

*Chair's Message*

# CLE, Certification Top the Agenda

by Deborah S. Crumbley, Chair

We are now well over half way through the year. I want to take this opportunity to update you on the Section's latest activities and to give advance notice regarding upcoming programs and issues. Let me start by congratulating Cathy Jo Beveridge on a very successful Miami seminar, "See Ya In Court, Boss." Turn out for this program was very good. We also owe a special thanks to Professor Michael Fischl and with The University of Miami and Mark Zelek for a special half day program, "What Labor Lawyers Need to Know About Employee Benefits." As I write this column, Ron Rosengarten, Program Chair for the 1997 Advanced Labor Topics, has just completed the final touches on that program. For those of you who have not yet seen the brochure, the program is scheduled for April 17 and 18 at The Pier House in Key West, Florida. I encourage all of you to attend. Kevin Hyde, this year's Section CLE Chair, is also working on trying to repeat last year's very successful Employment Law Trial Skills Program.

At the most recent Executive Council meeting, the issue of certification for labor and employment law was once more discussed. From an historical perspective, the issue has been consid-

ered several times, but to date has not been approved by this Section. It was decided by the Executive Council that consideration should again be given to this issue for several reasons. First, our Section has experienced and is experiencing phenomenal growth. We currently have over 1,500 members. These new members should have the opportunity to have input into this decision. Second, the Bar has enhanced its focus on certification, with the result that a number of Sections have pursued and attained, that goal. Finally, the previously existing Designation for Labor and Employment Law no longer exists. For these reasons, the Executive Council has authorized me to appoint a Committee to study this issue and report back to the Executive Council. The Committee is charged with formulating an advisory presentation to the Executive Council on the general parameters for certification and how to best communicate the information on certification to the membership in order to effectively gauge interest in pursuing the subject further. Stuart Rosenfeldt has graciously agreed to Chair the Committee. Appointments will be made shortly.

Finally, consideration of the development of our own Section Web Page

continues under the direction of Pro Bono/Special Project Co-Chairs Walter Aye and Greg Hearing. Walter arranged for a special presentation at our last Executive Council meeting on how other Sections have been approaching this issue. In addition, Stuart Rosenfeldt chaired a Special Long Range Planning Committee dinner on the benefits of technology in the practice of law. On a related note, our Committees continue to work on compiling Web sites of interest to our membership.

As we move forward, I encourage those of you who have been appointed to a Committee but who have not been involved to contact your Co-Chairs. It is not too late to become an active participant in the Section.

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# Employer Liability for Sexual Favoritism Under Title VII

by Marlene Rodriguez

Romance in the work place is certainly nothing new, and will undoubtedly continue regardless of any employer prohibitions. However, when romance translates into work place favoritism, a claim of discrimination may be the result.

Sexual favoritism occurs when a member of management enters into a relationship with an employee who then receives favorable treatment because of the relationship, sometimes at the expense of other co-workers. While consensual sexual relationships between members of management and employees may not be good for business, such affiliations do not necessarily violate Title VII.<sup>1</sup> In fact, employees alleging sexual harassment based on paramour preference have met with little success in court. The key inquiry in sexual favoritism cases is whether the paramour's co-workers get the message that the only ones rewarded with job benefits or opportunities are those who submit to a supervisor's sexual demands.

## EEOC Guidelines

Sexual harassment violates Section 703 of Title VII.<sup>2</sup> The EEOC defines two types of sexual harassment.

The first is "quid pro quo" harassment, where "submission to or rejection of [unwelcome sexual advances] by an individual is used as the basis for employment decisions affecting such individual."<sup>3</sup> The second is "hostile environment" harassment, where the unwelcome sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."<sup>4</sup>

The EEOC's guidelines suggest that a qualified employee who is denied an employment benefit or opportunity in favor of a co-worker who has submitted to the sexual advances of a supervisor may have a Title VII claim. EEOC Guidelines on Discrimination Because of Sex provide that:

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 were denied that employment opportunity or benefit.<sup>5</sup>

The EEOC has also issued specific Policy Guidance addressing em-

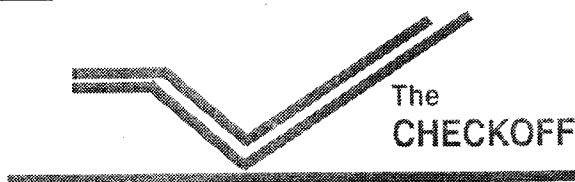
ployer liability where sexual favoritism works to the disadvantage of other qualified employees.<sup>6</sup> The guidance suggests that, while isolated instances of paramour favoritism do not trigger Title VII liability, sexual favoritism may, under certain circumstances, constitute *quid pro quo* or hostile environment sexual harassment.

