Sexual Favoritism: A Cause of Action Under a "Sex-Plus" Theory

I. INTRODUCTION

Consider the following hypothetical scenario: Sally and Jane work at Number One Computers, Inc. They both are sales representatives who sell computers and computer equipment to large businesses. Jane has been with Number One Computers, Inc. for five years and Sally for two. Jane graduated with a marketing degree from the University of Wisconsin. Sally was forced to drop out of college after her third year for personal reasons. Jane had the highest commission for the past two years selling $500,000 worth of computer equipment. Sally’s commission rate has been $200,000 for the past two years. Joe is Sally and Jane’s superior and is in the position to promote both Sally and Jane. Sally has been having sexual intercourse with Joe for the past six months. Jane has not been having sex with Joe, but she knows of Sally and Joe’s relationship because Sally had told her. Sally is promoted to be a sales manager after her second year of being with the company while Jane does not get a promotion. Our common sense, if not
our common ideas of decency and ethics, tells us this is unfair. But for whom, if anyone, is there a legal cause of action?

The foregoing is a scenario involving a body of law usually referred to as “sexual favoritism.” Typically, sexual favoritism is divided into two categories: isolated instances of sexual favoritism and widespread sexual favoritism. In order to succeed on a claim of sexual favoritism, one must be able to prove sexual harassment. Therefore, because isolated instances of sexual favoritism are considered consensual sexual relationships, the vast majority of courts have rejected any claim arising from an isolated instance of sexual favoritism. In short, in today’s courts, no one would have any legal recourse in our scenario involving Jane, Sally, and Joe.

The purpose of this Comment is to address the counterproductive ramifications of this reality of our law. Since the enactment of Title VII, an integral element of public policy in American jurisprudence has been to promote equality between men and women in the workplace. Yet our common law rejects arguments that would allow women like Jane to bring a lawsuit. Further, courts implicitly articulate a public policy that encourages women like Sally to use their sexuality to further their careers. As an alternative to today’s prevailing treatment by courts, this Comment calls for

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1. EEOC POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM, http://www.eeoc.gov/policy/docs/sexualfavor.html (last visited Nov. 13, 2009) [hereinafter EEOC POLICY GUIDANCE]. The EEOC Guidelines state that isolated instances of sexual favoritism are “unfair” but not actionable under Title VII. Id.

2. See 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 (2007).

3. EEOC POLICY GUIDANCE, supra note 1.

4. Id. In order for a person to claim sexual favoritism, there must be evidence of either quid pro quo or hostile work environment sexual harassment. Id.; see also Tenge v. Phillips Modem Ag Co., 446 F.3d 903, 908 (8th Cir. 2006). See generally Mitchell Poole, Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability?, 25 PEPP. L. REV. 819 (1998).

5. See Harvey v. Chevron U.S.A., Inc., 961 F. Supp. 1017, 1029 (S.D. Tex. 1997) (“Alleged favoritism to a paramour generally has been held not to constitute discrimination in violation of Title VII because the alleged discrimination is not based on the plaintiff’s gender.”); see also McGinnis v. Union Pac. R.R., 496 F.3d 868, 874 (8th Cir. 2007); Tenge, 446 F.3d at 908; Schobert v. Ill. Dep’t of Transp., 304 F.3d 725, 733 (7th Cir. 2002); Murray v. City of Winston–Salem, 203 F. Supp. 2d 493 (M.D.N.C. 2002); Riggs v. City of Banner, 159 F. Supp. 2d 1158, 1164 (D. Neb. 2001).

6. 42 U.S.C. § 2000e(2)(a)-(c) (1964). Title VII makes it unlawful for public and private employers, labor organizations, and employment agencies “to discriminate against any individual because of his race, color, religion, sex, or national origin.” Id. Title VII stands for the proposition that similarly situated people should be treated equally, i.e., men and women in the workplace. See id.

7. Id.; see also McGinnis, 496 F.3d at 874; Tenge, 446 F.3d at 908; Schobert, 304 F.3d at 733; Murray, 203 F. Supp. 2d at 493; Riggs, 159 F. Supp. 2d at 1164; Harvey, 961 F. Supp. at 1029.
courts to apply a legal theory known as “sex-plus” to isolated instances of sexual favoritism. In doing so, ill-treated women like Jane, or men in a similar situation, will have the opportunity to establish a prima facie case under Title VII.9

This Comment will begin by discussing the background of sexual harassment claims. This is important because sexual favoritism was first introduced under the theory of hostile work environments.10 It will argue that the courts undermined the important socio-political purposes of sexual harassment law by rejecting sexual favoritism claims.11 This Comment will analyze some courts’ resistance in recognizing sexual harassment as sex discrimination. These arguments are now being applied to sexual favoritism claims.12 The argument that sexual harassment is not sex discrimination has been invalidated.13 The rationale that was invalidated in the context of sexual harassment is equally invalid when it is applied to sexual favoritism.14

This Comment will next discuss the emergence of sexual favoritism in our legal system, which will include a brief overview of relevant cases and the Equal Employment Opportunity Commission’s (hereinafter “EEOC”) position on sexual favoritism.15 After reviewing relevant case law, we will see how widespread sexual favoritism has been argued under a hostile work

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8. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (recognizing the validity of “sex-plus” theory). “Sex-plus” discrimination occurs when a person is subjected to disparate treatment based not solely on one’s sex, but rather on one’s sex when “considered in conjunction with a second characteristic.” Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995). With regard to sexual favoritism, the “plus” would be the sexual relationship.

9. 42 U.S.C. § 2000e(2)(a)-(c) (1964). Title VII makes it unlawful for public and private employers, labor organizations, and employment agencies “to discriminate against any individual because of his race, color, religion, sex, or national origin.” *Id.*

10. *See, e.g.,* Tenge, 446 F.3d at 908

11. Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995) (“A major purpose of Title VII is to immunize the workplace from sexual intimidation and repression.”); *see also* ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 442 (7th ed. 2004) (noting numerous studies that have documented the pervasiveness of sexual harassment in the workplace).

12. *See, e.g.,* EEOC POLICY GUIDANCE, *supra* note 1 (“An isolated instance of favoritism toward a ‘paramour’ . . . does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man . . . .”).

13. Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 551 (1994) (noting that at first some courts claimed that sexual harassment was not sex discrimination because “both sexual harassment’s perpetrators and its victims can be of either gender”).

14. *Id.* at 553 (noting that around 1980, “most of the early judicial resistance to the concept of harassment as discrimination had melted away”).

environment theory.\textsuperscript{16} By looking specifically at cases within the Seventh Circuit of the United States and in Illinois courts, it is evident that a plaintiff's burden for proving a hostile work environment is too high.\textsuperscript{17} To ensure that individuals who are discriminated against because of their sex combined with a sexual relationship or lack thereof have access to a remedy, sexual favoritism must be pleaded under a different legal theory. Rather than operating under a hostile work environment argument, this Comment will argue that sexual favoritism is a form of "sex-plus" discrimination. Under a sex-plus argument, a plaintiff must show that she was discriminated against because of her sex in conjunction with a second characteristic.\textsuperscript{18} Therefore, a plaintiff in a sexual favoritism case utilizing the sex-plus doctrine would argue that she was discriminated against because of her sex plus the sexual relationship or lack thereof.

