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I. Introduction

Title VII of the 1964 Civil Rights Act forbids employment discrimination against any individual "because of such individual's sex."[1] This prohibition of sex discrimination was hurriedly added to Title VII not long before its passage; as a result, little legislative history exists to aid courts in its interpretation.[2] Perhaps for this reason, the prohibition has been a judicial battleground, in which some expansive readings of its language eventually have found favor,[3] whereas others have failed to command support.[4] Today, Title VII recovery for sexual favoritism is one such battleground.[5]

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1. 42 U.S.C. § 2000e-2(a) (1988); *see id.* § 2000e-2(b)-(d) (containing similar language).

2. *See* Meritor Sav Bank v Vinson, 477 U.S. 57, 63-64 (1986); *see also infra* notes 80-90 and accompanying text (discussing relevant legislative history).

3. One example of an expansive reading of Title VII's prohibition of sex discrimination is the law of sexual harassment discussed *infra* at notes 15-43 and accompanying text.

4. For an example of a narrower reading of Title VII, see MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.25(c)(2) (1988) (noting that Title VII's ban on sex discrimination has been held not to include discrimination on bases of homosexuality and transsexuality).

5. *See* Mundy v Palmetto Ford, Inc., No. 92-1041, 1993 U.S. App. LEXIS 19588, at *5 (4th Cir. July 27, 1993) (holding that for Title VII purposes, "sex" does not include voluntary romance); Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (recognizing possibility of sexual favoritism recovery and of work environment sexual harassment claim based in part on sexual favoritism, but denying recovery on facts); Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861-63 (3d Cir. 1990) (recognizing

possibility of work environment sexual harassment recovery based in part on sexual favoritism, but denying recovery on facts); DeCintio v Westchester County Medical Ctr., 807 F.2d 304, 306-08 (2d Cir. 1986) (holding that sexual favoritism based on consensual sexual relationship does not constitute sex discrimination), *cert. denied*, 484 U.S. 825 (1987); King v Palmer, 778 F.2d 878, 880-82 (D.C. Cir. 1985) (recognizing possible recovery for sexual favoritism, but reversing and remanding trial court decision that recognized favoritism claim but denied liability on facts); Dirksen v City of Springfield, 842 F Supp. 1117, 1121-22 (C.D. Ill. 1994) (holding that sexual favoritism, although not actionable as such, may help establish that advancement generally hinged on granting sexual favors, which supports quid pro quo harassment claim); Piech v Arthur Andersen & Co., 841 F Supp. 825, 828-30 (N.D. Ill. 1994) (denying sexual favoritism claim and holding that sexual favoritism can help establish quid pro quo sexual harassment claim); Ayers v AT&T, 826 F Supp. 443, 445 (S.D. Fla. 1993) (finding that sexual favoritism does not constitute sex discrimination); Parrish v English Am. Tailoring Co., 56 Fair Empl. Prac. Cas. (BNA) 567, 569 (D. Md. 1988) (noting that Title VII does not prohibit discrimination based upon sexual affiliations); Broderick v Ruder, 685 F Supp. 1269, 1278 (D.D.C. 1988) (granting recovery for work environment sexual harassment based almost wholly on sexual favoritism); Miller v Aluminum Co. of Am., 679 F Supp. 495, 501-02 (W.D. Pa.) (holding that sexual favoritism based on consensual sexual relationship does not constitute sex discrimination and noting that sexual favoritism may contribute to work environment sexual harassment claim, but denying harassment claim on facts), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988); Priest v Rotary, 634 F Supp. 571, 581 (N.D. Cal. 1986) (finding violation of Title VII when employer prefers female employees who submit to his sexual advances); Toscano v Nimmo, 570 F Supp. 1197, 1199 (D. Del. 1983) (holding that proof of sexual favoritism helps plaintiff establish that granting sexual favors is necessary for advancement, which constitutes quid pro quo sexual harassment that violates Title VII); *see also* Herman v Western Fin. Corp., 869 P.2d 696, 701-03 (Kan. 1994) (finding sexual favoritism and other sex-related employer behavior insufficient for work environment sexual harassment liability under Title VII); Polk v Pollard, 539 So. 2d 675, 677-78 (La. Ct. App. 1989) (holding that sexual favoritism does not constitute sex discrimination under state statute resembling Title VII); Hickman v W-S Equip. Co., 438 N.W.2d 872, 874 (Mich. Ct. App. 1989) (same); Erickson v Marsh & McLennan Co., 569 A.2d 793, 802-03 (N.J. 1990) (holding that at least when sexual relationship is consensual, resulting sexual favoritism does not violate state statute resembling Title VII); Nicolo v Citibank N.Y State, 554 N.Y.S.2d 795, 798-99 (Sup. Ct. 1990) (holding that isolated act of sexual favoritism favoring only one employee is not actionable under state statute resembling Title VII, but that sexual favoritism may contribute to quid pro quo and work environment sexual harassment claims on appropriate facts); Kersul v Skulls Angels Inc., 495 N.Y.S.2d 886, 889 (Sup. Ct. 1985) (denying motion to dismiss sexual favoritism claim under state statute resembling Title VII); Kryeski v Schott Glass Technologies, Inc., 626 A.2d 595, 598 (Pa. Super. Ct. 1993) (holding that sexual favoritism resulting from consensual relationship does not constitute sex discrimination under state statute resembling Title VII), *appeal denied*, 639 A.2d 29 (Pa. 1994).

For a discussion of quid pro quo and work environment sexual harassment, see *infra* notes 33-43 and accompanying text.

In the typical sexual favoritism (or "paramour") claim,[6] the plaintiff alleges that her employer has violated Title VII by favoring another employee (the paramour) due to a sexual or romantic relationship between a supervisor and the paramour. Perhaps the most common case involves a male supervisor who assertedly favors a female subordinate over another female subordinate.[7] Sometimes, however, the injured party is male.[8] In most, if not all, of the relevant cases, the sexual or romantic relationship between supervisor and paramour appears to have been consensual. Few, if any, assert that the relationship was coerced by the supervisor's sexual harassment of the subordinate.[9] At the other end of the spectrum, few cases appear to involve paramours willing to trade sex for personal advancement.[10]

A majority of the courts that have considered Title VII sexual favoritism claims have recognized the possibility of recovery for sexual favoritism under one theory or another.[11] The relatively sparse scholarly

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6. *See EEOC. Policy Guide on Employer Liability for Sexual Favoritism Under Title VII*, 8 Lab. Rel. Rep. (BNA) 405:6817, 405:6817 (Jan. 12, 1990) [hereinafter *EEOC Policy Guide*] (using terms "sexual favoritism" and "paramour"). The sexual favoritism claim also has been called a "reverse quid pro quo" sexual harassment claim. *See* Piech v. Arthur Andersen & Co., 841 F Supp. 825, 828 (N.D. Ill. 1994).

7 *See* King v. Palmer, 778 F.2d 878, 878-79 (D.C. Cir. 1985). Because no sexual favoritism case as yet has involved a female supervisor or a male paramour, this Article invariably describes the supervisor as a man and the favored party/paramour as a woman.

8. *See* DeCintio v. Westchester County Medical Ctr., 807 F.2d 304, 305 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987); *see also* Mundy v. Palmetto Ford, Inc., No. 92-1041, 1993 U.S. App. LEXIS 19588, at *5 (4th Cir. July 27, 1993) (rejecting retaliatory discharge claim involving male employee who complained of sexual favoritism).

9. In fact, I have been unable to identify any sexual favoritism case in which a coerced sexual relationship was clearly present. Priest v. Rotary, 634 F Supp. 571 (N.D. Cal. 1986), is the best candidate, but the defendant in *Priest*, although liable to the plaintiff for sexual harassment and sexual favoritism, apparently had a consensual sexual relationship with the paramour. *Id.* at 576.

10. In King v Palmer, 598 F Supp. 65 (D.D.C. 1984), *rev'd*, 778 F.2d 878 (D.C. Cir. 1985), there was deposition testimony that the paramour "was intimate with [the supervisor] and was prepared to have sex with him if necessary to get the promotion." *Id.* at 67 The testimony, however, came from the paramour's "former close boy friend." *Id.*

11. *See supra* note 5 (noting cases that involve sexual favoritism claims).

work on sexual favoritism also tends to favor such claims.[12] This Article, however, departs from the scholarly consensus on sexual favoritism. After the next Part describes Title VII sexual harassment law and Title VII sexual favoritism litigation, the Article concludes that Title VII's prohibition of sex discrimination in employment does not include sexual favoritism as such.[13] Then, the Article examines three ways in which victims of sexual favoritism might seek relief through Title VII sexual harassment law and concludes that that body of law occasionally may be useful to them.[14]

II. Preliminary Matters

Sexual harassment law and sexual favoritism law interact in ways that are described at various points in this Article. In addition, certain common themes pervade both bodies of law For these reasons, the Article opens by briefly describing the law of sexual harassment under Title VII. Then, it surveys the extant case law on Title VII sexual favoritism claims.

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12. *See* PLAYER, *supra* note 4, § 5.25(d)(2), at 251 (concluding that sexual favoritism should be actionable discrimination); Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 177 (1991) (arguing that sexual favoritism should be recognized as distinct form of sexual harassment under Title VII); 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, 663-64 (1989) (favoring recognition of Title VII cause of action for sexual favoritism); *cf.* 1 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 41A.36 (1993) (describing law on sexual favoritism and apparently not objecting to it); Robert A. Shearer, *Paramour Claims Under Title VII: Liability for Co-Worker/Employer Sexual Relationships*, 15 EMPLOYEE REL. L.J. 57, 58-65 (1989) (same). *See generally* Colleen R. Courtade, Annotation, *Nature and Burden of Proof in Title VII Action Alleging Favoritism in Promotion or Job Assignment Due to Sexual or Romantic Relationship Between Supervisor and Another*, 86 A.L.R. FED. 230 (1988).

13. By sexual favoritism "as such," I mean sexual favoritism that is not factually linked to sexual harassment and is not part of a sexual harassment claim.

14. The three arguments are that: (1) victims of sexual favoritism have standing to sue on behalf of favored parties who submitted to quid pro quo sexual harassment; (2) sexual favoritism occasionally can help establish an implied quid pro quo sexual harassment claim; and (3) sexual favoritism may constitute, or help establish, work environment sexual harassment. On the distinction between quid pro quo and work environment sexual harassment, see *infra* notes 33-43 and accompanying text.

A. Sexual Harassment Under Title VII

Coincident with increased popular attention to the subject,[15] Title VII sexual harassment claims began to appear during the late 1970s.[16] At first, some courts rejected these claims. Among their reasons was the belief that sexual harassment, while no doubt morally objectionable, is not sex discrimination. According to one district court, for example:

> The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.[17]

One might argue that if a woman suffers a job-related disadvantage because she refused to have sexual relations with a male supervisor, that disadvantage surely had something to do with her gender. The reply is that while this may be true in a particular case, both sexual harassment's perpetrators and its victims can be of either gender. As the district court asserted in *Tomkins v Public Service Electric & Gas Co.*:[18]

> In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.[19]

In other words, sexual harassment is not sex discrimination because gender, while important to any particular harasser, is not the essence of the asserted wrong.

This argument against Title VII sexual harassment liability did not endure for long. Indeed, it was rejected by the courts of appeals in the two

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15. *See* 1 LARSON & LARSON, *supra* note 12, § 41A.21, at 8-155 to -156.

16. *See id.* at 8-155 to -158 (describing early Title VII sexual harassment litigation); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV 328, 329-37 (1988) (same).

17 Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974), *rev'd sub nom.* Barnes v Costle, 561 F.2d 983 (D.C. Cir. 1977).

18. 422 F Supp. 553 (D.N.J. 1976).

19 Tomkins v Public Serv Elec. & Gas Co., 422 F Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

cases quoted above.[20] Title VII's basic liability provision, section 703(a), forbids employment decisions made "because of" the victim's sex.[21] Whatever its meaning,[22] this language almost certainly does not require that the challenged decision be *wholly* motivated by gender.[23] Thus, it is not irrational to say that sexual harassment occurs "because of" the victim's gender. As the United States Court of Appeals for the District of Columbia Circuit stated the issue:

> [A]ppellee has argued that "[the plaintiff] was allegedly denied employment enhancement not because she was a woman, but rather because she decided not to furnish the sexual consideration claimed to have been demanded." We cannot accept this analysis of the situation
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> But for [the plaintiff's] womanhood, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.[24]

"It is no answer," the court added, "to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender."[25] In each case, the employee would be confronted with employer behavior that the employee would not have faced but for his or her gender.[26]

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20. Tomkins v Public Serv Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977); Barnes v Costle, 561 F.2d 983, 990-92 (D.C. Cir. 1977).

21. 42 U.S.C. § 2000e-2(a) (1988).

22. For a discussion of some competing Title VII causation requirements, see *infra* notes 93-110 and accompanying text.

23. *See Barnes*, 561 F.2d at 990-91 (observing that House of Representatives rejected amendment in 1964 that would have added "solely" to "because" in § 703(a), presumably on ground that Congress feared debilitating effect of amendment on Title VII's prohibitions); Willingham v Macon Tel. Publishing Co., 507 F.2d 1084, 1089 (5th Cir. 1975) (same); *see also* 110 CONG. REC. 2728 (1964).

24. *Barnes*, 561 F.2d at 990 (footnotes omitted) (quoting from defendant's brief).

25. *Id.* at 990 n.55.

26. *Id.* Some courts have agreed that Title VII forbids a supervisor's sexual harassment of a subordinate of the same gender. *See* 1 LARSON & LARSON, *supra* note 12, § 41A.35(b). For an argument that this rule is not inconsistent with Title VII's failure to ban discrimination on the basis of homosexuality, see *id.* at 8-183. In addition, Title VII almost certainly forbids

Arthur and Lex Larson assert that by 1980, "most of the early judicial resistance to the concept of harassment as discrimination had melted away "[27] As if to signify the concept's acceptance, the Equal Employment Opportunity Commission (the EEOC) issued its sexual harassment guidelines during that year.[28] Although they do not bind the courts,[29] the guidelines provide a useful framework for describing Title VII sexual harassment law [30] The guidelines begin by making "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" potential candidates for Title VII liability [31] However, such behavior does not violate Title VII unless it is "[u]nwelcome."[32]

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sexual harassment of male employees by their female superiors. *See id.* § 41A.35(a). However, the *Barnes* court suggested that Title VII would not forbid sexual harassment by a bisexual supervisor of either gender who directs his or her attentions to subordinates of both genders because such behavior "would apply to male and female employees alike." *Barnes*, 561 F.2d at 990 n.55. Other courts have agreed. *Cf.* 1 LARSON & LARSON, *supra* note 12, § 41A.31.