## General Rule: No Title VII Liability for Isolated Instances of Paramour Preference

Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships.<sup>7</sup> While favoritism toward a paramour may be unfair, it does not constitute discrimination against men or women in violation of Title VII.<sup>8</sup> In situations of paramour preference, both men and women are disadvantaged not because of their gender, but because of the existence of a romantic affiliation between a co-worker and supervisor.<sup>9</sup>

The Eleventh Circuit seems to agree that a supervisor's favoritism toward a consenting sexual partner to the detriment of other qualified employees, alone, is not a cognizable Title VII claim. In *White v. Fowler*, No. 94-10038-CIV-SH (S.D. Fla. 1994), *aff'd mem.*, 82 F.3d 430 (11th Cir. 1996), a female court administrator alleged that her supervisor violated Title VII by firing her after she refused to go to a hotel room with him and replacing her with his paramour.<sup>10</sup> The Court dismissed the plaintiff's sexual harassment claim based on paramour preference, finding that favoring a lover when granting employment opportunities or benefits does not violate Title VII.

Similarly, in *Ayers v. American Tel. & Tel. Co.*, 826 F. Supp. 443 (S.D. Fla. 1993), the court granted summary judgment for the defendant, holding that paramour preference does not violate Title VII. The *Ayers* plaintiff alleged that her supervisor engaged in sexual discrimination by transferring her to a less desirable location



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in order to bestow his younger lover with the more attractive job assignment.<sup>11</sup> The court reasoned that the sexual favoritism, although unfair, was gender-neutral, and more akin to nepotism than sexism.<sup>12</sup>

Ayers relied largely on the Second Circuit's decision in *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 108 S. Ct. 89 (1987). Seven male respiratory therapists in *DeCintio* alleged that they were unlawfully disqualified for a promotion that went to a woman who was engaged in a consensual sexual relationship with the department administrator. In finding that the administrator's conduct did not violate Title VII, the court held that the statute covers discrimination on the basis of sex, not sexual attraction or affiliation, and that there was no causal connection between the plaintiffs' gender and the employment preference.<sup>13</sup> The *DeCintio* court found that the plaintiffs were not prejudiced "because of" their status as males, as they faced exactly the same predicament as women applicants for the promotion.<sup>14</sup>

In analyzing Title VII sexual favoritism claims, courts have focused on the willingness of the paramour to enter into the sexual relationship with the supervisor. In *DeCintio*, for example, the court noted that use of the word "submission" in the EEOC Guidelines on Sex Discrimination implied a necessary element of coercion or harassment. As the department administrator in *DeCintio* did not coerce employees to submit to sexual advances in order to gain employment benefits or opportunities, his favoring of the paramour for promotion was not within the ambit of Title VII or the EEOC Guidelines.<sup>15</sup>

While paramour preference alone may not violate Title VII, instances of such favoritism may be used as evidence in proving widespread workplace harassment. The plaintiff in *Proskel v. Gattis*, 41 Cal.App.4th 1626 (Ct. App. 1996), claimed that her employer violated a state statute similar to Title VII by providing his lover, the plaintiff's co-worker, with higher year-end bonuses and more valuable Christmas gifts. The court ruled that the employer's preferential treatment toward the paramour did not constitute sex discrimination,

but added that acts of sexual favoritism may be relevant in cases considering larger sexual harassment claims.<sup>16</sup>

Thus, isolated instances of paramour preference discrimination do not violate Title VII because such preferences are not based on gender classifications, and where the paramour and defendant are engaged in a consensual sexual relationship, the EEOC and courts are likely to find no Title VII violation. However, whether a relationship is "consensual" is often a matter of perspective or timing, and "isolated" is a relative term, differences in which could change this analysis.

### Paramour Preference as Quid Pro Quo Sexual Harassment

The EEOC takes the position that, if a female employee is coerced into submitting to unwelcome sexual ad-

vances as the *quid pro quo* for a job benefit, other female employees who were qualified for but denied the position may have a Title VII claim.<sup>17</sup> The disfavored employees would need to establish that submission to sexual advances was *generally made a condition* to promotion or other employment opportunities or benefits.<sup>18</sup> In other words, in order for a woman to have received the employment benefit or opportunity at issue, it would have been necessary for her to grant sexual favors, a condition that *would not have been imposed on a man*.<sup>19</sup>

One case that supports this view is *Toscana v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983). In *Toscana*, the plaintiff claimed she was denied promotion because she refused to grant sexual favors, which her supervisor made a condition to career advancement. In addition to making sexual overtures to both the plaintiff and

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## EMPLOYER LIABILITY

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the favored paramour, there was evidence that the supervisor made telephone calls to proposition female employees at home and engaged in suggestive behavior at work. The plaintiff proved that in order to be selected for a job benefit, a woman had to grant sexual favors. Because the supervisor in *Toscana* made submission to unwelcome sexual conduct "explicitly or implicitly" a term or condition of the individual's employment, the court found his conduct to constitute *quid pro quo* sexual harassment in violation of Title VII.<sup>20</sup>