It will be argued that the courts' recognition of sexual favoritism claims under a sex-plus theory would not require the creation of any new law.\textsuperscript{19} Instead, courts would merely apply existing common law and statutory law.\textsuperscript{20} Because sex-plus is limited in scope, the risk of an overwhelming, or even high, influx of litigation in this area of law is low.\textsuperscript{21} Therefore, it will be argued that the advantages of applying the sex-plus theory to sexual favoritism claims, allowing those with legitimate claims, like Jane, to seek a remedy, comes at little or no risk of flooding court dockets.


\textsuperscript{17} See Whittaker v. N. Il. Univ., 424 F.3d 640, 645 (7th Cir. 2005). The Seventh Circuit has found the severity requirement to be very high, stating that the workplace must be "hellish" to be actionable. \textit{id.} (quoting Perry v. Harris Cherin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997)).

\textsuperscript{18} Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995).

\textsuperscript{19} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (outlining the burden shifting model in employment discrimination cases under Title VII); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (recognizing the validity of a "sex-plus" theory). Plaintiffs claiming sexual favoritism under a sex-plus theory would still have to meet their burden of persuasion and production. See \textit{Fisher}, 70 F.3d 1420, 1433 (2d. Cir. 1995). Plaintiffs would have to show that the motivating factor in their denial of promotion was their sex in conjunction with their lack of a sexual relationship. \textit{id.} This is very difficult to prove and illustrated why isolated instances of sexual favoritism would be a very limited cause of action. Hence, the painless transition that would be required, as only old law would be applied.

\textsuperscript{20} See, e.g., Phillips, 400 U.S. at 543-44 (1971).

II. BACKGROUND

A. SEXUAL HARASSMENT AS SEX DISCRIMINATION

Title VII of the Civil Rights Act of 1964 makes it unlawful for public and private employers, labor organizations, and employment agencies "to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin." Sexual harassment is now recognized by courts as a form of sex discrimination under Title VII. However, this was not always the case. Initially, relying on the reasoning that both males and females alike could potentially be victims of sexual harassment, courts were reluctant to say that sexual harassment was discrimination on the basis of sex. At the same time, many feminist theorists formulated arguments articulating the many reasons why sexual harassment was indeed a form of sex discrimination and the social importance of the courts recognizing it as such. These feminists argued that sexual harassment kept women inferior to men in the workplace. They also argued that the courts, by rejecting sexual harassment as sex discrimination, sent a clear message that women were sexual playthings, rather than competent, qualified workers. Therefore, feminists like Catherine MacKinnon called for sexual harassment to be legally actionable in order to achieve the ultimate goal of equality between men and women in the workplace.

22. Id.
25. See, e.g., Katherine M. Franke, What's Wrong with Sexual Harassment? 49 Stan. L. Rev. 691, 703-04 (1997) (discussing different feminist perspectives on "ways to understand sexual harassment as more than harmless conduct"); see also Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 15 (1978) (arguing that all forms of sexual harassment contribute to the ultimate goal of keeping women subordinate in the workplace); Rosabeth Moss Kanter, Men and Women of the Corporation 18-27 (1977) (arguing that the feminization of clerical jobs and the growth of a masculine ethic in management allows men to maintain their dominant status in corporate culture).
26. See Farley, supra note 25.
27. See, e.g., Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2497 (1994) ("[S]exual harassment, characterizes discrimination as the devaluative sexualization or derogation of women in the workplace. Whether employers are expressing overt hostility or manifesting 'sex role spillover,' harassment characterizes women primarily as sexual objects... rather than as competent workers.").
28. Catherine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 32 (Yale Fastback Series 1979) (arguing that sexual harassment stemmed from the problem of sex-based power). In one of the first cases to recognize that
This theoretical framework was eventually recognized by courts and articulated by the EEOC. In 1986, the United States Supreme Court addressed the issue of sexual harassment in *Meritor Savings Bank, FSB v. Vinson*, concluding that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." The Court also recognized that there are two forms of sexual harassment: quid pro quo and hostile work environment. Quid pro quo sexual harassment occurs when an employer gives some type of economic benefit to an employee in exchange for sexual acts. Under a hostile work environment theory, a plaintiff may sue an employer because of severe and abusive harassment that unreasonably interferes with plaintiff's work performance or creates an intimidating, hostile, or offensive work environment. In 1990, the EEOC regulations added sexual harassment as a form of sex discrimination.

The recognition of sexual harassment as a form of sex discrimination was followed by an immense amount of litigation in which courts were forced to define what exactly rose to the level of sexual harassment. More specifically, courts attempted to determine what constitutes a hostile work environment. Different courts have taken different approaches. It was in the courts' grappling with this issue, and in the different approaches that ensued, that sexual favoritism was born as a legal theory.

sexual harassment is cognizable under Title VII, the court held that "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated." *Williams*, 413 F. Supp. at 657-58.

29. 29 C.F.R. § 1604.11(a)(1)-(3) (1980). The EEOC added regulations embodying the notion of quid pro quo and hostile work environment sexual harassment as a violation of Title VII. *Id.; see also* Henson v. City of Dundee, 682 F.2d 897, 908-09 n.18 (11th Cir. 1982).

31. *Id.* at 64.
32. *Id.* at 65, 73.
33. *Id.* at 65.
34. 29 C.F.R. § 1604.11(a) (1980).
35. *Id.* ("Harassment on the basis of sex is a violation of section 703 of Title VII.").
36. *See Meritor*, 477 U.S. at 72. The Supreme Court ruled on the issue, which is evidence of the fact that this specific issue has been widely litigated and discussed.

37. *Compare* Miller v. Dep't of Corr., 115 P.3d 77, 88 (Cal. 2005) (stating that the severity element in a hostile work environment case should not be defined narrowly; rather, all surrounding circumstances should be considered and should be judged by a reasonable person in the plaintiff's position), with Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005) (reaffirming that the only actionable hostile work environment case is one where the workplace is "hellish").
B. EMERGENCE OF SEXUAL FAVORITISM

In general, sexual favoritism occurs when an employee receives a benefit for being sexually involved with a superior employee or employer.\(^{38}\) The potential cause of action is brought by an employee who is just as qualified or more qualified as the employee receiving sexual favoritism. The employee who brings the claim seeks redress for denial of benefits when denial of said benefits is caused because she was not having sex with her superiors.\(^{39}\) Sexual favoritism is different from sexual harassment because the potential plaintiff will not have been a target of sexual harassment or in a consensual sexual relationship.\(^{40}\)

