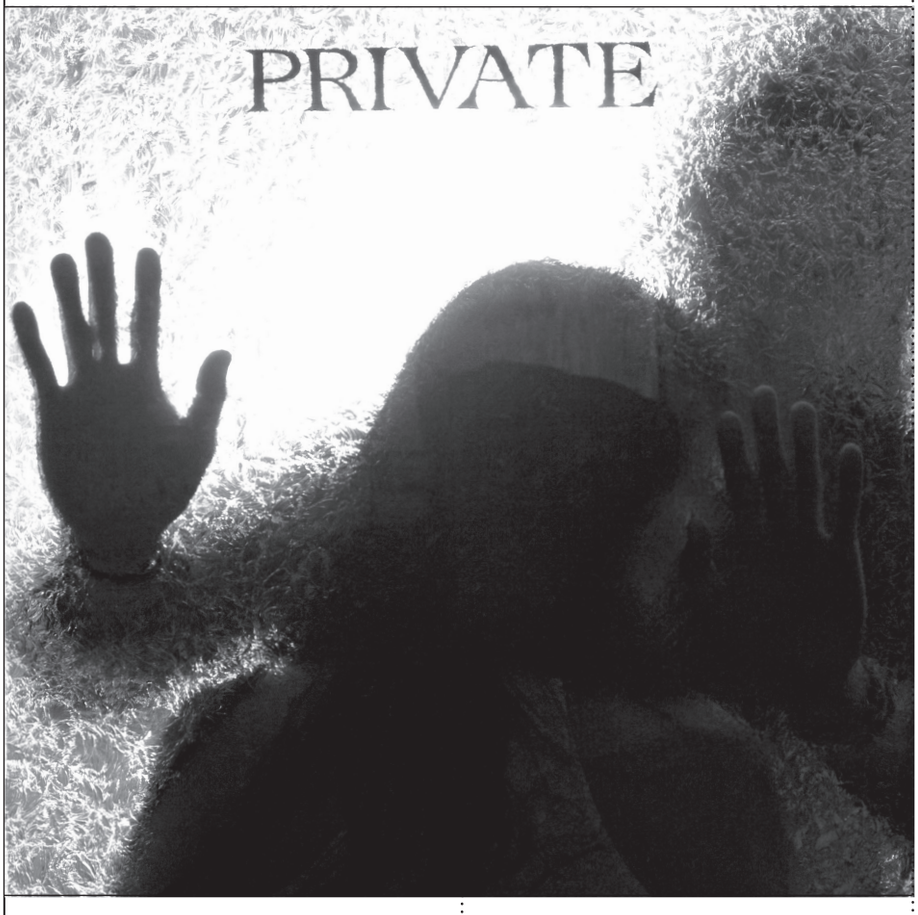
Title VII and the Workplace Romance

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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the district court agreed:

> 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.[23]

In short, for the plaintiff and others similarly qualified, the granting of sexual favors was an implied condition of the job. In *Priest v. Rotary*,[24] the court held that a waitress, given less favorable work assignments than a waitress who was sleeping with the restaurant manager, had stated a viable claim for sex discrimination under Title VII.[25] The plaintiff also established a claim by demonstrating that female employees who tolerated the manager's sexual advances (*e.g.*, suggestive comments, inappropriate touching) were likewise given preferential assignments.[26] Again, the clear and demeaning message to staff was that granting sexual favors (or at least tolerating sexual misconduct by the supervisor) was an implied condition of employment. When managers communicate that, to get ahead in the workplace, women must engage in sexual conduct, or that sexual solicitations are a prerequisite to their fair treatment, this can be a form of "implied" quid pro quo sexual harassment.[27]

The second exception to the general no-liability rule arises when the granting of sexual favors is considered to be widespread within a workplace. According to the EEOC Policy Guidance, an isolated instance of sexual favoritism will not be considered sexual harassment, but *multiple* relationships can create a sexually hostile work environment. This is true even if the objectionable conduct is not directed at the plaintiff, and regardless of whether those afforded preferential treatment willingly bestowed their sexual favors. As the EEOC warned, widespread favoritism conveys the message "that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."[28] For example, in *Broderick v. Ruder*,[29] a female staff attorney employed at the Securities and Exchange Commission (SEC) complained about a "pattern" of sexual favoritism within her division. The SEC denied any widespread sexual favoritism by its supervisory personnel, admitting only to a series of "social/sexual interactions between and among employees" that Title VII, so the SEC argued, was never intended to regulate.[30] The district court disagreed. The evidence at trial established that conduct of a sexual nature "was so pervasive" within the plaintiff's division that it could "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."[31] The plaintiff was forced, in effect, to work in an environment where managers routinely bestowed preferential treatment upon employees who submitted to their sexual advances, and as a result, the plaintiff was entitled to recover under Title VII (even if those who engaged in such consensual sexual relations were not).[32]

