NOTES

THE WORKPLACE ROMANCE AND SEXUAL FAVORITISM: CREATING A DIALOGUE BETWEEN SOCIAL SCIENCE AND THE LAW OF SEXUAL HARASSMENT

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I. INTRODUCTION

The integration of women into the workforce represents a major social change of the last forty years. The number of women workers nearly doubled between 1960 and 1980,[1] and this dramatic increase continued throughout the 1980s and 1990s. By 1999, women composed forty-six and a half percent of the workforce,[2] and sixty-one percent of women age twenty or above were in the labor force compared with seventy-seven percent of men in the same age group.[3] The U.S. Census Bureau estimates that the gap between women and men will have narrowed to twelve points, such that seventy-four percent of men and sixty-two percent of women over age sixteen will be working by the year 2008.[4]

The workforce's changed face is responsible for several social and economic changes, one being the increased interaction between male and female employees. As a result of this newfound contact between the sexes, two types of social-sexual behaviors have become pervasive in organizations. First, romantic relationships between coworkers have

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[1] *See* HERMA HILL KAY & MARTHA S. WEST, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 540 (5th ed. 2002) (citing Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1994 (Table No. 616) (114th ed., 1994)).

[2] *Id.* (citing U.S. Dep't of Labor, HANDBOOK OF U.S. LABOR STATISTICS (Table 1–2) (4th ed. 2000)).

[3] *Id.*

[4] *Id*. at n.3 (citing Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2000 (Table No. 644) (120th ed. 2000)).

become increasingly common.[5] The workplace has been referred to as a "natural dating service" because it is where most people spend the majority of their time and is thus conducive to finding a mate.[6] Secondly, hostile environment sexual harassment[7] in the organizational setting has become increasingly widespread.

While social scientists have recognized that sexual harassment and workplace romances are similar in that both involve a sexual component among two employees,[8] courts have not sufficiently examined the connection between these two behaviors. The first systematic social scientific study realizing that workplace romances are likely to have detrimental effects on coworkers was conducted nearly thirty years ago.[9] In the 2005 decision *Miller v. Department of Corrections*,[10] the California Supreme Court came to a similar understanding. The *Miller* court recognized that a workplace romance between a supervisor and subordinate could generate a hostile environment for other employees and allowed plaintiff coworkers to prevail on claims of hostile environment sexual harassment.[11] Because courts have just recently begun to expand their perceptions of behaviors actionable as hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964,[12] social

[5] *See* Charles A. Pierce, Herman Aguinis & Susan K. R. Adams, *Effects of a Dissolved Workplace Romance and Rater Characteristics on Responses to Sexual Harassment Accusation*, 43 ACAD. MGMT. J. 869, 869 (2000) (stating that thirty-three percent of all romances develop at work with a fellow employee, and seventy-one percent of employees have either observed or participated in a workplace romance) (citations omitted).

[6] *See* Gwen E. Jones, *Hierarchical Workplace Romance: An Experimental Examination of Team Member Perceptions*, 20 J. ORGANIZATIONAL. BEHAV. 1057, 1057 (1999). *See also* MANE HAJDIN, THE LAW OF SEXUAL HARASSMENT: A CRITIQUE (2002). According to Hajdin, coworkers typically become involved with one another because a person's occupation generally manifests some aspects of his or her personality. After pursuing a career for some time, one often finds that one's preferences, interests, outlooks, and lifestyle has been importantly influenced by that career in many ways. As a consequence of this as well as shared experiences, coworkers often have a lot in common, which acts as a basis for their sexual interaction. *Id.* at 44–45.

[7] Courts recognize two broad categories of sexual harassment actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to e-17 (1994). *See infra* notes 34–36 and accompanying text.

[8] Charles A. Pierce & Herman Agunis, *Bridging the Gap Between Romantic Relationships and Sexual Harassment in Organizations*, 18 J. ORGANIZATIONAL BEHAV. 197, 197 (1997) (citing G. N. POWELL, *Dealing with Sexuality in the Workplace*, in WOMEN AND MEN IN MANAGEMENT 122–148 (2nd ed. 1993)).

[9] Quinn initiated the scholarly review of the workplace romance in 1977. *See* Robert E. Quinn, *Coping With Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, 22 ADMIN. SCI. Q. 30, 34 (March 1977). His work identified factors pertaining to the formation of workplace romances, subsequent management actions, and the impact of workplace romances on coworkers and the organization as a whole. *Id.* Since Quinn, two major theoretical articles have been published on organizational romances. Mainiero offered a model of how theories of power, dependency, and social exchange influence the internal dynamics of workplaces romances and coworker reactions to such affairs. *See* Lisa A. Mainiero, *A Review and Analysis of Power Dynamics in Organizational Romances*, 11 ACAD. MGMT. REV. 750 (1986). Pierce, Byrne, and Aguinis then built upon Mainiero's model and elaborated on the formation and impact of workplace romances. *See* Charles A. Pierce, Donn Byrne & Herman Aguinis, *Attraction in Organizations: A Model of Workplace Romance*, 17 J. ORGANIZATIONAL. BEHAV. 5 (1996).

[10] 36 Cal. 4th 446 (2005).

[11] *Id.* at 451.

[12] 42 U.S.C. § 2000e-2 (1994).

scientists have yet to characterize the detrimental effects they have identified as a form of hostile environment sexual harassment.

It is often the case that courts dismiss sexual harassment claims based on the legal conclusion that no reasonable person could find that certain behaviors amount to harassment.[13] By granting motions to dismiss, summary judgments, and judgments as a matter of law, judges have taken cases away from juries and hindered the development of a community standard with respect to what an objective and reasonable member of the community perceives as harassment.[14] As many social scientists have devoted their careers to the systematic study of the antecedents and consequences of sexual harassment and other social-sexual behaviors, a dialogue between courts and social scientists with respect to these behaviors would benefit both disciplines.

The premise of this Note is that social science has tremendous implications for sexual harassment law. As the law incorporates assumptions about the manner in which a reasonable human being should behave, social science offers an empirical and systematic understanding of those assumptions. Because social science research categorizes the conduct that is sufficiently pervasive to be reasonably actionable as sexual harassment, it offers valuable insights with regard to what a reasonable harassment victim will perceive as harassing. What is disconcerting is that certain studies show a consensus about behaviors that some courts have rejected as being actionable.[15]

This Note focuses on an area of harassment law that is still in its early stages of development. It looks specifically at situations where a consensual workplace romance gives rise to sexual favoritism[16] and creates an actionable hostile work environment sexual harassment claim for other employees in the workplace. In its 1990 policy statement, the Equal Employment Opportunity Commission ("EEOC") observed that sexual favoritism may create a hostile work environment if it is "widespread in a workplace."[17] It reasoned that "[i]n these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."[18]

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[13] *See* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 29 (2005).

[14] *Id.* at 30. Decision by judges to take sexual harassment cases away from juries leads to confusion for both employers and workers. *Id.* Employers who do not know what a jury would find sexually harassing will not be able to properly assess harassment complaints, and workers will not be able to avoid behaviors that may offend their coworkers. *Id.*

[15] *See, e.g.*, DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2nd Cir. 1986) (holding that a romantic relationship between an employer and a person preferentially hired could not amount to sexual discrimination under Title VII).

[16] Sexual favoritism refers to the preferential treatment shown by supervisors to employees who are their sexual partners.

[17] S*ee* Bureau Nat. Aff., *EEOC Policy Guidance on Employer Liability for Sexual Favoritism*, DAILY LAB. REP., Feb. 15, 1990, at D-1, D-2 [hereinafter EEOC II].

[18] *See id.* at D-2.

The California Supreme Court adopted the EEOC's analysis in *Miller* when it held that coworkers could prevail upon their hostile work environment claims based on several workplace romances and their accompanying favoritism.[19] The *Miller* decision will be discussed in detail in Part III. It is important to note that the court's decision is somewhat of an anomaly in the realm of sexual harassment law. Most courts have been skeptical of hostile environment claims based on paramour sexual favoritism.[20] However, social science paints a very different picture. Studies demonstrate that workplace romances give rise to favoritism and have injurious effects such as hostility in the work group, distorted communication, lowered productivity, slower decision making, acts of sabotage, gossip, and lower morale.[21]

This Note draws upon social scientific findings to argue that workplace romances between supervisors and subordinates can reasonably create a hostile environment for female coworkers who are not themselves directly involved in the romance. Part II provides a legal background on Title VII, hostile environment sexual harassment, and sexual favoritism. It concludes with an in-depth examination of the *Miller* decision. Part III explains the social scientific theories pertinent to workplace romance and sexual harassment. Part IV applies the theoretical framework developed in Part III to the facts of *Miller* and illustrates that social science backs the *Miller* holding. It goes on to discuss several premises that showcase social scientific support for hostile environment cases based on consensual workplace romances. Part IV concludes with a discussion of implications for current law and proposes ways in which social science findings might be added to the contours of a hostile environment sexual harassment claim. Part V closes with the suggestion that courts look to social science data in deciding future sexual harassment claims, and that courts use an interdisciplinary approach to sexual harassment in order to reach correct decisions.

