

Dangerous Liaisons? An Analysis of Employer Liability for Sexual Favoritism in the Workplace

By Christina J. Fletcher

I. Introduction

In 2005, the California Supreme Court held in *Miller v. Department of Corrections* that sexual favoritism in the workplace may establish a claim of sexual harassment under a hostile work environment theory.¹ Following the *Miller* decision, the national media and legal commentators heralded it as “a ruling that significantly expanded the law on sexual harassment in the workplace”² and forecast “a new definition of sexual harassment.”³ The decision was deemed a “victory” for “the unloved” workers who “can no longer be treated as second class citizens because they are not putting out.”⁴ The defense and plaintiff’s bar both classified the case as “ground-breaking”⁵ and “sound[ing] [an] alarm” to employers who were “scrambling for cover” in the wake of the decision.⁶ The idea that a sexual favoritism claim can expand a wholly consensual sexual relationship into sexual harassment of employees *uninvolved* in that sexual relationship made these admonishments seem warranted.

Has the outcry surrounding *Miller* and claims of sexual favoritism come to pass? While the past few years have seen an increasing rise in lawsuits containing allegations of “sexual favoritism,” courts considering these claims have applied a rigorous analysis, and, at least in New York, claims grounded in sexual favoritism—even those with salacious facts—have not had a good track record at surviving either 12(b)(6) motions to dismiss, or motions for summary judgment.

This article will provide an analysis of the recent treatment of such allegations by New York courts, as well as an overview of the legal standard governing sexual favoritism allegations in today’s legal landscape.

II. What Is Sexual Favoritism?

This new twist on a traditional sexual harassment claim occurs when a supervisor provides preferential job benefits to a subordinate with whom he is having a consensual sexual relationship to the detriment of other subordinates.⁷ The concept of sexual favoritism expands a sexual harassment claim beyond those actually in the workplace relationship to other individuals in the workplace who claim they were affected by the relationship.⁸ The facts of the *Miller* case provide an illustrative example of unlawful sexual favoritism in action.

The events in *Miller* occurred at prison facilities run by the state’s Department of Corrections.⁹ Beginning in 1994, Plaintiffs Miller, a correctional officer, and Mackey (her assistant) heard from other employees that the

warden of the prison (Kuykendall) was having a consensual sexual relationship with three different female subordinates (Patrick, Brown, and Bibb).¹⁰ During the time that the relationships occurred, Patrick, Brown, and Bibb received various job benefits ranging from desirable transfers, promotions for which there were better qualified candidates, special assignments, and work privileges.¹¹ The three women bragged to coworkers about their power over the warden to effectuate the transfers and promotions.¹² Significantly, Brown was able to win numerous promotions over Plaintiff Miller, even though Miller had a higher rank, superior education, and greater experience.¹³

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Within a year and a half, Brown was promoted to the position of associate warden. Other employees were outraged at the pace of her promotions and complained that to achieve higher-ranking positions they would have to “F [their] way to the top.”¹⁴ Things got worse for Miller when Yamamoto, a female chief deputy warden who was *also* rumored to be engaged in a sexual relationship with Brown, began interfering with plaintiff’s duties, including countermanding her orders, imposing upon her additional onerous duties and threatening her with reprisals.¹⁵ When Miller complained to the warden, he did nothing to discipline Yamamoto and instead stated that he was unable to help Miller due to his relationship with Brown and Brown’s relationship with Yamamoto.¹⁶ The facts proffered by plaintiffs also provided evidence of conduct that affected the workplace in general: employees witnessed the warden and one of his lovers fondling each other, and at various times the three women were seen fighting over the warden in emotional scenes at work.¹⁷

Plaintiffs eventually complained to internal affairs about the situation and, as a consequence, were subjected to additional ostracism and harassment.¹⁸ In one instance, Brown followed Plaintiff Miller home after an angry confrontation at work, resulting in a court order that required Brown to stay away from Miller.¹⁹ Suffering from increasing stress and humiliation at work, plaintiffs resigned from the Department.²⁰

Plaintiffs filed a lawsuit in California State Court alleging, among other things, that the warden's sexual favoritism constituted discrimination and sexual harassment.²¹ The trial court granted summary judgment for defendants and the Court of Appeals affirmed, concluding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, nonfavored employees.²² The Court of Appeals found that the plaintiffs had not stated an actionable hostile work environment claim because, although they had "demonstrated unfair conduct in the workplace," the preferential treatment of the lovers did not rise to a "concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex."²³ As explained below, the unanimous Supreme Court of California reversed the rulings of the lower courts.

