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You're Sending the Wrong Message: Sexual Favoritism and the Workplace

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YOU'RE SENDING THE WRONG MESSAGE: SEXUAL FAVORITISM AND THE WORKPLACE

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On October 1, 2009, late-night host, David Letterman, admitted on the *Late Night with David Letterman Show* ("*Late Night*"), "I have had sex with women who work for me on this show."[2] Although the employees who engaged in the sexual affairs affirmed that the relationships were consensual, other *Late Night* staff members sustained indirect harm by their actions.

A former female writer for the show, Nell Scovell, published an opinion piece about Letterman's sexual relationships for *Vanity Fair* entitled "Letterman and Me."[3] In 1990, Scovell joined the writing staff as the second female ever hired by *Late Night*.[4] It was her dream job—she moved across the country from Los Angeles to New York to be a part of the team.[5] However, she eventually perceived her working environment as intimidating for a female writer. As Scovell explained:

> Did Dave hit on me? No. Did he pay me enough extra attention that it was noted by

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[2] Bill Carter, *Letterman Extortion Raises Questions for CBS*, N.Y. TIMES, Oct. 3, 2009, at A1; *see also* Bill Carter, *Letterman Reveal Extortion Attempt Over His Affairs*, N.Y. TIMES, Oct. 2, 2009, at B4.

[3] Nell Scovell, *Letterman and Me*, VANITY FAIR ONLINE, Oct. 27, 2009, http://www.vanityfair.com/hollywood/features/2009/10/david-letterman-200910.

[4] *Id.*

[5] *Id.*

> another writer? Yes. Was I aware of rumors that Dave was having sexual relationships with female staffers? Yes. Was I aware that other high-level male employees were having sexual relationships with female staffers? Yes. Did these female staffers have access to information and wield power disproportionate to their job titles? Yes. Did that create a hostile work environment? Yes. Did I believe these female staffers were benefiting professionally from their personal relationships? Yes. Did that make me feel demeaned? Completely.[6]

Ultimately, Scovell walked away from her dream job within a few months of starting.[7]

Scovell's account is a prime example of sexual favoritism and why it is relevant in today's workplace. Sexual favoritism describes a situation where a supervisor bestows benefits, promotions, or disproportional power to an employee, who he or she is sexually involved.[8] Sexual favoritism primarily affects women in the workplace and places an obstacle for women to obtain respect at their jobs. This Note will address the past and future of sexual favoritism law as well as potential improvements in the law to protect more employees in the workplace. Part I will cover the background of sexual favoritism law; Part II will discuss sexual favoritism law at its current state; and Part III will forecast the future of sexual favoritism law and how it can improve. Ultimately, sexual favoritism law does not

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[6] *Id.*

[7] *Id.*

[8] *See generally* Mary Kate Sheridan, *Just Because It's Sex Doesn't Mean It's Because of Sex: The Need for New Legislation to Target Sexual Favoritism*, 40 COLUM. J. L. & SOC. PROBS. 379, 383-85 (2007).

provide sufficient protection to employees and should expand in order to fulfill its purpose.

I. Background

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination concerning terms, conditions, and privileges of employment.[9] Sex discrimination occurs when an employer differentiates on the basis of sex in making employment decisions, where sex is not a pre-requisite for the job.[10] Sexual harassment is currently a violation of §703 in Title VII, sex discrimination.[11]

The United States Equal Employment Opportunity Commission ("EEOC"), in 29 C.F.R. § 1604.11, set forth guidelines for determining sexual harassment, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.[12]

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[9] *See* 42 U.S.C. § 2000e-2(a)(1) (2006); *see also* Toscano v. Nimmo, 570 F. Supp. 1197, 1198 (D.C. Del. 1983). 42 U.S.C. § 2000e-2(a)(1) states that: "[I]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . or otherwise to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment because of such individual's . . . sex. . . ."

[10] *See Toscano*, 570 F. Supp. at 1199.

[11] 29 C.F.R. § 1604.11(a) (2009).