II. LEGAL BACKGROUND

A. TITLE VII

Title VII makes it unlawful for an employer "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."[22] The Supreme Court has identified two approaches

[19] *See* Miller v. Dep't of Corr., 36 Cal. 4th 446 (2005).
[20] *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3rd Cir. 1990) (rejecting plaintiff's hostile environment sexual harassment claim based on the workplace environment created by the relationship between her supervisor and her subordinate); Candelore v. Clark County Sanitation Dist., 752 F.Supp 956, 961 (D. Nev. 1990), aff'd 975 F.2d 588 (9th Cir. 1992) ("preferential treatment of a paramour, while perhaps unfair, is not discrimination on the basis of sex . . . .") .
[21] *See* Mainiero, *supra* note 9, at 755.
[22] 42 U.S.C. § 2000e-2(a)(1) (1994).

to proving conduct violates Title VII.[23] One form is disparate treatment, where the claim is that employees are being treated differently because of a protected characteristic.[24] The second form is disparate impact, which occurs when facially neutral employment practices, procedures, or tests disproportionately harm members of a protected class.[25] Sexual harassment and sexual favoritism claims most often are brought using the disparate treatment category.[26]

A plaintiff must establish the following four elements to make out a prima facie case for disparate treatment discrimination under Title VII: (1) membership in a protected class; (2) qualification for a job for which the employer was seeking applicants; (3) employer's rejection of the plaintiff despite his qualification; and, (4) the other applicants with the same or lesser qualifications were subsequently considered for or received the position.[27] The Supreme Court has stated that plaintiffs may rely on circumstantial evidence to prove discriminatory intent.[28] For sexual favoritism claims such evidence will almost always be necessary.[29]

B. THE FAIR EMPLOYMENT AND HOUSING ACT

The Fair Employment and Housing Act ("FEHA")[30] is a California antidiscrimination statute that expressly prohibits sexual harassment in the workplace. While there are some minor differences in the wordings of Title VII and the FEHA,[31] California courts have relied upon federal interpretation of Title VII for assistance in interpreting analogous provisions of the FEHA and its prohibition against sexual harassment.[32] Thus, both federal law and guidelines are relevant to the FEHA's interpretation.

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[23] *See* Mary C. Manemann, Comment, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 614 (1989).

[24] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (formulating for the first time a prima facie case for disparate treatment); *See also* Manemann, *supra* note 23 (discussing disparate treatment analysis).

[25] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (adopting disparate impact theory under the Civil Rights Act of 1964); *See also* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (applying *Griggs* test for disparate impact claims); *See also* Manemann, *supra* note 23, at 615 (discussing disparate impact analysis).

[26] *See* Manemann, *supra* note 23, at 615.

[27] *See McDonnell Douglas*, 411 U.S. at 802*;* Manemann, *supra* note 23, at 617.

[28] *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) (holding that direct proof of discrimination is not required under the *McDonnell Douglas* formula).

[29] *See* Manemann, *supra* note 23, at 621–622.

[30] CAL. GOV'T CODE § 12900 (West 1992).

[31] The FEHA specifically identifies sexual harassment as an unlawful employment practice. *Id.* Sexual harassment is actionable under Title VII as a form of sex-based discrimination and is not separately identified. *See* 42 U.S.C. § 2000e-2(a)(1).

[32] Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996) ("California courts have relied upon federal interpretations of Title VII to interpret analogous provisions of the California Fair Employment and Housing Act (FEHA) . . . ."); Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal.4th 121, 130 (1999) ("Title VII cases may be considered in interpreting the FEHA"). *See also* Miller v. Dep't of Corr., 36 Cal. 4th 446, 463 (2005) (noting that FEHA and Title VII share the common goal of preventing sexual harassment in the workplace and so should be consistently interpreted).

C. SEXUAL HARASSMENT UNDER TITLE VII

In 1980, the EEOC issued guidelines on sexual harassment which stated that unwelcome sexual advances could be regarded as potential Title VII violations.[33] The guidelines went on to distinguish between two types of sexual harassment: quid pro quo and hostile work environment.[34] Quid pro quo harassment occurs when either (1) "submission to [sexual] 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."[35] Hostile work environment sexual harassment occurs when the sexually-oriented conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[36]

Although not binding upon the courts, these guidelines were ratified by the Supreme Court in 1986. The Court first recognized sexual harassment as a valid legal claim under Title VII in *Meritor Savings Bank v. Vinson*.[37] In its attempt to set out the parameters of a sexual harassment claim, the Court relied upon the EEOC guidelines on sexual harassment as well as the language of Title VII itself.[38]

Because Title VII prohibits discrimination with respect to "terms, conditions or privileges of employment,"[39] the *Meritor* Court reasoned that a harassing behavior must affect a term, privilege, or condition of employment to be actionable.[40] As the Court stated, the behavior must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[41]

Referring to the EEOC Guidelines for support, the *Meritor* Court also established a "totality of circumstances" standard for assessing harassing behavior.[42] It was the Court's opinion that "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and

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[33] *See* 29 C.F.R. § 1604.11 (2006).
[34] *See id.* The terms 'quid pro quo' and 'hostile work environment' do not appear in that statutory text of Title VII. Courts have nonetheless relied on these terms as a means of categorizing sexual harassment claims.
[35] *Id.* at § 1604.11(a).
[36] *Id.*
[37] 477 U.S. 57 (1986).
[38] *Id.* at 64–65 ("the language of Title VII is not limited to "economic" or "tangible" discrimination," and "[t]he EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.").
[39] 42 U.S.C. § 2000e-2(a)(1) (1988).
[40] *Meritor*, 477 U.S. at 67.
[41] *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)). The *Meritor* court was careful to point out that "not all workplace conduct that can be described as 'harassment' affects a 'term, condition or privilege' of employment within the meaning of Title VII. *Id.* The *Meritor* court also noted that the " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [sic] sufficiently significant degree to violate Title VII . . . ." *Id.* (quoting Rogers v. EEOC, 454 F.2d 234, 238 (1971)).
[42] *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.' "[43]

Unfortunately, the *Meritor* Court left the lower courts with an ambiguous definition of harassment and its elements, as well as unclear guidance on how severe or pervasive the harassing conduct had to be to violate Title VII. The lower courts subsequently struggled with the definition of sexual harassment and the proper standard to employ in its assessment. A split in the circuits soon arose as to two issues: (1) whether a plaintiff must establish that psychological injury resulted from the harassing conduct to prevail upon a claim and (2) the proper standard to apply in evaluating the severity of a hostile work environment claim.[44]

The Supreme Court resolved both issues in *Harris v. Forklift Systems, Inc.*[45] Clarifying the correct standard to be used in evaluating sexual harassment cases, the Court rejected the Sixth Circuit's psychological injury requirement and held that a Title VII plaintiff need not demonstrate serious psychological injury to prevail upon a sexual harassment claim.[46] It reasoned that while discrimination may not lead to serious psychological injury, it may nonetheless affect an employee's job performance and ability for career advancement.[47] Thus, the presence of a hostile or abusive work environment based on race, sex, religion or national origin violates Title VII, regardless of whether or not the plaintiff has sustained psychological injury.[48]

The *Harris* Court also endorsed a dual standard for evaluating the perception that an environment was hostile. It held that the hostile work environment must be both objectively perceived as hostile by the fact finder under a reasonable person standard and subjectively perceived as hostile by the victim.[49] Under the objective test, the 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."[50] Conduct that does not meet this standard, the Court said, is "beyond Title VII's purview."[51] The subjective standard requires the victim to be subjectively aware of the hostile environment. A victim who does not find the environment subjectively abusive, the court reasoned,

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[43] *Id.*
[44] *See, e.g.,* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (rejecting requirement that harassment need effect victim's psychological well-being and adopting reasonable woman standard); *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (ratifying approach that victim's psychological well-being need be seriously affected).
[45] 510 U.S. 17 (1993).
[46] *Id.* at 22 ("So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it to also be psychologically injurious."). The court emphasized that, while evidence of psychological harm was relevant to the inquiry whether the plaintiff found the work environment offensive, it was not required. *Id.*
[47] *Id.* at 22.
[48] *Id.*
[49] *Id.* at 21.
[50] *Id.*
[51] *Id.*

would not have an actionable claim under Title VII because no terms, conditions, or privileges of employment would have been altered.[52]

In affirming *Meritor*'s "totality of circumstances" approach, the *Harris* court went on to elaborate upon the factors to be considered in its evaluation. These factors include "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."[53]

One of the more recent Supreme Court cases to consider the "totality of circumstances" standard was *Oncale v. Sundower Offshore Services, Inc*.[54] The *Oncale* court held that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances" as well as the "social context" in which particular behaviors occur.[55] The Court's primary holding, however, was that same-sex sexual harassment is actionable as sex discrimination under Title VII.[56] It reasoned that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women and "requires neither asexuality nor androgyny in the workplace."[57] Same sex harassment, the court said, is actionable under Title VII so long as "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[58] Thus, harassing conduct need not be motivated by sexual desire to be actionable, but simply must be directed at a victim because of his or her sex.[59]

D. SEXUAL FAVORITISM UNDER TITLE VII

The latest conundrum with which courts have been grappling is the hostile environment claim based on sexual favoritism of a paramour.[60] In its

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[52] *Id.* at 21–22.
[53] *Id.* at 23. While an employee's psychological well-being is relevant to the determination of whether a plaintiff actually found the environment abusive, no single factor is required. *See id.*
[54] 523 U.S. 75 (1998).
[55] *Id.* at 81–82.
[56] *See id.*at 82.
[57] *Id.* at 81.
[58] *Id.* at 80 (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The court also noted that the social context in which particular behavior occurs is especially important. For example, "[a] professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." *Id.* at 81.
[59] *See id.* at 80. For example, "if a female victim is harassed in sex-specific and derogatory terms by another woman, making it clear that the harasser is motivated by general hostility to the presence of women in the workplace," she would have an actionable claim for harassment under Title VII. *Id.* at 80.
[60] *Broderick v. Ruder* was the first well-publicized case to recognize the viability of such a claim. *See* 685 F. Supp. 1269 (D.C. Cir. 1988). Not all courts embraced the *Broderick* Court's reasoning, however. *See, e.g.*, Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Pa. 1988), aff'd, 856 F.2d 184 (3rd Cir. 1988) (without opinion).