### Paramour Preference as Hostile Environment Sexual Harassment

If favoritism based upon the granting of sexual favors is widespread in the workplace, both male and female co-workers who do not welcome this conduct may be able to establish a hostile work environment claim under Title VII.<sup>21</sup> Such employees have standing to bring hostile environment claims whether or not any objectionable conduct is directed at them and regardless of whether the favored paramour willingly granted the sexual favors.<sup>22</sup> The theory is that managers engaging in widespread sexual favoritism create an atmosphere that is demeaning to female employees by implying that women can only get ahead in the workplace through sexual conduct.<sup>23</sup> As with all hostile environment claims, plaintiffs alleging hostile environment sexual harassment based on paramour preference discrimination must establish that the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment.'" *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

For example, in *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), the plaintiff alleged that two of her supervisors engaged in sexual relationships with two secretaries who received promotions, cash

awards and other employment benefits. Another of the plaintiff's supervisors allegedly promoted the career of a colleague with whom he frequently socialized. Additionally, there were instances of sexual overtures directed at the plaintiff herself. The court found that the conduct of the supervisors created an atmosphere of hostile work environment offensive to the plaintiff. The court noted that by bestowing preferential treatment upon those who submitted to their sexual advances, the supervisors undermined the plaintiff's work performance and deprived her and other female employees of promotions and job opportunities.<sup>24</sup>

However, while a supervisor's sexual favoritism of an employee may be both unfair and unprofessional, it does not always infuse the workplace with sexual overtones sufficient to support a hostile environment claim. In *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990), the plaintiff alleged that the open sexual relationship between her supervisor and a co-worker created a hostile and sexually charged work environment. The court acknowledged that a consensual sexual relationship between supervisor and subordinate may give rise to hostile environment claims where the workplace atmosphere becomes oppressive and intolerable, but found that the conduct alleged did not rise to that level.<sup>25</sup> The court explains that, although there was evidence of repeated paramour preference, the plaintiff was not prevented from being evaluated on grounds other than her sexuality.<sup>26</sup>

### Conclusion

Isolated instances of preferential treatment based on consensual sexual relationships, while unfair, do not violate Title VII. However, sexual favoritism discrimination which adversely affects the employment benefits of other qualified employees may take the form of *quid pro quo* or hostile environment harassment. In order to prevail on a *quid pro quo* sexual favoritism claim, a plaintiff must establish that the paramour was coerced into engaging in sexual acts and that submission to sexual advances was generally made a condition of promotion or other employ-

ment benefit. For a plaintiff to establish hostile environment harassment based on paramour preference discrimination, he or she must show that the sexual favoritism was so extensive as to create an intolerable, sexually charged workplace environment.

### Endnotes:

<sup>1</sup> See *Mundy v. Palmetto Ford, Inc.*, No. 92-1041, 1993 WL 280340, at \*2 (4th Cir. July 1993) (holding that for Title VII purposes, "sex" does not include voluntary romance).

<sup>2</sup> See 29 C.F.R. §1604.11(a).

<sup>3</sup> 29 C.F.R. §1604.11 (a)(2).

<sup>4</sup> 29 C.F.R. §1604.11 (a)(3).

<sup>5</sup> 29 C.F.R. §1604.11 (g).

<sup>6</sup> See Policy Guidance No. N-915-048, EEOC Compliance Manual (BNA) N:5051 (January 1990).

<sup>7</sup> *Id.* at N:5052.

<sup>8</sup> *Id.* But see *King v. Palmer*, 778 F.2d 878, 881-82 (D.C. Cir. 1985) (while the issue of whether a consensual sexual relationship can form the basis of a Title VII claim was not raised on appeal, the court implicitly recognized a Title VII action alleging discrimination based on a voluntary sexual relationship between a supervisor and a co-worker).

<sup>9</sup> See Policy Guidance No. N-915-048, EEOC Compliance Manual (BNA) N:5051, N:5052 (January 1990).

<sup>10</sup> While the plaintiff's complaint alleged a Title VII violation, it was unclear as to whether the sexual harassment at issue was *quid pro quo* or hostile environment. The court proceeded on the theory that the plaintiff was claiming hostile environment harassment. Additionally, the EEOC filed an amicus brief on behalf of the plaintiff, arguing that paramour preference can take the form of implied *quid pro quo* sexual harassment.

<sup>11</sup> See *Ayers v. American Tel. & Tel. Co.*, 826 F. Supp. 443, 444 (S.D. Fla. 1993).

<sup>12</sup> *Id.* at 445.

<sup>13</sup> It is clear that favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII. In *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 501 (W.D. Pa. 1988), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988), the plaintiff alleged that her supervisor engaged in sex discrimination by favoring a co-worker whom the supervisor knew was having an affair with the plant manager. The court granted summary judgment for the employer, holding that favoritism based upon a consensual sexual relationship is not gender-based discrimination since the female plaintiff shared the same disadvantage with her male co-workers relative to the paramour.

<sup>14</sup> See *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 89 (1987). See also *Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956, 961 (holding that preferential treatment of paramour is not bias on the basis of sex), *aff'd*, 975 F.2d 588 (9th Cir. 1992); *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 802-03 (N.J. 1990) (holding that sexual favoritism is not actionable under state statute resembling Title VII when relationship is consensual); *Kryeski v. Schott Glass Technologies, Inc.*, 626 A.2d 595, 598 (Pa. Su-

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