[12] 29 C.F.R. § 1604.11(a). The exact language of the code is as follows:

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1)

Under the EEOC guidelines, a sexual harassment claim may present either as *quid pro quo* or a hostile work environment.[13] *Quid pro quo* discrimination occurs in two possible situations. First, harassment can occur when a person is subjected to unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical sexual conduct.[14] Second, it can also occur if an employee's submission to sexual conduct is explicitly or implicitly required in an employer's employment decision-making process.[15]

A hostile work environment claim comes from judicial decisions and EEOC policies in the past that hold that an employee retains the right to work in an atmosphere free from discrimination based on intimidation, ridicule, or insult.[16] The sexual harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

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> submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[13] 29 C.F.R. § 1604.11(a).

[14] 29 C.F.R. § 1604.11(a); *see generally* Stephen Dacus, Note, Miller v. Department of Corrections: *The Application of Title VII to Consensual, Indirect Employer* Conduct, 59 OKLA. L. REV. 833, 835 (2006).

[15] 29 C.F.R. § 1604.11(a).

[16] *See* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74676 (Nov. 10, 1980) (to be codified 29 C.F.R. pt. 1604.11); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1985).

environment."[17] When determining the degree of sexual harassment needed to create an abusive working environment, a totality of the circumstances test is utilized.[18]

Sexual favoritism emerges as a subset of sexual harassment law. Instead of a first-person sexual harassment claim, a supervisor favors one employee or some employees sexually and discriminating against others through that preference, thus creating a third-person claim. The EEOC guidelines provide a cause of action based on sexual favoritism: "Where 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."[19]

1. Divergent Views on Sexual Favoritism

In the mid 1980s, two federal cases, *King v. Palmer*[20] and *DeCintio v. Westchester County Medical Center*[21], reached different conclusions on sexual favoritism claims.

In *King*, a female nurse, Mabel King was employed at the District of Columbia Department of Corrections.[22] When King applied for a promotion, her request was rejected because another candidate had already been preselected.[23] The preselected employee was romantically involved with their supervisor, the Chief Medical Officer.[24]

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[17] *Vinson*, 477 U.S. at 67.
[18] *Id.* at 69.
[19] 29 C.F.R. § 1604.11(g).
[20] King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985).
[21] DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986).
[22] *King*, 778 F.2d at 879.
[23] *Id.*
[24] *Id.*

King sued the employer for unlawfully denying a promotion and for creating a discriminatory work environment.[25] The District of Columbia Circuit court held "unlawful sex discrimination occurs whenever sex is for no legitimate reason a substantial factor in the discrimination."[26] The court found that King's circumstantial evidence of the employee and supervisor sexual relationship (including long lunches, preferential treatment and physical contact at work[27]) met the burden of persuasion for a Title VII sexual discrimination claim.[28]

However, a few months later, the Second Circuit determined in *DeCintio* "that sexual relationships between coworkers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."[29] In *DeCintio*, seven physical therapists brought a claim against their employer for being disqualified for a promotion to an Assistant Chief position.[30] The supervisor made a requirement that the promoted individual must be registered by the National Board of Respiratory Therapists.[31] However, the only therapist considered for the position with the requisite registration was the supervisor's girlfriend, Jean Guagenti, and she ultimately secured the job.[32]

The dispositive issue in this case examined whether "'discrimination on the basis of sex' encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired."[33] The court refused to expand the

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[25] *Id.* at 878-79.
[26] *Id.* at 880.
[27] *Id.* at 879.
[28] *Id.* at 882-83.
[29] *DeCintio*, 807 F.2d at 308.
[30] *Id.* at 305.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 306 (quoting 42 U.S.C. §2000e (1982)).

meaning of "sex" for Title VII purposes to include sexual liaisons and sexual attractions after determining that this definition was "overbroad" and "wholly unwarranted."[34]

Thus, a split emerged among district courts on whether to include sexual favoritism claims under Title VII.