27 1 LARSON & LARSON, *supra* note 12, § 41A.22, at 8-158 to -159.

28. *See* 29 C.F.R. § 1604.11 (1993).

29. *See* Meritor Sav Bank v Vinson, 477 U.S. 57, 65 (1986) (noting that while guidelines do not control courts, courts may resort to them for guidance).

30. However, the EEOC guidelines are relatively unhelpful on a question that has preoccupied many courts: an employer's liability for sexual harassment committed by its employees. The guidelines make an employer strictly liable for sexual harassment committed by supervisors, but an employer is held liable for harassment between fellow employees only when it knew or should have known of the harassment and did not take immediate and appropriate corrective action. *See* 29 C.F.R. § 1604.11(c)-(d) (1993). However, in Meritor Savings Bank v Vinson, 477 U.S. 57 (1986), the Supreme Court held that courts should look to common-law agency principles for guidance on the employer liability question. *Id.* at 72. For a discussion of the courts' subsequent mangling of the common law of agency, see Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v Vinson, 44 VAND. L. REV 1229, 1239-52 (1991). Despite their doctrinal impurity, the courts have reached relatively consistent results on the employer liability question: (1) in quid pro quo cases, an employer normally is strictly liable; (2) in cases that involve work environment harassment among fellow employees, an employer generally is liable only when it had actual or constructive knowledge of the harassment; and (3) in cases in which a supervisor engages in work environment harassment, an employer usually is liable only when it had actual or constructive knowledge of the harassment, although some courts impose strict liability in such cases. *Id.* at 1237-38.

31. 29 C.F.R. § 1604.11(a) (1993).

32. *Id.* For an extended discussion of the "unwelcomeness" requirement, see 1 LARSON & LARSON, *supra* note 12, § 41A.32(b)-(e).

Next, the guidelines make the familiar distinction between quid pro quo sexual harassment and work environment sexual harassment. They forbid the former by declaring that the unwelcome sex-related conduct described above violates Title VII "when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[33] Thus, the guidelines clearly include situations in which the harasser expressly links an employee's submission to tangible job consequences.[34] But as the words "explicitly or implicitly" suggest, the quid pro quo need not be express[35] and may be implied from the facts and circumstances.[36] Such implied quid pro quo cases apparently overlap with decisions in the EEOC's second quid pro quo category· those in which employment decisions are based on the victim's submission or refusal to submit.[37] In any category of sexual harassment case, most courts hold that the victim must suffer a tangible job detriment of an economic nature in order to recover.[38]

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33. 29 C.F.R. § 1604.11(a) (1993).

34. For example, a supervisor might tell an employee that she must submit to his advances to retain her job; to avoid being demoted or disciplined; or to get a promotion, a choice assignment, or a training opportunity. *See* 1 LARSON & LARSON, *supra* note 12, § 41A.42, at 8-193.

35. *See* Huitt v Market St. Hotel Corp., 62 Fair Empl. Prac. Cas. (BNA) 538, 541 (D. Kan. 1993).

36. *See infra* notes 171-89 and accompanying text (discussing implied quid pro quo sexual harassment).

37 In cases falling under the EEOC's second quid pro quo category, "the supervisor propositions the employee, but does not issue any express threats or bribes. After the employee rejects him, however, she is fired or demoted." 1 LARSON & LARSON, *supra* note 12, § 41A.42, at 8-193. The overlap between this form of harassment and implied quid pro quo harassment would occur when in addition to the facts just stated, the circumstances surrounding the proposition suggest that accepting it or rejecting it will have employment consequences.

38. *See, e.g.*, Henson v City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (requiring proof that employee's reaction to harassment affected tangible aspects of her compensation, terms, privileges, or conditions of employment); Saxton v. AT&T, 785 F Supp. 760, 765 (N.D. Ill. 1992) (requiring denial of some economic employment benefit), *aff'd on other grounds*, 10 F.3d 526 (7th Cir. 1993); Babcock v. Frank, 783 F Supp. 800, 807 (S.D.N.Y 1992) (requiring economic injury resulting from employer's denial of concrete employment benefit); 1 LARSON & LARSON, *supra* note 12, § 41A.41, at 8-191 (noting that harassment must result in tangible economic consequences). *But see* Karibian v. Columbia Univ., 14 F.3d 773, 778-79 (2d Cir. 1994) (holding that actual economic loss is not necessary in quid pro quo case;

However, neither a quid pro quo nor a tangible job detriment is necessary when the sex-related conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[39] This "work environment" sexual harassment typically involves unwelcome sex-related inquiries, jokes, slurs, propositions, touchings, and other kinds of abuse directed at an employee by either a supervisor or a fellow worker.[40] For Title VII liability to exist, these activities must be sufficiently severe or pervasive to create an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive.[41] However, they need not cause the victim actual, concrete psychological harm.[42] Still, the victim must at least perceive the environment as abusive in order to recover.[43]

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instead, inquiry is merely whether supervisor linked tangible job benefits to victim's rejection or acceptance of sexual advances), *petition for cert. filed*, 62 U.S.L.W 3724 (U.S. Apr. 22, 1994) (No. 93-1674).

39. 29 C.F.R. § 1604.11(a)(3) (1993); *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986) (specifically rejecting claim that tangible economic loss is required in work environment harassment cases); *see also* Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988) (omitting mention of tangible job detriment when stating requirements for successful work environment sexual harassment claim); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987) (same).

40. *See* Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (involving work environment sexual harassment by fellow workers); Bundy v. Jackson, 641 F.2d 934, 939-40, 943-44 (D.C. Cir. 1981) (involving work environment sexual harassment by supervisors). In addition, harassment is actionable when it is based on gender even though it is not sexual. *See Gus Constr.*, 842 F.2d at 1013-14 (holding that calling female employee "Herpes" and urinating into gas tank of another female employee's car both are actionable).

41. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); *see Meritor*, 477 U.S. at 67 (citing *Henson*, 682 F.2d at 904) (holding that actionable sexual harassment must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment). For a discussion of the factors that determine whether a working environment is hostile or abusive, see *infra* notes 206-14 and accompanying text.

By using the term "reasonable person," the *Harris* Court may have resolved the dispute over whether offensiveness and abuse should be tested by a "reasonable person," "reasonable woman," or "reasonable victim" standard. For a discussion of these competing standards, see 1 LARSON & LARSON, *supra* note 12, § 41.A44(d)-(e). The Court did not discuss the issue, however.

42. *See Harris*, 114 S. Ct. at 371.

43. *Id.* at 370-71.

B. *Sexual Favoritism Under Title VII*

After asserting that gender is "incidental to the claim of abuse,"[44] the district court in the 1976 *Tomkins* case developed another argument against Title VII sexual harassment claims. "[T]he pleadings in this case," the court noted, "aver that the supervisor's advances were spurned. Had they been accepted, however, and plaintiff thereby preferred, could coworkers be heard to complain in federal court as well? It is clear that such a claim is simply without the scope of the Act."[45] What supposedly was clear in 1976, however, became muddy soon thereafter. The EEOC's 1980 sexual harassment guidelines conclude with the following statement: "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."[46]

The EEOC's apparent recognition of a Title VII sexual favoritism claim[47] did not bear fruit until the mid-1980s.[48] The first decision clearly recognizing the theory, *King v Palmer*,[49] involved a female nurse who complained that she was denied a promotion in favor of a less qualified female nurse because the other nurse had a sexual relationship with the male

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44. Tomkins v Public Serv Elec. & Gas Co., 422 F Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *see supra* notes 18-19 and accompanying text (quoting *Tomkins*).

45. *Tomkins*, 422 F Supp. at 556.

46. 29 C.F.R. § 1604.11(g) (1993).

47 Actually, the EEOC does not support all Title VII sexual favoritism claims. *See infra* notes 131-35 and accompanying text (discussing EEOC's 1990 Policy Guide on sexual favoritism).

48. Toscano v Nimmo, 570 F Supp. 1197 (D. Del. 1983), typically is identified as the first Title VII sexual favoritism case. *See* Van Tol, *supra* note 12, at 154. *Toscano*, however, is better classified as an implied quid pro quo sexual harassment case in which sexual favoritism played a significant role. *See infra* notes 177-84 and accompanying text (discussing *Toscano*).

49 598 F Supp. 65 (D.D.C. 1984). For another early decision recognizing the sexual favoritism theory, see Priest v Rotary, 634 F Supp. 571, 581-82 (N.D. Cal. 1986). For an early state case recognizing the theory, see Kersul v Skulls Angels Inc., 495 N.Y.S.2d 886, 888-89 (Sup. Ct. 1985).

doctor who promoted her.[50] For two reasons, the United States District Court for the District of Columbia quickly concluded that the plaintiff's claim was cognizable under Title VII. First, the EEOC's guidelines supported it.[51] Second, when sexual favoritism occurs, sex is "for no legitimate reason a substantial factor in the discrimination."[52] Due to the technicalities of Title VII's "disparate treatment" method of proof,[53] however, the district court denied the plaintiff's claim.[54] Even though the plaintiff made out a prima facie case and even though the employer's justification for its decision was clearly pretextual, she failed to meet her burden of persuasion because there was no direct evidence of a sexual relationship between the doctor and his alleged paramour.[55] Because it completely disagreed with the district court on this point, the court of appeals reversed.[56] In the process, though,

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50. King v. Palmer, 598 F Supp. 65, 66 (D.D.C. 1984), *rev'd*, 778 F.2d 878 (D.C. Cir. 1985).

51. *Id.* at 67

52. *Id.* at 66-67 (quoting Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981)).

53. For a discussion of the disparate treatment method of proof, see BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1291-1324 (2d ed. 1983). *But see* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746-49 (1993) (altering framework of proof).

54. *King*, 598 F Supp. at 68.

55. *Id.* At the time that *King v. Palmer* was decided, disparate treatment cases usually proceeded as follows: (1) the plaintiff had to prove a prima facie case or else lose his suit; (2) if the plaintiff was successful, then the employer had to articulate a legitimate, nondiscriminatory reason for the challenged decision or suffer the same fate; and (3) if the employer met this burden, then the plaintiff had to show that the proffered justification was a pretext for discrimination or the defendant would prevail. *See* SCHLEI & GROSSMAN, *supra* note 53, at 1298-1300, 1313-14.

However, the version of the disparate treatment method applied by the district court in *King* differed somewhat from this model. According to the district court, the plaintiff was not automatically entitled to judgment once she established a prima facie case and the defendant failed to produce evidence that would allow a fact finder rationally to conclude that the defendant acted from a nondiscriminatory motive. *King*, 598 F Supp. at 67 Instead, "[t]he plaintiff retains the burden of persuasion, and once the Court has heard the evidence on both sides, it must decide the ultimate question of discrimination based on all the evidence with no presumptions in favor of either side." *Id.* Although the matter is of no concern here, the district court's position seems to resemble the position recently adopted by the Supreme Court. *See Hicks*, 113 S. Ct. at 2747-49.

56. King v Palmer, 778 F.2d 878, 879 (D.C. Cir. 1985). First, the court of appeals rejected the district court's apparent requirement that the plaintiff produce proof of an "explicit" sexual relationship between supervisor and paramour. *See id.* at 882. More

the court of appeals expressed its agreement with the district court on the issue of concern here: the existence of a Title VII cause of action for sexual favoritism.[57]

However, *King v Palmer* quickly was countered by the Second Circuit's 1986 decision in *DeCintio v Westchester County Medical Center* [58] In *DeCintio*, seven male respiratory therapists complained that they had been unfairly disqualified from promotion to a higher position so that the administrator making the promotion could elevate a woman with whom he was having a consensual romantic relationship.[59] In rejecting their Title VII claim, the court began by noting that Title VII forbids discrimination based on gender, but not discrimination based on sexual activity irrespective of gender.[60] In all the cases in which Title VII sex discrimination liability has been found, it continued, "there existed a causal connection between the gender of the individual or class [claiming relief] and the resultant preference or disparity "[61] Here, however, the plaintiffs "were not prejudiced because of their status as males; rather, they were discriminated against because [the administrator] preferred his paramour. [The plaintiffs] faced exactly the same predicament as that faced by any woman applicant for the promotion."[62] Then the court raised a practical concern: Allowing Title VII recovery for sexual favoritism "would involve

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importantly, the court of appeals held that "a plaintiff who establishes a *prima facie* case of intentional discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination." *Id.* at 881. This is consistent with the usual model of the disparate treatment method. *See supra* note 55 (discussing disparate treatment method).

57 "We agree with the District Court's conclusion and its rationale: that unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination.'" *King*, 778 F.2d at 880 (quoting *King*, 598 F Supp. at 66-67 (quoting Bundy v Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981))). Moreover, on appeal both parties agreed that the plaintiff's allegation of sexual favoritism presented "a cognizable cause of action under statutes prohibiting sex discrimination in employment." *Id.*

58. 807 F.2d 304 (2d Cir. 1986).

59. DeCintio v Westchester County Medical Ctr., 807 F.2d 304, 305 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987).

60. *Id.* at 306.

61. *Id.* at 307

62. *Id.* at 308.

the EEOC and the federal courts in the policing of intimate relationships."[63] The Second Circuit also tried to qualify the EEOC guidelines' endorsement of sexual favoritism claims by limiting the guidelines' application to situations in which the favoritism resulted from a coerced sexual relationship.[64] However, it did not specifically address *King*'s argument that gender is a substantial factor in sexual favoritism.[65]

Since the *King-DeCintio* face-off,[66] almost all courts considering the sexual favoritism issue have followed *DeCintio* by rejecting the idea that Title VII forbids sexual favoritism as such.[67] Like the *DeCintio* court, these courts have held that discrimination on the basis of a consensual romantic or sexual relationship does not constitute sex discrimination under Title VII.[68] And in the lone apparent exception, the plaintiff failed to

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63. *Id.*

64. *Id.* at 307-08. The court attempted to limit the EEOC guidelines' endorsement of sexual favoritism claims by fastening on the word "submission" in the guidelines. *Id.*, *see* 29 C.F.R. § 1604.11(g) (1993). For an argument that in such cases, the victim of sexual favoritism should have standing to sue on behalf of the victim of sexual harassment, see *infra* notes 131-70 and accompanying text.