However, sexual favoritism and sexual harassment share similar characteristics and effects. Sexual favoritism was traditionally thought of as dependent upon sexual harassment law because it can potentially create the same work atmosphere that sexual harassment law seeks to eliminate.\(^{41}\) For example, if favoritism is based upon the widespread granting of sexual favors in a workplace, then a “message is implicitly conveyed that the managers view women as ‘sexual playthings,’ thereby creating an atmosphere that is demeaning to women.”\(^{42}\) In Section I, it was noted that the Supreme Court recognized sexual harassment claims, starting with \textit{Meritor Savings Bank}, in order to diminish the existence of such an atmosphere.\(^{43}\) Professor Abrams discusses the theories of liability in sex discrimination cases that courts have recognized. In her article, \textit{Title VII and the Complex Female Subject},\(^{44}\) Abrams writes: “Sexual harassment characterizes discrimination as the devaluative sexualization or derogation of women in the workplace. Whether employers are expressing overt hostility or manifesting ‘sex role spillover’ harassment characterizes women primarily as sexual objects . . . rather than as competent workers.”\(^{45}\) Engaging in widespread sexual favoritism characterizes women as sexual objects as well. For example, a woman is repeatedly passed-up for a promotion while her female co-workers receive promotions because they had sexual relationships with their boss. This type of widespread favoritism may communicate the message that the way for women to get ahead in the workplace is to engage in sexual con-

\begin{itemize}
  \item \textsuperscript{38} Sheridan, \textit{supra} note 2, at 383.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} EEOC POLICY GUIDANCE, \textit{supra} note 1.
  \item \textsuperscript{41} Id. The Guidelines state that a person may have a claim of sexual favoritism if there is evidence of quid pro quo or hostile work environment sexual harassment. \textit{Id.} Implicitly, this means that favoritism is dependent on whether or not sexual harassment is present. \textit{Id.}
  \item \textsuperscript{42} Miller, 115 P.3d at 87 (citing EEOC guideline policy).
  \item \textsuperscript{43} Meritor Sav. Bank, FSB v. Vinson, 497 U.S. 57 (1986).
  \item \textsuperscript{44} Abrams, \textit{supra} note 27, at 2497.
  \item \textsuperscript{45} Id.
\end{itemize}
duct or that sexual solicitations are a prerequisite to their fair treatment. This type of situation, therefore, may constitute a hostile work environment and the women who are not promoted may have a claim of widespread favoritism. Sexual favoritism employs the same ideologies as sexual harassment—ideologies that should not show their effects in the workplace.

Therefore, because it was observed that widespread favoritism and hostile work environment could potentially lead to the same negative workplace environment, the emergence of sexual favoritism appeared as a form of sexual harassment, which was litigated mostly under the theory of a hostile work environment. In 1980, the EEOC guidelines categorized sexual favoritism as a practice that should be governed by Title VII. The guidelines stated:

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 discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

Between 1980 and 1990, there were only six reported cases involving sexual favoritism. Of the six reported cases, four courts found that sexual favoritism was a cause of action under Title VII and two did not. The courts in Toscano v. Nimmo, Priest v. Rotary, and Broderick v. Ruder

46. EEOC POLICY GUIDANCE, supra note 1.
47. Id.
48. Toscano v. Nimmo, 570 F. Supp. 1197, 1199 (D. Del. 1983) (recognizing sexual favoritism as a cause of action under Title VII and noting that even though the facts were not the "typical" Title VII sexual harassment case, it was "no different in its theoretical underpinnings").
49. EEOC POLICY GUIDANCE, supra note 1.
52. 29 C.F.R. § 1604.11(g) (1980).
54. DeCintio, 807 F.2d at 304 (rejecting a cause of action for isolated instances of sexual favoritism); Miller, 679 F. Supp. at 495 (rejecting a cause of action for isolated instances of sexual favoritism); Broderick, 685 F. Supp. at 1269; Priest, 634 F. Supp at 571; King, 598 F. Supp. at 65; Toscano, 570 F. Supp. at 1197.
treated sexual favoritism claims much like sexual harassment claims.55 These courts all found in favor of plaintiffs who claimed sexual favoritism by determining, in some form or another, that an employer who favored an employee because of their sexual relationship contributed to a hostile work environment.56

In Priest, the court noted that:

Title VII is also violated when an employer affords preferential treatment to female employees who submit to his sexual advances or other conduct of a sexual nature, or when, by his conduct or statements, implies that job benefits will be conditioned on an employee's good-natured endurance of his sexually-charged conduct or sexual advances.57

In Broderick, the court ruled that "Title VII is also violated when an employer affords preferential treatment to female employees who submit to sexual advances or other conduct of a sexual nature."58 Further, the court held that "consensual sexual relations, in exchange for tangible employment benefits, while possibly not creating a cause of action for the recipient of such sexual advances who does not find them unwelcome, do, and in this case did, create and contribute to a sexually hostile working environment."59

In Toscano, the court noted that although the facts were slightly different from a typical sexual harassment case, it was "no different in its theoretical underpinnings."60 All of these cases are evidence of the fact that at its birth, sexual favoritism was argued using the theory of sexual harassment under Title VII.

By contrast, in DeCintio v Westchester County Medical Center61 and Miller v. Aluminum Co. of America,62 neither court found sexual favoritism

55. See Broderick, 685 F. Supp. at 1280; Priest, 634 F. Supp. at 571; Toscano, 570 F. Supp. at 1197.
56. See Broderick, 685 F. Supp. at 1280; Priest, 634 F. Supp. at 571; Toscano, 570 F. Supp. at 1197.
57. Priest, 634 F. Supp. at 581.
59. Id. at 1280.
as a cause of action under Title VII.63 The courts' reasoning in both cases was relied upon in more recent opinions by courts and by the EEOC.64

In DeCintio, the district court ruled that the plaintiffs, seven males who were passed up for promotion in favor of a female employee who had a sexual relationship with the employer, had a cause of action under Title VII.65 However, the Second Circuit reversed this decision and ruled that Title VII does not encompass the situation of a romantic relationship between an employer and a person preferentially hired.66 The court was concerned with the possibility of the EEOC and the federal courts policing intimate relationships.67

The facts in DeCintio were similar to the facts in Miller. In Miller, an employee alleged that her supervisor treated her less favorably than her female co-worker, who was having a romantic relationship with their supervisor.68 The court came to the same conclusion as the court in DeCintio, ruling that Title VII does not protect this type of sexual favoritism.69 DeCintio and Miller exemplify courts' reluctance to identify isolated instances of sexual favoritism as a brand of sexual favoritism banned by Title VII.