2. EEOC Policy Guidance Memo Reconciles Divergent Views

On January 12, 1990, the EEOC issued a policy memo concerning its stance on employer liability for sexual favoritism in the workplace.[35] Although the policy memo is non-binding on judicial decisions, it provides a persuasive framework for how to look at sexual favoritism claims in the context of 29 C.F.R. § 1604.11(g).[36] In the policy memo, the EEOC has described three situations of sexual favoritism and what forms are actionable.[37]

First, isolated instances of sexual favoritism are not actionable under Title VII.[38] As the policy memo explains, although a single episode of sexual favoritism toward an employee is unfair, it equally discriminates against men and women because both parties are disadvantaged equally.[39] Isolated sexual favoritism is exemplified in *DeCintio*, where the supervisor's preference for his one girlfriend results in her promotion.[40]

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[34] *DeCintio*, 807 F.2d at 306.

[35] EEOC, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "EEOC Policy Guidance"]. The policy memorandum was approved by present day Supreme Court Justice Clarence Thomas, while he was chairperson of the EEOC.

[36] Dacus, *supra* note 14 at 842.

[37] EEOC Policy Guidance, *supra* note 35.

[38] *Id.*

[39] *Id.*

[40] *DeCintio*, 807 F.2d at 308.

Second, sexual favoritism based on an implicit *quid pro quo* claim may be actionable under Title VII. In this situation, female employees with appropriate qualifications may be overlooked or discriminated against because they do not submit to sexual harassment actions.[41] However, in many situations, employees lack verifiable proof that sexual conduct was a condition for an employment benefit or promotion.[42] For example an employer or supervisor may only express interest in one employee, and only coerce that employee for sexual activity.[43] In that situation, "both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the employee who was coerced."[44]

The EEOC explained the coerced single employee position through *Toscano v. Nimmo*.[45] In *Toscano*, the court found a Title VII claim where sexual favors were a condition for receiving a promotion.[46] Although the employee receiving preferential treatment engaged in a consensual relationship with the supervisor, the fact that the supervisor solicited female employees on the phone, bragged about his sexual relations with subordinates and engaged in sexually suggestive behavior at work provided enough circumstantial evidence that sexual favors were a condition for benefits at the place of employment.[47]

Third, widespread sexual favoritism may create a cause of action for hostile environment harassment.[48] If sexual favoritism extensively pervades in the place of

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[41] EEOC Policy Guidance, *supra* note 35.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Toscano*, 570 F. Supp. at 1199-01.
[46] *Id.* at 1200.
[47] *Id.* at 1200-01.
[48] EEOC Policy Guidance, *supra* note 35.

employment, "both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors."[49] The policy behind the action is to eradicate the implicit message that women are "sexual playthings" and the only way to get ahead in the workplace requires engaging in sexual conduct.[50]

The EEOC presented *Broderick v. Ruder*[51] as the prototype widespread sexual favoritism case.[52] In *Broderick*, a female attorney at the Securities and Exchange Commission brought a sexual discrimination action against her employer.[53] She alleged that two of her supervisors engaged in sexual relationships with their secretaries, who received cash rewards, promotions and other job benefits.[54] In addition, another female staff attorney received a promotion because a supervisor was attracted to her.[55] Finally, during an office party, a drunk supervisor untied her sweater and kissed her as well as another female employee.[56] The court found that the plaintiff had "established a *prima facie* case of sexual harassment because of having to work in a hostile work environment."[57] The court noted that by bestowing preferential treatment upon those who submitted to their sexual advances, the supervisors "undermined plaintiff's motivation and work performance and deprived plaintiff,

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[49] *Id.*
[50] *Id.*
[51] 685 F. Supp. 1269 (D.D.C. 1988).
[52] EEOC Policy Guidance, *supra* note 35.
[53] *Broderick*, 685 F. Supp. at 1270.
[54] *Id.* at 1274.
[55] *Id.*
[56] *Id.* at 1273.
[57] *Id.* at 1278.

and other WRO female employees, of promotions and job opportunities."[58] Although the court in *Broderick* found a hostile work atmosphere, the EEOC recognized this case as an example of an implicit *quid pro quo* case because the sexual favors also represent conditions for promotions.[59]

