Labor and Employment Law

LOVE BENEATH THE (DOCKET) SHEETS: OFFICE ROMANCE AND SEXUAL DISCRIMINATION LAW

by Alan Orantes Forst

The December 14, 1998 cover story of *U.S. News & World Report,*[1] titled "Love in the Office," deals with the topic of office romance, along with its evil cousin, sexual harassment law suits. The article quotes Dennis Powers, author of *The Office Romance: Playing With Fire Without Getting Burned,* as stating "Today's fling is tomorrow's filing." The article goes on to discuss "the costs of inaction," i.e. sexual discrimination and sexual harassment lawsuits, and notes the existence of the "love contract," devised by national employment-law firm Littler Mendelson to concisely record that the co-workers "independently and collectively desire to undertake and pursue a mutually consensual social and amorous relationship."[2]

There are several forms of employer costs associated with office romances. The most publicized cost is probably that associated with legal damages when a court finds the employer legally liable for sexual harassment (office romance gone *bad!*). Both of the U.S. Supreme Court's June 1998 decisions, *Faragher v. City of Boca Raton, Fla,* 124 DLR AA-2, E-11,77 FEP Cases 14 (June 29, 1998), and *Burlington Indus. v. Ellerth,* 124 DLR AA-1, E-1, 77 FEP Cases 1 (June 29, 1998), involved claims that the plaintiffs had been victimized by supervisors' unwelcome sexual advances. However, neither of the plaintiffs in *Faragher* and *Ellerth* engaged in a sexual relationship, consensual or otherwise, with the supervisors who allegedly made sexual advances toward them, and thus they do not fit into the scenarios that I will set forth below.

The subject of the Supreme Court's rulings on employer liability for unwelcome sexual harassment was discussed by Jason Gunter and Tammie Rattray in the October issue of the

Florida Bar Journal in their article, "Recent Developments in Employer Liability for Sexual Harassment-*Ellerth* and *Faragher*."[3] Rather than revisit this subject, this article will address three scenarios in the context of an actual or presumed office romance, which involves, to some degree, a "voluntary" sexual relationship.

(A "sexual relationship" need not involve sexual intercourse--in fact, one of the first appellate decisions to address the issue of "sexual favoritism" commented that the district court had "seemingly attempted to draw an inexplicable distinction between sexual intercourse and other (arguably lower) forms of sexual conduct." *King v. Palmer*, 778 F.2d 878, 880 (D.C. Cir. 1985). The circuit court's decision declared that "[s]uch a distinction finds no support in the governing case law and we can discern no good reason to carve out such an exception in this case." Gee, it would be hard to imagine a defendant attempting to make this "inexplicable distinction" today, wouldn't it?)

Scenario One: Sexual Favoritism

Charlotte is a longtime employee of the company. Charlotte applies for a promotion. Charlotte's qualifications and experience are deemed to be superior to most of the other applicants. However, Gennifer, a less experienced and apparently less qualified woman who was originally ranked ninth out of eleven applicants is selected for the position, after the requisite qualifications for the position are rearranged in a manner designed to aid Gennifer. Charlotte later learns that Gennifer is the girlfriend of the company's CEO and that the officials who changed the qualifications are appointees of the CEO.[4]

Does Charlotte have a viable sexual discrimination claim if Charlotte can prove that, but for the selectee's consensual sexual relationship with the company CEO, Charlotte would have received the promotion?

Does the gender of Charlotte matter?

The Equal Employment Opportunity Commission's guidelines define sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1998). The Supreme Court had previously deemed the first two forms of sexual harassment as "quid pro quo" sexual harassment, as the victim of this form of harassment receives or does not lose job benefits in exchange for his or her submission to the unwelcome sexual advances or requests for sexual favors. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67-68 (1986). The third form of sexual harassment has been termed "hostile environment" sexual harassment, and a finding of hostile environment harassment does not require an economic effect on the complainant's employment.[5]

In its landmark 1986 decision, *Meritor Savings Bank v. Vinson*, the United States Supreme Court noted:

> [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Id. at 68, citing 29 C.F.R. § 1604.11(a) (1986). Some feminist "scholars" would argue that "[w]hen a formal power differential exists, ALL sexist or sexual behavior is seen as harassment, since the woman is not considered to be in a position to object, resist, or give fully free

consent...,"[6] and at least one law professor has written that shielding employers who enter into consensual relationships with employees from Title VII actions sends other employees the message that they must use their sexuality to advance in the workplace and, thus, preferential treatment of a decision maker's sexual partner should be "prohibited by Title VII regardless of the nature of the underlying relationship."[7] Nonetheless, the Equal Employment Opportunity Commission (EEOC),[8] and Federal[9] and Florida[10] courts have pretty uniformly[11] held that an employer is not liable under Title VII of the Civil Rights Act of 1964, as amended, if an employee receives preferential treatment because of a consensual office romance with a supervisor, *i.e.* a relationship that is both voluntary in the sense that the employee is not in the relationship against her will, *and* is consensual as the employee is not "submitting" to sexual advances or requests for sexual favors in return for employment benefits, and there is no other evidence that a relationship with a supervisor is a term and condition of employment.

The EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, breaks "sexual favoritism" down into three categories. The first category covers the situation set forth in Scenario One, an isolated instance of favoritism toward a "paramour." The EEOC Policy Guidance declares that Title VII does not prohibit isolated instances of preferential treatment based on consensual romantic relationships -- "An isolated instance of favoritism to a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."

The EEOC Policy Guidance was issued in early 1990,[12] and the conclusion that Title VII does not prohibit preferential treatment based on a consensual relationship relies in large part on a 1986 Second Circuit Court of Appeals decision, *DeCintio v. Westchester County Medical Center*,

807 F.2d 304 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987). This case involves the sex discrimination claims of seven male respiratory therapists, who argued that promotion requirements were altered (possession of a certification that they all lacked was added as a criterion) in order to disqualify them for the position of Assistant Chief Respiratory Therapist, thus ensuring the promotion of a woman with whom the Program Administrator of the Respiratory Therapist Department was romantically involved (she had the requisite certification). The Circuit Court's decision reversed the District Court's decision in favor of the plaintiffs, with the Circuit Court decision stating "We can adduce no justification for defining 'sex,' for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement." *Id.* at 307. In reaching this conclusion, the court reasoned that "[t]he proscribed discrimination under Title VII must be a distinction based on a person's sex, and not on a person's sexual affiliations." *Id.* at 306-07. The court also examined the EEOC's Guidelines on Discrimination Because of Sex, particularly 29 C.F.R. 1604.11(g) which states "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." 29 C.F.R. 1604.11(g). The court concluded that "submission" as used in section 1604.11(g) "clearly involves a lack of consent and implies a necessary element of coercion or harassment."

> [The defendant's] conduct, although unfair, simply did not violate Title VII . . . . [The plaintiffs] were not prejudiced because [the decision maker] preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but [the favored woman] could be considered for the appointment because of [her] special relationship to [the decision maker].

DeCintio at 308. The court reasoned that a finding of Title VII sex discrimination under these circumstances would:

> . . . involve the EEOC and the federal courts in the policing of intimate relationships. Such a course, founded on a distortion of the meaning of the word "sex" in the context of Title VII, is both impracticable and unwarranted . . . [as] sexual relationships between co-workers should not be subject to Title VII scrutiny, so long as they are personal, social relationships."

Id.[13] Subsequent Eleventh Circuit decisions have cited to *DeCintio* in reaching a similar conclusion. *See, e.g., Womack v. Runyon*, 147 F.3d 1298, 1299-1300 (11th Cir. 1998) (noting that *DeCintio* is "the leading case in this area," and "Title VII does not authorize any relief from an adverse employment decision predicated on the decision-maker's romantic and/or sexual involvement with the successful applicant"); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902 (11th Cir. 1990) (citing to *DeCintio* in noting that "it is clear that sexual activity, rather than sexual identity as such, is not a discriminatory basis for employment action under Title VII . . .").