Following these six initial cases, there began a trend among courts to recognize and permit a remedy for claims of widespread sexual favoritism under a hostile work environment but not to give credence to claims involving isolated sexual favoritism.70 In 2005, the California Supreme Court, in Miller v. Department of Corrections,71 would be the first to decide in express terms that widespread sexual favoritism may be actionable under a hostile work environment theory.72

C. MILLER V. DEPARTMENT OF CORRECTIONS

In Miller, the warden of a prison gave preferential treatment to three employees with whom he was having sexual relations.73 The warden granted promotions to these three women when others on the promotion

63.  DeCintio, 807 F.2d at 308; Miller, 679 F. Supp. at 500-01.
64.  See EEOC POLICY GUIDANCE, supra note 1 (noting that isolated instances of sexual favoritism are not prohibited under Title VII).
65.  DeCintio, 807 F.2d at 306.
66.  Id. at 308.
67.  Id.
68.  Miller, 679 F. Supp. at 500-01.
69.  Id.
70.  See, e.g., DeCintio, 807 F.2d at 308; Miller, 679 F. Supp. at 501; see also EEOC POLICY GUIDANCE, supra note 1.
72.  Id.
73.  Id. at 81-84.
committee had not recommended such promotions. The warden was affectionate with them in the workplace, and the girlfriends would often fight with one another for his attention. Further, the three women would often brag about their relationships with the warden to other employees. The court found that the plaintiff had a valid widespread sexual favoritism claim. Under this set of facts, the plaintiff, who was not one of the three women engaging in sexual conduct with the warden, demonstrated that the sexual favoritism in her workplace was widespread and that she was forced to work in a severe and pervasive hostile work environment, which constituted sexual harassment. However, in reaching its conclusion, the court noted that sexual favoritism towards a girlfriend or boyfriend is not actionable as sexual harassment. The court reaffirmed the EEOC’s interpretation of Title VII as applied to widespread and isolated instances of sexual favoritism: widespread sexual favoritism may be actionable under Title VII; whereas, isolated instances of sexual favoritism are not.

In Miller, the California Supreme Court found that a third-party employee had a cause of action under the theory of hostile work environment when his or her employer engaged in widespread sexual favoritism. However, the issue the court addressed was “whether a prima facie case of sexual harassment was established under the California Fair Employment and Housing Act.” Even though this case was highly significant regarding the future recognition of widespread sexual favoritism as a legal cause of action, it was governed by state law, not the federal law of Title VII. Therefore, on the particular issue of third-party employees in widespread sexual favoritism, the common law of the federal circuits and most state courts remains split, if not undecided.

74. Id.
75. Id. at 83-84.
76. Miller, 115 P.3d at 83-84.
77. Id. at 80.
78. Id.
79. Id.
80. EEOC POLICY GUIDANCE, supra note 1. A plaintiff may have a claim of widespread sexual favoritism but will not when there is only evidence of an isolated instance of sexual favoritism. Id.
81. Miller, 115 P.3d at 80.
82. Id.
83. Id. at 77.
III. ARGUMENT

A. SEVENTH CIRCUIT: SEXUAL FAVORITISM & HOSTILE WORK ENVIRONMENT

Some courts have recognized that widespread sexual favoritism constitutes a cause of action under the hostile work environment theory. However, the Seventh Circuit has not adopted this view. The Seventh Circuit has also denied any claim based on facts alleging an isolated sexual relationship. Therefore, as it stands, a party who suffers from either widespread or isolated sexual favoritism in the Seventh Circuit has no legal recourse under Title VII. Parties who seek redress for sexual favoritism under a hostile work environment theory in the Seventh Circuit fail due to the court’s definition of “hostile work environment.”

To prevail on a claim of hostile work environment in the Seventh Circuit, a plaintiff must show the following:

(1) she was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the conduct was severe or pervasive enough to create a hostile work environment; (3) the conduct was directed at her because of her sex; and (4) there is a basis for liability.

The court’s requirement that “the conduct was severe” is difficult to prove, because the court has set the severity requirement at a very high standard, concluding that the workplace must be “hellish” to be actionable. The question then becomes, what is “hellish”? Different factors that are considered include the frequency of the discriminatory conduct; its

86. Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 505 (7th Cir. 2004) (citing Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)). The Seventh Circuit finds that to prevail on a claim of hostile work environment, an employee must show that: “she was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.” Id. In other words, a plaintiff arguing a hostile work environment claim must have been targeted with some type of sexual harassment. See id.
87. Schobert v. Ill. Dep’t of Transp., 304 F.3d 725, 733 (7th Cir. 2002) (stating that consensual relationships, i.e., isolated sexual relationships, resulting in favoritism are not in violation of Title VII and that in non-consensual relationships, only the target of the harassment has a claim of sex discrimination).
88. Id.; see also Rhodes, 359 F.3d at 505.
89. Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005).
90. Rhodes, 359 F.3d at 505.
91. Id.
92. Whittaker, 424 F.3d at 645.
93. Id.
severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. This does not answer our question of what a “hellish” workplace is. Instead, it begs further questions, like what constitutes severe humiliation?

In Weiss v. Coca-Cola Bottling Co. of Chicago, the court held that the plaintiff failed to show that the conduct was severe and pervasive. Weiss’s supervisors consistently asked her out on dates (which were each followed by rejections), repeatedly called her a “dumb blond,” put their hands on her shoulders at least six times, placed “I love you” signs in her workplace, and tried to kiss her on multiple occasions. In Koelsch v. Beltone Electronics Corp., the plaintiff failed to show severe conduct when the company’s president stroked plaintiff’s leg with his foot, “grabbed her bottom,” and made other unwanted sexual advances. In Saxton v. American Telephone & Telegraph Co., the plaintiff failed in claiming a hostile work environment even though her supervisor repeatedly suggestively touched her and kissed her. These decisions illustrate the Seventh Circuit’s high standard, which make it difficult for a victim of direct sexual harassment to prove the “hellish” work environment necessary to bring a sexual harassment claim. If it is hard for a victim who is directly sexually harassed, it follows that it would be nearly impossible for a third-party to claim sexual favoritism under the sexual harassment theory of hostile work environment. As a result, widespread sexual favoritism, if argued under a hostile work environment theory, presently leaves plaintiffs with no legal recourse in the Seventh Circuit because (1) the court has already stated that they will not recognize widespread sexual favoritism as constituting a hostile work environment, and (2) even if the court did recognize widespread favoritism as a hostile work environment on a theoretical basis, claimants would still have a burden that is pragmatically impossible to meet.

95. Whittaker, 424 F.3d at 645.
96. 990 F.2d 333, 337 (7th Cir. 1993).
97. Id.
98. 46 F.3d 705, 708 (7th Cir. 1995).
99. 10 F.3d 526, 534-35 (7th Cir. 1993).
100. See, e.g., Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 505 (7th Cir. 2004).
101. Id. (citing Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)). The Seventh Circuit finds that to prevail on a claim of hostile work environment, an employee must show that: “she was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.” Id. In other words, a plaintiff arguing a hostile work environment claim must have been targeted with some type of sexual harassment. See id.
B. ISOLATED INSTANCES OF SEXUAL FAVORITISM

As discussed, there is a split among the federal circuits on whether widespread sexual favoritism is a cause of action under the hostile work environment theory of sexual harassment. However, there is little disagreement among courts regarding isolated instances of sexual favoritism. The EEOC Guidelines state: “Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships.” The majority of courts cite this provision of the Guidelines to support the rule that isolated instances of sexual favoritism between two consensual partners is not prohibited. The EEOC Guidelines, however, lack the force of law, meaning that courts are not bound by the EEOC Guidelines. The EEOC Guidelines are “entitled to respect,” but courts certainly have the power to disregard the Guidelines. Even so, the majority of courts have taken the position that isolated instances of sexual favoritism are not actionable.