The Legal Standard for Sexual Favoritism Claims

In reversing the dismissal of Plaintiffs' claims, the unanimous Supreme Court of California held that "an employee may establish an actionable claim of sexual harassment...by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."²⁴ In so holding, the Court relied almost exclusively on Equal Employment Opportunity Commission ("EEOC") policy guidance regarding employer liability for sexual favoritism, issued by the EEOC in 1990.²⁵ The Court applied this "widespread" standard to the facts of *Miller* and concluded that the "evidence proffered by [the] plaintiffs, viewed in its entirety, established a prima facie case of sexual harassment under a hostile work environment theory."²⁶ The *Miller* court found that the plaintiffs were able to show "far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner"; the plaintiffs demonstrated the impact of widespread favoritism on the work environment and that this had created an atmosphere that was "demeaning to women."²⁷ The Court rejected the defendant's contention that recognition of a sexual favoritism cause of action would result in regulation of personal relationships because the Court found that it "is not the relationship, but its effect on the workplace, that is relevant."²⁸ The Court reasoned that the negative effect on the non-favored employees and work environment that resulted from the warden's affairs diminished concerns the Court may have had about intruding on the privacy of the relationships.²⁹

Prior to *Miller*, the overwhelming majority of previous rulings throughout the federal circuits had consistently held that consensual sexual relationships in the workplace do not constitute discrimination based upon sex or sexual harassment, but rather reflect the "personal preference" of a supervisor to engage in relations with

one employee over another.³⁰ By in large, the courts acknowledged that it was "unfair"³¹ for a supervisor to provide job benefits to a subordinate with whom he is in a sexual relationship while denying benefits to other employees; yet the courts refused to recognize such a situation as rising to a level where it creates a cause of action for sexual harassment on behalf of the non-sexually favored employees.³²

In addition, in the Title VII context, sexual harassment claims based upon sexual favoritism in the workplace tended to fail because such claims lacked the causal connection between the alleged discriminatory/harassing act and plaintiff's protected class (usually gender). For example, in the leading case of *DeCintio v. Westchester County Medical Center*,³³ the Second Circuit relied on the definition of "sex" in Title VII to hold that consensual sexual relationships do not constitute sex discrimination. The *DeCintio* court's rationale was that because an employee of the opposite sex could have suffered the same negative impacts from the supervisor's sexual favoritism, the non-favored employee was not disadvantaged because of his gender.³⁴ Thus, if a male supervisor prefers a female subordinate with whom he is having a sexual relationship, a male employee is disadvantaged in the same way as other female employees. Because there was no disparate treatment based upon sex, plaintiff's sexual harassment claim failed. Consequently, pre-*Miller*, it seemed that most sexual favoritism claims were dead in the water.

How New York Courts Are Handling Sexual Favoritism Today

When evaluating sexual favoritism allegations, New York Courts have continued to require the causal connection between the purported favoritism and the plaintiff's gender required by the *DeCintio* court. If plaintiff cannot show that the favoritism-generated actions were because of plaintiff's gender (and not just because the supervisor preferred the employee with whom he is having a sexual relationship), plaintiff's claim will fail. Even when faced with the sort of egregious facts and "widespread" sexual favoritism evidenced in the *Miller* case, New York Courts are routinely dismissing sexual favoritism claims where the plaintiff fails to show that the supervisor's favoritism did not disadvantage those of plaintiff's own gender, rather than employees of both genders. This is a high bar for plaintiffs.

Three recent New York district court decisions on sexual favoritism highlight the substantial hurdle plaintiffs face in bringing sexual favoritism claims. In *Krasner v. HSH Nordbank AG*,³⁵ Plaintiff (a male) brought a multitude of scandalous allegations regarding sexual harassment and favoritism in the workplace against his employer and the supervisor he accused of engaging in the prohibited sexual favoritism. Plaintiff, a Vice-Presi-

dent and Head of Corporate Services, was supervised by Defendant Kiser, Defendant HSH's General Manager and Chief Operating Officer.³⁶ Plaintiff alleged Defendants' workplace was "an atmosphere infected with overt sexism, where career advancement based on sexual favoritism was accepted, and where male supervisors promoted a sexist and demeaning image of women in the workplace in which women's advancement was governed by a 'casting couch.'"³⁷ Defendants were accused of supporting a "culture of widespread sexual favoritism...stemming from several male managers' open, public intimate relationships with [female] subordinates whom they later favored in the workplace."³⁸ Plaintiff named numerous male managers who engaged in sexual relationships with subordinates, and also recounted a business trip where his supervisor, Kiser, forced him to go to a strip club where Plaintiff witnessed Kiser "engaging in sexual acts with the strippers."³⁹