In *Ayers v. AT&T*, 826 F. Supp. 443 (S.D. Fla. 1993), a female plaintiff claimed to have been discriminatorily transferred to a less lucrative location, while a less qualified female employee was awarded the "preferred" position by virtue of her past and present voluntary sexual relationship with the supervisor. The court granted summary judgment in favor of the defendant employer, noting that "favoring a 'paramour' does not constitute a violation of Title VII . . . . The 'discrimination' is not based on sexism (whether gender or activity), but is rather more akin to nepotism [and t]he favoritism is a gender neutral, albeit unfair, justification for the given action." *Id.* at 445.

The *Ayers* case is worth noting because the favored employee, Maser, had broken off her romantic relationship with the Regional Supervisor, Wilson, just prior to the latter's selection of Ms. Maser for a transfer to a choice position. Shortly after the transfer, Wilson and Maser resumed their relationship and soon thereafter married. The plaintiff claimed that Wilson used his position as supervisor to coerce Maser into resuming a sexual relationship with him. The court responded that there was no evidence of actual or intended coercion on the part of Wilson. It further noted that even if the plaintiff could prove that Wilson transferred Maser "to rekindle romance," there would be no Title VII violation, as such an action would be akin to nepotism, rather than sexism, with no difference between favoring a "former sweetheart" as opposed to a current "sweetheart." *Id.* at 445-46. The court noted, in *dicta*, that even with evidence of coercion on the part of supervisor Wilson, the plaintiff's claim would still fail as a matter of law. As discussed below, this is an arguable proposition.

A second "local" case worth discussing is *Freeman v. Continental Technical Services*, Inc., 710 F. Supp. 328 (N.D. Ga. 1988). In this case, Dunlap, the president of defendant Continental, had commenced an affair with Freeman shortly before he hired her as a clerk-typist. She apparently was a poor employee, retained merely because of her "ongoing personal relationship with her supervisor, Mr. Dunlap." Several months into her employment, Freeman informed Dunlap (who was married to another woman) that she was pregnant and intended to have the child. Within weeks, Freeman was terminated. The court found that Freeman's termination was not based on sex discrimination; it was based on the "personal involvement of Dunlap with Freeman." Finding no evidence that the relationship was involuntary or coercive ("it was certainly ongoing and romantic"), the court noted that "Title VII does not require an

employer to have good cause for its personnel decisions . . . The transfer, demotion, or discharge of an employee for sexual or sex-related behavior does not constitute unlawful sex discrimination under Title VII." (citation omitted). *Id.* at 331.

Thus, in light of the overwhelming case law and EEOC policy guidance, it does not appear that Charlotte would have a viable Title VII claim under the facts set forth in Scenario One. Nor would the gender of a third-party complainant (an employee who charges sexual discrimination because he or she did not get the same employment benefits received by the participant in the consensual relationship) be relevant because the discrimination is not gender-based, *i.e.*, women were not discriminated against because they are women, nor were men discriminated against because they are men. Male applicants for the promotional opportunity would face the same obstacle encountered by Charlotte - favoritism for another applicant based on her status as a "sweetheart" or (as in *Ayers*) former sweetheart of an individual with input in the selection decision. The favoritism would not be "because of such individual's . . .sex," which is the language utilized in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a) (1998).

Scenario Two: Quid Pro Quo Sexual Favoritism

Monica is a fairly low-level female employee of the company who engages in a sexual affair with the CEO of the company. She receives employment benefits, including promotions and job interviews with senior managers of the company that are not made available to other men or women of the company, including individuals with far greater experience and qualifications. After about a year, the CEO ends the sexual relationship with Monica, and Monica turns around and maintains that the sexual affair was never consensual and she only engaged in sex with the CEO because she was coerced to do so in order to receive promotions and other employment benefits. (Relax! This is only a hypothetical scenario.) Monica further claims that the CEO required other female employees to grant sexual favors in order to advance in the workplace, and such a condition was not imposed on male employees.