The main argument as to why isolated instances of sexual favoritism are not prohibited is that the alleged discrimination is not based on the plaintiff’s gender. The argument unfolds as follows: “An isolated instance of favoritism toward a ‘paramour’ may be unfair, but it does not discriminate against women or men... since both are disadvantaged for reasons other than their genders.” Moreover, “a female [plaintiff] who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman.” As noted previously, when sexual harassment cases were first being tried, courts were reluctant to say that sexual harassment was discrimination on the basis of

103. Compare Miller v. Dep’t of Corr., 115 P.3d 77, 90 (Cal. 2005) (recognizing that widespread sexual favoritism can be sexual harassment under a hostile work environment), with Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002) (affirming that a plaintiff must have been personally sexually harassed in order to bring a hostile work environment claim).

104. See, e.g., McGinnis v. Union Pac. R.R., 496 F.3d 868, 874 (8th Cir. 2007); Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908 (8th Cir. 2006); Schobert v. Ill. Dep’t of Transp., 304 F.3d 725, 733 (7th Cir. 2002).

105. EEOC POLICY GUIDANCE, supra note 1.

106. See, e.g., McGinnis, 496 F.3d at 874; Tenge, 446 F.3d at 908; Schobert, 304 F.3d at 733; Harvey v. Chevron U.S.A., Inc., 961 F. Supp. 1017, 1029 (S.D. Tex. 1997).


109. See, e.g., Harvey, 961 F. Supp. at 1029.

110. EEOC POLICY GUIDANCE, supra note 1.

111. Id.

112. Id.
sex. Courts relied on the reasoning that both males and females could potentially be victims of sexual harassment. This is the same argument being made against isolated instances of sexual favoritism. However, this is no longer a valid legal argument for sexual harassment cases. It is now recognized that when a supervisor sexually harasses a subordinate, it is because of the subordinate’s sex and, therefore, discrimination based on sex. In other words, but for the employee’s sex, the employer would not have sexually harassed her.

By applying this same reasoning to isolated instances of sexual favoritism, it is clear that but for the employee’s sex, the employer would not have had a sexual relationship with that employee. Therefore, it is sex discrimination if that employer gives employment benefits to that employee solely because of their sexual relationship. The old and invalidated legal reasoning that sexual harassment is not sex discrimination should not now be considered valid when applied to isolated instances of sexual favoritism.

Further, the EEOC states that “[i]f a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish” a claim of favoritism based upon coerced sexual conduct. Under these circumstances, the same argument against isolated instances of sexual favoritism applies. A female employee who was denied the employment benefit would not have been treated more favorably had she been a man. This is evidence of the fact that in both cases—consensual instances and coerced instances of sexual relationships—the legal reasoning is the same. But for the employee’s sex, the employer would not have had consensual or coerced sexual relations with that employee. However, in one instance of a coerced sexual relationship, a third-party employee may have a claim of sexual favoritism; but in an-

114. E.g., Tomkins, 422 F. Supp. at 556.
115. EEOC POLICY GUIDANCE, supra note 1.
117. Id.
118. Id. (recognizing that sexual harassment is a form of sex discrimination). Old legal arguments against sexual harassment have been rejected and, therefore, should not be applied to sexual favoritism when the issue is still employers targeting a particular sex.
119. EEOC POLICY GUIDANCE, supra note 1.
120. See Phillips, supra note 13, at 579.
121. Id.
122. EEOC POLICY GUIDANCE, supra note 1.
other instance of a consensual sexual relationship, a third-party employee will not have a claim of sexual favoritism.\textsuperscript{123} In other words, as it stands now, there must be evidence of sexual harassment between the two involved in a sexual relationship in order for a third-party employee to claim sexual favoritism.\textsuperscript{124}

If an employee is injured as a third-party by a sexual relationship, that employee’s right to a remedy should not rest on the consensual nature of said sexual relationship. Consensual or not, but for that employee’s sex, the employer would not have engaged in a sexual relationship. Consensual or not, but for the sexual relationship, the employee would not have received employment benefits.\textsuperscript{125} If this is the case, a third-party employee should have a claim without the consensual nature of the sexual relationship ever becoming a factor.

Coercion is a very important element of sexual harassment. If a woman consents, then there is no harassment.\textsuperscript{126} However, in sexual favoritism claims, the issue should not be whether the female employee was coerced into or consented to the sexual relationship. Rather, the issue should be whether the employee is receiving employment benefits \textit{solely} because of the sexual relationship. If benefits are given solely because of a sexual relationship, then the employee is receiving benefits because of her sex, in addition to the sexual acts. If sexual favoritism is accepted under the legal theory of sex-plus, this is sex discrimination.\textsuperscript{127} The purpose of sexual favoritism cases is to eliminate an individual’s opportunity to use his or her sexuality for the purpose of gaining employment benefits. In order to accomplish this, the threshold issue of sexual favoritism claims must be whether or not an employee is receiving employment benefits \textit{solely} because of certain sexual acts.\textsuperscript{128}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} Coerced sexual relationship exemplifies a quid pro quo sexual harassment situation and therefore, sexual favoritism may be present and actionable. \textit{Id.} Widespread sexual favoritism may constitute a hostile work environment under sexual harassment. \textit{Id.}

\textsuperscript{125} \textit{See Phillips, supra note 13, at 579; Mary C. Manemann, Comment, The Meaning of Sex in Title VII: Is Favoring an Employee Lover a Violation of the Act?, 83 Nw. U. L. Rev. 612, 614 (1989).}

\textsuperscript{126} 29 C.F.R. § 1604.11(a) (1980); \textit{see also} Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

\textsuperscript{127} \textit{See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (recognizing sex-plus discrimination as a form of sex discrimination for purposes of Title VII). In this case, the “plus” was having pre-school-age children. Id.}

\textsuperscript{128} \textit{See generally 42 U.S.C. § 2000e(2)(a)(1) (1964) (noting that if it can be argued and proved that an employee is receiving benefits solely because of sexual acts, there is sex discrimination). But for the employee’s sex, there would be no sexual relationship and but for the sexual relationship there would be no preferential treatment. See \textit{id.}}
C. SEX-PLUS AS SEX DISCRIMINATION

In Phillips v. Martin Marietta Corp., the United States Supreme Court adopted the proposition that sex considered in conjunction with a second characteristic—sex-plus—can delineate a 'protected group' and can therefore serve as a basis for a Title VII suit. The defendant in Phillips refused to hire women with children in pre-school but hired men in that same situation. The district court found that at the time Mrs. Phillips applied, seventy-five to eighty percent of those hired for the position were women. This indicates that there was no real question of any general bias against hiring women. Nevertheless, the Supreme Court held that "permitting one hiring policy for women and another for men—each having pre-school-age children," violated Title VII. Other characteristics that have been recognized by courts under the sex-plus doctrine are: sex plus child, sex plus marriage, sex plus fertility, sex plus gender stereotypes, and sex plus pregnancy. Gender-neutral characteristics (e.g., child rearing or child care) will not be considered a "plus" factor under sex-plus doctrine. Sexual relationships have not specifically been used as a "plus" characteristic, though "personal relationships" have.