Plaintiff's most specific allegations of sexual favoritism were with regard to Kiser, whom he alleged had a relationship with Melissa Campfield, the most junior member of Plaintiff's department.⁴⁰ Plaintiff alleged that Kiser's relationship with Campfield resulted in her being advanced and promoted at the expense of the career advancement and reputations of other far more senior and qualified employees, even though Campfield was viewed as a "consistent underperformer."⁴¹ Kiser's purported favoritism of Campfield resulted in her being given a separate office and laptop, while similar requests by another female employee with more experience than Campfield were denied.⁴² Kiser also arranged for Campfield to attend a business trip to Germany—"an unprecedented junket for someone in such a junior position"—where Plaintiff alleges Kiser and Campfield spent time privately together.⁴³ In addition, Plaintiff had issued a management directive to his team that employees were prohibited from sending text messages on their company BlackBerries, but Kiser and Campfield exchanged over 500 text messages in July alone.⁴⁴ Moreover, Kiser gave Campfield prestigious assignments directly, even taking them away from other employees to whom they had originally been assigned, including Plaintiff and other senior employees.⁴⁵ After Plaintiff complained to human resources about Kiser and his liaisons, Plaintiff was stripped of substantial responsibilities, forced to undergo humiliating scrutiny of his work, and ultimately terminated.⁴⁶

Even in the face of all of these detailed factual allegations of sexual favoritism, Defendants prevailed on their 12(b)(6) motion to dismiss.⁴⁷ The *Krasner* court explained that "Plaintiff does not allege, and proffers no facts that remotely suggest, that a female supervisor in his position would not have experienced exactly the same consequences from Kiser's preferential treatment of Campfield. Nothing in the facts alleged plausibly connects any of the actions taken against Krasner to his sex."⁴⁸ "Even the al-

legations of 'widespread sexual favoritism' through male supervisors' relationships with female subordinates reveal that this purported favoritism is alleged by [Plaintiff] to disadvantage women (by subjecting them to differential demands for sexual favors), not men (by denying them advantages open to compliant women)."⁴⁹ Plaintiff simply failed to demonstrate the "prohibited causal factor requirement" that a sexually hostile environment "is one that is *discriminatorily* hostile to an employee based on *his or her* sex."⁵⁰ Plaintiff's hostile environment claim thus failed, as did his retaliation claim for complaining about Kiser's affair with Campfield, because the court found that it was not protected activity under Title VII.⁵¹

While dismissing Plaintiff's claims of sexual favoritism in the instant case, the *Krasner* court cautioned that claims of sexual favoritism may survive, if properly asserted under governing legal standards. As explained by the Court: "This is not to say that widespread sexual favoritism or the perpetration of offensive stereotypes of women through other means can never serve as the foundation for a sexual discrimination claim, on a hostile environment theory or otherwise, by a person of either gender.... This may occur, for example, if the sexualized atmosphere of the workplace created a hostile environment for women by making submission to the sexual advances of their male supervisors a condition of employment and discriminated against men by foreclosing job benefits reserved for compliant women."⁵² Thus, in attempting to establish a claim of harassment based upon sexual favoritism, a New York plaintiff would be wise to raise the sort of allegations the *Krasner* court highlights as actionable (if they exist), or face dismissal.

New York courts have not held differently where the plaintiff was a female alleging sexual favoritism. In *Foster v. The Humane Society of Rochester and Monroe County, Inc.*⁵³ Defendant prevailed on a Rule 12(b)(6) motion to dismiss on Plaintiff's Title VII claim of "gender-based hostile work environment" based upon the Defendant President's alleged sexual favoritism towards one of Defendant's donors.⁵⁴ Plaintiff (a female) alleged that the married President's affair with the married donor affected the performance of Plaintiff's duties in that she was "burdened with the responsibility to keep President Alice's relationship [with the donor] in hiding" and that the donor was "continually meddl[ing] in matters for which plaintiff was responsible" but, "if plaintiff disagreed with the donor's suggestions, or tried to limit his involvement, [the President] would override plaintiff and let the donor have his way."⁵⁵ After complaining about the President's affair, Plaintiff was terminated.⁵⁶ The court dismissed Plaintiff's claim, explaining that Plaintiff failed to allege facts sufficient to show actionable sexual favoritism in that she did not demonstrate "widespread favoritism" or "favoritism based upon coerced sexual conduct."⁵⁷ In addition the court found that "[t]he most significant flaw in this claim, [], is that plaintiff's allega-

tions do not indicate that her gender was causally related to the hostility that she allegedly faced.⁵⁸ “Nothing in the complaint suggests that plaintiff would have been treated any differently had she been a man.”⁵⁹ The court held that Plaintiff’s claim failed under the New York State Human Rights Law for the same reasons.⁶⁰