The California Supreme Court addressed the issue of widespread sexual favoritism in the landmark case, *Miller v. Dep't of Corrections*.[33] Noting that it was "not the relationship, but its effect on the workplace" that was relevant, the court acknowledged that isolated instances of favoritism towards a paramour might not constitute a sexually hostile environment.[34] However, the working environment at Valley State Prison for Women in Chowchilla, California, involved far more than isolated instances: the warden accorded unwarranted favorable treatment to numerous subordinate employees with whom he was having sexual affairs. Two female correctional officers not targeted by the warden sought recovery for sexual harassment under the California Fair Employment and Housing Act (the State equivalent of Title VII). The trial court allowed the defendants' motion for summary judgment, but the California Supreme Court reversed.

> Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and [the warden's] admission he could not control [one of his paramours] because of his sexual relationship with her...[35]

Such evidence created at least a triable issue of fact on whether the warden's conduct constituted sexual favoritism that was sufficiently widespread to create a hostile work environment.[36]

Not all courts agree, however, that widespread sexual favoritism is actionable by all disadvantaged employees, regardless of gender. Thus, in *Krasner v. HSH Nordbank AG*,[37] the district court dismissed a Title VII claim brought by a male employee who alleged that his supervisors promoted a "demeaning view of women in the workplace" which the plaintiff found "objectionable" and which denied him "the opportunity to work in an employment setting free of unlawful harassment,"[38] noting:

> Krasner's concern for a woman's right to be free of workplace discrimination, and offense taken upon being surrounded by conduct believed to impinge on that right, admirable as it may be, does not make Krasner himself a victim of gender-based discrimination within the scope of Title VII's protections.[39]

Absent any allegation that sexual favoritism toward compliant females hindered the advancement opportunities, Krasner failed to state a claim for relief under Title VII. He simply identified no causal connection between his gender and any hostility he allegedly faced.

The third exception to Title VII and

isolated instances of sexual favoritism liability arises out of the "jilted lover" scenario. All bets are off once the relationship sours. Not surprisingly, many of them do: while "hell hath no fury like a woman [or man] scorned," a jilted supervisor comes in a very close second.

Romantic relationships (as any teenager knows) do not always terminate by mutual agreement. Breaking-up is often a unilateral decision, and if the jiltee is a supervisor and the jilter his subordinate, workplace havoc frequently ensues. The supervisor may continue to woo the employee in an effort to "win back" affection, or retaliate by firing the former lover (or take other less "serious" adverse employment actions). The point is that, if the jilted supervisor does anything other than accept the new status quo and thereafter treat the ex-paramour fairly and appropriately, he may expose himself and the employer to Title VII liability.

Several courts have wrestled with the "jilted lover" problem without reaching uniform results. In *Huebschen v. Dep't of Health and Soc. Servs.*,[40] the Seventh Circuit rejected an equal protection claim brought by a male employee against his female supervisor, based on allegations that the supervisor demoted him following his cessation of a consensual sexual relationship (his claim was based on the supervisor's alleged discrimination against him because of his membership in a protected class—*i.e.*, males). The court reasoned that any discrimination was merely "coincidental" to the plaintiff's gender:

> When the consensual romance between [the employee and supervisor] ended ... [the supervisor] did indeed react spitefully towards [the employee] by recommending that he be demoted at the end of the probationary period. But [the supervisor's] motivation in doing so was not that [the employee] was male, but that he was a former lover who jilted her.[41]

Embracing this analysis, an Illinois court subsequently denied recovery to a high school administrator who brought a Title VII suit for sex discrimination against her former lover, a high school principal.[42] After the plaintiff ended the relationship, she was demoted to a lower-paying teaching position. The court was wholly unsympathetic to her plight, finding that an employee who opts to become involved in an intimate affair with her employer "removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting."[43]

...if the jilted supervisor does anything other than accept the new status quo and thereafter treat the ex-paramour fairly and appropriately, he may expose himself and the employer to Title VII liability.

