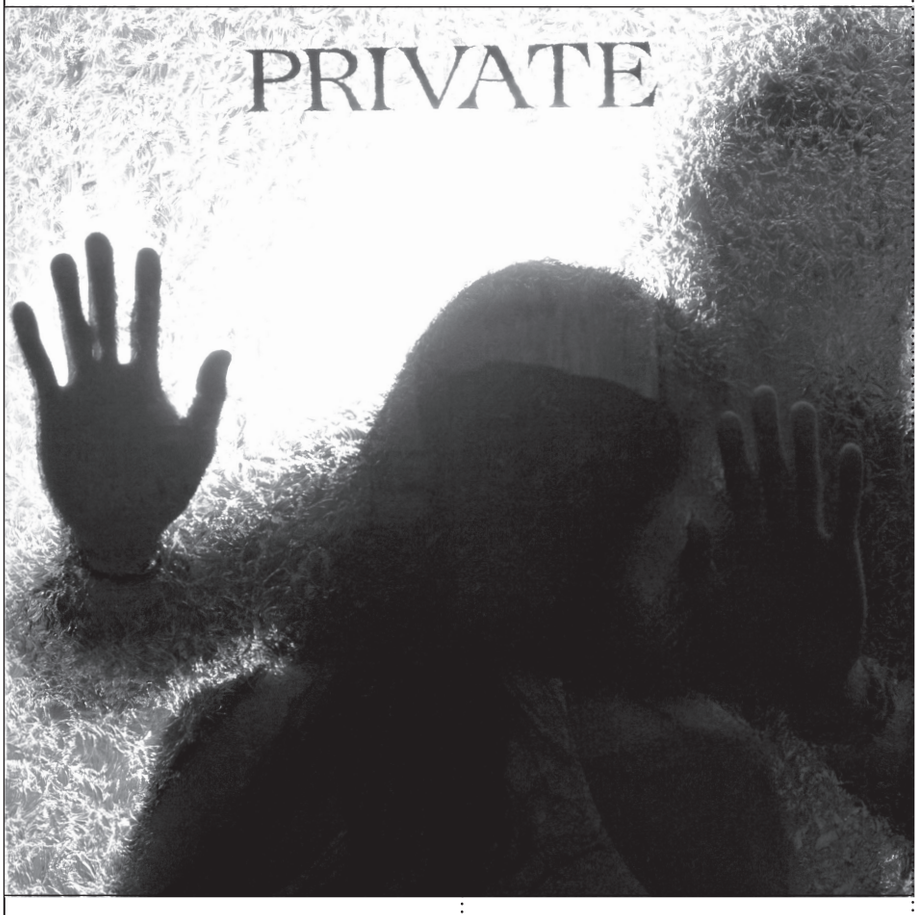
Title VII and the Workplace Romance

by John J. Davis



When the boss plays favorites by promoting his lover, raising her salary, or showering her with benefits not afforded to other employees, the entire office suffers. Management's clear message in such cases is that diligence, hard work, and leadership qualities do not always pay, and that career advancement depends on whom you're sleeping with. Employee morale, teamwork, loyalty, and even productivity are all adversely affected by sexual favoritism in the workplace. But while preferential treatment based on sex may be bad for business, is it unlawful? Is sexual favoritism a form of sex discrimination prohibited under federal law? The answer is generally no—isolated instances of sexual favoritism do not ordinarily violate Title VII of the 1964 Civil Rights Act. Still, it's the exceptions to this rule that employers must watch out for.

Title VII

Title VII forbids an employer from discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's . . . sex."[1] As the United States Supreme Court recognized in *Meritor Savings Bank, FSB v. Vinson*,[2] sexual harassment is a type of sex discrimination. "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[3] Analytically, courts have identified two forms of sexual harassment — quid pro quo harassment, and the sexually hostile work environment.[4] Quid pro quo sexual harassment occurs when a supervisor gives some type of economic benefit to an employee in exchange for sex; or, conversely, takes an adverse employment action against an employee who refuses to submit to his (or her) sexual advances.[5]

A sexually hostile work environment is one where the harassment is so severe or pervasive that it "alter[s] the conditions of [the plaintiff's] employment and create[s] an abusive working environment."[6] As defined by the Equal Employment Opportunity Commission (EEOC), Title VII prohibits sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[7]