> *If Monica can prove that the sexual relationship with the CEO was nonconsensual, can she assert a valid sexual harassment claim?*
>
> *Can other female employees who did not engage in sexual relations with the CEO, and were qualified for the employment benefits awarded to Monica, but were denied these benefits, recover if they establish that sexual relations were made a condition for receiving the benefits?*
>
> *Alternatively, if the CEO was only interested in one woman, Monica, and it is established that he coerced her into maintaining a sexual relationship in return for employment benefits, can other employees, both male and female, have standing to challenge this sexual favoritism, asserting an injury based on the discrimination/harassment incurred by Monica?*

After reading Scenario One, the in-house attorneys are smiling, and the feminists and plaintiffs' attorneys (throw in unions and you have most of the Democratic National Committee) are frowning. But, the law gets a bit more interesting in Scenario Two.

This scenario involves a sexual relationship between a supervisor and subordinate employee, with the subordinate claiming that the relationship was *not consensual*, and she only engaged in sex with the supervisor because she was coerced to do so in order to receive promotions and other employment benefits.

The aforegoing fact pattern calls to mind the U.S. Supreme Court's 1986 sexual harassment decision, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). There, the Court held:

> [T]he fact that sex-related conduct was "voluntary," in the sense that appellant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Id. at 68. Thus, in this scenario, Monica would have a quid pro quo sexual harassment claim against the employer, under either section 1604.11(a)(1) or section 1604.11(a)(2) of the EEOC's sexual harassment guidelines, as "submission" to her supervisor's sexual advances was "made explicitly or implicitly a term or condition" of her employment or, alternatively, "submission to such conduct . . . is used as the basis for employment decisions effecting" Monica.[14]

Monica's co-workers may also have a viable sexual discrimination claim. The EEOC's Sexual Favoritism policy guidance states that favoritism based on coerced sexual conduct may constitute third party quid pro quo sexual discrimination under 29 C.F.R. § 1604.11(g). That regulation states "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 sexual discrimination against other persons who were qualified for but denied that employment opportunity or benefit." The EEOC Policy Guidance states that if the employer requires female employees (not merely one female employee) to grant sexual favors in order to advance in the workplace, and such a condition is not imposed on men, other women could file a sex discrimination claim. The Policy Guidance notes that "[t]his is essentially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a 'quid pro quo' in return for job benefits."

The EEOC Policy Guidance cites to the 1983 case of *Toscano v. Nimmo,* 570 F. Supp. 1197 (D.Del. 1983), to support its argument. Toscano was one of the most qualified applicants for a promotion at the Veterans' Administration Hospital. The individual selected for this promotion had engaged in a sexual encounter with the decision maker. Toscano's Title VII suit alleged that in order for a woman to be selected for the promotion, it was necessary for that

woman to grant sexual favors, a condition not imposed on men. Although the court failed to rule whether the selectee's sexual relationship with the decision maker was coercive, it found four evidentiary bases for concluding that the granting of sexual favors was made a condition to getting the promotion (including the supervisor's admission that he was a "life-long 'womanizer,'" telephoned female employees at home to proposition them, telephoned them at work to describe his supposed sexual encounters with other female employees, and engaged in sexually suggestive behavior at work, *id.* at 1197-1201). The subsequent *DeCintio* decision noted that the court in *Toscano* determined that granting of sexual favors was a condition to receiving promotions, and therefore Toscano could establish Title VII discrimination because of the coercive nature of the employer's acts, rather than the relationship between the employer and the favored employee.[15] Other courts have used similar language.[16]

Thus, one way for Monica's co-workers to succeed on a § 1604.11(g) claim is to demonstrate a link between submission to sexual advances and job advancement, *i.e.*, submission to sexual demands on the part of one sex (usually women) has been implicitly made a condition to receipt of tangible employment benefits.

Do Monica's co-workers have standing to file Title VII actions based on the coerced sexual relationship between a co-worker and a supervisor (arguing, perhaps, that they "feel their pain")? One Federal judge found they do. In *Leibovitz v. New York City Transit Authority*, 4 F. Supp. 2d 144 (E.D.N.Y. 1998). a U.S. District Court upheld a $60,000 jury verdict for emotional damages awarded to a female manager who claimed she was distraught when she learned that other female employees were being sexually harassed by her employer, although the plaintiff herself was not a direct victim of this harassment. The court distinguished this situation

from earlier 1998 cases in which Federal circuit courts held that white plaintiffs could not allege violations based upon a hostile work environment imposed upon their black co-workers. *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir.) (en banc), *cert. denied*, 118 S.Ct. 2322 (1998); *Drake v. Minnesota Mining & Manufacturing*, 134 F.3d 878 (7th Cir. 1998). The *Leibovitz* decision noted that plaintiffs who belong to the protected class (generally women in sexual harassment cases) have a stronger case in pleading hostile work environment based on the treatment of others in their class.[17]