65. *See supra* note 52 and accompanying text (discussing argument in *King* that gender is substantial factor in sexual favoritism). The *DeCintio* court did try to distinguish *King*, however. In an apparent reference to the parties' agreement on the subject in *King*, *see supra* note 57, the *DeCintio* court claimed that the sexual favoritism issue was not presented on appeal in *King*. *DeCintio*, 807 F.2d at 307 The Second Circuit also noted that the District of Columbia Circuit, while denying a rehearing en banc in *King*, emphasized that the sexual favoritism issue had not been presented on appeal. *Id.*, *see* King v Palmer, 778 F.2d 878, 883 (D.C. Cir. 1986) (denying rehearing en banc). Both arguments, however, ignore the *King* court's enthusiastic endorsement of the sexual favoritism theory *See id.* at 880 (D.C. Cir. 1985); *see also supra* note 57

66. For further discussion of *King* and *DeCintio*, see Manemann, *supra* note 12, at 625-34.

67 By sexual favoritism "as such," I mean sexual favoritism that is not factually linked to sexual harassment and is not part of a sexual harassment claim. Sexual favoritism's role in sexual harassment litigation will comprise much of this Article. *See generally infra* notes 131-225 and accompanying text.

68. *See* Mundy v Palmetto Ford, Inc., No. 92-1041, 1993 U.S. App. LEXIS 19588, at *5 (4th Cir. July 27, 1993) (citing *DeCintio*) (holding that for Title VII purposes, no justification exists for defining "sex" so broadly as to include ongoing, voluntary, romantic engagement); Piech v Arthur Andersen & Co., 841 F Supp. 825, 829 (N.D. Ill. 1994) (holding that preference for paramour is not discrimination on basis of gender); Ayers v. AT&T, 826 F Supp. 443, 445 (S.D. Fla. 1993) (holding that favoring paramour does not

recover.[69] Some of the courts that hold that sexual favoritism is not sex discrimination provide little justification for that conclusion.[70] Among the courts that do attempt to justify their holdings, the reasons vary To one court, favoring a paramour does not violate Title VII because it "is not based

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violate Title VII); Parrish v English Am. Tailoring Co., 56 Fair Empl. Prac. Cas. (BNA) 567, 569 (D. Md. 1988) (citing Autry v North Carolina Dep't of Human Resources, 820 F.2d 1384 (4th Cir. 1987)) (holding that Title VII does not forbid discrimination based upon sexual affiliations); Miller v Aluminum Co. of Am., 679 F Supp. 495, 501 (W.D. Pa.) (citing *DeCintio*) (holding that preferential treatment on basis of consensual romantic relationship between supervisor and employee is not gender-based discrimination), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

Several state courts interpreting statutes resembling Title VII have reached the same conclusion. *See* Polk v Pollard, 539 So. 2d 675, 678 (La. Ct. App. 1989) (holding that victim of sexual favoritism did not suffer discrimination on basis of her gender); Hickman v W-S Equip. Co., 438 N.W.2d 872, 874 (Mich. Ct. App. 1989) (holding that sexual favoritism is unrelated to victim's gender and therefore is not actionable under state law forbidding sex discrimination in employment); Kryeski v Schott Glass Technologies, Inc., 626 A.2d 595, 598 (Pa. Super. Ct. 1993) (holding that discrimination resulting only from sexual favoritism toward coworker is not gender discrimination), *appeal denied*, 639 A.2d 29 (Pa. 1994); *cf.* Erickson v Marsh & McLennan Co., 569 A.2d 793, 803 (N.J. 1990) (holding that on facts of case, at least, male employee's sexual favoritism claim fails because he would have suffered same fate were he female); Nicolo v Citibank N.Y State, 554 N.Y.S.2d 795, 799 (Sup. Ct. 1990) (citing Priest v Rotary, 634 F Supp. 571 (N.D. Cal. 1986)) (holding that although sexual favoritism could create liability for sexual harassment, no liability attaches for isolated act of sexual favoritism involving one employee).

However, favoritism accompanying a *nonconsensual* sexual relationship between supervisor and paramour may be actionable. *See Miller*, 679 F Supp. at 501 (asserting only that preference resulting from *consensual* relationship is not sex discrimination); *Erickson*, 569 A.2d at 803 (citing *DeCintio*) (noting that unsuccessful sexual favoritism plaintiff did not allege that relationship between supervisor and paramour was coercive); *see also supra* note 64 and accompanying text (noting Second Circuit's attempt to limit EEOC guidelines' endorsement of sexual favoritism claims to cases of nonconsensual relationships). Most likely, however, the claim would not be for sexual favoritism; rather, the victim of such favoritism might have standing to sue for the quid pro quo harassment inflicted upon the paramour. *See infra* notes 131-70 and accompanying text (discussing standing issue).

69. In Candelore v Clark County Sanitation Dist., 975 F.2d 588 (9th Cir. 1992), the court quoted the EEOC guidelines' sexual favoritism provision, *see* 29 C.F.R. § 1604.11(g) (1993), but held for the defendant because the plaintiff never identified the employment benefits that she was denied, and that less qualified co-employees received, because they submitted to sexual advances and she did not. *Candelore*, 975 F.2d at 590.

70. *See* Mundy v Palmetto Ford, Inc., No. 92-1041, 1993 U.S. App. LEXIS 19588, at *5 (4th Cir. July 27, 1993); Parrish v English Am. Tailoring Co., 56 Fair Empl. Prac. Cas. (BNA) 567, 569 (D. Md. 1988).

on sexism (whether gender or activity), but is rather more akin to nepotism."[71] But the most common argument is *DeCintio's* contention that because an employee of the opposite sex could have suffered the same fate, the plaintiff was not disadvantaged because of his or her gender.[72]

According to several courts, however, sexual favoritism can constitute, or contribute to, actionable sexual harassment.[73] For example, the United States Court of Appeals for the Third Circuit has held that a consensual romantic relationship between a supervisor and a subordinate can create a workplace environment that violates Title VII.[74] In so holding, the court observed that "[t]he theoretical basis for the kind of environmental claim alleged here is that the sexual relationship impresses the workplace with such a cast that the plaintiff is made to feel that she is judged only by her sexuality "[75] Somewhat more precisely, the "sexually charged" atmosphere created by a consensual romantic relationship might be discriminatory "if sexual discourse displaced standard business procedure in

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71. Ayers v AT&T, 826 F Supp. 443, 445 (S.D. Fla. 1993).

72. *DeCintio*, 807 F.2d at 308; *see* Miller v Aluminum Co. of Am., 679 F Supp. 495, 501 (W.D. Pa.), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988); *see also* Piech v Arthur Andersen & Co., 841 F Supp. 825, 829 (N.D. Ill. 1994) (noting that plaintiff is in same position as any other male or female employee who did not have sexual relationship with decision maker). For some state cases to the same effect, see Polk v Pollard, 539 So. 2d 675, 677 (La. Ct. App. 1989); Hickman v W-S Equip. Co., 438 N.W.2d 872, 874 (Mich. Ct. App. 1989); Erickson v Marsh & McLennan Co., 569 A.2d 793, 803 (N.J. 1990).

73. Some of the courts that deny claims for sexual favoritism as such also hold or suggest that sexual favoritism is useful in establishing a sexual harassment claim. *See* Piech v Arthur Andersen & Co., 841 F Supp. 825, 829-30 (N.D. Ill. 1994) (noting that plaintiff's sexual favoritism allegations fit definition of quid pro quo harassment); *cf.* Miller v Aluminum Co. of Am., 679 F Supp. 495, 501-02 (W.D. Pa.) (noting that plaintiff's work environment harassment claim contained some apparent instances of favoritism, yet not objecting to their inclusion despite denying favoritism claim), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

74. *See* Drinkwater v Union Carbide Corp., 904 F.2d 853, 859-62 (3d Cir. 1990) (recognizing that sexual favoritism may contribute to work environment sexual harassment claim, but ultimately holding for defendant). For further discussion of *Drinkwater*, see *infra* notes 215-23 and accompanying text. Also holding that sexual favoritism may constitute, or contribute to, a work environment sexual harassment claim are Candelore v Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (finding for defendant) and Broderick v Ruder, 685 F Supp. 1269, 1277-78 (D.D.C. 1988) (finding for plaintiff). For further discussion and criticism of *Broderick*, see *infra* notes 192-214 and accompanying text.

75. *Drinkwater*, 904 F.2d at 861 n.15.

a way that prevented plaintiff from working in an environment in which she could be evaluated on grounds other than her sexuality "[76] Sexual favoritism also might contribute to, or constitute evidence for, a successful implied quid pro quo sexual harassment claim.[77] This seems most likely to happen when the favoritism and the supervisor-paramour relationship, along with other evidence, suggest a link between submission and job advancement.[78] For example, suppose that a supervisor propositions his subordinate without ever mentioning a quid pro quo, but does so after having favored other women who submitted, or having punished still other women who refused, or both. If the subordinate later suffers a tangible job detriment, the evidence of sexual favoritism might contribute to a successful implied quid pro quo sexual harassment claim.

III. Should Sexual Favoritism Be Actionable Under Title VII?

As we have just seen, most courts do not recognize Title VII sexual favoritism claims outside the sexual harassment context. In the process, they generally deny that sexual favoritism is sex discrimination for Title VII purposes. In an effort to determine whether this result is correct, this Part examines two legal arguments for the proposition that sexual favoritism *is* sex discrimination under Title VII. The first is that Title VII's prohibition of "sex" discrimination includes discrimination based on sexual activity The second is that sexual favoritism is gender-based discrimination. After concluding that neither argument is persuasive and that Title VII does not prohibit sexual favoritism as such, the Part bolsters these conclusions by adducing some ethical and policy reasons for removing sexual favoritism from Title VII's reach.

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76. *Id.* at 862.

77 *See* Dirksen v. City of Springfield, 842 F Supp. 1117, 1121-22 (C.D. Ill. 1994); *Piech*, 841 F. Supp. at 829-30; Toscano v Nimmo, 570 F Supp. 1197, 1199 (D. Del. 1983). For further discussion of the use of evidence of sexual favoritism in an implied quid pro quo harassment claim, see *infra* notes 171-89 and accompanying text.

78. "[Plaintiff's] allegations regarding the favored female coworker who received a promotion while involved romantically with a decision-maker may be considered simply circumstantial evidence that her employer conditioned employment benefits on the granting of sexual favors." *Piech*, 841 F Supp. at 830; *see Toscano*, 570 F Supp. at 1199. For further discussion of *Toscano*, see *infra* notes 177-84 and accompanying text.

A. Does "Sex" Include Sexual Activity?

Title VII forbids employment discrimination on the basis of "sex."[79] The most direct route to the conclusion that sexual favoritism violates Title VII is to assert that sex discrimination includes discrimination on the basis of sexual activity In the typical sexual favoritism case, a supervisor favors the paramour for (among other things) engaging in sexual relations with him. Here, one can argue, the employer violates Title VII because a proscribed criterion—sexual activity—motivates both the paramour's advancement and other employees' failure to advance.

Commentators sometimes suggest that because the relevant legislative history is so scanty,[80] it is unclear whether Congress meant to limit "sex" to gender when it amended Title VII to include sex discrimination.[81] Whatever its other deficiencies, however, the legislative history is reasonably clear on this particular subject. So far as can be determined, it is devoid of meaningful references to sexuality, sexual activity, or sexual

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79. 42 U.S.C. §§ 2000e-2(a)-(d) (1988).

80. After a relatively brief debate, the House of Representatives amended Title VII to include sex discrimination on February 8, 1964. *See* 110 CONG. REC. 2577-84 (1964). The House passed the 1964 Civil Rights Act on February 10, *id.* at 2804, and the Senate on June 19. *Id.* at 14,511. The amendment is widely viewed as a last-ditch effort to derail the full act, *see* Manemann, *supra* note 12, at 638 & n.180, but it passed the House by a vote of 168 to 133. 110 CONG. REC. 2584 (1964). I have been unable to find any Senate discussion of the sex-discrimination ban prior to Senate passage of the act. Nor, apparently, has at least one other observer. *See* N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV 365, 385 (1989) (noting that sex amendment went without challenge and virtually without comment even though bill went through several months of Senate debate).

81. For example, Mack Player notes:

> Congress neither defined nor made clear in the legislative history of Title VII what it meant by the term "sex." Lexically, the term has two acceptable meanings: (1) "Division of organisms distinguished respectively as male or female," in a word "gender," or (2) "The sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction .," simply stated, "sexuality "

PLAYER, *supra* note 4, § 5.25(a), at 239 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 1062 (1976)). Player then asserts that the limitation of sex to gender is a "narrow construction" that the courts have merely "divined." *Id.*, *see also* Manemann, *supra* note 12, at 638-39 (noting limited guidance from Title VII's legislative history on question of whether "sex" is limited to gender).

orientation.[82] Instead, it stresses gender at every turn. The amendment's sponsor opened his remarks by stating that its aim was to prevent discrimination against women.[83] A female supporter claimed that "a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister."[84] Another referred to the time of the debate as "ladies' afternoon."[85] Still another asserted that "[i]n this amendment we seek equal opportunity in employment for women. No more—no less."[86] Just before the vote, a male supporter of the amendment said that its aim was "to protect the employment rights of all women."[87] Foes of the amendment were no less unanimous in the conclusion that its concern was gender.[88]

To be sure, the legislative history's preoccupation with gender does not logically entail the rejection of sexuality as an additional forbidden criterion. Although nothing in the history supports that reading of Title VII, nothing specifically rejects it either. The courts, however, have declined to exploit this possibility While denying Title VII claims by homosexuals, transsexuals, and those deemed effeminate, the courts have routinely asserted that Title VII only bans gender-based discrimination.[89] As some of these

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82. *See* 110 CONG. REC. 2577-84 (1964); *cf.* Ulane v Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (noting no mention of homosexuality, transvestitism, or transsexuality in legislative history), *cert. denied*, 471 U.S. 1017 (1985).

83. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith). Representative Smith almost certainly did not offer the amendment because he agreed with its substance. Although he said that "I am serious about this thing," Representative Smith's main argument for the amendment was a letter from a woman who complained about the statistical imbalance between men and women and its implications for each woman's opportunity to obtain a husband. *Id.* The usual explanation for Smith's offering the amendment is his expectation that its passage would derail passage of the full act. *See* Manemann, *supra* note 12, at 638 & n.180.

84. 110 CONG. REC. 2580 (statement of Rep. Griffiths).

85. *Id.* at 2582 (statement of Rep. May); *see also id.* at 2581 (statement of Rep. Green) (referring to proceedings as "women's afternoon").

86. *Id.* at 2583 (statement of Rep. Kelly).

87 *Id.* at 2584 (statement of Rep. Gathings).

88. *See, e.g., id.* at 2577-78 (statement of Rep. Celler); *id.* at 2581-82 (statement of Rep. Green); *id.* at 2584 (statement of Rep. Roosevelt).

89. *See, e.g.*, Ulane v Eastern Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984) (denying Title VII discrimination claim based on transsexuality), *cert. denied*, 471 U.S. 1017 (1985); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (same); DeSantis

courts note, moreover, the 1970s and 1980s witnessed several unsuccessful attempts to amend Title VII to ban discrimination on the basis of affectional or sexual orientation.[90] Although Congress's failure to act on these bills does not speak directly to the sexual favoritism issue, it does suggest a general congressional disposition to limit "sex" to gender in Title VII.

B. Is Sexual Favoritism Gender-Based Discrimination?

Even if "sex" means gender for Title VII purposes, sexual favoritism might qualify as gender-based discrimination. The rationale for this position is that like sexual harassment,[91] sexual favoritism almost inevitably involves gender. Indeed, a paramour's gender normally is critical to the person who discriminates in her favor. For example, suppose that a heterosexual supervisor promotes his paramour over several other deserving subordinates because she delights him sexually Here, the sexual attraction and satisfaction that motivate the discrimination are inseparable from the paramour's gender. Presumably, the supervisor would not have reacted in the same way to a male subordinate.[92]

1 The But-For Standard

The preceding argument focuses on the employer's (or supervisor's) motives for engaging in sexual favoritism. Some courts that reject sexual favoritism claims, however, focus less on those motives than on the parties

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v Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (denying Title VII discrimination claim based on homosexuality); Smith v Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (denying Title VII discrimination claim based on effeminacy); *see also* PLAYER, *supra* note 4, § 5.25(a) (concluding that in courts' view, Title VII's prohibition of sex discrimination refers only to gender and not to sexuality, sexual practices, or sexual preferences); SCHLEI & GROSSMAN, *supra* note 53, at 430 (asserting that usual rationale of courts is that "sex" equals gender for Title VII purposes).

90. *See Ulane*, 742 F.2d at 1085-86; *Sommers*, 667 F.2d at 750; *see also* Manemann, *supra* note 12, at 642 & n.210.

91. *See supra* notes 23-26 and accompanying text (noting role of gender in sexual harassment claims).

92. *See* PLAYER, *supra* note 4, § 5.25(d)(2), at 251 & n.68 (suggesting that sexual favoritism can be regarded as actionable "sex-plus" discrimination: discrimination on basis of gender plus some other factor such as sex appeal or willingness to engage in sexual relationship). For a discussion of sex-plus discrimination, see SCHLEI & GROSSMAN, *supra* note 53, at 403-17

potentially affected by the employer's actions. As we have seen, such courts typically say that sexual favoritism cannot be sex discrimination because its victims can be either male or female.[93] As we also have seen, a similar argument proved unpersuasive in the sexual harassment context.[94] Even though both sexes can suffer sexual harassment, in any particular case the victim's gender would be a but-for cause of the harassment she suffered.[95] In sexual favoritism cases, however, the employer focuses on the *paramour's* gender rather than victim's gender. Until the late 1980s, this difference was sufficient to distinguish sexual favoritism claims from sexual harassment claims and to put the former outside the reach of Title VII.

Title VII's basic liability provision makes it an unlawful employment practice for an employer to discriminate against any individual "because of sex."[96] Before 1989,[97] the Supreme Court usually read this language as imposing a but-for causation test.[98] As the Court articulated this test, a Title VII sex discrimination recovery requires "treatment of a person in a manner which but for that person's sex would be different."[99] To elaborate:

> 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 had been

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93. *See supra* notes 62, 72 and accompanying text (noting argument that sexual favoritism plaintiff suffers no discrimination because both sexes are equally disadvantaged).

94. *See supra* notes 23-26 and accompanying text (noting role of gender in sexual harassment claims).

95. *See* Barnes v Costle, 561 F.2d 983, 990 & n.55 (D.C. Cir. 1977).

96. 42 U.S.C. § 2000e-2(a) (1988).

97 As we will see shortly, Price Waterhouse v Hopkins, 490 U.S. 228 (1989), eliminated the but-for standard in favor of a standard that focuses on the defendant's motive, and a 1991 amendment to Title VII solidified the change. *See infra* notes 103-10 and accompanying text (discussing *Hopkins*).

98. *See, e.g.*, Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v Norris, 463 U.S. 1073, 1081 (1983) (opinion of Marshall, J.); Newport News Shipbuilding & Dry Dock Co. v EEOC, 462 U.S. 669, 683 (1983); City of Los Angeles Dep't of Water & Power v Manhart, 435 U.S. 702, 711 (1978). The lower federal courts, however, did not always agree that a but-for test applied. *See Hopkins*, 490 U.S. at 238 n.2.

99 *Manhart*, 435 U.S. at 711 (quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV L. REV 1109, 1170 (1971)).

> absent, the event nevertheless would have transpired in the same way [100]

Here, the relevant "event" is the employment decision challenged by a victim of sexual favoritism, and the relevant "factor" is the victim's gender. Because the event normally would occur even if the factor were absent—even if the claimant's gender were different—there is no but-for causation between factor and event and thus no liability under Title VII.

2. The "Motivating Factor" Test

In the Civil Rights Act of 1991, Congress amended Title VII to include a new section 703(m), which states: "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."[101] As the 1991 Act's legislative history makes clear,[102] section 703(m) was intended to overrule one portion of the Supreme Court's 1989 decision in *Price Waterhouse v Hopkins*.[103] *Hopkins* was a "mixed motives" case in which the female claimant's failure to make partner at an accounting firm was attributable both to gender discrimination (sexual stereotyping) and to a neutral factor (her abrasiveness).[104] Early in his opinion, Justice Brennan, writing for a four-

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100. *Hopkins*, 490 U.S. at 240. *Hopkins*, however, rejected the but-for test that it articulated so well. *See infra* notes 105-06 and accompanying text (noting *Hopkins* Court's rejection of but-for standard).

101. 42 U.S.C. § 2000e-2(m) (Supp. III 1991). However, when an employer demonstrates that it would have taken the same action even without the discrimination, the court cannot award damages or issue an order requiring the plaintiff's admission, reinstatement, hiring, promotion, or payment. *Id.* § 2000e-5(g)(2)(B)(ii).

102. *See generally* H.R. REP NO. 40(I), 102d Cong., 1st Sess. 45-49 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583-87 [hereinafter HOUSE REPORT I]; H.R. REP NO. 40(II), 102d Cong., 1st Sess. 2-3, 16-19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695, 709-12 [hereinafter HOUSE REPORT II].

103. 490 U.S. 228 (1989).

104. *See* Price Waterhouse v Hopkins, 490 U.S. 228, 234-36 (1989) (opinion of Brennan, J.). The gist of the sexual stereotyping claim was that Hopkins suffered discrimination because she failed to act in a stereotypically "feminine" fashion. *Id.* at 235. The portion of the Court's opinion treating sexual stereotyping as actionable sex discrimination, *see id.* at 250-52, was unaffected by § 703(m). *See* HOUSE REPORT I, *supra* note 102, at 45 n.39, *reprinted in* 1991 U.S.C.C.A.N. at 583 n.39.

Justice plurality, rejected a but-for causation standard and asserted instead that discrimination is "because of" sex when the employer relies upon sex-based considerations in making the challenged decision.[105] Under a but-for test, the plaintiff presumably could not have recovered if she would have been rejected in any event because of her abrasiveness. The plurality's new standard seemed to remove this obstacle to recovery But soon thereafter the plurality reversed course and held that in order to preserve employers' freedom of choice, "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person."[106] It was this last aspect of *Hopkins* that Congress meant to overrule by enacting section 703(m).[107]

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105. *Hopkins*, 490 U.S. at 240-42 (opinion of Brennan, J.). In the plurality's view, apparently, the "because of" test would be satisfied if gender played *any* role in the challenged decision. *See id.* at 240-41. As the plurality later elaborated:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. at 250; *see id.* at 240 (interpreting Title VII to mean that gender must be irrelevant to employment decisions).

It is unclear what causation standard Justice White's concurrence adopted. *See id.* at 259 (White, J., concurring) (finding no need to discuss whether adopted standard is but-for causation in another guise). Justice O'Connor's concurring opinion, however, did adopt a but-for test, *see id.* at 262-63 (O'Connor, J., concurring), and Justice Kennedy's dissent apparently did the same. *See id.* at 282-84 (Kennedy, J., dissenting). As if to underline *Hopkins*'s uncertainty on the causation question, the Court enunciated a but-for standard under Title VII as late as 1991. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

106. *Hopkins*, 490 U.S. at 242 (opinion of Brennan, J.); *see id.* at 252-53 (requiring that employer prove by preponderance of evidence that it would have come to same decision in absence of discrimination). Justice White, at least, joined the four-Justice plurality on this point. *See id.* at 259-60 (White, J., concurring) (asserting that once unlawful motive is shown to be substantial factor in decision, burden then shifts to employer to demonstrate by preponderance of evidence that it would have reached same decision in absence of wrongful motive). Because the court of appeals had held that Price Waterhouse must make this showing by clear and convincing evidence, the Supreme Court remanded the case for further proceedings consistent with its opinion. *Id.* at 258 (opinion of Brennan, J.). On remand, Hopkins eventually triumphed. *See* Hopkins v Price Waterhouse, 737 F Supp. 1202, 1207 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

107 As a House Report stated, the amendment

> overturns one aspect of the Supreme Court's decision in *Price Waterhouse v. Hopkins* ., by adding a new subsection to Title VII. It provides that an unlawful employment practice is established when a complaining party

For present purposes, section 703(m)'s most important implication is that it appears to permit Title VII sexual favoritism claims. As I conceded earlier, gender is a "motivating factor" in the typical sexual favoritism case.[108] Section 703(m) forbids employment practices motivated by gender.[109] If read literally, therefore, section 703(m) appears to make sexual favoritism unlawful under Title VII.[110] Moreover, nothing in the section's legislative history suggests that Congress intended to override *Hopkins*'s shift from a but-for standard (which would block paramour claims) to the view that discrimination exists anytime sex-based consider-

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> demonstrates that sex, race, color, religion, or national origin was a contributing factor for an employment practice, even though other factors also contributed to such practice.

HOUSE REPORT II, *supra* note 102, at 16-17, *reprinted in* 1991 U.S.C.C.A.N. at 709-10 (citation omitted); *see* HOUSE REPORT I, *supra* note 102, at 48, *reprinted in* 1991 U.S.C.C.A.N. at 586. The House Report elaborated:

> The Court's holding in *Price Waterhouse* severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason.
>
> If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.
>
> In providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability.

HOUSE REPORT II, *supra* note 102, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711.

108. *See supra* notes 91-92 and accompanying text.

109. *See* 42 U.S.C. § 2000e-2(m) (Supp. III 1991).

110. Some language in the legislative history might support this reading of § 703(m). *See* HOUSE REPORT II, *supra* note 102, at 2, *reprinted in* 1991 U.S.C.C.A.N. at 695 ("[A]ny reliance on prejudice in making employment decisions is illegal."); *id.* at 17, *reprinted in* 1991 U.S.C.C.A.N. at 710 ("When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions.").

ations motivate an employer (which presumably allows paramour claims). Indeed, section 703(m)'s "motivating factor" language strongly suggests that Congress endorsed this particular aspect of *Hopkins*.

3. The Language of Section 703(a)

Despite its apparent implications for sexual favoritism claims, the Civil Rights Act of 1991 did not touch Title VII's basic liability provision, section 703(a). That section provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin.[111]

The section clearly requires that for an unlawful employment practice to exist, the victim of discrimination must have suffered such discrimination because of *his or her own* race, color, religion, sex, or national origin. In sexual favoritism cases, however, the victim's gender typically is irrelevant. Instead, the asserted sex discrimination in such cases involves the *paramour's* gender. The analysis is the same even if, as is likely, section 703(a)'s "because of" language no longer imposes a but-for causation requirement.[112] Suppose that "because of sex" simply means "motivated to any degree by sex." Even so, sexual favoritism normally is motivated by the paramour's gender, not the victim's. If Paul (who is heterosexual) promotes Cindy over Bess (or Bob) because Cindy is his lover, it is Cindy's gender that motivates Paul, not Bess's or Bob's.[113]

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111. 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added); *see id.* § 2000e-2(a)(2), (b)-(c) (containing similar structure and language).

112. *See supra* notes 101-10 and accompanying text (noting rejection of but-for test in favor of motivating factor test).

113. Conceivably, however, Bob's gender *would* help explain his plight. As Mack Player has argued:

> When a female employee is promoted over a male employee because she is having a sexual affair with the supervisor, this should constitute sex discrimination against the rejected male employee. [H]e was denied the employment opportunity because he is a male, and the female was given the job because of her gender.