1990 policy statement, the EEOC explored the viability of such a claim.[61] It concluded that while isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demeaning message that managers view female employees as "sexual playthings," or that "the way for women to get ahead in the workplace is by engaging in sexual conduct."[62] The policy statement is significant in light of prior federal and state case-law which demonstrated courts' divergent views with regard to sexual favoritism claims under Title VII.

1. *The Split in the Circuits: King and DeCintio*

The seminal cases dealing with consensual romantic relationships in the workplace, *King v. Palmer*[63] in the District of Columbia Circuit, and *DeCintio v. Westchester County Medical Center*[64] in the Second Circuit, reached essentially different results.

King involved a female nurse, Mabel King, who was employed at the District of Columbia Jail.[65] She sued for sex discrimination under Title VII contending she was unlawfully denied a promotion to a supervisory position when it was awarded to another nurse who was romantically involved with the Jail's Chief Medical Officer.[66] In entering a judgment for defendants, the District Court held that although King had made out a prima facie case of sex discrimination under Title VII, her failure to offer direct proof that the sexual relationship in question had been consummated precluded her claim.[67] The District of Columbia Circuit Court reversed, holding that the lower court misapplied Title VII by requiring direct evidence of an explicit sexual relationship between the nurse and the medical officer.[68]

The circuit court discounted what it deemed an "inexplicable distinction between sexual intercourse and other (arguably lesser) forms of sexual conduct."[69] It reasoned that King should prevail because she was able to provide clear evidence of sexual conduct between the favored nurse

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[61] *See* EEOC II, *supra* note 17. It is worth noting that the 1980 EEOC Guidelines seemingly included sexual favoritism as a form of sex discrimination. The guidelines stated that where employers grant opportunities or benefits to employees that submit "to the employer's sexual advances or requests for sexual favors," other qualified employees denied the opportunity or benefit have a viable legal claim against the employer for sex discrimination. 29 C.F.R. § 1604.11(g) (2006). In interpreting this provision, however, courts faced the question of whether consensual romantic relationships between employees were the same as relationships "submitted to" by employees. *See* DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986) (holding that a consensual romantic relationship was not covered by the EEOC Guidelines).

[62] *See* EEOC II, *supra* note 17, at D-2.

[63] 778 F.2d 878 (D.C. Cir. 1985), reh'g en banc denied, 778 F.2d 883 (D.C. Cir. 1986).

[64] 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 89 (1987).

[65] *King*, 778 F.2d at 878.

[66] *Id.* at 878–79.

[67] *Id.* at 879.

[68] *Id.*

[69] *Id.* at 882. The court also noted that such a distinction finds no support in governing case law, and that "[a] requirement of proof of intercourse might have the advantage of any "bright line" test, but it would establish a patently absurd legal principle." *Id.*

and the medical officer.[70] Among King's evidence was testimony from coworkers that the couple "frequently took long lunches together and that their behavior on the job, including physical contact, suggested intimacy between them."[71] Testimony "as to the favoritism shown toward [the nurse]" noted that although she disregarded the work schedule and behaved unprofessionally, she was "not punished consistent with the policy and practice toward other employees."[72] King also introduced evidence to demonstrate the favoritism and unfairness surrounding the promotion "created a demoralizing and disruptive work environment."[73] The circuit court held that "unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination."[74] Thus, King's circumstantial evidence that the sexual relationship led to the promotion and preferential treatment allowed her to meet her burden of persuasion for a Title VII claim.

King has been referred to as the "high-water mark for sexual favoritism claims."[75] Just one year later came the Second Circuit's *DeCintio v. Westchester County Medical Center,*[76] which rejected *King's* interpretation of sexual favoritism law. *DeCintio* involved seven male respiratory therapists who brought suit for sex discrimination under Title VII when their supervisor added a seemingly irrelevant requirement that disqualified them for a promotion.[77] The only employee who did meet the additional requirement of registration with the National Board of Respiratory Therapists was a female employee with whom the supervisor was involved in a consensual affair.[78]

The dispositive issue, the circuit court said on appeal, was whether under Title VII "the phrase 'discrimination on the basis of sex' encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired."[79] Relying on a textual argument based on Title VII itself, the court characterized such an interpretation as "overbroad" and "wholly unwarranted."[80] It reasoned that, aside from sex, the categories offered protection under Title VII refer to a person's status as a member of a particular race, color, religion, or nationality.[81] When read within this

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[70] *Id.*
[71] *Id.* at 879.
[72] *Id.* at 879–80.
[73] *Id.* at 880.
[74] *Id.* (quoting Bundy v. Jackson, 641 F.2d 934, 942–43 (D.C. Cir. 1981)).
[75] *See* Mitchell Poole, Comment, *Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability?*, 25 PEPP. L. REV. 819, 837 (1998).
[76] 807 F.2d 304 (2d Cir. 1986). *See also* Poole, *supra* note 75, at 837–41.
[77] *Decintio*, 807 F.2d at 305.
[78] *Id.* The two requirements for registration with the National Board of Respiratory Therapists ("NBRT") are prior experience as a respiratory care practitioner and successful completion of an examination given by the NBRT. Special knowledge or experience in neonatal care is not required. *Id.* at n.1.
[79] *Id.* at 306.
[80] *Id.* The Court did not believe that the meaning of "sex" should be expanded to include "sexual liaisons" and "sexual attractions" for the purposes of Title VII. *Id.*
[81] *Id.*

context, the sex category "could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender."[82] Thus, the court explicitly declined to follow the *King* approach as it could "be interpreted as recognizing Title VII claims for non-gender based sex discrimination."[83]

Further, the *DeCintio* court held that the consensual nature of the romantic relationship removed it from the realm of behaviors proscribed by the EEOC's 1980 Guidelines.[84] The Guidelines 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 denied that employment opportunity or benefit."[85] Focusing on the word 'submission,' the court interpreted it to denote a "lack of consent" and imply "a necessary element of coercion or harassment."[86] Because the relationship in the case at hand was voluntary, it could not give rise to a sex discrimination suit under Title VII.[87]

2. *The Connection Between Consensual Workplace Romances, Sexual Favoritism and Hostile Work Environment Sexual Harassment*

After *King* and *DeCintio*, the majority of courts sided with the latter.[88] Most courts tended to look upon sexual favoritism in isolation, rejecting its ability to contribute to hostile environment harassment.[89] Nonetheless, at least some courts began to recognize sexual favoritism as a component of sexually hostile work environments.

One of the first cases to recognize that a consensual romantic relationship and its related sexual favoritism could contribute to a sexually hostile work environment for other employees was *Broderick v. Ruder*.[90] *Broderick* involved a female staff attorney employed at a regional office of the Securities and Exchange Commission ("SEC") who claimed that sexual relationships among three members of the managerial staff and subordinate employees created an actionable hostile work environment.[91] Specifically, the plaintiff claimed that sexual relationships between two of her supervisors and their subordinate secretaries were the source of promotions, commendations, cash awards, and other job benefits for the

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[82] *Id.*
[83] *Id.* at 307.
[84] *Id.* at 307–08.
[85] *Id.* (quoting 29 C.F.R. § 1604.11(g) (1986) (emphasis included)).
[86] *Id.* at 307–08.
[87] *Id.* at 308. The court also noted that the appellees did not allege that they or any other staff members were forced to submit to any sexual advances in order to win a promotion. *Id.*
[88] *See* Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990) (applying New Jersey law). Erickson v. Marsh & McLennan Co., Inc., 569 A.2d 793, 802 (1990) (same).
[89] *See, e.g.*, Herman v. Western Fin. Corp., 869 P.2d 696, 701–03 (Kan. 1994) (holding that sexual favoritism by itself does not give rise to sexual harassment under a hostile work environment theory).
[90] 685 F. Supp. 1269 (D.D.C. 1988).
[91] *See id.* at 1273–75.

secretaries.[92] The plaintiff also presented evidence that another supervisor promoted a staff attorney to whom he was noticeably attracted.[93] The court held that "conduct of a sexual nature was so pervasive at the [office] that it can reasonably be said that such conduct created a hostile or offensive work environment which affected the motivation and work performance of those who found such conduct repugnant and offensive."[94] The court also found that the supervisors' preferential treatment of employees who submitted to their sexual advances "undermined plaintiff's motivation and work performance and deprived plaintiff, and other . . . female employees, of promotions and job opportunities."[95]

While *Borderick* illustrates a factual scenario where a hostile environment claim may arise from an employer's promotion of his paramour, other courts have declined to find actionable hostile environments in cases with similar fact patterns.[96] Rather than construing consensual workplace romances and their accompanying favoritism as sources for a hostile environment, courts have distinguished sexual favoritism from claims of hostile environment harassment.[97] Many courts have held that a consensual sexual relationship between a supervisor and subordinate which results in preferential treatment for the paramour does not amount to a hostile work environment for other employees.[98] Courts that decline to recognize Title VII paramour claims have concluded that "preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination."[99]