In Coleman v B-G Maintenance Management of Colorado, Inc., the plaintiff claimed that she was discriminated against because of her gender and her personal relationship. She was not successful because, in contrast to Phillips, there was no corresponding subclass of men—that is, men in a "personal relationship" or common law marriage with the defendant. The court concluded that in order to show discrimination on the basis of gender in conjunction with a personal relationship, the plaintiff must show

129. 400 U.S. at 542.
130. Id. at 544.
131. Id. at 543.
132. Id.
133. Id. at 544.
140. Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1203 n.1 (10th Cir. 1997) (noting the plaintiff has the burden of proving by a preponderance of the evidence that the defendant's actions were motivated by the plaintiff's gender or gender along with her personal relationship with the defendant).
141. Id.
143. Coleman, 108 F.3d at 1203-04.
that she was treated less favorably in comparison to similarly situated persons of the opposite sex.144

As shown in Phillips and Coleman, an important element in sex-plus claims is deciding which two groups of individuals will be compared in determining whether or not there was indeed sex discrimination.145 In Phillips, the sex discrimination between men and women was not based solely on their gender.146 The discrimination occurred between women with preschool children and men with pre-school children.147 However, there is a split in the federal circuits on what the appropriate comparison is in sex-plus claims.148 The debate "over whether the proper comparator may only include a person outside of the protected class who has the same 'plus characteristic' as the plaintiff . . . or whether the comparator may include any person (male or female) who lacks the 'plus' characteristic" has sparked controversy.149 For example, does a woman with young children (claiming sex plus child), have to prove that she was treated less favorably than a man with small children,150 or does she have to prove that people, male or female, without children were treated more favorably?151 With regards to sexual favoritism, the ability to state a cause of action under sex-plus discrimination depends on which comparison a court chooses to use. However, under both approaches a sexual favoritism claim is possible.

1. **Comparison Approach: Plaintiff Must Show that She Was Treated Less Favorably than Similarly-Situated Men**

First, it is important to reiterate that bringing a sex-plus claim means that an individual's sex is considered in conjunction with a second characteristic.152 In other words, a person is discriminated against not solely be-

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144. *Id.*
146. *Id.*
147. *Id.*
148. Compare Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (rejecting the notion that women plaintiffs must show that they were treated differently than similarly-situated men in order to survive summary judgment), with Coleman v. B-G Maint. Mgmt. of Colo. Inc., 108 F.3d 1199 (10th Cir. 1997) (requiring that women plaintiffs show that they were treated differently than similarly-situated men).
149. Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *6 (E.D. Mich. Mar. 22, 2007). Compare Back, 365 F.3d at 107 (rejecting the notion that women plaintiffs must show that they were treated differently than similarly-situated men in order to survive summary judgment), with Coleman, 108 F.3d at 1199 (requiring that women plaintiffs show that they were treated differently than similarly-situated men).
151. *Id.*
152. *Id.*
cause of his or her gender, but because of his or her gender along with something else (e.g., marriage). A female victim of sexual favoritism using a sex-plus argument would be claiming that she was discriminated against because of her sex and a sexual relationship. When a sexual relationship is the ‘plus’ factor, the plaintiff will actually be arguing that she was discriminated against because of her sex and her lack of the plus factor, i.e., the sexual relationship. Therefore, under this first comparison approach, the comparison would be between women who lack the plus characteristic and men who lack the plus characteristic.

Recall the hypothetical presented at the beginning of this Comment involving Jane and Sally. However, add Graham to the equation. Graham and Jane have the same qualifications and Sally has substantially lower qualifications than both Graham and Jane. There is direct evidence that Sally is having consensual sexual intercourse with Joe, the boss of all three employees. Graham and Sally get promotions. Jane does not. Here, both Graham and Jane are similarly situated because they both lack the ‘plus’ characteristic (the sexual relationship) and are treated differently because Graham got the promotion and Jane did not. So, women who do not have a sexual relationship with the boss are being treated less favorably than men who do not have a sexual relationship with the boss. Assuming that Jane is able to prove that Joe’s motivating factor in promoting Sally was the sexual relationship, she should have a valid cause of action. However, what if both Graham and Jane were not promoted? Graham may have a claim of sex discrimination if he is able to prove that gender was the motivating factor in promoting Sally. Jane, on the other hand, would not have a claim if the court adopted the first comparison approach—requiring Jane to show that she was treated less favorably than similarly situated persons of the

153. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197-98 (7th Cir. 1971) (“[A]n employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act.”).

154. See generally Phillips, 400 U.S. at 544 (recognizing the “sex-plus” theory as a cause of action for victims of sexual favoritism).

155. See Coleman v. B-G Maint. Mgmt. of Colo. Inc., 108 F.3d 1199, 1203 (10th Cir. 1997) (“[A]lthough the protected class need not include all women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men.”).

156. 42 U.S.C. § 2000e-2(m) (1991) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). In a sexual favoritism claim, the plaintiff would have the burden of proving that the employer’s actions were motivated by another employee’s gender and his or her sexual relationship with that employee. See id.

157. Id.
opposite sex (Graham). For this reason, the comparison approach adopted by the court in *Back v. Hastings on Hudson Union Free School District* would be more favorable to a plaintiff arguing sexual favoritism under the sex-plus doctrine.

2. **Comparison Approach: Plaintiff Must Show that She Was Treated Differently than Anyone Who Has or Lacks the “Plus Characteristic”**

The comparison used in *Back* is between the plaintiff and all other persons, male or female, who lack the “plus” characteristic. The court states, “In [sex-plus] cases the employer does not discriminate against a class of men or women as a whole but rather treats differently a subclass of men or women.” According to the court in *Back*, the relevant issue is whether a subclass of people is being treated differently than the non-subclass of individuals. In *Back*, the defendants were “wrong in their contention that Back cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently.” Although the case may be stronger with such evidence, “there is no requirement that such evidence be adduced.” “In determining whether an employee has been discriminated against ‘because of such individual’s . . . sex,’ the courts have consistently emphasized that the ultimate issue is the reasons for the individual plaintiff’s treatment, not the relative treatment of different groups within the workplace.”

Applying a claim of the sexual favoritism to the approach adopted in *Back*, the question becomes: is the plaintiff being treated less favorably in comparison to the individual(s) having the sexual relationship with the boss? This is a more rational and logical comparison because this is the essence of sexual favoritism—the plus characteristic. It allows courts to focus on the ultimate issue: the motivating reasons behind the individual plaintiff’s treatment.

