since the Supreme Court's decision in Meritor Savings Bank gave an expansive definition of sexual harassment, this decision lends support to her argument that sexual favoritism is a form of liability under Title VII. In Van Tol's view, the EEOC and DeCintio and Miller decisions have misinterpreted the Court's expansion of sexual harassment leading to a narrow construction of Title VII with respect to sexual favoritism. This restrictive interpretation has led the EEOC and courts to require either coercion or widespread favoritism for there to be a valid Title VII claim; this both ignores the impact that consensual sexual relationships have on the workplace and fails to recognize that even one instance of favoritism can affect a condition of employment. Instead, the EEOC and the courts need to re-examine the narrow definition of sexual harassment and recognize that sexual favoritism is sexual harassment, and therefore sexual discrimination for purposes of Title VII.

III. Response to Van Tol

Although Professor Van Tol's arguments highlight the potential unfairness of workplace sexual favoritism, they do not lead to the conclusion that the EEOC position and the DeCintio and Miller decisions are incorrect. The refusal to treat sexual favoritism as a distinct form of sexual harassment, and instead to allow sexual favoritism claims only when based on derivative quid pro quo and hostile work environment theories, comports with the intent and language of Title VII as well as Supreme Court cases interpreting the statute, all of which require that liability arise only where there are instances of gender-based discrimination.

A. Refuting the Power Premise

Van Tol mistakenly criticizes the EEOC and the DeCintio and Miller decisions' requirement that sexual favoritism claims be based on a derivative quid pro quo or hostile work environment theory of liability. She asserts that sexual harassment is sexual discrimination because sexual harassment involves the expression of power which is, for no legitimate reason, based on sex.\textsuperscript{170} From this proposition, Van Tol concludes that sexual favoritism is also sexual harassment, and

\textsuperscript{170} Id. at 161.
therefore cognizable under Title VII, because sexual favoritism also involves the expression of power based on sex.171

Van Tol's argument is flawed. Even if sexual harassment is sexual discrimination because the harassment is an expression of power based on sex, it does not follow that sexual favoritism is another form of sexual harassment cognizable under Title VII. In a sexual favoritism claim where the underlying relationship is consensual there is no expression of power based on gender. In cases of sexual favoritism none of the parties involved—neither the favored employee nor any third party—are being discriminated against because of their gender. Only in cases where the underlying relationship is coercive, and serves as a condition on employment, is there evidence of an expression of power based on gender. Thus, while the expression of power may be a factor in determining whether harassment is sexual discrimination, the dispositive question is whether this expression of power involves gender-based discrimination. Since sexual favoritism claims do not involve gender-based discrimination, regardless of whether the preferential treatment is an inappropriate expression of power, they are not forms of sexual discrimination cognizable under Title VII.

In prohibiting “discriminat[ion] against any individual . . . because of such individual's race, color, religion, sex or national origin,”172 Title VII prohibits discrimination that is based on an immutable characteristic. In the case of race, the statute is intended to strike at disparate treatment of employees based on their inclusion in a particular race.173 Similarly, with respect to sex, the statute is intended to prohibit disparate treatment of employees because they are of a particular sex. In prohibiting “sex” discrimination, the word “sex” in Title VII refers to gender.174 Thus, when a plaintiff sues under Title VII alleging sexual discrimination, the plaintiff must prove employment discrimination based on gender.175

B. An Erroneous View of Meritor Savings Bank

In attacking the EEOC and recent court cases involving claims of sexual favoritism, Professor Van Tol argues that Meritor Savings Bank supports an expanded theory of sexual harassment which would recognize claims of sexual favoritism.176 However, Van Tol's interpreta-