II. Current State of Sexual Favoritism Law

Although the Supreme Court has yet to hear a case concerning sexual favoritism, federal courts as well as state courts addressed sexual favoritism since the EEOC Policy Guidance issued in 1990. In a 2005 California Supreme Court case, *Miller v. Department of Corrections*,[60] two female employees, Edna Miller and Frances Mackey, filed a California Fair Employment and Housing Act ("FEHA") discrimination suit against their employer based on a sexual favoritism theory.[61] The plaintiffs allege that the Department of Corrections chief deputy warden engaged in sexual relationships with three other subordinate coworkers.[62] These subordinate coworkers received benefits from their relationship with the warden, including one employee's promotion determined by her affair with the warden instead of her qualifications.[63] Plaintiff Miller addressed one of the paramours about her relationship with the warden, and the paramour locked Miller in her office for a couple of hours.[64]

The court found that the plaintiffs presented an actionable claim under FEHA, and concluded that,

> [A]lthough an isolated instance of favoritism

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[58] *Id.*
[59] EEOC Policy Guidance, *supra* note 35.
[60] Miller v. Dep't of Corr., 115 P.3d 77 (Cal. 2005).
[61] *Id.* at 80.
[62] *Id.* at 83.
[63] *Id.* at 81.
[64] *Id.* at 83-84.

> on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way required for women to get ahead in the workplace is to engage in sexual conduct with their supervisors or the management.[65]

The court upheld the EEOC policies on sexual favoritism, separating a claim for "widespread" sexual favoritism from "isolated" sexual favoritism.

Another 2005 case, *Wilson v. Delta State University*, also addressed sexual favoritism in the workplace.[66] A former male university employee filed suit against the university on a theory of preferential treatment of a paramour.[67] The paramour was promoted to a job that was not publicized to the rest of the community.[68] However, the Fifth Circuit found that "paramour favoritism" is not an unlawful employment practice under Title VII.[69] Unlike *Miller*, this was a case of isolated favoritism, and thus did not rise to the level of "widespread" under the EEOC Policy Guidance.

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[65] *Id.* at 80.
[66] Wilson v. Delta State Univ., 143 Fed. Appx. 611 (5th Cir. 2005).
[67] *Id.* at 612.
[68] *Id.* at 611.
[69] *Id.* at 614.

III. The Future of Sexual Favoritism Law and How to Improve It

1. The Future of Sexual Favoritism Law

The two latest significant sexual favoritism cases, *Miller* and *Wilson*, who have adopted EEOC Policy Guidance, demonstrate that the EEOC recommendations are most likely here to stay.[70]

A line between isolated favoritism and widespread favoritism will remain, because sexual favoritism is based upon sex discrimination.[71] The EEOC Policy Guidance recommends that "[a]n isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders (emphasis added)."[72] In other words, isolated instances of sexual favoritism are based on a preference for a particular person, and therefore the sexes are discriminated against equally. Moreover, current federal case law suggests that isolated instances of sexual favoritism do not give rise to a claim.[73] Thus, the

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[70] *See generally* Maureen S. Binetti, *Romance in the Workplace: When "Love" Becomes Litigation*, 25 HOFSTRA LAB. & EMP. L. J. 153, 157-163 (2007).

[71] *But see* Susan J. Best, Comment, *Sexual Favoritism: A Cause of Action Under a "Sex-Plus" Theory*, 30 N. Ill. U. L. Rev. 211, 231-32 (2009) (discussing the possibility of a sex-plus theory analysis in place of a separation between isolated and widespread sexual favoritism).

[72] EEOC Policy Guidance, *supra* note 35.

[73] *See* Schobert v. Illinois Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002) (holding that if favoritism has the same impact on male and female employees at work, then the claims were not cognizable under Title VII); Womack v. Runyon, 147 F.3d 1298, 1301 (11th Cir. 1998) (holding that 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); Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1370 (10th Cir. 1997) (holding that

EEOC Policy Guidance and current law are set in not extending a cause of action to only an isolated instance of sexual favoritism.