A pro-se Plaintiff faced a similar fate on summary judgment in *Torres v. Do It Best Corp.*⁶¹ Plaintiff Torres (a male) alleged that he was discriminated against on the basis of his gender because his supervisor assigned a lighter workload to females to whom the supervisor was “sexually attracted” and had “a fetish for.”⁶² The court granted Defendant’s motion for summary judgment, finding that “although on its face Plaintiff’s claim seems to allege that he, as a member of one sex, was treated differently than members of another sex, Plaintiff’s deposition testimony reveals that the disparate treatment was based on sexual attraction and not on gender discrimination...such a claim is not cognizable under Title VII.”⁶³

“[W]hile sexual favoritism claims remain viable, New York courts have set a high bar, and there is no indication that ‘a new definition of sexual harassment’ has emerged in New York.”

Conclusion

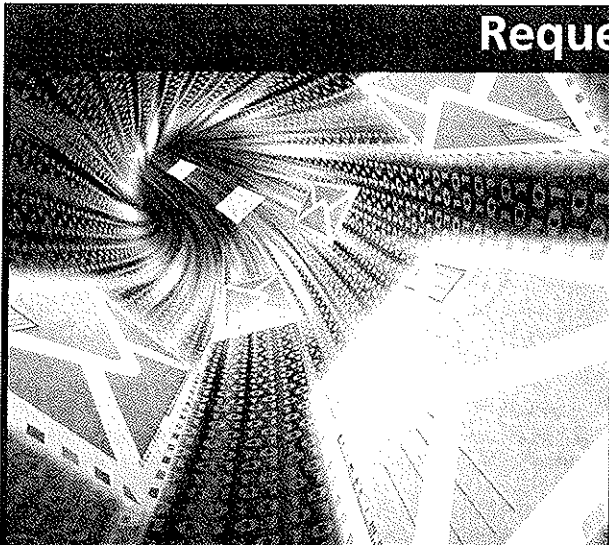
As a review of recent decisions suggests, even evidence of “widespread” sexual favoritism by a supervisor may not be enough to maintain a viable sexual harassment claim without establishing the causal relationship between the favoritism and the plaintiff’s own gender. It appears a female plaintiff who cannot prove that a sexualized workplace atmosphere created a hostile environment for women by making submission to a male supervisor’s sexual advances a condition of employment may not have a viable claim. Similarly, a male plaintiff who cannot prove that men were foreclosed from job benefits reserved for compliant women may not have a viable claim. As such, plaintiff’s bar may begin hedging their sexual favoritism claims with other claims such as non-gender related wage retaliation claims permitted under the new Wage Theft Prevention Act (which may result in back pay, liquidated damages and reinstatement).⁶⁴ For their part, New York employers may attempt to protect themselves from sexual favoritism claims by prohibiting consensual supervisor-subordinate relationships through anti-fraternization or “no dating” policies.⁶⁵ Overall, while sexual favoritism claims remain viable, New York courts have set a high bar, and there is no indication that “a new definition of sexual harassment” has emerged in New York.⁶⁶

Endnotes

1. 115 P.3d 77 (Cal. 2005).
2. Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9, at 1; see also *Workplace Romance May Create Hostile Work Environment for Other Employees*, JACKSON LEWIS LEGAL UPDATE, July 22, 2005, available at <http://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=818> (characterizing the decision as a “significant expansion of sexual harassment law”).
3. *Employment Law: When Sex Is Unfair*, THE ECONOMIST, July 23, 2005, at 46.
4. Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9, at 1.
5. Kim Curtis, *High Court Agrees Women Harassed*, MONTEREY COUNTY HERALD (July 19, 2005).
6. *California Ruling on Workplace Romance Sends Employers Scrambling for Cover*, JACKSON LEWIS LEGAL UPDATE, Aug. 8, 2005, available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=827>.
7. Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 162–63 (1991).
8. *Id.*
9. 115 P.3d 77 (Cal. 2005).
10. *Id.* at 81.
11. *Id.* at 82.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 83.
16. *Id.* at 83–84.
17. *Id.* at 83.
18. *Id.* at 84–85.
19. *Id.* at 84.
20. *Id.*
21. *Id.* at 85–86.
22. *Id.* at 86.
23. *Id.*
24. *Id.* at 90.
25. *Id.* at 88–90; EEOC OFFICE OF LEGAL COUNSEL, EEOC NOTICE NO. 915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), available at <http://eoc.gov/policy/docs/sexualfavor.html>.
26. *Miller*, 115 P.3d at 90.
27. *Id.* at 93.
28. *Id.* at 94.
29. *Id.*
30. See, e.g., *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986); *Ackel v. Nat’l Commc’ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (reasoning that “when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender”); *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (stating that “Title VII does not, however, prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible”); *Womack v. Runyon*, 147 F.3d 1298, 1299–1301 (11th Cir. 1998) (following *DeCintio* and affirming dismissal of claim on issue of “whether preferential treatment based on a consensual relationship between a supervisor and an employee constitutes