Scenario Three: Widespread Sexual Favoritism

The CEO of the company is engaged in a sexual relationship with Monica. He is also engaged in sexual relationships with Kathleen, Madeline, Donna, and Alexis! (I must repeat, this is only a hypothetical scenario). In fact, many managers of the company are engaged in sexual relationships with employees, and many of these employees are receiving "preferential treatment."

Can Linda, who is not involved in any type of sexual relationship at work, claim sexual harassment, even though she has not suffered any tangible loss of employment benefits?

In this scenario, the company has a CEO and other managers engaged in sexual relationships with employees, and many of these employees are receiving "preferential treatment." Linda is not involved in any type of sexual relationship at work and has not suffered any tangible loss of employment benefits. Several cases have indicated that, in such a situation, Linda may have a "hostile environment" sexual harassment claim. The lead case in this area is *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988). The plaintiff in this case was a female staff attorney employed at Securities and Exchange Commission. She claimed that a sexually hostile work environment existed within her division during her five years there. For the most part, the work environment harassment of which the plaintiff complained was not directed at her personally.

Instead, her claim focused on a "pattern" of sexual favoritism that existed within her division, involving relationships which were common knowledge throughout her division, as well as charges that Division employees frequently drank together, took long lunch hours and went to parties together. The District Court held that these relationships "created an atmosphere of hostile work environment offensive to [the] plaintiff" and to the other female employees who also testified about them, because the "plaintiff . . . was forced to work in an environment in which the [division] managers by their conduct harassed her and other [division] female employees, by bestowing preferential treatment upon those who submitted to their sexual advances." *Id.* at 1278.

The EEOC 's Sexual Favoritism policy guidance, relying upon *Broderick*, states:

> 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.'"

> *Vinson,* 477 U.S. at 67, (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904, 29 EPD P 32,993 (11th Cir. 1982)) (footnote omitted). An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor "play along" and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them. (Citations omitted). This sort of behavior can form the basis of an implicitly "quid pro quo" harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.

EEOC Notice No. 915-048 (Jan. 12, 1990). To date, *Broderick* has been treated by other courts as an exceptional example of a work place in which "sexual discourse displaced standard business procedure in a way that prevented [nonparticipating employees] from working in an environment in which [they] could be evaluated on grounds other than [one's] sexuality."[18] Thus, absent pervasive sexual favoritism that permeates the work place, a court is unlikely to convert a finding of sexual favoritism into a *Broderick*-type hostile environment decision.

Conclusion

Employers and their attorneys need not fear Title VII liability based merely on a *consensual* personal relationship (sexual or otherwise) between a supervisor and subordinate. There is case law, however, that indicates Title VII liability *may* be found when the personal

relationship or an unsuccessful attempt at romance is of a coercive nature or, in an extremely rare situation, pervades the work place. Notwithstanding this case law, Federal district courts in the Eleventh Circuit (which encompasses Florida) have noted that a third party sexual discrimination claim would not lie even if the sexual relationship was coerced (*Ayers v. AT&T*) and that, under some circumstances, a former paramour could not claim sexual discrimination for an adverse action arising from a relationship gone bad (*Llampallas v. Mini-Circuits; Freeman v. Continental Technical Services*). Nonetheless, there is the very real possibility that today's office romance may turn into tomorrow's *Vinson*-like sexual harassment claim (with the subordinate claiming that the relationship was coerced) or lead to friction in the workplace, with complaints of favoritism by workers outside of the relationship, claims of sexual harassment, and decreased productivity of those involved in the office romance.[19]

Thus, many companies now have written polices that forbid dating by persons with supervisory responsibility and employees who are subject to that supervision. These policies should be fashioned to promote uniform treatment of all employees and reduce the likelihood of claims of discrimination or favoritism. Employers who do draft such policies need be careful that the policies do not discriminate against married employees (unless in the nature of anti-nepotism policies), nor permit a situation favoring the supervisor in such a relationship (such a situation is an open-ended invitation to a sexual discrimination claim). Certainly, employers can require that employees in a close personal relationship refrain from public displays of affection or excessive conversation (if they're going to find creative uses for cigars, they need do so discretely). Workplace relationship rules should apply to all employees, even senior executives.