Additionally, most courts continue to apply the EEOC Policy Guidance in determining "widespread" sexual favoritism claims. For example, *Miller* reflects the trend of keeping with the EEOC Policy Guidance by advocating that a hostile work environment occurs when the sexual favoritism is widespread, even though the policy was fifteen years old at the time.[74]

However, it remains unclear how many instances of sexual favoritism constitute "widespread." In *Miller*, one supervisor engaged in three affairs with subordinates.[75] In *Broderick*, multiple supervisors were involved in affairs with subordinates.[76] The EEOC Policy Guidance states that one affair is not actionable. Could widespread occur at two supervisors and one employee? Could widespread occur at one supervisor and two employees? The current law's use of "widespread" connotes a large quantity of sexual favors, but offers limited guidance beyond multiple occurrences.

2. How to Improve Sexual Favoritism Law

New legislation may identify objective criteria for a sexual favoritism claim. Title VII protects against discrimination "because of" sex as in gender and not sexual conduct.[77] Under the current sexual favoritism analysis set out by the EEOC Policy Guidance and followed by courts, a third-party employee must prove that the sexual favoritism in a workplace amounted to an implicit *quid pro*

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consensual romantic relationships do not qualify for relief under Title VII because they are not based on any gender differences).

[74] *Miller*, 115 P.3d at 80.

[75] *Id.* at 83.

[76] *Broderick*, 685 F. Supp. at 1273.

[77] 42 U.S.C. § 2000e-2(a)(1) (2006).

quo claim and/or a hostile work environment claim.[78] The current law leaves out isolated instances of sexual favoritism because the favoritism involved discriminates equally between the genders—favoritism based on a consensual romantic relationship. However, circumstances arise creating an isolated instance severe enough to affect the conditions of a workplace. Currently, the law focuses on the quantity of the sexual favoritism rather than the quality. Thus, new legislation, not under the traditional context of Title VII "because of . . . sex"[79] language, would better promote the EEOC's intent to stop adverse affects on employment opportunity based on sexual conduct.[80]

A claim for sexual favoritism should be available to widespread or isolated, coerced or non-coerced conduct. Current sexual favoritism law fails to cover a consensual relationship that may be so outrageous—the paramour receives a promotion, undue responsibilities, preferential treatment, advantages, and the like beyond the paramour's skill, experience or merit—that it may alter the conditions of a coworker's environment.

For example, a secretary of an accounting executive begins an intimate relationship with her boss. The secretary completed a two-year associate's degree, and she entered work force one year ago while employed at her current position for one month. The executive, while engaged in the intimate relationship, appoints the secretary to an entry-level accountant's position, provides her an office, and quadruples her salary. An entry-level accountant position usually requires an individual complete a four-year bachelor's degree program from an accredited university or college and some internship/work experience. The position typically pays only double what the secretaries make. The paramour later receives a promotion to an

[78] EEOC Policy Guidance, *supra* note 35.
[79] 42 U.S.C. § 2000e-2(a)(1) (2006).
[80] EEOC Policy Guidance, *supra* note 35.

executive position within six months. Coworkers perceive the message that an employee must be involved in an intimate relationship with the boss to receive benefits and promotions. The mere existence of one consensual relationship between a supervisor and employee can create hostility in the workplace.[81] Yet under Title VII, a coworker of the paramour cannot recover because the intimate relationship is consensual and not because of gender.

New legislation should focus on qualifying sexual favoritism rather than quantifying instances of favoritism. Designating an extreme isolated instance of sexual favoritism as merely unfair and only three instances of sexual favoritism as widespread is inconsistent with reducing sexual favoritism in the workplace, which adversely affects the employment opportunities of third parties.

A model sexual favoritism law requires legislators to develop a separate statute including the following elements: (1) a cause of action not under Title VII, (2) supervisor favoring a subordinate, (3) because of sexual conduct, (4) which is severe or persuasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment.

First, the sexual favoritism claim would be independent of Title VII. Although current sexual favoritism law remains subset of sexual harassment under Title VII, sexual harassment limits what conduct amounts to sexual favoritism by excluding isolated instances and not defining widespread. A new law would allow a finder of fact to assess the quality of the sexual favoritism to determine its severity. Additionally, lawmakers should consider making sexual favoritism claim actionable by the

[81] *See* Jennifer Bercovici, Note, *The Workplace Romance and Sexual Favoritism: Creating a Dialogue Between Social Science and the Law of Sexual Harassment*, 16 S. CAL. INTERDISC. L. J. 183, 210 (2006).