171. Id. at 161-62.
174. See, e.g., Johnson v. Transportation Agency, 480 U.S. 616 (1987) (holding that employee’s sex is appropriately taken into account when determining promotions); see also supra notes 98-99 and accompanying text.
175. Johnson, 480 U.S. at 616.
176. Van Tol, supra note 10, at 177; see supra notes 146-150 and accompanying text.
tion of *Meritor Savings Bank* is misguided because the Court’s decision and underlying purpose in *Meritor Savings Bank* was not as broad and expansive as Van Tol asserts with respect to sexual harassment. The Court’s purpose in *Meritor Savings Bank* was simply to expand Title VII’s prohibition against sexual discrimination in order to include claims of sexual harassment involving noneconomic injuries. Before *Meritor Savings Bank*, Title VII had only been recognized as prohibiting sexual discrimination which affected a “term, condition[,] or privilege[ ] of employment.” In *Meritor Savings Bank*, because the claim of hostile work environment did not involve a term, condition, or privilege of employment that would be an economic injury, the defendant argued that Title VII did not apply. Thus, the clear task before the Court was to confront Title VII sexual discrimination claims involving noneconomic injuries.

This is precisely the issue the Court addressed. As Professor Van Tol notes, the Court in *Meritor Savings Bank* could have simply decided the case on the previously recognized quid pro quo theory of sexual harassment. Instead, the Court accepted the plaintiff’s hostile work environment theory and rejected the defendant’s argument that Congress intended Title VII to prohibit only the tangible and economic barriers created by sexual discrimination. “[T]he language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”

Therefore, although the Court was seeking to expand Title VII’s prohibition against sexual discrimination to include hostile work environment sexual harassment, thereby “giv[ing] victims of sexual harassment an additional avenue of recourse,” this expansion remained within the scope of discrimination based on gender. Nowhere in the decision did the Court either explicitly or implicitly state that harassment regardless of gender is prohibited by Title VII. Rather, the Court indicated the importance of gender when it prefaced its acceptance of the plaintiff’s theory of sexual harassment by stating, “Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” The Court further stated, “Since the Guidelines [codified at Code of Federal Regulations Section 1604.11] were issued,

180. *Id.* (quoting *Sprogis v. United Air Lines*, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)) (emphasis added).
courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”\(^{183}\)

Thus, as all of these statements show, the Court was simply expanding Title VII's coverage to include gender-based harassment which leads to "noneconomic injury"\(^{184}\) but not to expand it in order to include harassment regardless of gender.

C. The DeCintio and Miller Decisions and the EEOC Policy Guidance Have Properly Interpreted Section 1604.11(g)

The EEOC Policy Guidance and the DeCintio and Miller decisions have correctly restricted sexual favoritism claims to either the derivative quid pro quo or hostile work environment theories of liability because, as both Title VII and Supreme Court cases interpreting the statute require, these theories of liability are premised upon gender-based discrimination. The derivative quid pro quo claim adopted in the EEOC Policy Guidance allows both male and female co-workers, such as Patty and Peter in the introductory hypothetical, to sue even when a supervisor, such as David, is interested in only one woman.\(^{185}\) A plaintiff who can establish that the favored woman, such as Theresa, was coerced into the relationship can challenge the favoritism by showing injury resulted from the discrimination leveled against the coerced employee.\(^{186}\) This is consistent with both Meritor Savings Bank and Title VII's prohibition against sex-based discrimination because, in these claims, the sex-based discrimination is being directed at the favored woman coerced into the relationship. The favored woman faces gender-based discrimination because, but for her sex, she would not be coerced into granting sexual favors for job benefits. Although the claimants in these situations are not directly discriminated against because of their gender, the favored woman does face discrimination. Thus, the EEOC allows those employees who are denied job benefits given to the coerced woman to sue derivatively for the gender-based discrimination.\(^{187}\) Since these claimants derive their standing from the gender-based discrimination leveled against the favored woman, they are consistent with Title VII.

Van Tol also argues that requiring sexual favoritism claims to be based on a derivative quid pro quo theory of liability, which requires the underlying relationship to be coercive, is wrong for two reasons:

183. \textit{Id.} at 66 (emphasis added).

184. \textit{Id.} at 65.