Non-fraternization policies are not illegal in Florida. *See Parks v. City of Warner Robins, Georgia*, 43 F.3d 609, 615 (11th Cir. 1995) (upholding constitutionality of anti-nepotism policy, noting that policies that reduce "favoritism or even the appearance of favoritism" and, "by limiting inter-office dating, decreas[e] the likelihood of sexual harassment in the workplace," serve a legitimate purpose). However, whether such policies are necessary, and to what extent, is more of a human resources issue than a legal issue (unless one of the participants lies about the relationship under oath before a grand jury) since, as set forth in the preceding discussion, lawsuits based on non-coercive, consensual personal relationships are most likely going to be unsuccessful, reducing the spectre of the involvement of "the EEOC and the federal courts in the policing of intimate relationships."

ENDNOTES

---

1. *Cupid's Cubicles: Office romance is alive and well, despite a barrage of corporate countermeasures*, U.S. News & World Report, Dec. 14, 1998.

2. *Id.* The U.S. News & World Report article reports that the "love contract" has "yet to gain widespread acceptance," although Littler Mendelson "has drawn up about a thousand so far." The article also notes the "date and tell" policy of the office of the attorney general of New Jersey, whereby "the supervisor is responsible for notifying a designated person in the hierarchy, the subordinate is advised of his rights, and the employer gains the protection of knowing that the relationship is, at least for the time being, consensual."

3. Jason L. Gunter and Tammie L. Rattray, *Recent Developments in Employer Liability for Sexual Harassment - Ellerth and Faragher*, 72 FLA. B.J. 94 (Oct. 1998).

4. A recent article in the on-line magazine (*e-zine*), *Salon Magazine*, reported that in 1990, Charlotte Perry, a longtime employee in the State of Arkansas government, applied for a better paying State government job. However, despite seemingly superior qualifications and experience, she failed to receive the desired promotion to an administrative assistant position with the Arkansas Board of Review. Instead, the position was awarded to a woman, Gennifer Flowers,

who allegedly had engaged in a sexual affair with the then-CEO of the state, the Governor. Ms. Flowers had originally been ranked ninth out of eleven applicants. However, the qualifications for the position were subsequently changed by the Chairman of the Arkansas Board of Review, in a manner that favored Ms. Flowers.

After losing the promotion to Ms. Flowers, Charlotte Perry filed a complaint with the state Grievance Review Committee. The Committee ruled in favor of Charlotte Perry, finding favoritism and "irregular practices" in the hiring of Flowers. However, the Committee's findings were subsequently overruled by the Chairman of the Board (interestingly, the same individual who allegedly interceded on behalf of Gennifer Flowers by changing the position's qualifications). Ms. Perry apparently never filed a Title VII or any other judicial claim. *See* Murray Waas, *The Other Woman*, Salon (Sept. 11, 1998) <http://www.salonmag.com/news/1998/09/11newsa.html>.. President Clinton was questioned about the Charlotte Perry grievance during the Paula Jones deposition. *President Clinton's Deposition* (Released March 13, 1998) <http://www-wp9.washingtonpost.com/wp-srv/politics/special/clinton/stories/clintondep031398.htm#flowers>.

5. The Supreme Court recently made clear that "the labels quid pro quo and hostile work environment are not controlling for purposes of establishing employer liability." *Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 2257, 2271 (1998).

6. Louise Fitzgerald, *quoted in* MICHELLE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 7 (1991).

7. Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 Indus. Rel. L.J. 153, 179 (1991).