By using this second comparison approach, a plaintiff arguing sexual favoritism would have to show that she is being treated less favorably in comparison to the individual(s) having the sexual relationship with the

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158. See Coleman, 108 F.3d at 1203.
160. *Id.*
161. *Id.* at 119 n.7.
162. *Id.* at 119.
163. *Id.* at 121.
164. *Back*, 365 F.3d at 121.
165. *Id.* (citing Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)).
166. *Id.*
boss. Going back to the hypothetical, Jane would have to show that she was treated less favorably because of her sex in conjunction with not having a sexual relationship with Joe, the boss. The comparison would be between Jane and Sally. This type of comparison is more appropriate because it allows courts to focus on the ultimate issue—"the reasons for the individual plaintiff's treatment, not the relative treatment of different groups within the work place."\textsuperscript{167} In other words, the issue that should be focused on is why Jane, who lacks the plus characteristic, was treated less favorably than Sally who does have the plus characteristic. This type of comparison approach is more favorable to a person arguing that they were discriminated against because of their sex plus a sexual relationship because it eliminates the situation, outlined above, in which Jane is left with no cause of action.

When an employee is receiving employment benefits solely because she is having a sexual relationship with the boss, third-parties, who are being denied benefits, must have a legal remedy because: (1) but for the gender of the employee who is receiving benefits, the employer would not have had a sexual relationship with her;\textsuperscript{168} and (2) but for the sexual relationship, the employer would not have given her employment benefits.\textsuperscript{169} This is sexual favoritism and, under a sex-plus legal argument, discrimination on the basis of sex.\textsuperscript{170} Therefore, the second approach makes it easier for Jane to bring an actionable claim of sexual favoritism under Title VII.

D. SIGNIFICANCE OF ARGUING SEXUAL FAVORITISM UNDER SEX-PLUS

Arguing sexual favoritism under the sex-plus theory is significant because it allows plaintiffs to bring a cause of action regardless of whether the

\textsuperscript{167}. Id.

\textsuperscript{168}. A Title VII sex discrimination recovery requires "treatment of a person in a manner which but for that person's sex would be different." City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978). The Supreme Court later developed a test for the determination of the but-for causation:

In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor has been absent, the event nevertheless would have transpired in the same way.

Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989). A portion of the Price Waterhouse decision, however, was overturned by 42 U.S.C. § 2000e(2)(m), which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e(2)(m) (1991).

\textsuperscript{169}. See, e.g., McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 327 (E.D. Pa. 1997) ("The rationale behind the 'sex-plus' theory of gender discrimination is to enable Title VII plaintiffs to survive summary judgment where the employer does not discriminate against all members of a sex.").

Sexual conduct was consensual or not. In other words, the sex-plus theory gives rise to legal action in isolated instances of sexual favoritism. It is important to keep in mind that how one argues sexual favoritism claims will depend upon the facts of a particular case. If a situation arises in which the facts are comparable to those in *Miller v. Department of Corrections,* then arguing widespread sexual favoritism under a hostile work environment theory would suffice. However, arguing under the theory of sex-plus discrimination would cover not only the extreme situation in *Miller,* but also isolated cases involving individuals who are being denied promotions for not having sex with his or her superior.

Sexual favoritism under a sex-plus theory would cover both isolated and widespread sexual favoritism because the ultimate issue for the courts would be whether the motivating factor in denying one individual a promotion over the other is based on the individual's gender in conjunction with the sexual relationship. The threshold question for sexual favoritism would not be whether an individual consented to or was coerced into a sexual relationship; rather, the question would be, were gender and a sexual relationship the motivating factor in the employer's decision to promote one employee over the other? When courts focus on the latter issue, there are three significant effects: (1) it allows victims of isolated sexual favoritism to potentially have a claim, (2) it maintains the rationale used by courts to refrain from regulating personal relationships, and (3) it protects the courts from a flood of meritless lawsuits by limiting the cause of action.

E. SEXUAL FAVORITISM AS SEX-PLUS: A LIMITED CAUSE OF ACTION

Sexual favoritism as a cause of action will be limited because sex-plus discrimination under Title VII requires a disparate treatment analysis governed by *McDonnell Douglas Corp. v. Green.* In *McDonnell Douglas,*

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171. Miller v. Dep't of Corr., 115 P.3d 77, 81-84 (Cal. 2005). The warden of a prison gave preferential treatment to three other employees with whom he was having sexual relationships. *Id.* Promotions were granted to these three women by the warden when others on the promotion committee had not recommended such promotions. *Id.* The warden was affectionate with them in the workplace and the girlfriends would often fight with one another. *Id.* Further, the three women would often brag about their relationships with the warden to other employees. *Id.*

172. *Id.*


174. EEOC POLICY GUIDANCE, supra note 1.


the Supreme Court developed a three-tiered burden-shifting framework for applying § 2000e-2. First, the plaintiff must present a prima facie case of discrimination which must include the following allegations: (1) plaintiff is a member of a protected class; (2) plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite these qualifications, the employer rejected the plaintiff; and (4) that, after this rejection, the job remained open and the employer continued to seek applicants having the plaintiff's qualifications.

If the plaintiff presents a prima facie case, then the burden shifts to the employer, who is required to demonstrate "some legitimate, nondiscriminatory reason" for not hiring or promoting the plaintiff. The defendant need only articulate—but need not prove—the existence of a non-discriminatory reason. In other words, the burden on the defendant is low. If the defendant provides some type of reason, then the plaintiff assumes the burden to show that the employer's stated reason for the plaintiff's rejection was in fact merely a pretext. The plaintiff must establish "both that the reason was false, and that discrimination was the real reason."

The benefit of arguing sexual favoritism under a sex-plus theory is that a plaintiff should now be able to make out a prima facie case under the McDonnell Douglas model. Courts that completely reject the notion that isolated instances of sexual favoritism can be actionable under Title VII will, in essence, be rejecting the McDonnell Douglas model of a prima facie case. In our hypothetical, Jane can show that she is within a protected class (women), her employer was looking to promote someone, she was denied the promotion, and that the promotion was given to someone else. Therefore, Jane can establish a prima facie case under the McDonnell

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178. Id. at 802.
179. Id.
180. Id.
185. Harvey v. Chevron U.S.A., Inc., 961 F. Supp. 1017, 1029 (S.D. Tex. 1997) ("Alleged favoritism to a paramour generally has been held not to constitute discrimination in violation of Title VII because the alleged discrimination is not based on the plaintiff's gender."); see also McGinnis v. Union Pac. R.R., 496 F.3d 868, 874 (8th Cir. 2007); Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908 (8th Cir. 2006); Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002); Murray v. City of Winston-Salem, 203 F. Supp. 2d 493 (M.D.N.C. 2002); Riggs v. County of Banner, 159 F. Supp. 2d 1158, 1164 (D. Neb. 2001); EEOC POLICY GUIDANCE, supra note 1 (rejecting isolated instances of sexual favoritism as being actionable under Title VII).
186. McDonnell, 411 U.S. at 802 (outlining the elements needed to create a prima facie case of discrimination under Title VII).
Douglas model. However, after the employer states a legitimate reason for not promoting (or hiring) Jane, she has a difficult burden of proof. There are limited sets of facts in which a plaintiff claiming sexual favoritism will be successful. Jane would have to prove that Joe’s reason for not promoting her was not only false, but also that discrimination was the real reason. In other words, Jane would have to prove, by a preponderance of the evidence, that the motivating factor in Joe’s decision to deny Jane the promotion was because of the sexual relationship he was having with Sally. Arguably, Jane has a good case. She was more qualified (college degree in marketing), she had been with the company three years longer than Sally, she had a higher commission rate by $300,000, and Sally told Jane she was having a sexual relationship with Joe, which, assuming that Sally was telling the truth, would be direct evidence that there was indeed a sexual relationship between Sally and Joe. Jane could use these facts to overcome the presumption that Joe had legitimate reasons to promote Sally over her, and to prove that Joe’s actual motivation in promoting Sally over her was Joe’s sexual relationship with Sally.