185. \textit{EEOC Policy Guidance, supra} note 9, at D-1 to D-2.

186. \textit{Id.}

187. Of course, the woman coerced may also sue the employer for quid pro quo harassment. \textit{See} 29 C.F.R. \textsection 1604.11(a)(1) (1993); \textit{supra} notes 19-22 and accompanying text.
(1) because the coercion requirement ignores the impact that even consensual sexual relationships can have on the workplace;\textsuperscript{188} and (2) because coercion is virtually impossible for a third-party plaintiff to prove without the cooperation of the favored woman.\textsuperscript{189} These changes are addressed in turn below.

\textit{(1) Isolated Consensual Relationships Should Be Ignored}

In arguing that the coercion requirement ignores the impact that consensual sexual relationships, such as the relationship between David and Theresa in the introductory hypothetical, have on the workplace, Van Tol asserts that co-workers, such as Patty and Peter, are disadvantaged by these relationships. According to Van Tol, this is because the message is given that in order to advance in the workplace they must "use" or "surrender" their sexuality.\textsuperscript{190} Because this message is just as offensive to a worker who is not the direct recipient of the harassment, it should be prohibited by Title VII.\textsuperscript{191} Moreover, Van Tol argues, the imposition of a sexual standard, not the nature of the relationship from which the standard originates, should give rise to a sexual favoritism claim.\textsuperscript{192}

Van Tol's argument that the imposition of a sexual standard, and not the nature of the underlying relationship, gives rise to a sexual favoritism claim is flawed. The nature of the underlying relationship must be examined because it determines whether the sexual standard imposed is based on gender. If the underlying relationship is not based on coercion, and the supervisor is not making sexual advances towards other employees, no one involved is being discriminated against because of their gender. If no one is facing gender-based discrimination, then there can be no Title VII liability.

To broaden Title VII to encompass sexual relationships would create contradictions in the law. Suppose David, in the introductory hypothetical, is merely in a close and platonic relationship with Theresa when he promotes her to assistant branch manager. In such a situation there could be no Title VII violation since there is no discrimination leveled against anyone, either Theresa or her co-workers. However, should David and Theresa go a step further and become sexually intimate, Van Tol would argue that Title VII is implicated. Yet, nothing has changed in either of the scenarios with respect to discrimination based on sex since neither scenario involves any gender-based discrimination. Theresa is not facing any gender-based dis-

\begin{itemize}
\item \textsuperscript{188} Van Tol, \textit{supra} note 10, at 178.
\item \textsuperscript{189} \textit{Id.} at 179.
\item \textsuperscript{190} \textit{Id.} at 178-79.
\item \textsuperscript{191} \textit{Id.} at 179.
\item \textsuperscript{192} \textit{Id.}
\end{itemize}
crimination since she is involved in a relationship with a man whom she loves. Similarly, neither Patty nor Peter, the plaintiffs in the introductory hypothetical, are facing any gender-based discrimination. Neither was denied the promotion because of their gender; they were denied because David preferred Theresa, his friend in the first example and his lover in the second.

The fallacy of an approach founded on the expression of power based on sex—as opposed to an approach which asks whether the underlying relationship is coercive—is also apparent when one considers the application of Title VII relief to a hypothetical where a supervisor, like David, promotes his homosexual lover. In such a situation, there is the expression of power based on sex, which Van Tol views as dispositive. Yet, the favored employee in no way faces gender-based discrimination, and neither do any of the employees denied the promotion.

The above examples show that to focus on the expression of power based on sex does nothing to assist in determining whether the preferential treatment involves gender-based discrimination. Rather, the appropriate guide is to examine the underlying relationship to determine whether the favored employee has been subjected to gender-based discrimination. If the underlying relationship involves people of the opposite sex, and if it is shown that the favored employee was coerced, then he or she has faced discrimination based on sex.