3. *The EEOC's New Policy*

In 1990 the EEOC issued a policy statement that, while consistent with *DeCintio*,[100] also recognized that sexual favoritism could give rise to valid

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[92] *Id.* at 1273–75.
[93] *Id.*
[94] *Id.* at 1278.
[95] *Id.*
[96] *See, e.g.*, Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Pa. 1988), aff'd, 856 F.2d 184 (3rd Cir. 1988) (without opinion).
[97] Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861 (3d Cir. 1990) ("[I]n hostile environment cases, it is the environment, not the relationship, that is actionable. The relationship may contribute to the environment, but it is the workplace atmosphere that is critical.").
[98] *See, e.g.*, Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992); *See also Drinkwater*, 904 F.2d at 862.
[99] Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 522 (1999) (quoting Miller v. Aluminum Co., 679 F. Supp. 495, 501 (W.D. Penn. 1988)).
[100] The policy statement held that isolated instances of sexual favoritism toward a paramour were not prohibited under Title VII. *See* Poole, *supra* note 75, at 842 (arguing that the policy statement's proclamation that "Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships" is basically a codification of the *DeCintio* ruling). The Commission reasoned that although such instances of favoritism may be unfair, the instances do "not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders." EEOC II, *supra* note 17, at D-1. The policy statement cites *DeCintio* in support of the following illustration: "A female charging party who is denied an employment benefit because of such

hostile environment claims consistent with *Broderick*. It provided that favoritism is actionable under Title VII when (1) it is based upon "coerced sexual activity" or (2) "is widespread in a workplace."[101] The latter instances of favoritism may constitute hostile environment sexual harassment. The policy statement explains:

> If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment.' "[102]

In *Proksel v. Gattis*,[103] the California Fourth Court of Appeal used this EEOC policy statement to provide the guidelines in its interpretation of the FEHA.[104] Although the *Proksel* court rejected the plaintiff's hostile environment claim based on a coworker's romantic involvement with her employer, it recognized that "sexual favoritism *could* create a hostile environment."[105] In dictum, the *Proksel* court "suggested that sexual favoritism by a superior may be actionable when it leads employees to believe that" romantic involvement with a manager will result in favorable treatment from him.[106] It also suggested that actionable favoritism could exist when the affair is conducted in a manner "so indiscreet as to create a hostile work environment," or the manager engages in "other pervasive conduct . . . which creates a hostile work environment."[107] The court reasoned that the plaintiff could not prevail on her claim solely upon a

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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." *Id.*

[101] *See* EEOC II, *supra* note 17, at D-2.

[102] EEOC II, *supra* note 17, at D-2 (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)). The guidelines cite *Broderick* for an example of a case where the number of consensual relationships is excessive. *Id.*

[103] 41 Cal. App. 4th 1626 (1996).

[104] *See id.* at 1630 (applying the EEOC's 1990 policy statement); *see also supra* notes 30–32 and accompanying text for a brief discussion of the FEHA.

[105] *See* Miller v. Dep't of Corr., 36 Cal. 4th 446, 465 (2005) (discussing *Proksel* decision) (emphasis in original).

[106] *Miller*, 36 Cal. 4th at 465. *See Proksel*, 41 Cal. App. 4th at 1629 ("[Plaintiff] does not contend that Gattis led Burton or any other employee to believe that they could obtain favorable treatment from him if they became romantically involved with him.").

[107] *Miller*, 36 Cal. 4th at 465 (citing *Proksel*, 41 Cal. App. 4th at 1629–30).

showing of managerial favoritism to the paramour, and that a showing of some other act of sexual discrimination or harassment was necessary.[108]

4. *Miller v. Department of Corrections*

In *Miller v. Department of Corrections*, the California Supreme Court relied heavily on the EEOC policy statement as well as guidance from the *Broderick* and *Proksel* decisions in determining that sexual favoritism can create an actionable hostile work environment under the FEHA.[109]

a. Facts

Plaintiffs Edna Miller and Frances Mackey[110] filed suit against the California Department of Corrections alleging sexual harassment and discrimination under the FEHA.[111] While plaintiffs were employed at the Valley State Prison for Women ("VSPW"), the chief deputy prison warden, Lewis Kuykendall, openly carried on affairs with three subordinate female employees.[112] He was romantically involved with his secretary, Kathy Bibb, as well as two other subordinates, Debbie Patrick and Cagie Brown.[113] Plaintiffs alleged that Kuykendall's paramours were granted undeserved privileges, and that his multiple sexual relationships pervaded the workplace.[114]

For instance, when Kuykendall was transferred from another facility to VSPW, he gradually had all three of his paramours transferred there. Despite Bibb's initial rejection by the interview committee appointed to evaluate her application for a promotion that would entail a transfer to VSPW, she was eventually awarded the transfer after Kuykendall directed the panel to "make it happen."[115] Patrick had also been awarded a transfer to VSPW, which Miller believed was solely a result of Patrick's relationship with Kuykendall.[116] Once at VSPW, Patrick enjoyed unusual privileges, such as reporting directly to Kuykendall rather than to her immediate supervisor.[117]

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[108] *See Proksel*, 41 Cal. App. 4th at 1627 ("As we explain in greater detail, although office romances may create a host of problems for employers and in particular cases may be relevant evidence in considering a larger claim of sexual harassment, by itself preferential treatment of paramours is not actionable by other employees.").
[109] *See Miller*, 36 Cal. 4th at 466.
[110] Mackey died in 2003 while the suit was pending. *See Miller*, 36 Cal. 4th at 451 n.1.
[111] California law mandates that FEHA is to be interpreted in a manner wholly consistent with the federal courts' interpretations of Title VII. *See supra* notes 30–32 and accompanying text.
[112] *Miller*, 36 Cal. 4th at 452.
[113] *Id.* Miller first heard of Kuykendall's relationships with Bibb and Patrick from other employees in 1994. *Id.* She was made aware of Brown's relationship with Kuykendall from Brown herself. *Id.*
[114] *Id.*
[115] *Id.* Although Miller served on the interview committee that rejected Bibb's promotion, she and the other panel members were informed by an associate warden that Kuykendall wanted them to "make it happen." *Id.*
[116] *Id.*
[117] *Id.* at 453.

Brown's relationship with Kuykendall gave rise to many unpleasant incidents in the workplace. Brown admitted her affair with Kuykendall to Miller, bragged about her power over him, and stated that it was her intention to use this power to extract benefits from him.[118] Brown was likely awarded a promotion as a result of Kuykendall's seat on the interview panel,[119] as other officers involved in the selection process conceded that they had recommended Miller for the position.[120] The overall sentiment in the office was that Brown's promotion was unfair and that she was unqualified for the position.[121] Many employees were upset by the promotion and believed it was solely a result of Brown's involvement with Kuykendall.[122]

Mackey was certain that Brown's promotion was a result of Brown's sexual affair with Kuykendall and not a result of her own merits.[123] Mackey testified that she believed she failed to receive a promotion because she was not sexually involved with Kuykendall.[124] Brown believed Mackey had complained to Kuykendall about their relationship.[125] Not only was Mackey's supplemental pay withdrawn, but she was verbally abused by Brown in the presence of her coworkers.[126]

Brown continued to be promoted at an unusually rapid pace. She went on to compete with Miller for the position of permanent facility captain and secured the position.[127] Within a year and a half Brown was promoted to the position of associate warden where Kuykendall once again sat on the interview panel; she became Miller's direct supervisor.[128]

Another group of incidents arose when chief deputy warden Vicky Yamamoto arrived at VSPW. Yamamoto was rumored to be a lesbian and was said to be involved in a relationship with Brown which coworkers perceived was "more than platonic."[129] Miller believed that Yamamoto was interfering with her authority because of Miller's refusal of dinner invitations which Yamamoto had not extended to any male coworkers.[130] Miller complained to Gerald Harris, a chief deputy warden and the department's sexual harassment advisor, about Brown's relationships with

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[118] *Id.* When Brown and Miller competed for a promotion to a temporary post as facility captain at VSPW, Brown told Miller that Kuykendall would be forced to award her the position or she would "take him down" with her knowledge of "every scar on his body." *Id.* Despite Miller's higher rank, superior education and greater experience, Brown was awarded the promotion. *Id.*

[119] A department internal affairs investigation report later deemed this unethical due to Kuykendall's sexual relationship with Brown. *See id.*

[120] *Id.* at 454.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 458.

[124] *Id.* at 459. This testimony appeared in Mackey's deposition. *Id.*

[125] *Id.* at 458.

[126] *Id.* Mackey claimed that Brown demeaned her and impeded the execution of her duties in various respects. *Id.*

[127] *Id.* at 454.

[128] *Id.* Employees were infuriated by the pace of Brown's advancement and were saying things like "what do I have to do, 'F' my way to the top?" *Id.*

[129] *Id.* at 455.

[130] *Id.*

both Kuykendall and Yamamoto. Miller told Harris that Yamamoto was disrupting the work of the institution, and that she felt that she was working in a hostile environment.[131] Miller subsequently complained to Kuykendall about Brown and Yamamoto's interference with her duties.[132]

Brown and Yamamoto, likely having heard about Miller's complaints, consequently made her work life miserable. They countermanded Miller's orders, undermined her authority, reduced her supervisory responsibilities, imposed additional onerous duties on her, made unjustifiable criticisms of her work, and threatened her with reprisals when she complained about their behavior to Kuykendall.