8. *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, EEOC Notice No. 915-048 (Jan. 12, 1990) (Title VII does not prohibit isolated instances of preferential treatment based on consensual romantic relationships). The EEOC guidelines are not administrative "regulations" promulgated pursuant to notice and comment requirements and are, therefore, "not controlling upon the courts by reason of their authority." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). However, EEOC guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 142.

9. *See, e.g., Taken v. Oklahoma Corporation Commission*, 125 F.3d 1366, 1370 (10th Cir. 1997) (Supervisor's preselection of his paramour for a position for which either plaintiff was better qualified does not establish a violation of Title VII, as employment decision was based on a voluntary romantic affiliation, and not on any gender differences); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996), *cert. denied, 519 U.S. 1151 (1997)*, (no cognizable Title VII claim based on allegation that co-worker traded sexual favors for promotional opportunities to plaintiff's detriment); *Ellert v. University of Texas*, 52 F.3d 543, 546 (5th Cir. 1995) ("Even if [the plaintiff's] knowledge of the affair [between her supervisor and his subordinate] was the true

animus behind the discharge decision, it was a motivation that did not rely upon her gender and, as such, it was not within the ambit of Title VII's protections."); *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 306-08 (2d Cir. 1986) (sexual favoritism based on consensual sexual relationship does not constitute sex discrimination), *cert. denied*, 484 U.S. 825 (1987); *Elger v. Martin Memorial Hosp. Systems*, 6 F. Supp. 2d 1351, 1353 (S.D. Fla. 1998) (generally, the law doesn't recognize a Title VII claim based on favoritism on behalf of a consensual sexual partner); *Ayers v. AT&T*, 826 F. Supp. 443, 445 (S.D. Fla. 1993) (finding that sexual favoritism does not constitute sex discrimination); *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 497-98, 501 (W.D.Pa. 1988) ("Male employees[] shared with the plaintiff the same disadvantage relative [to the favored woman]: none could claim the special place in [the plant manager's] heart that [the favored woman] occupied."), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

10. I was unable to find any Florida decisions that directly dealt with the sexual favoritism issue. However, one related decision is *Department of Corrections v. Chandler*, 582 So. 2d 1183 (Fla. 1st DCA 1991). In that case, a black applicant for a promotion at the Florida Correctional Institute claimed that he was discriminated against when he was not recommended for the promotion because of his race. The Florida Commission on Human Relations found that Jane Grizzard, one of the three-person interview team who considered the applicants persuaded the other committee members not to recommend Chandler because his candidacy would jeopardize the candidacy of a white applicant, Kate Eldridge, who was a long-time friend of Grizzard. *Id.* at 1184. The District Court of Appeal reversed the Commission's decision, citing to the lead Federal decision on the issue of "sexual favoritism," *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987), to find that a promotion based upon friendship "*cannot* be considered a pretext to disguise the existence of racial discrimination." *Id.* at 1185.

11. The one case that is most often cited as an exception to the *DeCintio* rule is *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985). This decision assumed, without deciding, that a romantic relationship between a supervisor and a subordinate was sufficient to make out a prima facie case of sexual discrimination. The Circuit Court did not address the sexual favoritism issue, finding that it was not before it on appeal, 778 F.2d at 883, and the defendant had conceded that it had violated Title VII's prohibition on sex discrimination if plaintiff could establish favored employee received the promotion because of her sexual relationship with deciding official. *Id.* Thus, it is inappropriate to rely upon *King* to find sexual discrimination based on sexual favoritism as discussed in the first part of the EEOC Guidelines.

12. As a special assistant to the EEOC's Chairman from 1987 to November 1989, the author of this article was a participant in the Commission's consideration of this policy guidance.

13. Citing Preamble to EEOC Interim Guidelines on Sex Discrimination, 45 *Fed. Reg.* 25024 (1980).

14. Recently, the Eleventh Circuit reversed a $1.7 million award and found no sexual discrimination with respect to the termination of a female employee who had been the victim of sexual harassment on the part of her female supervisor and former sexual partner. In *Llampallas v. Mini-Circuits*, 1998 U.S. App. LEXIS 32512 (11th Cir. 12/28/98), Llampallas was harassed by her supervisor at Mini-Circuits, Blanch, after their sexual relationship ended. Blanch told Llampallas that she would have her fired if she did not resume the sexual relationship. Ultimately, Blanch called the president of Mini-Circuits and told him that she was quitting because she could not work with Llampallas. After meeting with Llampallas, the president terminated her, in order to retain Blanch.