Sections 703(a) and 703(m) thus seem to have different implications for sexual favoritism claims. But the latter section's opening qualifier—"[e]xcept as otherwise provided in this subchapter"[114]—makes the conflict easy to resolve. Because section 703(a) clearly speaks to the "paramour" situation, section 703(m)'s qualifier plainly allows section 703(a) to control that situation. This conclusion is reinforced by the legislative history of section 703(m), which is almost entirely preoccupied with *Hopkins* and which does not mention sexual favoritism claims.

PLAYER, *supra* note 4, § 5.25(d)(2), at 251. In other words, if Paul gave a truthful account of his reasons for not promoting Bob, *see supra* note 105, Bob's gender would have been one of those reasons. In some cases, however, gender may have had nothing to do with Paul's decision not to promote Bob. For example, Paul may have been so enamored of Cindy that he could not seriously consider anyone else for the promotion, or he may have been unaware of Bob's existence.

Based on Player's reasoning, moreover, it is difficult to see how Paul was motivated by gender when he refused to promote Bess. The difficulty arises from Paul's sexual preference for women. Given this preference, Paul apparently would have to give some reason other than Bess's gender if he responded truthfully to a query about his reasons for preferring Cindy over Bess. If this assertion is correct, and if Player is correct in his argument that people like Bob *have* suffered sex discrimination, then we are left with the anomalous result that Bob could recover for Paul's sexual favoritism, but Bess could not. This would be true even though Bess suffered the same injury as Bob.

In any event, Player had another argument. "[W]hen one female is promoted over another female because of sexual willingness, this is an act of discrimination. If females must meet such conditions not imposed on male applicants, then this selection process necessarily proceeded along gender specific grounds that violate Title VII." PLAYER, *supra* note 4, § 5.25(d)(2), at 251. However, this situation appears to involve express or implied quid pro quo sexual harassment, which obviously is actionable under Title VII. *See supra* notes 33-38, 77-78 and accompanying text (discussing sexual favoritism's role in quid pro quo harassment suits); *see also infra* notes 171-89 and accompanying text (same). In addition, this situation excludes the scenario depicted in the previous paragraph. Here, the employer has set up a two-track system in which men are judged meritocratically, while women must engage in sexual activity to advance. In the previous scenario, however, the employer had a two-track system in which women must submit to advance, but (due to Paul's heterosexuality) men have little chance of advancement. Thus, Player's second argument does not resolve the problem that Bob could recover but Bess could not.

114. 42 U.S.C. § 2000e-2(m) (Supp. III 1991).

C. *Sexual Favoritism and Title VII's Forbidden Grounds for Discrimination*

In the previous subpart, Title VII's language served as the main reason for denying that sexual favoritism constitutes actionable sex discrimination. For some readers, this plainest of plain-meaning arguments should carry the day against Title VII sexual favoritism claims. For others, however, it may not suffice. People in the latter group are apt to believe that eliminating workplace sexual favoritism is sufficiently important to justify circumventing Title VII's language. This subpart tries to defuse that argument for a Title VII sexual favoritism claim by maintaining that sexual favoritism is morally less objectionable than the forms of discrimination that Title VII has been held to forbid.[115] Underlying the argument in this subpart is the assumption that the law cannot eliminate all forms of

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115. If this conclusion is correct, it is difficult to accept Joan Van Tol's apparently unqualified assertion that "[s]exual favoritism is sexual harassment." Van Tol, *supra* note 12, at 181. This is true, she elaborates, even when the favoritism arises from a consensual sexual relationship:

> When co-workers are damaged by these [consensual] relationships, the message they receive is that the only way to advance in the workplace is to "use" or "surrender" one's sexuality This is the same message that victims of direct sexual harassment receive. This message is just as offensive when it is communicated to a worker who is not the direct recipient of the harassment; it should therefore be prohibited by Title VII regardless of the nature of the underlying relationship.

Id. at 178-79 (footnote omitted). "By imposing a sexual standard to measure employees' performance and worth," Van Tol concludes, "the employer tells employees that 'their value is not in their job performance but in their use as sexual objects.'" *Id.* at 181 (quoting *Women in the Workforce: Supreme Court Issues: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 96 (1986) (statement of Sarah Burns, Assistant Director, Georgetown University Law Center Sex Discrimination Clinic)).

Van Tol's argument seems to have the following form: If A and B have x in common and if x is sufficiently important, then $A = B$. Thus, because sexual favoritism and sexual harassment both send the same message, they are the same phenomenon. What the argument ignores, of course, are the significant ways in which A and B might differ. Even if Van Tol is correct about the resemblance between sexual harassment and sexual favoritism, she ignores the morally relevant differences suggested later in this subpart. For example, being sexually harassed probably is more unpleasant than being disadvantaged by sexual favoritism. More importantly, the motives underlying sexual favoritism almost certainly are less blameworthy than those underlying sexual harassment.

employment discrimination and therefore should focus on its worst manifestations.[116] In a scheme familiar to ethicists, I divide my arguments into consequentialist and deontological claims. Consequentialist or teleological moral theories usually assert that the moral worth of an action should be judged by that action's consequences.[117] In contrast, deontological theories ordinarily say that considerations other than an act's consequences help determine its goodness or badness.[118] Such considerations may include the innate nature of the act[119] or the motives that underlie it.[120] Like others who have written about the wrongfulness of different kinds of discrimination,[121] I consider both consequentialist and deontological claims relevant to my argument.

1. Consequentialist Considerations

One consequentialist argument for including sexual favoritism within Title VII's embrace emphasizes meritocratic values.[122] From this point

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116. *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV 149, 203 (1992) (arguing that law should not attempt to prohibit all forms of employment discrimination).

117 *See* PETER A. ANGELES, THE HARPER COLLINS DICTIONARY OF PHILOSOPHY 55, 96 (2d ed. 1992). Utilitarianism is the obvious, but not the only, example of a consequentialist or teleological moral theory. *See* WILLIAM K. FRANKENA, ETHICS 34 (2d ed. 1973) (calling utilitarianism teleological).

118. FRANKENA, *supra* note 117, at 15.

119. *See id.* (stating that "certain features of the act itself" help make it right or obligatory).

120. "It is impossible to conceive anything at all in the world, or even out of it, which can be taken as good without qualification, except a *good will.*" IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 59 (H.J. Paton trans. 1972). Later, Kant adds: "A good will is not good because of what it effects or accomplishes it is good through its willing alone—that is, good in itself." *Id.* at 60.

121. *See* Alexander, *supra* note 116, at 154 (stating that reader will find "a somewhat messy blend of deontological and consequentialist considerations brought to bear on a variety of forms and contexts of discrimination").

122. Meritocratic values often are invoked in other efforts to expand the coverage of federal employment discrimination law. *See* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV L. REV. 2035, 2035 (1987) (noting that "appearance, like race and gender, is almost always an illegitimate employment criterion," one "frequently used to make decisions based

of view, the discrimination that Title VII expressly forbids is bad mainly because, or when, it deprives people of deserved job benefits. Sexual favoritism obviously can have the same effect on its victims. For this reason, one might argue that sexual favoritism is morally indistinguishable from the types of discrimination that Title VII clearly does proscribe. If so, one might also desire sexual favoritism's inclusion among Title VII's forbidden grounds of decision.

One objection to the preceding argument is that it proves too much. From the reasoning just advanced, Title VII arguably should be read as banning discrimination on the bases of sexual orientation, transsexuality, and appearance, and maybe even as forbidding all employment decisions made on nonmeritocratic grounds. But the obvious rejoinder is to say "Why not?"[123] Rather than arguing that the preceding argument proves too much, therefore, a better response is to advance morally relevant ways in which sexual favoritism's consequences differ from the consequences of the discrimination that Title VII expressly bans. Because it does not denigrate classes of people or suggest their innate inferiority, for example, sexual favoritism should be less hurtful to its victims than discrimination based on race, color, gender, religion, or national origin. For the same reason, it may not spark quite the same resentments that these forms of discrimination can produce. Turning to sexual harassment, finally, it is at least arguable that suffering quid pro quo or work environment harassment is more unpleasant than being the victim of sexual favoritism.

Even from a completely meritocratic standpoint, it might be safer to leave workplace sexual favoritism unregulated than to do the same for discrimination based on race, color, gender, religion, and national origin. For one thing, sexual favoritism probably is less common than these other kinds of discrimination. For another, because firms tend to perceive affairs between supervisor and subordinate as a threat to their proper functioning

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on personal dislike or prejudicial assumptions rather than actual merit").

123. *Cf.* PLAYER, *supra* note 4, § 5.25(c)(2), (d)(1)-(2) (appearing to sympathize with efforts to include sexual orientation, appearance, sexual favoritism, and perhaps transsexuality among Title VII's forbidden bases of discrimination).

and thus to their competitive position,[124] firms arguably have an incentive to penalize such relationships without prodding from the law [125]

2. *Deontological Differences*

The preceding points hopefully go some way toward differentiating sexual favoritism's morally relevant consequences from the effects of the discrimination that Title VII clearly bans. The most important bases of differentiation, however, concern sexual favoritism's nature and underlying motives and therefore are deontological. One reason for the stress the law has laid on eliminating race, color, gender, and national origin discrimination is the immutability of these traits.[126] The sexual attractiveness that leads a supervisor to favor his paramour, on the other hand, is much less permanent. While that attractiveness is difficult to separate from the paramour's gender, gender does not seem to be the most important factor

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124. *See, e.g.*, Lee Colby, *Regulating Love*, PERSONNEL, June 1991, at 23 (detailing how supervisor-subordinate relationships undermine group solidarity, mainly because coworkers suspect favoritism); Marilyn M. Kennedy, *Romance in the Office*, ACROSS THE BOARD, March 1992, at 23, 24, 26 (noting that top managers punish peers who have affairs because intraoffice relationships undermine existing alliances, create anger and jealousy, and also create suspicions of favoritism); Ellen Rapp, *Dangerous Liaisons*, WORKING WOMAN, Feb. 1992, at 56, 59 (noting that affairs between supervisor and subordinate are viewed negatively by coworkers, who may experience jealousy, anger, and abandonment, and may therefore be less productive); *see also* Jonathan Segal, *Love: What's Work Got to Do with It?*, HR MAGAZINE, June 1993, at 36, 38 (noting that in addition to dangerous appearance of favoritism that they can create, romances between superior and subordinate create possibility of sexual harassment claims).

125. Admittedly, there also may be incentives to penalize many kinds of discrimination that Title VII clearly forbids. Regarding sexual harassment, for example, see Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV 1311, 1321, 1323 (1989) (noting that employers have interest in curbing sexual harassment because it lowers productivity, offends many workers, and requires that female employees receive a "compensating differential").

126. *See* Frontiero v Richardson, 411 U.S. 677, 686 (1973) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility '") (quoting Weber v Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)). The basic idea, apparently, is that "[m]oral worth must be based on moral choices, not on [immutable] physical characteristics." Alexander, *supra* note 116, at 200 (discussing immutability from Kantian perspective).

behind the supervisor's preferential behavior. An employer who systematically discriminates against all women *is* largely motivated by gender, but a heterosexual male supervisor who favors one woman over other women presumably has other things on his mind.

Unlike many people who discriminate on the bases of race, color, sex, religion, and national origin, moreover, practitioners of sexual favoritism ordinarily do not disadvantage their victims because they believe that those people are morally inferior to the people whom they favor.[127] Instead, a supervisor's favoritism toward his paramour more closely resembles the preference that most people feel for people and groups to whom they are closely tied—a preference that seems difficult to condemn severely and that may even be morally obligatory [128] Unlike some forms of sex discrimination, finally, sexual favoritism is not the product of misogyny[129] or of the view that (competence aside) women simply should not perform certain social functions.[130]

IV Sexual Favoritism's Role in Sexual Harassment Claims

If the preceding arguments are at all persuasive, there is little reason to believe that Title VII bans sexual favoritism as such—sexual favoritism that is not connected with sexual harassment. Even so, however, Title VII may provide sexual favoritism's victims with other avenues of relief. Here,

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127 On the immorality of biases based on unjustified attributions of moral inferiority, see Alexander, *supra* note 116, at 158-63.

128. Larry Alexander articulates this widespread moral intuition as follows:

> [P]ersonal commitments, relations, and identifications morally permit and may require particular persons to have greater moral concern for some than for others, even if the preferred individuals merit no greater moral concern from people in general because they possess no greater moral worth than others. My family and my neighbors are morally no more worthy and deserving of concern than others' families or neighbors, but they are certainly more deserving of *my* concern.

Id. at 160.

129 *See* Posner, *supra* note 125, at 1318. Posner defines misogyny as "an elemental distaste on the part of men for associating with women at work, not founded on any notions of productivity or efficiency " *Id.*

130. *See* Alexander, *supra* note 116, at 163-65 (expressing puzzlement about moral rationale for this view, which is not men's and women's assumed greater or lesser suitability for certain social tasks).

I discuss three such possibilities: (1) that when sexual favoritism arises from the paramour's submission to quid pro quo sexual harassment, the victim of such favoritism has standing to sue for the harassment; (2) that sexual favoritism may sometimes help its victims win an implied quid pro quo sexual harassment suit; and (3) that sexual favoritism sometimes may constitute, or contribute to, actionable work environment sexual harassment. Only occasionally, however, will each prove useful to sexual favoritism's victims.

A. Standing to Sue

1. Introduction

In 1990, the EEOC endorsed the contention that sexual favoritism is not sex discrimination because its victims can be either male or female. In the EEOC's words:

> Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An 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. 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 nor, conversely, was she treated less favorably because she was a woman.[131]

In support of the preceding statement, the EEOC cited two cases that denied employer liability for sexual favoritism, both of which limited their holdings to situations in which the relationship between supervisor and paramour is consensual.[132] This gave the EEOC latitude to announce a different rule for cases in which the favoritism results from sexual harassment directed at the favored party In such cases, "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

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131. *EEOC Policy Guide*, *supra* note 6, at 405:6817 (footnote omitted).