Miller continued to complain to Kuykendall about incidents involving Brown and Yamamoto. During one conversation, Kuykendall stated he was finished with Brown and added to Miller "I should have chosen you."[133] Ultimately, Internal Affairs was brought into the picture because the workplace was described as "out of control."[134]

b. Holding and Analysis

The *Miller* court determined that the above facts constituted a work environment where sexual favoritism was so widespread that it created an actionable hostile work environment pursuant to the EEOC's policy statement.[135] It reversed a court of appeal ruling that granted summary judgment for the defendant employer on the basis that plaintiffs had failed to show a pattern of harassment which altered their working conditions based on sex.[136] The appellate court reasoned that plaintiffs did not have a valid claim because they were not themselves subjected to sexual advances and were not treated differently from their male counterparts.[137]

In reversing the court of appeal, the California Supreme Court held that the relevant inquiry was "whether the conduct in question conveyed a message that demeans employees on the basis of their sex."[138] It 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."[139] The court then remanded the case to the court of

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[131] *Id.*
[132] *Id.*
[133] *Id.* at 456. Miller understood these words to mean that Kuykendall should have chosen to have a relationship with her. *Id.*
[134] *Id.* at 457.
[135] After a lengthy discussion of the facts of the case, the court came to the determination that "[t]he evidence suggested Kuykendall viewed female employees as "sexual playthings" and that his ensuing conduct conveyed this demeaning message in a manner that had an effect on the workforce as a whole. *Id.* at 467. Additionally, the evidence showed that Kuykendall's sexual favoritism blocked plaintiffs way to merit-based advancement and caused them to be subjected to harassment at the hands of Brown. *Id.*
[136] *Id.* at 459 (discussing Court of Appeal decision).
[137] *Id.* at 459–60.
[138] *Id.* at 469.
[139] *Id.* at 466.

appeal for further consideration consistent with the standards it set out to determine whether the defendant's behavior created a hostile work environment sufficiently severe or pervasive to alter the working environment of other coworkers.[140]

The court also indicated that widespread sexual favoritism could amount to quid pro quo harassment if it created a reasonable belief that supervisors would only promote those employees who engaged in sexual relationships with them.[141] Liability is thus triggered by the particular effects of a workplace romance on the workplace, and not by the mere presence of the workplace romance itself. The court recognized that while the mere presence of a workplace romance equally impacts men and women, the effect of the romance on specific coworkers may vary from person to person on an individual basis which is not related to the gender of the co-employees.[142] The *Miller* decision therefore evidences a broad view of favoritism and its potential to impact coworkers and the workplace environment.

c. Aftermath and Impact

The *Miller* decision left California employment law practitioners in fear of excessive "third party" sexual harassment lawsuits.[143] A slew of attorneys warned that *Miller* would "'[open] the floodgates' for sexual harassment suits and 'dramatically [increase]' the potential breadth of sexual harassment law."[144] But *Miller* is unlikely to open any floodgates, and should have come as no surprise to employment law practitioners familiar with sexual harassment and discrimination law in California state and appellate courts. The *Miller* decision merely reaffirmed legal principles California lower courts had already adopted, arriving at its decision by following the guidance of the EEOC and applying standards adopted by prior California case-law.[145]

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[140] *See id.* at 477.

[141] *See id.* at 464.

[142] *See id.*

[143] *See* Jackson Lewis, *California Ruling on Workplace Romance Sends Employers Scrambling for Cover*, Aug. 8, 2005, http://www.jacksonlewis.com/legalupdates/article.cfm?aid=827 ("When the California Supreme Court ruled late last month that employers are liable for a hostile work environment created when supervisors show job-related favoritism to their co-worker paramours, it wasn't just California employers that sounded the alarm.").

[144] Robin J. Samuel & David R. Singer, *"Sexual Favoritism" – A 2005 California Supreme Court Ruling May Wake Up Employers But Doesn't Break New Ground*, HOGAN & HARTSON UPDATE: LABOR & EMPLOYMENT (Nov. 2005), http://www.hhlaw.com/newsstand/PubDetail.aspx?publication=2031 (citing *Recent Court Ruling Opens Floodgates for Sexual Harassment Suits*, THE NATIONAL CONSERVATIVE WEEKLY (Aug. 10, 2005); *State Supreme Court: Workplace Sex Can Equal Harassment*, THE MERCURY NEWS (July 18, 2005); *Can Consensual Workplace Sex Create a Hostile Workplace Environment?*, CNN (July 29, 2005) http://www.cnn.com).

[145] *Miller*, 36 Cal. 4th at 465–66 (applying the EEOC's 1990 policy statement, *Broderick v. Ruder*, and dictum from *Proksel v. Gattis*).

Moreover, *Miller* presented facts of a workplace with such widespread favoritism and outrageous behavior that it should be relatively easy for courts to construe the holding narrowly. Unlike *Proksel*, which involved only one consensual and discrete workplace romance, *Miller* involved three simultaneous workplace affairs. *Miller* was not a case of isolated favoritism but a case of a supervisor's continued pattern of favoritism toward the female employees with whom he was having an affair. In fact, the recent California District Court opinion of *Knadler v. Furth*[146] distinguished *Miller* on the basis of its extreme facts to support the dismissal of a female plaintiff's hostile work environment claim.[147]

Miller may still, however, act to "set a higher standard for workplace behavior . . . ."[148] Since the case hinges on the effects of a supervisor-subordinate relationship on a reasonable person, the possibility may arise that a reasonable person may be offended by facts that, while not as extreme as *Miller's*, present more than a case of isolated workplace romance of favoritism.

III. SOCIAL SCIENCE THEORETICAL BACKGROUND

Because hostile work environment sexual harassment based on sexual favoritism is rooted in the existence of a workplace romance, the following section discusses several social scientific theories that explain the mechanisms behind the workplace romance and its effects on coworkers. Before initiating a review of relevant social science theories, it is important to consider the definition of a workplace romance. Researchers define it as "any heterosexual relationship between two members of the same organization that entails mutual sexual attraction."[149] A workplace romance occurs "when two employees acknowledge their mutual attraction and physically act upon their romantic feelings in the form of dating or other intimate association."[150]

It is also of import to differentiate between two types of workplace romance: lateral and hierarchical. A lateral romance is a relationship between employees of equal status.[151] A hierarchical workplace romance occurs when the individuals are at different organizational levels, such as when a manager is romantically involved with his or her subordinate.[152] Hierarchical romances are more pervasive and more problematic than

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[146] No. C 04-01220, 2005 U.S. Dist. LEXIS 21278 (N.D. Cal. Sept. 9, 2005).
[147] *See id.* at *21 ("In *Miller*, there was 'widespread' sexual favoritism that permeated the working environment, including evidence that female employees were being rewarded by submitting to their superior's advances. *Miller* explicitly distinguished a case like the one here in which there is 'an isolated workplace sexual affair' coupled with 'the presence of mere office gossip.' ").
[148] Ron Brand, *Favoring a Paramour May Be Sexual Harassment*, FISHER & PHILLIPS LABOR LETTER 3 (Oct. 11, 2005), *at* http://laborlawyers.com/CM/Labor%20Letter/eLLoctoberr2005.pdf (interpreting *Miller*).
[149] Pierce, *supra* note 9, at 6 (citations omitted).
[150] Pierce, *supra* note 9, at 6.
[151] *See* Pierce, *supra* note 9, at 19.
[152] Pierce, *supra* note 9, at 19.

lateral romances, and are often the source of hostility in the workplace.[153] Reasons for this disparity will be considered in conjunction with the discussion of the theories below.

A. POWER DYNAMICS AND SOCIAL EXCHANGE THEORY

Lisa Mainiero's research uses a power analysis to understand the dynamics of workplace romance.[154] According to Mainiero, power is a "key variable" necessary for understanding the effects and consequences of the workplace romance.[155] The power dynamic in any relationship is a function of the relative dependency of each partner on the other for resources that are exchanged in the relationship.[156] Power dynamics are present in romantic relationships as well as among the day to day relationships of coworkers, managers, and subordinates in the organizational setting.

In romantic relationships, partners are typically dependent upon resources such as affection, expression, companionship, sex, services, as well as socioeconomic factors.[157] Mainiero groups these resources into what she deems the Personal or Sexual Domain.[158] The more powerful participant in the romance provides his partner with resources that are more highly valued than the resources he obtains.[159] Thus, the partner with more power is also the less dependent partner.

The power dynamic of an ordinary manager-subordinate relationship in the workplace involves the exchange of resources from two separate domains. Resources in the Task Domain are those which are necessary for an employee to perform his or her job functions and to complete work in an efficient and productive manner.[160] Career Domain resources concern career advancement and are typified by positive evaluations from superiors in order to obtain support for desired promotional opportunities.[161] An exchange of resources from each of these domains comprises the manager-subordinate relationship. For example, a subordinate's hard work, which falls within the Task Domain, is exchanged for a positive review or promotion from his or her manager, a Career Domain resource.