The circuit court found that the president of the company was unaware of the sexual relationship between Blanch and Llampallas, let alone the sexual harassment (Llampallas' law suit only addressed the termination, and not the preceding hostile environment harassment) and Llampallas therefore failed to establish a causal link between Blanch's harassment and the president's employment decisions. *Id.* at 12. The decision indicates, however, that if Blanch had taken a "tangible employment action" against her former partner or if Blanch's "discriminatory animus" (based on Llampallas' rejection of her sexual overtures) *caused* the president to terminate Llampallas, it would have affirmed the lower court's judgment. However, as there was no evidence to support an inference of a causal link between the discriminatory animus and the termination decision (as Llampallas had full opportunity to inform the president that Blanch's threats to resign may have been motivated by discriminatory animus), there is no Title VII discrimination, as that law:

> . . . does not prohibit an employer from discharging an employee because it wishes to retain another, presumably more valuable, employee - unless, of course, the desired employee is of a different sex from the plaintiff, and the decision can be linked to a discriminatory animus towards persons of the non-desired employee's sex. Here, Llampallas and Blanch are both women; thus, the fact that [the president of the company] chose Blanch over Llampallas cannot give rise to an ultimate inference that [the president] choose Blanch "because of" Llampallas' sex.

Id. at 36-37.

15. *DeCintio,* 807 F.2d at 307.

16. *See Dirksen v. City of Springfield,* 842 F. Supp. 1117, 1121-22 (C.D. Ill. 1994) (holding that sexual favoritism, although not actionable as such, may help establish that advancement generally hinged on granting sexual favors, which supports quid pro quo harassment claim); *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 828-30 (N.D. Ill. 1994) (denying sexual favoritism claim and holding that sexual favoritism can help establish quid pro quo sexual harassment claim); *Priest v. Rotary*, 634 F. Supp. 571, 575-76 (N.D. Cal. 1986) (the court refused to grant summary judgment against the plaintiff's quid pro quo claim, not because of the favored employee's sexual relationship with the defendant, but because of the evidence that the defendant generally conditioned employment benefits on the granting of sexual favors--during the plaintiff's employment, she and other female

employees were subjected to various instances of unwelcome sexual advances by the defendant, with those who objected to his conduct either quitting or getting fired, and those who did not reject the defendant's advances, including the woman with whom the defendant was having a sexual relationship, being given preference in shift and station assignments).

17. *Leibovitz* at 151 ("having to experience other women being harassed or knowing of the harassment in her own workplace caused plaintiff to become depressed, anxious, and emotionally distraught, because she felt demeaned as a member of the harassed class . . . [t]he jury found, in short, that plaintiff was injured by the hostile work environment and the defendant's indifference to her plight.").

18. *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (no evidence that sexual relationships between supervisors and subordinates were "prevalent"). *See also, Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588 (9th Cir. 1992) (same); *Weldon v. Weyerhaeuser Company*, 1995 U.S. Dist. LEXIS 21486 at 31-34 (N.D.C. Ala., 1995) ("a supervisor could show favoritism that, although unfair and unprofessional, would not create a sexually hostile workplace").

19. *See SHRM Survey Finds Office Romances Are Often Frowned Upon By Employers*, <http://www.shrm.org/press/releases/romance.htm>.

Alan Orantes Forst recently joined the law firm of Crary❖Buchanan in its Stuart office. A graduate of Georgetown University (B.S.) and Catholic University (J.D.), Mr. Forst served in politically sensitive front office positions during the Reagan, Bush, and Clinton administrations, at the U.S. Departments of Justice and Labor (OFCCP and the Wage and Hour Division), the Merit Systems Protection Board, and the Equal Employment Opportunity Commission. He represents both employers and employees, with an emphasis on training, investigation, and ADR, as well as traditional litigation.

This article is submitted on behalf of the Labor and Employment Law Section, Kevin Hyde, chair, and F. Damon Kitchen, editor.