132. *See* DeCintio v Westchester County Medical Ctr., 807 F.2d 304, 307-08 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987); Miller v. Aluminum Co. of Am., 679 F Supp. 495, 500-01 (W.D. Pa.), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

leveled against the woman who was coerced."[133] This conclusion seems consistent with the sexual favoritism provision in the EEOC's sexual harassment guidelines.[134]

At first glance, it is difficult to square the EEOC's position on harassment-induced favoritism with its position on favoritism that results from a consensual relationship. The latter position is that isolated instances of sexual favoritism based on a consensual romantic relationship do not constitute sex discrimination because their victims can be either male or female. But this also is true of favoritism arising from a coerced, nonconsensual relationship between the harasser and the favored party Under the reasoning used to justify the EEOC's position on "consensually-induced" favoritism, therefore, "harassment-induced" favoritism also should escape Title VII. Yet the EEOC would allow victims of sexual favoritism to sue in this second instance. The key to resolving this apparent inconsistency is the EEOC's assertion that victims of sexual favoritism "have *standing* to challenge the favoritism" if it results from sexual harassment directed solely against the favored party [135]

2. *Basic Title VII Standing Requirements*

Discussions of Title VII standing generally focus on section 706 of the statute.[136] Section 706 requires that a charge be filed with the EEOC or an appropriate state agency to trigger the Title VII enforcement process.[137] Section 706(b) states that the charge may be filed "by or on behalf of a

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133. *EEOC Policy Guide*, *supra* note 6, at 405:6819. Where the sexual relationship was coerced, the sexual harassment visited upon the favored party almost certainly would be quid pro quo harassment. The EEOC's position on quid pro quo and work environment harassment directed at people other than the paramour is discussed in the next two subparts. *See generally infra* notes 171-225 and accompanying text.

134. *See* 29 C.F.R. § 1604.11(g) (1993); *see also supra* note 64 and accompanying text (describing how one court tried to limit application of guidelines to situations in which paramour was coerced into sexual relationship).

135. *EEOC Policy Guide*, *supra* note 6, at 405:6819 (emphasis added).

136. 42 U.S.C. § 2000e-5 (1988); *see* 2 LARSON & LARSON, *supra* note 12, § 49.12(a), at 9B-23 to -24 & n.68; SCHLEI & GROSSMAN, *supra* note 53, at 986; 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.8.1 (2d ed. 1988).

137 *See* 42 U.S.C. § 2000e-5(b), (e)-(f) (1988 & Supp. III 1991); *see also* PLAYER, *supra* note 4, § 5.72, at 470 ("The charge is the document that triggers the enforcement process.").

person claiming to be aggrieved, or by a member of the [EEOC]."[138] Once the government has failed to act on the charge in certain specified ways, section 706(f)(1) permits a private suit to be brought "by the person claiming to be aggrieved."[139] The presence of a "person claiming to be aggrieved," therefore, is vital to private Title VII claims such as suits for sexual harassment or sexual favoritism. Discussions of the standing question usually term this party an "aggrieved person" or "person aggrieved."[140]

3. *The "Aggrieved Person" Requirement*

Who is an "aggrieved person" or "person aggrieved" for Title VII purposes? General discussions of this question do not specifically consider whether victims of sexual favoritism qualify [141] But they do suggest that in some cases whites and men may qualify as aggrieved persons when they suffer injury from discrimination against blacks and women, respectively [142] These situations are relevant here because they resemble the sexual favoritism claims that we are presently considering. Specifically, both involve: (1) forbidden discrimination against someone (a black person or a woman, as compared to the favored party who has been coerced into a sexual relationship) and (2) a plaintiff who has been injured by that discrimination, but whose injury was not due to his or her own gender (a white person or a man, as compared to a male or female victim of sexual favoritism whose recovery is blocked by section 703(a)).

4. *Actual Injury*

As noted above, an aggrieved person must have been injured, and in determining whether standing exists, the relevant cases involving whites and

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138. 42 U.S.C. § 2000e-5(b) (1988).

139. *Id.* § 2000e-5(f)(1).

140. *See* 2 LARSON & LARSON, *supra* note 12, § 49.12(a), at 9B-24; SCHLEI & GROSSMAN, *supra* note 53, at 987; 1 SULLIVAN ET AL., *supra* note 136, § 11.8.1, at 493, § 11.8.3, at 498-99.

141. *See* 2 LARSON & LARSON, *supra* note 12, § 48.11(a)(1); SCHLEI & GROSSMAN, *supra* note 53, at 986-91, 1 SULLIVAN ET AL., *supra* note 136, § 11.8.3.

142. *See* 3 LARSON & LARSON, *supra* note 12, § 69.12; 1 SULLIVAN ET AL., *supra* note 136, § 11.8.3.1, at 499-500; Torrey, *supra* note 80, at 376-80, 383-84, 388-98.

men usually consider whether the plaintiff suffered actual injury [143] They suggest that this injury might be either (1) the loss of important benefits resulting from association with people of the opposite race or gender, or (2) any other tangible injury resulting from a Title VII violation.[144] Most decisions of the first sort involve white plaintiffs who acquire standing to challenge race-based employment discrimination against blacks and other racial minorities.[145] One court described the injury that confers standing

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143. However, Arthur and Lex Larson say that Title VII standing has two facets: (1) the "person aggrieved" requirement and (2) constitutional requirements (which Title VII is said to impose). 2 LARSON & LARSON, *supra* note 12, § 49.12(a)(1), at 9B-23 to -24. The first requirement largely incorporates the second. *See id.* Thus, the basic Title VII standing requirements are the constitutional standards. These are: (1) that the plaintiff suffer some threatened or actual injury as a result of the illegal action, (2) that the injury interfere with an interest that is arguably within the zone of interests protected by Title VII, and (3) that the injury likely will be redressed if the requested relief is granted. *Id.* § 49.12(a)(2), at 9B-25; *see id.* at 9B-25 to -32; Torrey, *supra* note 80, at 370 ("Th[e] core component of standing requires a plaintiff to 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'") (quoting Allen v Wright, 468 U.S. 737, 751 (1984)); *id.* at 373-75 (discussing zone-of-interests test that some courts have applied in Title VII cases).

144. *See infra* notes 145-53 and accompanying text (discussing actual injury requirement).

145. *See, e.g.*, Stewart v Hannon, 675 F.2d 846, 848-50 (7th Cir. 1982); Waters v Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); Bartelson v Dean Witter & Co., 86 F.R.D. 657, 665 (E.D. Pa. 1980); *see also* 3 LARSON & LARSON, *supra* note 12, § 69.12 (citing some additional cases); Torrey, *supra* note 80, at 376-80 (discussing some additional cases).

These cases generally rely on Trafficante v Metropolitan Life Ins. Co., 409 U.S. 205 (1972), in which a white plaintiff and a black plaintiff sued under the Civil Rights Act of 1968 for alleged racial discrimination in the renting of units by an apartment complex. *Id.* at 206. The question for the Court was whether each plaintiff qualified as a person aggrieved under the Act. Quoting a Title VII decision, Hackett v McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971), the Court concluded that these words showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante*, 409 U.S. at 209. Under those criteria, the main inquiry was whether the plaintiffs had suffered injury in fact, and the Court concluded that they had. This injury was "the loss of important benefits from interracial associations." *Id.* at 210. The lost benefits in question apparently were: (1) the lost social benefits of living in an integrated community, (2) the lost business and professional advantages that would have been acquired through living with members of minority groups, and (3) the esteem and wealth lost by being stigmatized as residents of a "white ghetto." *Id.* at 208. The Court also noted that because private suits were the principal means of enforcing the Act, only a generous construction of its standing provision could give

as the loss of "interracial harmony" and "advantageous personal, professional, or business contacts."[146] Much the same reasoning has been applied in cases granting white plaintiffs standing to challenge work environments that allegedly are hostile toward racial minorities.[147]

The second form of "actual injury" that confers standing—any other tangible injury resulting from a Title VII violation—has been emphasized in sex discrimination cases.[148] In *Allen v American Home Foods, Inc.*,[149] the relevant plaintiffs were five men who claimed that sex discrimination against women was a factor in their employer's decision to close the plant in which they worked.[150] Relying on a decision involving our first "actual injury" rationale,[151] the court concluded that Title VII's "person aggrieved" language "confers standing to all persons injured by an unlawful employment practice."[152] Because the plaintiffs obviously were injured by their employer's allegedly discriminatory decision, they had standing to sue. "This," the court said, "is as it should be. These males suffered the same injury as did the females that lost their jobs; [and] the injuries of the males and females were occasioned by the same corporate decision."[153]

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the Act vitality *See id.* at 210-12.

146. Waters v Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

147 *See* Clayton v White Hall Sch. Dist., 875 F.2d 676, 678-80 (8th Cir. 1989); Smithberg v Merico, Inc., 575 F Supp. 80, 82-83 (C.D. Cal. 1983).

148. For a detailed discussion of standing in sex discrimination cases, see Torrey, *supra* note 80, at 383-84, 388-98.

149. 644 F Supp. 1553 (N.D. Ind. 1986).

150. Allen v American Home Foods, Inc., 644 F Supp. 1553, 1554-55 (N.D. Ind. 1986).

151. Stewart v Hannon, 675 F.2d 846 (7th Cir. 1982); *see supra* note 145 and accompanying text (discussing rationale behind *Stewart*).

152. *Allen*, 644 F Supp. at 1557; *see* Pennsylvania Nurses Ass'n v Pennsylvania, 55 Fair Empl. Prac. Cas. (BNA) 807, 809-11 (M.D. Pa. 1988) (applying *Allen* to case involving male nurses whose benefits allegedly were reduced by sex discrimination against women in female-dominated positions).

153. *Allen*, 644 F Supp. at 1557

5. *Two Conflicting Lines of Authority*

Sexual favoritism that results from sexual harassment against the favored party resembles the facts in *Allen* in certain critical respects. In both situations, we have gender discrimination against women that results in tangible injury to a third party who has not suffered discrimination due to his or her own gender. If cases like *Allen* control, therefore, male or female victims of sexual favoritism should have standing to attack that favoritism if it resulted from sexual harassment against the favored party Although the point is speculative, perhaps those victims also could get standing under our first rationale. If the loss of "interracial harmony" or "advantageous personal contacts" confers standing, perhaps the loss of a "merit-based employee evaluation process" or a "harassment-free work environment" qualifies as well.

Unfortunately for these arguments, another line of Title VII sex discrimination cases denies standing in situations like those just discussed. Worse yet, these cases employ a familiar rationale—the absence of discriminatory treatment based on one's *own gender*—to effect the denial. Like *Allen*, *Patee v Pacific Northwest Bell Telephone Co.*[154] involved male employees who alleged injury resulting from sex discrimination against women in a traditionally female job category [155] The court denied the male employees standing because they did "not claim that they have been discriminated against because they are men."[156] The court also distinguished the cases establishing our first "actual injury" rationale because the male claimants did not claim "that they have been denied interpersonal contracts with women or that the alleged sex-based wages discrimination has deprived them of harmonious relationships."[157] "In fact," the court continued, "most of their co-workers are women."[158]

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154. 803 F.2d 476 (9th Cir. 1986).

155. Patee v Pacific Northwest Bell Tel. Co., 803 F.2d 476, 476 (9th Cir. 1986).

156. *Id.* at 478; *see* Spaulding v University of Wash., 740 F.2d 686, 709 (9th Cir.) (denying standing because male employee made no claim that he received lower wage because of his sex), *cert. denied*, 469 U.S. 1036 (1984); American Fed'n of State, County & Mun. Employees v County of Nassau, 664 F Supp. 64, 66-67 (E.D.N.Y 1987) (denying standing because male claimants suffered "no injury *qua* men").

157 *Patee*, 803 F.2d at 479.

158. *Id.*

Under *Patee* and similar cases, therefore, standing requires not just actual injury, but an actual injury resulting from discrimination based on one's own gender.[159] Because victims of sexual favoritism do not suffer such discrimination,[160] they lack standing to redress the favoritism if the *Patee* reasoning controls. Thus, we appear to be left with two conflicting lines of authority on the question of whether victims of sexual favoritism have standing to sue when the favoritism results from sexual harassment against the favored party

6. *Two Arguments for Standing*

For at least two reasons, the *Allen* line of cases should prevail and standing should exist in the situations that I have been discussing. First, the reasoning of the cases denying standing to men injured by discrimination against their female coworkers is not especially persuasive. Those cases basically argue that the male employees cannot sue because their injuries were not caused by their own gender. As previously argued, this should prevent the employer's treatment of these men from being an unlawful employment practice.[161] But does it follow that they lack standing to sue for sex discrimination against the women? Section 703(a), Title VII's basic liability provision, makes employment practices unlawful if they disadvantage any person because of his or her own gender.[162] But

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159. The cases are uninformative about the source of the requirement of an actual injury resulting from discrimination based on one's own gender. Most likely, it reflects the belief that to be an aggrieved person, one must have a Title VII claim on his or her own account. Another possibility is that employees who have not suffered discrimination based on their own gender are not within the "zone of interests" protected by Title VII. *County of Nassau*, 664 F Supp. at 66. On the zone of interests notion as a standing requirement, see *supra* note 143. As one court stated, male employees should not be able to "bootstrap their job grievances" into a federal employment discrimination claim just because they receive a salary "infected" by sex discrimination against female employees. *Spaulding*, 740 F.2d at 709 (citing Ruffin v County of Los Angeles, 607 F.2d 1276, 1281 (9th Cir.), *cert. denied*, 445 U.S. 951 (1979)).

160. *See supra* notes 111-13 and accompanying text (arguing that Title VII's language blocks sexual favoritism claims).

161. *See supra* notes 111-13 and accompanying text (arguing that Title VII's language blocks sexual favoritism claims).

162. 42 U.S.C. § 2000e-2(a) (1988).

section 706, which controls private suits under Title VII, basically gives any "person claiming to be aggrieved" the right to sue.[163] It is possible that section 703(a) controls the definition of section 706's "person claiming to be aggrieved." If that were true, the only aggrieved persons would be those against whom an unlawful employment practice has been committed. But if this is what Congress intended, it did not make that intent clear. Indeed, the lack of parallelism between sections 703(a) and 706 suggests Congress's desire to extend Title VII standing to injured parties other than those suffering discrimination because of their own gender.[164]

A second reason for extending standing to victims of sexual favoritism where the favoritism resulted from sexual harassment is that the victims may be the only parties capable of challenging the harassment in a private Title VII suit. That harassment generally would be of the quid pro quo variety To recover for quid pro quo harassment, the victim normally must have suffered some tangible job detriment.[165] Here, however, that victim also is a favored party whose submission to the harassment may have brought her a tangible job *benefit*.[166] This being the case, it seems that if the victim of this favoritism cannot mount a private Title VII suit, no one can. Thus, if the victim is denied standing, there may be no

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163. *Id.* § 2000e-5(b), (f); *see supra* notes 136-40 and accompanying text.