EEOC, similar to Title VII, which would help filter cases.

Second, the action must involve a supervisor and a subordinate. The thrust of the sexual favoritism law attempts removal of adverse employment opportunities caused by sexual favoritism in the workplace. Actions such as promotion, benefits, and other intangible rewards are generally presented to employees by supervisors. The claim does not apply to employees at the same level or supervisors who do not give promotions, benefits and the like to paramours.

Third, the claim must include favoritism because of sexual conduct. The finder of fact will not look to see employee discrimination because of their gender, but rather if the employee is being discriminated against because of the sexual conduct between the supervisor and employee. Sexual conduct differentiates favoritism claim from a sexual harassment claim.

Fourth, a claim must establish that the favoritism reaches a severe or persuasive level as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. This language derives from the EEOC Policy Guidance concerning a hostile work environment claim. The fact finder would evaluate the severity of a claim. This can be done through objective and subjective tests similarly used in current sexual harassment analysis.[82]

A reasonable person standard provides an objective test to determine the severity of the favoritism. Thus, an employee must first prove that a reasonable person, in the employee's situation, would perceive the conduct as severe or pervasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. The factors for proving severity would include the components from a sexual harassment claim and the EEOC Policy Guidance: implicit message by

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

actions of a supervisor, psychological harm, interfering with work, frequency, and behavior. The touchstone factor would be the implicit message that the supervisor's actions convey onto the workplace.

Finally, the fact finder applies the subjective test: whether the employee proved they perceive the conduct as severe or pervasive as to alter the condition of the employee's employment and create a hostile and/or abusive working environment. The employee perception element would use the same factors for considering severity of the sexual favoritism as the reasonable person standard.

However, the reality is that new legislation may not be feasible. In today's society, a majority of the population spends a significant portion of the week at work. The workplace is natural meeting place for potential mates. Romances between colleagues occur and most likely happen at a high rate. Moreover, courts remain reluctant engage in the policing of intimate relationships.[83] Sexual favoritism law may continue as a subset of sexual harassment under Title VII in order to separate out weak claims and reduce the number of claims. Yet, new sexual harassment legislation provides the best option for addressing the genuine issue at stake in a sexual favoritism claim, discrimination based on sexual conduct.

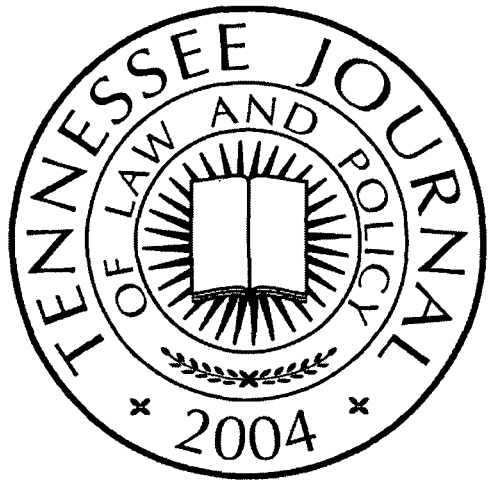
IV. Conclusion

Ideally, the sexual favoritism law requires change in order to give employees who witness severe sexual favoritism in the workplace, either in isolated or widespread scenarios, a claim against the employer. Sexual favoritism law should not function as a subset of sexual harassment under Title VII, because it has more to do with sexual conduct rather than gender. However, the current law may continue unaltered, considering the trend of cases

[83] *DeCintio*, 807 F.2d at 308.

applying the EEOC Policy Guidance.

Nell Scovell's *Late Night* scenario creates a challenge to concentrate on the severity of sexual favoritism when determining if a plaintiff sustained a legitimate claim. She struggled as a female writer in a male dominated division who witnessed subordinates exercise disproportional power, making her feel uncomfortable and eventually forcing her to leave her dream job. A sole act of favoritism may trigger an actionable response, because if the sexual favoritism is severe, the inappropriate behavior still delivers the wrong message to employees. Women, as well as men, should not be subjected to such severe sexual favoritism at work—a place where merit should determine your success instead of sexual appeal.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