In our hypothetical, Jane gets her day in court to prove unfair sexual favoritism if the court applies the sex-plus doctrine. As stated from the outset, this seems only fair by any reasonable measure of conscience. On the other hand, we have also seen the rigorous scrutiny the court would give to these cases in its application of the sex-plus doctrine through the McDonnell Douglas burden-shifting model. Jane would need to claim particular facts to establish a prima facie case, and she would have the difficult task of overcoming presumptions in favor of the defendant. Therefore, under sex-plus, those who deserve their day in court will have it, but those who do not meet the narrowly-tailored requirements of sex-plus will have their cases easily disposed of by the court.

187. Id.
188. Id.
190. See 42 U.S.C. § 2000e(2)(m) (1991) (requiring a plaintiff to prove that sex or sex-plus was the motivating factor); see also McDonnell, 411 U.S. at 802 (establishing the required burden-shifting).
191. Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995); see also McDonnell, 411 U.S. at 802.
192. St. Mary’s Honor Ctr., 509 U.S. at 515.
195. Id.
IV. CONCLUSION: INCORPORATING A FEMINIST PERSPECTIVE

Allowing the practice of sexual favoritism promotes the idea that women should use their sexuality as a way to advance themselves in the workplace. It reinforces many post-feminist ideas that a woman's body can and should be used as a form of empowerment.\footnote{196} It symbolizes a post-feminist perspective that men and women are now equal, so there is no harm in a woman using her sexuality to feel empowered and to use it strategically to get what she wants.\footnote{197} Embracing such an attitude allows individuals to look past the ongoing discrimination women still face in the workplace. It encourages the demeaning viewpoint that women are "sexual playthings," the very stereotype denounced by sexual harassment law.\footnote{198}

Providing legal redress for sexual favoritism claims under a sex-plus theory promotes the continuation of a movement away from sex discrimination and inequality in the workplace. Early arguments of sexual favoritism under theories of sexual harassment were natural starting points. Attacking sexual favoritism via sexual harassment claims highlighted important characteristics and potential consequences of sexual favoritism;\footnote{199} for example, sexual favoritism can have the same effects as sexual harassment in the workplace.\footnote{200} Therefore, if there are not legal consequences for sexual favoritism, then the attitudes and behaviors that embody sexual harassment will be reinforced.\footnote{201} The view of women as "sexual playthings" rather than competent workers will continue to fester and remain persistent in many

\footnote{196. NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY 13 (1993) (arguing that the world has experienced a "gender quake" of social change and that women are now significantly better off and should embrace their power to achieve for themselves instead of focusing on what is wrong); see also Karen Pitcher, The Staging of Agency in Girls Gone Wild, in 23 CRITICAL STUDIES IN MEDIA COMMUNICATION 200, 212 (2006) (arguing that because women voluntarily choose to be on Girls Gone Wild, the experience becomes pleasurable, empowering, and liberating because these women choose to use their sexuality to reap some type of personal benefit).

\footnote{197. WOLF, supra note 196, at 15. Naomi Wolf, a proclaimed post-feminist, has coined the term "power feminism," which requires individuals to be tolerant of other women's choices about sexuality and appearance and believes that what every woman does with her body is her own business. So, arguably, it is acceptable to sleep with your boss to get the promotion that you have been wanting. \textit{Id.}

\footnote{198. See, e.g., Miller v. Dep't of Corr., 115 P.3d 77, 90 (Cal. 2005) (noting that sexual harassment sends the message that women are only sexual objects and not skilled, qualified workers). When an individual is repeatedly passed up for a promotion by other individuals who have had a sexual relationship with the boss, the same message is being sent. \textit{See id.}

\footnote{199. EEOC POLICY GUIDANCE, supra note 1 (noting that widespread favoritism can be a form of "hostile work environment"); see also Miller, 115 P.3d at 90 (recognizing widespread favoritism under a hostile work environment theory).

\footnote{200. See, e.g., Abrams, supra note 27, at 2497.

\footnote{201. See Van Tol, supra note 51, at 167.
employment atmospheres. Both isolated instances and widespread sexual favoritism must have legal consequences.

Personal and sexual relationships will inevitably remain present in the workplace. It is ludicrous to even imagine a legal system that would demand that all personal relationships be kept outside the workplace. However, courts have determined how some aspects of our personal lives can impact our professional relationships. For example, the law cannot demand that a boss not be a bigot. But, the law may, should, and does demand that a boss not discriminate based on bigotry. Therefore, regardless of the personal thoughts, feelings, and relationships that might develop in the workplace, it seems logical and fair that employers should not be allowed to favor the employees that they are having sex with as a matter of law. If victims of sexual favoritism can prove that they were not promoted, hired, etc., because they were discriminated against based on their gender in conjunction with a sexual relationship between a third-party and the employer, then that victim should have a chance to seek a remedy.

There was a great need to enforce sexual harassment claims in order to work toward a more equal work environment between men and women. Now there is a great need to enforce sexual favoritism claims if we are to continue to strive for equality in the workplace. Like sexual harassment, sexual favoritism is a logical consequence of persistent gender stereotypes. Stereotypes that women are inferior to men have not simply vanished, despite what pop-politics might lead us to believe. Inequality remains prevalent in the workplace, if only in the subtle nuances of sexual favoritism. Therefore, the courts need to revise their treatment of sexual favoritism cases by giving credence to isolated instances of sexual favoritism as sex discrimination under the sex-plus doctrine.

SUSAN J. BEST*

202. EEOC POLICY GUIDANCE, supra note 1.
203. Id.
204. 42 U.S.C. § 2000e(2)(a)-(c) (1964). Title VII makes it unlawful for public and private employers, labor organizations, and employment agencies "to discriminate against any individual because of his race, color, religion, sex, or national origin." Id.
205. See, e.g., FARLEY, supra note 25, at 15; KENTER, supra note 25, at 18-27; MACKNON, supra note 28, at 32.
206. Van Tol, supra note 51, at 167; see also Sheridan, supra note 2, at 383.
207. WOLF, supra note 196, at 15.
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