When a boss coerces a subordinate to participate in a sexual relationship (or punishes her for refusing to do so), the subordinate becomes the victim of quid pro quo sexual harassment. Her recovery rests on proof that she was subjected to unwelcome sexual advances.[8] But if a boss bestows special benefits upon a subordinate as a result of a voluntary and consensual sexual relationship, it's another story. *Welcome* sexual advances are typically not actionable.[9] Still, sexual favoritism (a/k/a "paramour favoritism") can infect an entire workplace and negatively impact other workers. When one employee receives preferential treatment due solely to her status as the boss's lover, co-workers legitimately feel resentful and cheated since such favorable (and disparate) treatment is not based on professional qualifications or merit; career advancement, instead, is based on a system viewed as biased, unethical and unfair.

Almost universally, courts have held that any disadvantage co-workers may feel due to a paramour's romantic relationship with the boss is not actionable for the simple reason that such discrimination is not "because of ...sex" within the meaning of Title VII. Instead, it is "because of" a personal relationship:

> Title VII does not...prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification.[10]

In *DeCintio v. Westchester County Med. Ctr.*,[11] the U.S. Court of Appeals for the Second Circuit rejected the claims of male plaintiffs who alleged they were discriminated against on the basis of sex, in violation of Title VII, when their supervisor disqualified them from promotion in favor of a female with whom the supervisor was having a romantic relationship. The plaintiffs, reasoned the court, were not prejudiced because of their status as men; rather, they were discriminated against because their supervisor preferred his paramour,[12] and other female applicants for promotion faced the same predicament. No one but the paramour could be considered for the appointment due to her special relationship with the supervisor.[13] In reversing a judgment entered in favor of the plaintiffs, the Second Circuit refused to expand the term "sex," for Title VII purposes, to include "sexual liaisons" and "sexual attractions."[14]

The Seventh Circuit reached the same result in *Preston v. Wisconsin Health Fund*,[15] ruling that a male plaintiff could not recover for sex discrimination under Title VII for being terminated and replaced by a woman with whom the CEO was having an affair. Writing for the court, Judge Posner put the point bluntly:

> A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. Such favoritism is not based on a belief that women are better workers, or otherwise deserve to be treated better, than men; indeed it is entirely consistent with the opposite opinion....Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination.[16]

Other circuits have similarly rejected the notion that workplace favoritism based on a personal relationship will support a claim for sex discrimination under Title VII.[17]

In 1990, the EEOC adopted its "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism."[18] While this is not binding authority, it nonetheless constitutes a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."[19] The Policy Guidance endorses the *DeCintio* rationale, discouraging recovery in *isolated* instances of paramour favoritism:

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> It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.[20]

Exceptions to the Rule

At the same time, the EEOC cautioned that, in certain circumstances, recovery may still be appropriate—either by the "favored" employee and/or by the disadvantaged co-workers.[21] Thus, while the general rule is that disparate treatment based on sexual favoritism will not support a claim for discrimination under Title VII, employers should be aware of at least three exceptions to this rule that may expose them to liability. The EEOC identified two such exceptions in its Policy Guidance; the third arises out of romantic relationships that turn bad.

The first exception involves the "implied" quid pro quo scenario. If a targeted employee voluntarily yields to a supervisor's sexual advances and receives job benefits in return, the employee may be unable to recover for sexual harassment, but co-workers may have viable claims. Thus, when a willing woman receives a promotion, men and women who were qualified for the position but did not receive it may have standing to challenge the favoritism on the basis that they were discriminated against, arguing that the furnishing of sexual favors was an implied condition of receiving the benefit. Those not benefited were those who declined to grant such favors or who were not given that opportunity. In either case, the un-benefited employees were treated differently on the basis of sex.

In *Toscano v. Nimmo*,[22] the female plaintiff was qualified, but not selected, for a position in a Veterans Administration Hospital in Delaware. Instead, the hospital's administrative chief appointed a woman with whom he was having an affair. The plaintiff filed suit under Title VII, claiming she was discriminated against because the administrative chief conditioned his selection on the receipt of sexual favors (that in order for a woman to be selected, it was necessary to grant sexual favors, a condition not imposed on men). Citing the EEOC guidelines,

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