As for Van Tol’s concern that a message is given that to advance in the workplace women must “use” or “surrender” their sexuality, this concern is addressed by the implicit and derivative quid pro quo, as well as widespread favoritism, theories of liability. Under an implicit quid pro quo theory of liability a woman may sue under Title VII if she can establish that the supervisor, such as David, propositioned other female employees. In this case there would be an implicit message that to get a promotion women in the office must sleep with the supervisor. Under a widespread favoritism theory of liability, both male and female co-workers can assert a Title VII violation by showing that the favoritism is “sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment.’”

(2) The Burden on the Plaintiff Is Fair

Van Tol criticizes the EEOC’s coercion requirement as “repugnant” because it is nearly impossible for a plaintiff to prove coercion without the cooperation of the favored employee. While it may be

194. Van Tol, supra note 10, at 179.
true that sufficient proof of coercion is difficult for a plaintiff to produce, the requirement nonetheless is necessary to keep in line with Title VII’s prohibition against gender-based discrimination. Because of this, courts should not redefine words in a statute, such as “discriminate . . . because of . . . sex,”195 just to create an easier burden of proof for Title VII plaintiffs.

D. Linking Sexual Favoritism to Hostile Work Environment Sexual Harassment Is Proper

Finally, Van Tol objects to the EEOC’s use of the Meritor Savings Bank standard in cases of widespread favoritism because, she argues, even one instance of favoritism gives out the message to women that they must “use” their sexuality to advance in the workplace. However, it is simply not the case that one instance of favoritism will give the message to women that they must use their sexuality to succeed. If the instance between David and Theresa is the only one where an intimately involved bank employee is promoted by her supervisor, Patty can not reasonably believe that she will have to sleep with a supervisor to move up from her bank teller position. Admittedly, Patty may believe that her chances would be better if she were to sleep with the person in charge of promotions. However, the same could be said for anyone, male or female, who develops a close, yet platonic, relationship with the supervisor, and that situation would not implicate Title VII.

Moreover, one instance of favoritism does not send out a message sufficiently coercive that it should give rise to Title VII liability. With just one instance there is no evidence that other bank supervisors will do what David did, and nothing suggests that David will do the same thing again. It is intuitively apparent that it takes a series of instances, where women involved in intimate relationships with supervisors get promotions, to produce the message that female employees in the office must “use” or “surrender” their sexuality to get promoted. If it is required that a pattern must develop within the bank, then it becomes much more clear that the bank’s supervisors have made it a practice to promote those employees with whom they are intimately involved. This practice would then form a reasonable basis for a female employee to believe that she must “use” or “surrender” her sexuality to advance. Furthermore, accepting one instance of favoritism as proof that a message has been given to female employees that they must sleep to get to the top risks the possibility that a claim will be allowed in a situation where the supervisor promoted the employee for reasons other than the relationship alone. Instead, requiring a series of instances of favoritism ensures that when supervisors like David are

promoting their intimate partners they are doing so primarily because of their relationship with the subordinate.

Conclusion

While the practice of a supervisor promoting an employee with whom he is romantically involved is unfair to those employees not chosen for the promotion, this practice is nonetheless outside the purview of Title VII since it does not involve discrimination on the basis of sex. The EEOC and those courts refusing to recognize claims based on practices of this type have correctly focused on whether the challenged relationship is coercive.196 In making this inquiry, the determination is thereby made as to whether any employees are being discriminated against because of their gender. Since claims alleging coercive relationships are the only ones involving an employee discriminated against because of her gender, only they concern the discrimination Title VII was intended to address.197 Unless the practice of favorable treatment by supervisors produces a hostile environment,198 those claims involving noncoercive relationships simply do not fall under Title VII. Even if it is true that all instances of sexual favoritism have adverse effects upon the workplace, it is up to the legislature to fashion laws that will prohibit these practices entirely. For courts to take this action on their own would require them to distort the only logically consistent meaning of the word "sex" in Title VII.

196. See supra text accompanying notes 185-187.
197. See supra text accompanying notes 172-175.
198. See supra text accompanying notes 132-133.