Analyzing the relative power and dependency levels for a manager-subordinate relationship becomes much more complex when a hierarchical romance is added. That is, a manager-subordinate relationship which is simultaneously a hierarchical workplace romance creates difficulties due to

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[153] *See* Gary N. Powell, *Workplace Romances Between Senior-Level Executives and Lower-Level Employees: An Issue of Work Disruption and Gender*, 54 HUM. REL. 1519, 1520 (2001).
[154] *See generally* Mainiero, *supra* note 9.
[155] Mainiero, *supra* note 9, at 755. Mainiero points out that hierarchical differences are a recurrent theme in the literature on organizational romances. This suggests that power dynamics deserve attention.
[156] *Id.*
[157] *Id.* at 756.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*

the addition of the Personal/Sexual Domain to the Task and Career Domains already at play in the workplace.[162] The resources ordinarily exchanged in a personal romantic relationship, such as sex, love, affection, and companionship, come to be exchanged on a personal level in the organizational setting.[163]

The addition of the Sexual Domain can easily threaten the balance of power in the Task and Career Domains. When an exchange of resources takes place on a personal level in the workplace, workgroup members realize they cannot participate in exchanges that fall within that domain.[164] As a result, workgroup members begin to fear that the involved partners will exchange resources in the Sexual Domain for resources in either the Task or Career Domains.[165] For example, coworkers may fear that sex will be exchanged for a promotion.

This analysis explains why coworkers perceive hierarchical workplace romances as more troublesome and threatening than lateral romances. Because participants in a lateral romance are on equal organizational footing, neither has the authority to provide resources in the Career Domain in exchange for sex or other Sexual Domain resources. Thus, coworkers involved in lateral romances may only participate in the exchange of resources in the Sexual and Task Domains. In contrast, the hierarchical workplace romance provides an opportunity for the exchange of sex for career benefits such as promotions, salary increase or favorable assignments. Coworkers perceive this as an unfair exchange that "crosses the boundaries of propriety, equity, and justice."[166] Moreover, coworkers realize that hierarchical romances may be exploited as a means for the subordinate partner to achieve personal gain in the Career Domain.[167] Mainiero cites author Robert Quinn who found that hierarchical romances caused unfavorable behavior changes such as favoritism toward the partner, ignoring complaints about the partner, and promoting the partner, and Mainiero reasoned that these behaviors implied an exchange across Sexual and Career Domains.[168] Thus, hierarchical workplace romances raise issues of power and dependency beyond those raised by lateral workplace romances as a result of different power dynamics in both types of relationships.

B. COALITION FORMATION

An alternative way to conceptualize the power dynamic of a workplace romance is by viewing the involved couple as a coalition.[169] That is, once

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* ("Participants of equal status can only exchange resources in the task and career domains. Neither partner may have the legitimate authority to exchange career benefits.").
[166] LISA A. MAINIERO, OFFICE ROMANCE: LOVE, POWER, & SEX IN THE WORKPLACE 138 (1989).
[167] Mainiero, *supra* note 9, at 756–57.
[168] Mainiero, *supra* note 9, at 756 (citing Quinn, *supra* note 9).
[169] Mainiero, *supra* note 9, at 757.

workgroup members are aware of a workplace romance, they may view the couple as having formed a power coalition.[170] Participants in a hierarchical workplace romance can easily form a coalition due to their ability to exchange resources in the Personal Domain.[171] Since other workgroup members cannot participate in this exchange, they cannot join the coalition.[172] These excluded workgroup members begin to fear that what is said to one member of the coalition will be repeated to the other.[173] This fear disrupts communication patterns in the workplace.[174]

When a coalition has different goals than those of the workgroup, coworkers may undertake actions to break down the coalition. Researchers have observed a range of reactions, from social disapproval to outright hostility, and a desire to retaliate against the coalition via sabotage, ostracism, blackmail, complaining, and threats.[175] According to Mainiero, it is more likely that these sorts of negative reactions will occur when coworkers perceive there is a great exploitation of the Personal Domain. They will seek to dissolve the coalition in order to restore justice and equity to the organization.[176]

C. COWORKER PERCEPTIONS OF WORKPLACE ROMANCES

In a 1999 study, Sharon Foley and Gary Powell analyzed coworker perceptions of workplace romance. Specifically, they were interested in the way coworkers perceived workplace romance to impact the work environment.[177] Their model assumes that coworker perceptions consist of two components: (1) perceived conflict of interest and (2) perceived workgroup disruption.[178] This model also holds that coworker perceptions of workplace romance depend upon the motives they attribute to the participants of the romance[179] and the gender of the coworkers themselves.[180]

1. *Conflict of Interest*

Coworkers will perceive a conflict of interest when participants in a workplace romance use their status in the organization as a vehicle for advancing the interests of the other romantic partner.[181] For example, a

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[170] Mainiero, *supra* note 9, at 757 ("A coalition is defined as two or more members who seek common goals").
[171] *See supra* notes 157–165 and accompanying text.
[172] Mainiero, *supra* note 9, at 758.
[173] Mainiero, *supra* note 9, at 758.
[174] Mainiero, *supra* note 9, at 758.
[175] Mainiero, *supra* note 9, at 758 (citations omitted).
[176] Mainiero, *supra* note 9, at 758.
[177] Sharon Foley & Gary N. Powell, *Not All Is Fair in Love and Work: Coworkers' Preferences for and Responses to Managerial Interventions Regarding Workplace Romances*, 20 J. ORGANIZATIONAL BEHAV. 1043, 1045 (1999).
[178] *Id.*
[179] *Id.* at 1048.
[180] *Id.* at 1049–50.
[181] *Id.* at 1045–46.

conflict of interest is likely to be perceived when a coworker receives rewards in the workplace as a result of his or her participation in a workplace romance. Perception of a conflict of interest is also likely when coworkers believe the participants in the workplace romance will share confidential information during "pillow talk."[182]

Hierarchical workplace romances inevitably present conflicts of interest. They cause coworkers to become fearful that favoritism will occur and that they will be denied the same benefits afforded participants in the workplace romance. Such perceived conflicts of interest violate coworkers' sense of justice in the workplace and are likely to lead to workgroup disruption. As a result, coworkers are likely to suffer from lower group morale and productivity.

2. *Workgroup Disruption*

Workplace disruption, the second component studied in Foley and Powell's model, occurs as a result of perceived conflicts of interest.[183] Because conflicts of interest violate coworkers' sense of justice in the workplace, they inevitably cause workplace disruption. However, workgroup disruption may result from workplace romances even where they do not present conflicts of interest.[184] For example, disruption can be caused when the participants of the romance engage in inappropriate behavior in their coworkers' presence. Once the presence of a workplace romance is recognized, coworkers will react. Their responses can range from "approval to tolerance to outright objection expressed either to the participants or to management."[185] In most cases, workplace romances are characterized by negative workgroup outcomes such as high levels of gossip, complaints, hostilities, distorted communications, lower morale, and lower productivity.[186]

3. *Motives*

Another variable in determining the nature of coworker perceptions and responses to workplace romance is the motivation they attribute to participants in the romance.[187] Quinn identified three distinct motives for participating in a workplace romance: love, ego, and job.[188] Individuals with love motives are sincere in their desire for love, companionship and possibly even a spouse.[189] Ego motives pertain to individuals who engage

[182] *Id.* at 1046–7.
[183] *Id.* at 1047.
[184] *Id.*
[185] *Id.*
[186] *Id.* (citing Quinn, *supra* note 9). Foley & Powell point out that Quinn's 1977 study found workplace romances may occasionally enhance "work group functioning through lowered tension and improved coordination, teamwork, and workflow." *Id.* Negative outcomes, notably, were present in the majority of cases studied. *Id.* Moreover, Quinn did not differentiate between hierarchical and lateral workplace romances in assessing the effects of and reactions to romances. *See id.*
[187] *Id.* at 1048 (citing Quinn, *supra* note 9).
[188] *Id.*
[189] *Id.* at 1048.

in workplace romances for their own excitement, ego satisfaction, or sexual experience.[190] Those with job motives desire career advancement, financial rewards, security, and power.[191] Quinn proposed three likely combinations of participants' motives: ego for both participants, which he classified as a fling; love for both, classified as true love; and job for one and ego for the other, classified as a utilitarian relationship.[192]

Coworkers' perceptions of participants' motives for engaging in workplace romance influence their responses to such romances. Not surprisingly, coworkers object most strongly to workplace romances when they believe one participant has gained an unfair advantage in exchange for satisfying the other participants' desire for ego gratification. Thus, coworkers respond most negatively to utilitarian relationships.[193] Perceived conflicts of interest and workgroup disruption are also greatest for utilitarian relationships.

4. *Gender*

After performing a meta-analytic study of all psychological studies from 1982-1996 regarding gender differences in the perceptions of sexual harassment, Jeremy Blumenthal found that virtually every study he examined supported the existence of gender differences in perceptions of sexual harassment.[194] Blumenthal also found that women were overall more likely than men to perceive behaviors as amounting to harassment.[195] To account for these gender differences, Blumenthal endorses an understanding of what he deems a "power differential" for assessing whether certain behaviors amount to sexual harassment.[196]

The power differential finds that women, as opposed to men, are disproportionately more often the victims of workplace sexual harassment. Thus, it is more likely that taking the victim's perspective in sexual harassment cases will entail taking a woman's perspective, making it possible that a woman would perceive sexual harassment when a man might not.[197]

Gender differences are also present when it comes to perceptions of workplace romances such that a woman may react to a workplace romance differently than a man. Indeed, studies have consistently found that women hold more negative attitudes towards workplace romances than men.[198]

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[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *See* Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35, 46 (1998).
[195] *Id.* at 35.
[196] *Id.*
[197] *Id.*
[198] *See* Powell, *supra* note 153, at 1527.