- a cognizable sex discrimination cause of action under Title VII"); *Taken v. Okla. Corp. Comm'n.*, 125 F.3d 1366, 1370 (10th Cir. 1997) (explaining that "[f]avoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on a prohibited classification").
31. *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986).
 32. See cases cited *supra*, note 30.
 33. 807 F.2d 304 (2d Cir. 1986).
 34. See *id.* at 308.
 35. 680 F.Supp.2d 502 (S.D.N.Y. 2010).
 36. 680 F.Supp.2d 502, 508 (S.D.N.Y. 2010).
 37. *Id.*
 38. *Id.* at 508–509.
 39. *Id.*
 40. *Id.* at 509.
 41. *Id.*
 42. *Id.* at 510. "The reasons for the disparity did not escape" the woman whose request was denied and who wrote in an email to another employee that "I guess if I want to sit in an office and have a laptop, I better start handing out some" b*** jobs. *Id.* at n. 4.
 43. *Id.* at 509.
 44. *Id.* at 509–510.
 45. *Id.* at 510.
 46. *Id.* at 510–11.
 47. *Id.* at 522.
 48. *Id.* at 517.
 49. *Id.* at 514–15.
 50. *Id.* at 514.
 51. *Id.* 519–22.
 52. *Id.* at 516.
 53. 724 F. Supp. 2d 382 (W.D.N.Y. 2010).
 54. 724 F. Supp. 2d 382, 391–92 (W.D.N.Y. 2010).
 55. *Id.* at 386.
 56. *Id.* at 387.
 57. *Id.* at 392–93.
 58. *Id.* at 392.
 59. *Id.* at 394.
 60. *Id.* at 397.
 61. No. 07-CV-230 (CS)(LMS), 2008 WL 4974588 (S.D.N.Y. 2008).
 62. No. 07-CV-230 (CS)(LMS), 2008 WL 4974588, at *11 (S.D.N.Y. Nov. 24, 2008).
 63. *Id.*
 64. Under New York's newly enacted Wage Theft Prevention Act, if an employer is found to have retaliated against an employee because the employee complained that the employer engaged in conduct that the employee, reasonably and in good faith, believed violated any provision of the New York Labor Law, then the employee may be entitled to reinstatement, back pay and front pay. The employee may also recover up to \$10,000 in liquidated damages.
 65. While New York Labor Law § 201-d prohibits discrimination based on lawful off-duty activities, the Second Circuit, as well as New York's Appellate courts, have held that romantic dating is not a protected "recreational activity" for the purposes of § 201-d, and that termination of employees for engaging in relationships with each other does not violate § 201-d. *McCavitt v. Swiss Reinsurance America Corp.*, 237 F.3d 166 (2d Cir. 2001); *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep't 1995) (Definition of "recreational activities," for purposes of statute forbidding employer discrimination against employees because of their participation in legal recreational activities pursued outside of work hours, was unambiguous and did not include a dating relationship and, thus, employer's no-dating policy did not violate the statute.); *Hudson v. Goldman Sachs & Co., Inc.*, 283 A.D.2d 246, 725 N.Y.S.2d 318 (1st Dep't 2001) (Plaintiff's cause of action under Labor Law § 201-d(2)(c) was properly dismissed on the ground that romantic relationships are not protected "recreational activities" within the meaning of that provision, and male Plaintiff failed to state a cause of action for any form of discrimination where his female paramour, who was single, was also terminated, undermining any claim of discrimination on the basis of sex or marital status.).
 66. *Employment Law: When Sex Is Unfair*, THE ECONOMIST, July 23, 2005, at 46.

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