164. Morrison Torrey notes:

> While the Act makes employment practices unlawful if they constitute discrimination against any individual because of "such individual's race, color, religion, sex, or national origin," the private cause of action provision lacks identical words of limitation. Rather than restricting the right to sue to an individual discriminated against because of his race, color, religion, sex, or national origin, the statute accords that right to "*any* person claiming to be aggrieved" by a violation of the law. By not repeating the restrictive language, Congress appears to have intended to draw a distinction between the two sections, with the latter clearly being more expansive.

Torrey, *supra* note 80, at 372-73 (footnotes omitted).

165. *See supra* note 38 and accompanying text (noting requirement of tangible job detriment in quid pro quo sexual harassment claims).

166. Another reason why the favored party may not be able to sue is that in some cases the harassment may not have been "unwelcome." *See supra* note 32 and accompanying text (noting "unwelcomeness" requirement). This would be true when the favored party willingly submitted in order to get the benefit. For one case in which this may have occurred, see *supra* note 10 and accompanying text.

effective remedy against the harassment in such cases.[167] However, granting the victim standing may not afford an effective remedy either, because the victim would have to show a coerced sexual relationship between the harassing supervisor and the favored party This would require the favored party's cooperation, and such cooperation is unlikely to be forthcoming.[168] But in some cases there might be other evidence of the relationship.[169] In addition, Title VII's antiretaliation provision should help protect a sexually harassed favored party who wants to testify [170]

B. Sexual Favoritism as Implied Quid Pro Quo Sexual Harassment

Another possible device for attacking sexual favoritism under Title VII is to argue that sexual favoritism sometimes constitutes sexual harassment or at least can contribute to a successful sexual harassment claim. Some forms of sexual favoritism, the EEOC has said, may create a claim that resembles, or equals, an implied quid pro quo sexual harassment claim.[171] The EEOC's primary example was a situation in which

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167 One possible objection to this argument is that if the favored party cannot sue for quid pro quo harassment because she has not suffered a job detriment, and if standing gives the victim no more rights than the favored party possesses, the victim should not recover either. In my judgment, this technicality yields before the opportunity for rectifying sexual harassment afforded by letting the victim recover. This is particularly true when we consider that the victim *has* suffered a tangible job detriment.

168. *See* Van Tol, *supra* note 12, at 179.

169. For example, in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), a case involving a consensual relationship between supervisor and paramour, the plaintiff introduced evidence showing that the supervisor and the alleged paramour frequently took long lunches together, that their on-the-job behavior suggested intimacy between them, that they were observed kissing outside the workplace, that the supervisor often called the alleged paramour at home, that the pair often stayed out together all night long, and that the supervisor did not punish the alleged paramour's sloppy and unprofessional job performance. *Id.* at 879-80. Reversing a district court decision to the contrary, the court of appeals refused to require direct proof of a sexual relationship. *Id.* at 882. *See generally supra* notes 49-57 and accompanying text (discussing *King*).

170. *See* 42 U.S.C. § 2000e-3(a) (1988).

171. *See EEOC Policy Guide*, *supra* note 6, at 405:6818-:6820. For a further discussion of implied quid pro quo sexual harassment claims, see *supra* notes 33-37 and

the employer's sexual harassment of the favored party implied that "sex was *generally* made a condition for receiving the benefit" that the favored party obtained.[172] Because this implied quid pro quo is general,[173] it would apply to female employees[174] who were eligible for the benefit but who did not obtain it and thus would give them a quid pro quo harassment suit.[175]

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accompanying text.

172. *EEOC Policy Guide*, *supra* note 6, at 405:6818 (emphasis added).

173. Where the condition is not general, however, the victim cannot mount an implied quid pro quo claim because only the favored party was subjected to the quid pro quo. "For example, a supervisor may have been interested in only one woman and, thus, have coerced only her." *Id.* at 405:6819. In such cases, the EEOC asserted, victims of the resulting sexual favoritism should have standing to attack the quid pro quo harassment because they were injured by it. *Id.* On this standing question, see generally *supra* notes 131-70 and accompanying text.

174. In justifying its implied quid pro quo harassment claim, the EEOC stated: "[I]n order for a woman to have obtained the job benefit at issue, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men." *EEOC Policy Guide*, *supra* note 6, at 405:6818. Here, the EEOC evidently contemplated a situation in which women must grant sexual favors to advance, while men are judged on merit (or at least on nonsexual criteria). However, it is possible that men as well as women could be subjected to sexual criteria for advancement. This might occur, for instance, when *anyone* effectively must grant sexual favors to obtain job benefits. When such criteria are imposed by a heterosexual male superior who pursues women alone, his male subordinates should have very limited prospects of advancement as long as female competitors are present and are willing to submit. Thus, the disadvantage that such men would suffer arguably is motivated to some degree by their own gender. A female victim of sexual favoritism, however, probably would have difficulty arguing that her disadvantage was motivated by her gender. If the supervisor gave a truthful account of his reasons for preferring the paramour over the female victim, *see supra* note 105, those reasons presumably could not include gender. *See supra* note 113 (discussing gender's role in sexual favoritism claims). In this second instance, therefore, we may be left with the anomalous conclusion that male victims of sexual favoritism have a Title VII claim, while female victims do not.

175. *See EEOC Policy Guide*, *supra* note 6, at 405:6818 (noting that claim "is substantially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a 'quid pro quo' in return for job benefits"); *see also id.* at 405:6820 (noting that "managers who engage in widespread sexual favoritism may [send] a message that the way for a woman to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment," and finding that such behavior can form basis of implicit quid pro quo harassment claim for female employees).

Although the EEOC apparently thought that most implied quid pro quo claims would arise from a coerced sexual relationship between supervisor and favored party,[176] the EEOC's primary example of such a claim involved a consensual affair.[177] In *Toscano v Nimmo*,[178] the supervisor, a self-described "life-long 'womanizer,'"[179] telephoned female employees to proposition them at home, telephoned them at work to describe his supposed sexual encounters with other female employees, and engaged in sexually suggestive behavior at work.[180] In her Title VII sex discrimination suit, the plaintiff claimed that she was denied a deserved promotion because the supervisor conditioned his promotion decision on the receipt of sexual favors and promoted his paramour on that basis. The court apparently treated the plaintiff's claim as a sexual harassment claim:[181]

> [The plaintiff] maintains that in order for a woman to be selected [for the position at issue], it was necessary to grant sexual favors, a condition not imposed on men; this contention is consistent with the

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176. Indeed, the heading for this portion of the EEOC's statement reads: "Favoritism Based Upon Coerced Sexual Conduct May Constitute Quid Pro Quo Harassment." *Id.* at 405:6818.

177 *See* Toscano v Nimmo, 570 F Supp. 1197, 1200 (D. Del. 1983); *see also EEOC Policy Guide*, *supra* note 6, at 405:6818 (conceding that affair in *Toscano* was consensual).

178. 570 F Supp. 1197 (D. Del. 1983).

179. Toscano v. Nimmo, 570 F Supp. 1197, 1200 (D. Del. 1983).

180. *Id.* at 1199-1201.

181. After describing quid pro quo sexual harassment, the *Toscano* court said that "[t]his case is slightly different factually from the typical case, although no different in its theoretical underpinnings." *Id.* at 1199 The plaintiff did not claim work environment harassment. *Id.* at 1204.

Toscano might profitably be compared with Priest v Rotary, 634 F Supp. 571 (N.D. Cal. 1986), in which the defendant advantaged those female employees who responded favorably to his sexual conduct, disadvantaged those who did not, and fired the plaintiff because she reacted unfavorably to his sexually suggestive and offensive conduct. *Id.* at 576. In *Priest*, the court found the defendant liable for what apparently was quid pro quo harassment, *see id.* at 581, and also found the defendant liable for work environment harassment. *See id.* at 582. In addition, the court cited *Toscano* when it found the defendant liable for sexual favoritism. *See id.* at 581-82. But if *Toscano* was a sexual harassment case, it could not be the basis for this last finding.

> theory supporting recovery in the typical case. She does not seek to establish the existence of this condition, however, by showing she refused specific requests by [the supervisor] for sexual favors and was then denied the position because of her refusal. Rather, she has offered proof in the form of evidence of the circumstances of [the supervisor's] sexual affair with the applicant he in fact selected for the position.[182]

Based on such evidence, the court concluded that "granting sexual favors was a condition to receiving the position [in question], an employment practice which discriminated against [the plaintiff] on the basis of sex."[183]

Toscano v Nimmo is best read as a quid pro quo sexual harassment case in which evidence of sexual favoritism helped the plaintiff prove that advancement was generally conditioned on submission to sex-related behavior and that her own advancement was impliedly conditioned on such submission.[184] Although the case suggests the uses to which evidence of sexual favoritism might be put, it apparently does little to expand the cause of action for quid pro quo sexual harassment or to assist victims of sexual favoritism. In a quid pro quo claim, most courts say, the plaintiff must

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182. *Toscano*, 570 F Supp. at 1199 (citing 29 C.F.R. § 1604.11(g) in support of plaintiff's theory); *see supra* text accompanying note 46 (quoting EEOC's sexual harassment guidelines). In *Toscano*, the supervisor once told the plaintiff that he was going to give the favored party the promotion in question because the favored party was "very good in making him feel good—she's a real professional at it." *Toscano*, 570 F Supp. at 1201.

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

184. For two other examples of cases in which proof of sexual favoritism helped to establish a quid pro quo sexual harassment claim, see Dirksen v. City of Springfield, 842 F Supp. 1117, 1121-22 (C.D. Ill. 1994) (holding that plaintiff's claim that it was generally necessary for women to grant sexual favors for professional advancement survives motion to dismiss because it constitutes quid pro quo sexual harassment claim); Piech v Arthur Andersen & Co., 841 F Supp. 825, 829 (N.D. Ill. 1994) (holding that plaintiff's claim that it was generally necessary for women to grant sexual favors for job advancement constitutes quid pro quo sexual harassment claim). In *Piech*, the court stated that "allegations regarding the favored female co-worker who received a promotion while involved romantically with a decision-maker may be considered simply circumstantial evidence that her employer conditioned employment benefits on the granting of sexual favors." *Id.* at 830. While considering the plaintiff's quid pro quo harassment claim, the *Dirksen* court noted that when the plaintiff left her job on medical leave, she was replaced by a woman who was having sexual relations with her supervisor. *Dirksen*, 842 F Supp. at 1121.

show that the harassment caused her to suffer a tangible job detriment.[185] Thus, recovery may be difficult when, for example, the defendant can show that the favored party's qualifications were superior to those of the plaintiff.[186]

More importantly, the plaintiff must establish that the implied quid pro quo was sufficiently general to apply to her.[187] One has to wonder how often this occurs in sexual favoritism cases. Sexual favoritism typically involves: (1) a relationship between a supervisor and his paramour and (2) the paramour's acquisition of some job benefit through the relationship. Such facts do not necessarily imply that other employees are subject to an implied quid pro quo. As the EEOC observed, when a supervisor is interested in only one woman, third-party female employees often will be unable "to establish that sex was generally made a condition for the benefit in question."[188] To show that sex was generally a condition, the plaintiff probably would need evidence that the supervisor directed his attentions toward more than one woman. Although such evidence abounded in *Toscano*, it does not typify the extant sexual favoritism litigation.[189]

C. Sexual Favoritism as Work Environment Harassment

According to the EEOC, widespread sexual favoritism also "can form the basis of a hostile environment claim for both women and men who find this offensive."[190] As we have seen, such claims often proceed on the theory that the favoritism creates a sexually charged workplace atmosphere in which employees come to feel that their job advancement depends on their sexuality rather than their merit.[191]

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185. *See supra* note 38 and accompanying text (noting requirement of tangible job detriment in quid pro quo sexual harassment claims).

186. The defendant in *Toscano* attempted to argue that the paramour's qualifications were superior to the plaintiff's, but failed to show that the paramour's qualifications actually did exceed those of the plaintiff. *See Toscano*, 570 F Supp. at 1202-03.

187 *See supra* notes 172-73 and accompanying text (noting that sex must be made general condition for receiving benefit).

188. *EEOC Policy Guide*, *supra* note 6, at 405:6819; *see supra* notes 172-73.

189. For three exceptions to this generalization, see *supra* notes 181, 184.

190. *EEOC Policy Guide*, *supra* note 6, at 405:6820.

191. *See supra* notes 74-76 and accompanying text (discussing sexual favoritism's role in work environment harassment claim).

1 Broderick v Ruder

The case that the EEOC used as authority for its assertion, however, emphasized the general offensiveness of the sexual favoritism over its ability to reduce employees to their sexuality The plaintiff in *Broderick v Ruder*[192] was a female staff attorney employed in a division of the Securities and Exchange Commission.[193] She maintained that a sexually hostile work environment existed within her division during her five years there.[194] With only two major exceptions, the work environment harassment of which the plaintiff complained was not directed at her personally [195] Instead, it mainly involved the pattern of sexual favoritism that existed within her division. Specifically, two female secretaries benefited from sexual relationships with their male bosses, and a female attorney apparently benefited from a nonsexual relationship with another male supervisor.[196] Because these relationships were common knowledge throughout the division,[197] the court held that they "created an atmosphere of hostile work environment offensive to [the] plaintiff" and to the female employees who also testified about them.[198] This was because the "plaintiff was forced to work in an environment in which the [division] managers by their conduct harassed her and other [division] female employees, by bestowing preferential treatment upon those who submitted to their sexual advances."[199] This preferential treatment, the court added,

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192. 685 F Supp. 1269 (D.D.C. 1988).