Researchers have proposed several theoretical explanations for this distinction.[199]

Powell's research points out that men and women have traditionally had very different experiences with workplace romances.[200] Because the number of women proportionately decreases as one travels up the rungs of the organizational ladder, women have tended to be the lower level participants in hierarchical organizational romances.[201] As a result of their lower status and power, women have historically suffered more and have been subjected to more negative stereotypes than their male partners once the workgroup becomes aware of the romance.[202] Women's motivations for engaging in workplace romance are frequently attributed to job motives, in that they become romantically involved with a male superior to move up in the organizational hierarchy.[203] Males, conversely, are perceived to engage in workplace romances to satisfy their ego needs.[204] Thus, the stereotypical view of an organizational romance is a utilitarian relationship between a lower level female and a higher level male.[205]

The different experiences men and women have had with hierarchical workplace romances impact their cognitive processes in formulating reactions to them.[206] According to Social Identity Theory, individuals develop social identities based on the categories to which they assign themselves.[207] Gender, as a critical component of one's self concept, is an important basis for feelings of identification, similarity, and proximity.[208] Males and females alike tend to empathize and identify with members of their respective genders.[209] Accordingly, women are more likely to identify with the traditional role of the woman in the hierarchical romance.[210] Since women have traditionally suffered more in workplace romances than men, they will tend to identify with, and adopt the perspective of, the woman as a victim in such a relationship.[211] Moreover, women may view the hierarchical workplace romance as a more serious problem than men because they see themselves as having more to lose from such a relationship.[212]

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[199] Foley & Powell, *supra* note 177, at 1049–50.
[200] Powell, *supra* note 153, at 1526.
[201] Powell, *supra* note 153, at 1526.
[202] Powell, *supra* note 153, at 1526 (citing Pierce, *supra* note 9).
[203] Powell, *supra* note 153, at 1526.
[204] Powell, *supra* note 153, at 1526.
[205] Powell, *supra* note 153, at 1526–27. According to Powell, this stereotype works to the detriment of women. *Id.* at 1527.
[206] Powell, *supra* note 153, at 1526–27.
[207] Powell, *supra* note 153, at 1526–27.
[208] *See* Powell, *supra* note 153, at 1526–27*; See also* Foley & Powell, *supra* note 177, at 1050.
[209] Powell, *supra* note 153, at 1527.
[210] Powell, *supra* note 153, at 1527.
[211] Powell, *supra* note 153, at 1527.
[212] Powell, *supra* note 153, at 1527.

IV. A LEGAL CANVAS FOR SOCIAL SCIENCE

> *The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.*[213]

Familiarity with social science data is necessary to achieve the "appropriate sensitivity to social context" the Supreme Court advocated in the above quotation from *Oncale v. Sundower Offshore Services, Inc.*.[214] According to the Court, the key to determining whether an incident is actionable as harassment is dependent upon its context. This section will draw upon the theories explained in Part III to gauge the "real social impact" of the workplace behavior that occurred in *Miller v. Department of Corrections*. It will analyze *Miller* from a social scientific standpoint and demonstrate that a reasonable person would indeed perceive the workplace environment that existed as hostile, thus having a strong basis for a sexual harassment claim under Title VII.[215] It will then go on to discuss social science support for hostile environment claims generally and conclude with some implications for current sexual harassment law.

A. SOCIAL SCIENCE APPLIED TO *MILLER*

The relevant legal and social scientific backgrounds together allow for the submission of several insights into the *Miller* case. First, it is important to note that Kuykendall's relationships with Brown, Bibb, and Patrick can all be characterized as hierarchical workplace romances. As noted, coworkers perceive hierarchical romances as more problematic than lateral romances because they provide an opportunity for the exchange of resources in the Career Domain for those in the Personal Domain.[216] It appears that Kuykendall and his paramours participated in this type of exchange: Kuykendall provided career benefits in exchange for the sexual resources he received from his paramours. For example, Patrick received a promotion to VSPW where she was able to bypass reporting to her supervisor and instead could report directly to Kuykendall. Despite having her application rejected by the interview committee, Bibb was granted a promotion and transfer to VSPW pursuant to Kuykendall's order to "make

[213] Oncale v. Sundower Offshore Servs., 523 U.S. 75, 81–82 (1998).
[214] *Id.*
[215] *Miller* is a particularly useful case to analyze from a social scientific standpoint because of the prevalent workplace romances and social sexual behaviors that the court details in its opinion.
[216] *See supra* part III.A.

it happen." Brown also received promotions at an overly rapid rate. These promotions, transfers, and more favorable work assignments all fall within the Career Domain. In return for providing such benefits to his paramours, Kuykendall was rewarded with Sexual Domain resources from these women.

The second insight social science helps draw is that the utilitarian nature of Kuykendall and Brown's relationship made it particularly troubling to coworkers.[217] Brown clearly revealed her motivations for engaging in the romance when stating her intention to use Kuykendall's power to extract benefits from him.[218] According to Quinn's motivation theory,[219] this would be characterized as job motivation which is constituted by the desire for career advancement, financial rewards, security, and power. Kuykendall, conversely, is very likely to have had ego motives for participating in the romances with Brown and the others. That is, he became involved in the romance for his own excitement, ego satisfaction, or sexual experience. Moreover, both love and job motives may be ruled out for Kuykendall. Love motives are very unlikely because he was involved in at least four relationships at the same time including his marriage and romantic relationships with Brown, Bibb, and Patrick. Job motives are impossible to attribute to Kuykendall as all of his paramours were his subordinates and not in a position to offer him career advancement or rewards. Kuykendall's ego motives coupled with Brown's job motives gave rise to a utilitarian relationship between them. Coworkers object most strongly to utilitarian relationships as one participant gains unfair career advantages for satisfying the other's ego gratification.[220]

Third, social science illustrates that Miller and Mackey perceived that the only way they could attain the same benefits as Kuykendall's paramours was to provide Sexual Domain resources by becoming romantically involved with Kuykendall. Miller and Mackey could not receive the same career benefits that were provided to Brown and Kuykendall's other paramours because they had no desire to become sexually involved with him and provide resources in the Sexual Domain. They also experienced feelings of inequity and injustice, sentiments common to those in their situation, after realizing they would be denied promotions and other Career Domain resources because they were excluded from the types of social exchanges enjoyed by Kuykendall's paramours. Moreover, Miller and Mackey realized that Brown, Bibb, and Patrick were exploiting the relationship to achieve personal gain in the Career Domain. Miller, Mackey and other coworkers sensed that the only way to achieve career benefits was to participate in a sexual relationship, thus adding a Sexual Domain component to the workplace. This is

[217] It is very likely that Kuykendall's relationships with Bibb and Patrick are also utilitarian. Brown's relationship with Kuykendall, however, is assuredly utilitarian as she clearly stated her motivations for engaging in the romance.
[218] *See supra* note 118 and accompanying text.
[219] *See supra* part III.C.3.
[220] *See supra* part III.C.3.

evidenced by a statement made by one coworker: "what do I have to do, 'F' my way to the top?"[221]

Fourth, Miller and Mackey's negative perceptions of the romances that pervaded their workplace may be explained in terms of Foley and Powell's theory of perceived conflicts of interest and workgroup disruption. Indeed, both of these components were present in the *Miller* workplace. Coworkers were aware of Kuykendall's three ongoing hierarchical romances, which inevitably presented a conflict of interest.[222] Thus, Miller and Mackey's fears of favoritism were justified upon this ground. In addition to creating a conflict of interest, Kuykendall's romances pervaded the workplace and caused a great deal of workgroup disruption. Disruption occurred when Mackey, Miller, and other employees saw Kuykendall and Bibb fondling and groping each other at work related social gatherings. There was also evidence that Kuykendall telephoned Bibb at home hundreds of times while he was at work. Coworkers also witnessed that Patrick, Bibb, and Brown "squabbled" over him, in sometimes emotional scenes. Miller stated that she often heard Kuykendall arguing with Patrick at work about his relationship with Bibb.[223]

Last, findings of gender differences in perceptions of workplace romances make it possible that Miller and Mackey may have reacted more negatively to Kuykendall's workplace romances than their male coworkers might have. Indeed, Kuykendall's romances conformed to the stereotypical view of the organization romance. All three romances were utilitarian relationships between lower level females and a higher level male. As women are more likely to identify with the traditional role of the woman in the hierarchical romance, Miller and Mackey could very likely have adopted the perspective of the woman as a victim of the utilitarian romance. Miller and Mackey might have viewed the hierarchical romance as a more serious problem than their male coworkers did because they saw themselves as having more to lose from such a relationship. Thus, the fact that Miller and Mackey are females helps bolster their claim of hostile environment harassment.

B. GENERAL SOCIAL SCIENCE SUPPORT FOR THE HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS PREMISED UPON CONSENSUAL ROMANTIC RELATIONSHIPS AND SEXUAL FAVORITISM

While *Miller* presented a set of facts so extreme as to define the outer limits of unacceptable workplace behavior, it is possible that scenarios presenting less extreme facts may create a hostile environment from the perspective of a reasonable person. The easy and meaningful application of the social science findings to the *Miller* decision showcases their potential to inform and aid judges in all hostile environment sexual harassment suits

[221] Miller v. Dep't of Corr., 36 Cal. 4th 446, 454 (2005).
[222] *See supra* part III.C.1.
[223] *Miller*, 36 Cal. 4th 446, 452 (2005).

involving consensual workplace romances. This section provides several basic premises that courts may take into account in considering such claims.