193. Broderick v Ruder, 685 F Supp. 1269, 1270 (D.D.C. 1988).

194. *Id.* None of the acts of which the plaintiff in *Broderick* complained involved the exchange of employment benefits in return for her sexual favors. *Id.* at 1273. This presumably is the reason why she did not make a quid pro quo harassment claim.

195. *Id.* at 1272-73. In one of the incidents of direct harassment, a supervisor untied plaintiff's sweater and kissed her after getting drunk at an office party *Id.* at 1273. In the other, a different supervisor repeatedly offered plaintiff a ride home during her first week at the SEC, and after she finally acceded, he barged into her apartment and toured the premises (including the bedroom). *Id.* at 1274.

196. *See id.* at 1274-75.

197 *Id.* at 1275. Division employees also frequently drank, took long lunch hours, and went to parties together. *Id.*

198. *Id.* Later, however, the *Broderick* court suggested that the instances of harassment directed specifically at the plaintiff, *see supra* note 195, played a role in its decision as well. *See Broderick*, 685 F Supp. at 1278.

199. *Broderick*, 685 F Supp. at 1278.

also "undermined plaintiff's motivation and work performance."[200] The court concluded:

> We hold, and plaintiff has proved, 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.[201]

2. *Two Criticisms of* Broderick v Ruder

If read as holding that sexual favoritism alone can create work environment harassment, *Broderick v Ruder* is a questionable decision. First, the case did not clearly involve gender-based discrimination against plaintiff and the other affected employees. As we have seen, Title VII may be violated whenever the challenged decision is motivated to any appreciable degree by gender.[202] But it still is necessary for the plaintiff to have been disadvantaged because of *his or her own* gender.[203] Although their *paramours'* gender no doubt influenced the male supervisors' decisions in *Broderick*, it is questionable how much the *plaintiff's* gender did so.[204] This argument applies with even more force to the EEOC's contention that men also can recover for work environment harassment similar to that found in *Broderick*.[205] Although male employees no doubt could find such behavior offensive, it hardly is motivated by *their* gender.

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200. *Id.* The *Broderick* court then added that the preferential treatment also deprived the plaintiff of promotions and job opportunities. *Id.* However, because work environment harassment does not require a tangible job detriment, *see supra* note 39 and accompanying text, and because the plaintiff apparently was not making a quid pro quo claim, *see supra* note 194, the relevance of this remark is not obvious.

201. *Broderick*, 685 F Supp. at 1280.

202. *See supra* notes 101-10 and accompanying text (discussing motivating factor standard).

203. *See supra* notes 111-14 and accompanying text.

204. In this discussion, I ignore the two incidents of alleged sexual harassment directed against the plaintiff personally *See supra* note 195.

205. *See supra* text accompanying note 190 (quoting *EEOC Policy Guide*). The EEOC's position also seems inconsistent with its earlier position on isolated instances of favoritism resulting from consensual relationships, which depended on the claim that the victims of such favoritism are disadvantaged for reasons other than their gender. *See supra* text accompanying note 131 (quoting *EEOC Policy Guide*).

In addition, the notion that work environment harassment can arise solely from sexual favoritism coexists uneasily with the standards that the Supreme Court recently has articulated for work environment sexual harassment claims.[206] According to the Court, while a victim of work environment harassment must at least perceive the environment as abusive,[207] that environment need not cause her concrete psychological harm.[208] Although these two rules would not affect the result in *Broderick*, the Court also required that the employer's conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."[209] The Court further stated that in determining whether an environment is hostile or abusive, courts should look at "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[210]

Under these standards, was the sexual favoritism in the *Broderick v Ruder* environment sufficiently severe or pervasive to make that environment "objectively hostile or abusive"?[211] Certainly the favoritism occurred with "frequency" and was "pervasive." Although the plaintiff's job environment affected her work performance,[212] however, it is unclear whether it "unreasonably" did so. Should a reasonable person's work performance be affected by a pattern of sexual favoritism that did not directly impede that work? At least as compared with some work environment harassment cases,[213] moreover, the environment endured by the plaintiff in *Broderick*

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206. *See* Harris v Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993); *see also supra* notes 41-43 and accompanying text (discussing *Harris*).

207 *Harris*, 114 S. Ct. at 370-71.

208. *Id.* at 371.

209. *Id.* at 370.

210. *Id.* at 371.

211. Again, I ignore the two instances of possible work environment that were directed at the plaintiff herself. *See supra* note 195.

212. *See Broderick*, 685 F Supp. at 1278; *see also supra* note 200 and accompanying text (discussing effect of preferential treatment in *Broderick*).

213. For some allegations of particularly egregious work environment harassment, see Meritor Sav Bank v Vinson, 477 U.S. 57, 60 (1986) (supervisor allegedly fondled plaintiff during working hours, exposed himself to her, entered women's restroom when plaintiff was

hardly seems "severe." And only the most delicate would regard her environment as "physically threatening or humiliating."[214]

3. Other Sexual Favoritism/Work Environment Harassment Cases

Even if *Broderick v Ruder* was correctly decided, subsequent cases suggest little judicial inclination to broaden sexual favoritism/work environment harassment claims beyond the facts of that case. Courts seem particularly reluctant to allow recovery when, unlike *Broderick*, one supervisor was having a relationship with one subordinate. For example, in *Drinkwater v Union Carbide Corp.*,[215] the United States Court of Appeals for the Third Circuit confronted a claim based mainly on a sexual relationship between the plaintiff's supervisor and the plaintiff's female subordinate.[216] Even though the supervisor favored his paramour and may have disadvantaged the plaintiff,[217] the court read the plaintiff's claim as one alleging hostile environment sexual harassment.[218] While denying that

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in there alone, and raped her on several occasions); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988) (construction workers on construction site repeatedly asked female "flag persons" for sexual intercourse and oral sex, frequently mooned them, occasionally engaged in offensive touchings of their thighs and breasts, called them abusive sex-related names, secretly observed them while they were urinating, and caused one woman's car to malfunction by urinating into its gas tank).

214. Although the point is not directly relevant to the "reasonableness" inquiry, the *Broderick* court concluded that the "plaintiff was a sensitive person who had adjustment problems before she came to the SEC" and that "the environment in which she worked exacerbated these problems." *Broderick*, 685 F Supp. at 1273; *see id.* at 1280. Indeed, there was testimony that she suffered from "a paranoid personality disorder," and the court did not explicitly reject this testimony *Id.* at 1273.

215. 904 F.2d 853 (3d Cir. 1990) (applying New Jersey law).

216. Drinkwater v Union Carbide Corp., 904 F.2d 853, 855, 859 (3d Cir. 1990).

217 *See id.* at 854-57

218. *Id.* at 859. The *Drinkwater* court conceded that the plaintiff might have been making a quid pro quo sexual harassment claim, but asserted that she had offered no evidence to support that claim. *Id.* at 859 n.9. The court also asserted that if the supervisor was illegally using sexual attractiveness as a performance criterion, the plaintiff "must give the court some basis on which to so find." *Id.* A normal sexual favoritism claim was precluded because the case was decided under New Jersey law, and the New Jersey Supreme Court's decision in Erickson v Marsh & McLennan Co., 569 A.2d 793 (N.J. 1990), blocked such a claim. *See Drinkwater*, 904 F.2d at 861.

claim, the Third Circuit distinguished *Broderick* because sexual conduct pervaded the work environment in *Broderick.*[219] By contrast, the *Drinkwater* court found that "there is no evidence that [the supervisor and his paramour] flaunted the romantic nature of their relationship, nor is there evidence that these kinds of relationships were prevalent."[220] However, a sexually charged environment could be discriminatory "if sexual discourse displaced standard business procedure in a way that prevented plaintiff from working in an environment in which she could be evaluated on grounds other than her sexuality "[221] Finally, the court also discounted two alleged sexually stereotypical remarks by the supervisor because "[h]ostile environment claims must demonstrate a continuous period of harassment, and two comments do not create an atmosphere."[222] In the process, the court implicitly affirmed the uncontroversial proposition that other sex-related behavior may contribute to a work environment claim involving sexual favoritism, and vice versa.[223]

4. Conclusions

All things considered, the prospects for attacking sexual favoritism as work environment sexual harassment look dim. For one thing, it is questionable how often sexual favoritism will be sufficiently severe or pervasive to create an objectively hostile work environment. Still, cases in which the favoritism is even more open and pervasive than in *Broderick v*

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219. *See Drinkwater*, 904 F.2d at 862 & n.16; *see also* Candelore v Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (holding that where coworker allegedly was having romantic affair with one or more of plaintiff's supervisors, plaintiff's allegation that coworker's sexually charged behavior created hostile work environment failed because coworker's involvement with supervisor was insufficient for liability by itself, affairs in question largely took place outside work hours and work environment, and alleged incidents of sexual horseplay took place over series of years); Miller v. Aluminum Co. of Am., 679 F Supp. 495, 501-02 (W.D. Pa.) (rejecting weak work environment harassment claim in which sexual favoritism played some role, but apparently recognizing that sexual favoritism can contribute to work environment harassment claim), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

220. *Drinkwater*, 904 F.2d at 862.

221. *Id.*

222. *Id.* at 862-63.

223. *See Miller*, 679 F Supp. at 501-02 (recognizing possibility that sexual favoritism was one component of pattern of alleged work environment harassment, yet rejecting claim).

Ruder are imaginable and would seem to be candidates for the imposition of liability In addition, sexual favoritism can contribute to a work environment claim in which other forms of harassment are present. The real problem with sexual favoritism-based work environment harassment claims, however, is whether they involve discrimination based on the victim's gender.[224] Both men and women apparently can mount such claims.[225] More importantly, the victim's gender probably is not the motive for the favoritism that he or she attacks.

V Conclusion

Title VII's new section 703(m), which forbids employment practices in which sex was a "motivating factor,"[226] may someday expand the statute's reach. Currently, Title VII does not bar discrimination on the bases of sexual orientation, transsexualism, and physical appearance.[227] But like sexual favoritism,[228] discrimination on these grounds often is bound up with gender. Whatever section 703(m)'s eventual impact in these areas, however, it does not touch sexual favoritism. The reason, as always, is Title VII's section 703(a), which forbids employment discrimination against an individual only when that discrimination is "because of *such individual's* sex."[229] Because practitioners of sexual favoritism are not motivated by

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224. However, the problem of whether gender-based discrimination exists should not often arise in cases in which sexual favoritism helps establish implied quid pro quo harassment. In those situations, the favoritism is used merely to assist in proving harassment that normally is itself discriminatory

225. *See supra* text accompanying note 190 (quoting *EEOC Policy Guide*).

226. 42 U.S.C. § 2000e-2(m) (Supp. III 1991); *see supra* notes 101-10 and accompanying text (discussing motivating factor standard).

227 *See* PLAYER, *supra* note 4, § 5.25(c)(2) (noting inapplicability of Title VII to claims of discrimination based on homosexuality and transsexuality). *See generally* Note, *supra* note 122 (using handicap discrimination law, and not Title VII, as preferred device for outlawing discrimination on basis of physical appearance, thereby implying that Title VII does not even arguably bar such discrimination).

228. *See supra* notes 91-92, 108-10 and accompanying text (discussing gender's role in sexual favoritism claims).

229. 42 U.S.C. § 2000e-2(a) (1988) (emphasis added); *see id.* § 2000e-2(b)-(d). Because § 703(m) begins with the words "[e]xcept as otherwise provided in this subchapter," *id.* § 2000e-2(m) (Supp. III 1991), § 703(m) should not override § 703(a). However, a similar "motivations" test probably now applies under § 703(a). *See supra* notes 111-14 and accompanying text (discussing relationship between § 703(a) and § 703(m)).

their victims' gender, that favoritism is not "because of" their sex under section 703(a).[230] By contrast, discrimination against homosexuals, transsexuals, and the physically unattractive often cannot readily be separated from their gender.

However, victims of sexual favoritism may sometimes have recourse to Title VII sexual harassment law When the favored party submits to quid pro quo harassment, the victim of the resulting favoritism should have standing to sue for the harassment.[231] Few, if any, cases have involved this fact pattern, however.[232] When the employer has implicitly made sexual submission a condition for obtaining job benefits or avoiding job detriments, moreover, sexual favoritism sometimes may help establish that implied condition.[233] Cases of this kind, though, have not been abundant to date.[234] Finally, sexual favoritism may occasionally be so pronounced and pervasive as to become, or contribute to, work environment sexual harassment.[235] In all likelihood, however, most forms of sexual favoritism will lack the necessary severity and pervasiveness. In addition, it is questionable whether this workplace misbehavior has anything to do with the victim's gender.

In sum, Title VII has relatively little to offer victims of sexual favoritism. Although this conclusion most likely leaves those people without a legal remedy, several considerations may help mitigate the injustice. First, it is difficult to believe that sexual favoritism was before Congress's mind when it included sex among Title VII's forbidden grounds for employer decisions.[236] Second, although sexual favoritism obviously involves gender, when considered as a whole it seems to resemble nepotism[237] more

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230. For some possible qualifications to this statement, see *supra* note 113.

231. *See generally supra* notes 131-70 and accompanying text (discussing standing issue).

232. *See supra* note 9 and accompanying text (noting that no sexual favoritism case exists in which coerced sexual relationship was involved).

233. *See generally supra* notes 171-89 and accompanying text (discussing sexual favoritism's relationship to implied quid pro quo sexual harassment claims).

234. *See supra* notes 177-84 and accompanying text (finding only three such decisions).

235. *See generally supra* notes 190-225 and accompanying text (discussing sexual favoritism's relationship to work environment sexual harassment claims).

236. *See supra* notes 80-90 and accompanying text (discussing Title VII's legislative history).

237 *See* Ayers v AT&T, 826 F Supp. 443, 445 (S.D. Fla. 1993).

than, for example, misogyny, stereotyped views about female abilities, or the belief that women belong in the home. Finally, Title VII never was intended to rectify every employment-related injustice or to establish the Perfectly Meritocratic Workplace. Instead, Title VII simply forbids employment discrimination on the bases of race, color, religion, sex, and national origin. And as we have seen,[238] there are many moral reasons for distinguishing sexual favoritism from these abuses.

238. *See supra* notes 115-30 and accompanying text (arguing that sexual favoritism is morally less objectionable that discrimination forbidden by Title VII).