1. *The Mere Existence of a Consensual Workplace Romance Can Give Rise to Hostility Among Coworkers*

Because social science findings suggest that the mere presence of a workplace romance may have adverse effects on other female coworkers,[224] a workplace romance that results in isolated favoritism should not automatically be disregarded for having the potential to create a hostile environment. A consensual workplace romance can potentially create a hostile and abusive working environment for coworkers if it induces in them a belief that the only way to get ahead and reap the benefits of favoritism is to participate in a workplace romance.

Moreover, because one isolated incident of severe harassment may be actionable under *Harris*, an isolated instance of favoritism should arguably also be actionable if its severity is great. And from the point of view of certain women, an isolated instance of favoritism that stems from a workplace romance can very easily be perceived as severe.[225] As Blumenthal noted, women are more often victims of harassment than men and thus respond more negatively to workplace romances.[226] Even one instance of favoritism has the potential of making a woman believe that the only way for her to get ahead is to engage in a romantic relationship with her superiors. Thus, courts should not automatically disregard an instance of favoritism merely because it is isolated. Rather, they should ask whether, considering all the circumstances, the victim could reasonably have been harmed by it.

2. *A Hierarchical Workplace Romance is Likely to Negatively Impact a Reasonable Woman*

Social scientific evidence on gender differences in perceptions of workplace romance suggests that a woman may have an actionable hostile environment claim whenever a workplace romance exists, whether or not it results in widespread favoritism. That is, because social science data has recognized that women perceive and are impacted more negatively by the presence of hierarchical workplace romances, they may reasonably experience a hostile work environment based on one's mere presence. The fact that hierarchical workplace romances are especially troublesome and problematic for coworkers, taken together with the finding that women more negatively perceive and are impacted by workplace romances, yields the conclusion that hierarchical romances may have a particularly detrimental effects on females in the workplace. Thus, because the mere

[224] *See supra* part III.C.4.
[225] *See supra* part III.C.4.
[226] *See supra* part III.C.4.

presence of a hierarchical workplace romance is a proven source of hostility for females, social science thus suggests that an environment that contains a consensual sexual relationship, but that does not rise to the blatant levels of favoritism as seen in *Miller* and *Borderick*, could still be legitimately problematic for a reasonable woman.

3. *Factors Drawn from Social Science Findings May Strengthen a Plaintiff's Hostile Environment Claim Based on an Isolated Sexual Relationship or Instance of Favoritism*

Social science data suggests using a middle ground approach that would recognize the potential of favoritism that is neither widespread nor isolated to be actionable under Title VII. Such an approach would incorporate the following variables taken from social science findings to identify situations that could give rise to a hostile environment: the degree of hierarchy in the workplace romance, the motivations the victim attributes to the participants of the romance, the degree of conflict of interest and workgroup disruption, as well as the gender of the victim. It would also allow an avenue of recovery for plaintiff employees who are negatively impacted by workplace romances which do not lead to overtly widespread favoritism or rise to the extreme levels of the *Miller* workplace.

The first inquiry would consider the degree of hierarchy of the workplace romance, involving a determination of whether it is hierarchical or lateral in nature. The understanding that a hierarchical workplace romance has more injurious effects on coworkers than a lateral romance may help judges to weed out cases of lateral workplace romances and focus more closely on the hierarchical nature of the relationship in question. Incorporation of the gender factor would bring to light female coworkers' heightened likelihood to respond negatively to hierarchical romances in comparison to their male counterparts. Judges would thus understand that the mere presence of a hierarchical romance, whether or not it results in overt displays of favoritism, may nonetheless cause female coworkers to be fearful of favoritism. Moreover, because hierarchical romances inevitably present a conflict of interest, the latter is invoked as a factor and further legitimizes coworker's fears of favoritism. The motivation factor would additionally allow judges to recognize that the perception of a hierarchical romance as a utilitarian relationship is likely to give rise to greater degrees of hostility, objection, and negative responses from coworkers.

Were courts to consider the factors discussed above, courts' sensitivity toward female plaintiffs' hostile environment claims would increase. An application of social science factors would allow judges to differentiate between instances where isolated workplace romances lack the potential to create a hostile environment and situations where they are likely to create an actionable environment.

C. SOCIAL SCIENCE IMPLICATIONS FOR CURRENT LAW

1. *Incorporating Social Science Findings into the "Totality of Circumstances"*

The above referenced premises and factors derived from social science findings may be incorporated into the totality of circumstances approach *Harris* requires for the evaluation of sexual harassment claims.[227] In fact, considering such information might have led some courts to arrive at contrary decisions.

For example, the *Proksel* court discounted plaintiff's hostile environment claim on the ground that a demonstration of managerial favoritism toward a paramour was not enough to make out a valid hostile environment claim.[228] It suggested, however, that plaintiff could have prevailed if she were able to show that the favoritism caused her to believe that her own involvement with the manager would have resulted in her own favorable treatment.[229] But social science suggests that plaintiff was likely to believe the former, regardless.

A consideration of social scientific variables would yield the conclusion that the romance was hierarchical in nature and thus involved an exchange of resources across the sexual and career domains.[230] Because hierarchical romances often give rise to the belief that favorable career resources will result from becoming sexually involved with a superior,[231] it would not be unreasonable for the plaintiff in *Proksel* to have believed that romantic involvement with her manager could have resulted in favorable treatment.

Furthermore, consideration of additional social scientific variables would have concentrated on plaintiff's perception of the workplace romance and focused on the large amount of workgroup disruption the romance caused. For example, plaintiff's testimony as to seeing her boss looking down his paramour's blouse, as well as witnessing the couple blow kisses at each other demonstrates a degree of workgroup disruption which was not emphasized by the court to the extent it should have been. Moreover, because plaintiff was a female, this would further heighten her sensitivity to the workplace romance.[232] So, a review of certain social scientific variables could have acted to shift the court's perception away from viewing the favoritism in isolation to otherwise considering the totality of circumstances to possibly arrive at a contrary holding.

The EEOC's policies might also benefit from an understanding of social science findings. The 1990 policy statement discusses instances

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[227] *See supra* part II.C.
[228] *See supra* notes 103–108 and accompanying text.
[229] *See supra* notes 103–108 and accompanying text.
[230] *See supra* part III.A.
[231] *See supra* part III.A.
[232] *See supra* part III.C.4.

where favoritism is exceptionally widespread or merely isolated, circumstances that lie on opposite poles of one another. Social science would suggest creating a middle ground approach that would recognize the viability of a hostile environment claim in situations that fall within the two extremes.

2. *Perception Differences "Because of Sex"*

Gender differences in perceptions of workplace romances and sexual harassment go to the "because of sex" element necessary for a hostile work environment claim under Title VII.[233] The recognition of inherent gender difference in perceptions of sexual harassment and workplace romances may allow female plaintiffs to get around the hurdles courts impose by striking down their sexual favoritism and harassment claims on the basis that both male and female coworkers were disadvantaged by the favoritism giving neither a valid Title VII claim. That is, because of her sex, a female will inherently react to a workplace romance more negatively than a male.

Some courts have tried to incorporate the different perceptions of men and women into the law. The realization that there is a "wide divergence" in the perspectives of men and women when evaluating social sexual behaviors led the Ninth Circuit to adopt the reasonable woman or victim standard in *Ellison v. Brady*.[234] Pursuant to the standard, a "female plaintiff states a prima facie case for hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[235] The *Ellison* Court reasoned that the severity and pervasiveness of sexual harassment should be evaluated with a focus on the perspective of the victim, and "[a] complete understanding of the woman's view requires . . . analysis of the different perspectives of men and women."[236]

In light of social science data on gender differences in perceptions of sexual harassment and workplace romances, the view of the *Ellison* Court is correct. Social science theories confirm that because women have historically suffered more from workplace romances, they hold more negative attitudes towards workplace romances and react differently to them compared with men.[237] The realization of the distinct view of females should create an automatic sensitivity in courts to hostile environment suits brought by female plaintiff coworkers. Thus, courts should apply the reasonable victim standard to all hostile work environment sexual harassment claims that are premised on a workplace romance.

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[233] *See supra* part II.A.
[234] 924 F.2d 872, 878 (9th Cir. 1991) (holding that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . A complete understanding of the victim's view requires analysis of the different perspectives of men and women.").
[235] *See id.* at 879.
[236] *See id.* at 878.
[237] *See supra* part III.C.4.

V. CONCLUSION

The reality of the modern workplace is that sexual relationships between employees are becoming increasingly common, and that these relationships often have detrimental effects on coworkers. Although courts have recognized the possibility for a hierarchical workplace romance to give rise to an actionable hostile work environment for coworkers,[238] the instances they have recognized to potentially create such claims are much too limited. Occasions where workplace romances result in widespread favoritism, which courts and the EEOC alike agree create an actionable hostile work environment under Title VII and its parallel state statutes,[239] are merely one set of circumstances that can give rise to hostility among coworkers.

The factors and variables derived from the social scientific findings discussed in this Note suggest that certain behaviors which courts have rejected as being actionable, namely the isolated case of sexual favoritism, may create the same feelings of hostility in coworkers that widespread favoritism has been shown to create. Social science variables suggest that the mere existence of a workplace romance, if hierarchical in nature, may effect a term or condition of employment required under Title VII if other specific factors are present.[240] Courts should begin to understand and apply social scientific findings to coworker hostile environment claims as part of the totality of circumstances evaluation. This will give rise to a much needed level of heightened sensitivity to such claims.

[238] *See, e.g.*, Miller v. Dep't of Corr., 36 Cal. 4th 446 (2005).
[239] *See supra* part II.D.
[240] *See supra* note 22 and accompanying text; *see supra* part IV.B.3.