Where some courts see nothing but hurt feelings and bruised egos, others see unlawful sex discrimination: in *Forrest v. Brinker Int'l Payroll Co., LP*,[44] the First Circuit held that one's status as a former paramour did not bar recovery for sexual harassment under Title VII. To interpret harassment by a jilted lover not as gender discrimination, but as discrimination based on a failed relationship, was a "flawed" proposition; the harassment, stated the court, was still "based upon sex."[45] In *Ammons-Lewis v. Metro. Water Reclamation Dist.*,[46] the Seventh Circuit, in an apparent attempt to ameliorate its earlier *Huebschen* decision, agreed that the plaintiff's prior sexual relationship with her alleged harasser was "by no means dispositive of her claim."[47] It was, however, relevant to whether the complained-of conduct was unwelcome, resulted in a workplace that plaintiff subjectively experienced as hostile, or occurred because of the plaintiff's sex.[48]

Conclusion

For many reasons, workplace romances spell nothing but trouble for employers —and, not surprisingly, such trouble is multiplied severalfold when the relationship is between a supervisor and a subordinate. Beyond the obvious pitfalls inherent in coercive behavior and the implicit or explicit promises of reward in exchange for sexual favors, the business of an employer suffers when the boss gives preferential treatment to a staff member simply because they share a sex life, and not because the staffer is better-educated, more intelligent, or has greater work experience. Employees not afforded such preference become resentful and discouraged, and employee morale and performance correspondingly decline. This negative impact on business can explode when employees affected by a workplace romance assert claims of unlawful sex discrimination. While such claims may find no traction when the relationship is isolated and involves only consenting adults, the risks of "implied" quid pro quo sexual harassment, widespread sexual favoritism, and unpredictable reactions by jilted lovers may keep managers and employers up at night. Employment policies prohibiting fraternization in the workplace may be of some benefit, but regular anti-discrimination training and a good employment practices liability insurance policy should also be considered. Because workplace romances can never be effectively eliminated, wise employers ought to prepare themselves to deal with the anticipated (and frequently unanticipated) consequences.

Notes

1. 42 U.S.C. § 2000e-2(a) (1982).
2. 477 U.S. 57 (1986).
3. *Id.* at 64.
4. Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 897-98 (1st Cir. 1988).
5. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).
6. *Id.* at 904.
7. 29 CFR § 1604.11(a)(3). *See* Harris v. Forklift Sys., Inc., 510 U.S.

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17, 21 (1993) (a sexually hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").
8. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995).
9. *See, e.g.,* Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988).
10. Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002).
11. 807 F.2d 304 (2d Cir 1986), *cert. denied*, 484 U.S. 965 (1987).
12. *Id.* at 308.
13. *Id.*
14. *Id.* at 306.
15. 397 F.3d 539 (7th Cir. 2005).
16. *Id.* at 541.
17. *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); Wilson v. Delta State Univ., 143 Fed. Appx. 611, 614 (5th Cir. 2005); Tenge v. Phillips Modern AG Co., 446 F.3d 903, 907 (8th Cir. 2006); Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997); Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998). *But see* King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985) ("unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination'") (citations omitted).
18. EEOC Notice No. 915-048 (Jan. 12, 1990), available at http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "Policy Guidance"). Supreme Court Justice Clarence Thomas signed the 1990 Policy Guidance in his capacity as the EEOC Chairman.
19. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing the 1980 EEOC policy guidelines).
20. Policy Guidance, *supra* note 18.
21. *Id.* (favoritism based upon coerced sexual conduct may constitute quid pro quo harassment, and widespread favoritism may constitute hostile environment harassment).
22. 570 F. Supp. 1197 (D. Del. 1983).
23. *Id.* at 1199, quoting 29 C.F.R. § 1604.11(g).
24. 634 F. Supp. 571 (N.D. Cal. 1986).
25. *Id.* at 581.
26. *Id.* at 582.
27. Policy Guidance, *supra* note 18, *but see* Leibovitz v. New York City Transit Auth., 252 F.3d 179, 185 (2d Cir. 2001) (female manager distraught over the sexual harassment of other women in workplace had standing to bring suit under Title VII, but was denied recovery because she did not witness such harassment).
28. Policy Guidance, *supra* note 18.
29. 685 F. Supp. 1269 (D.D.C. 1988).
30. *Id.* at 1280.
31. *Id.* at 1278.
32. *Id.* at 1280. *Cf.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990) (co-worker's claim of sexually hostile environment denied absent evidence that boss and paramour "flaunted" their sexual relationship, or that such relationships were "prevalent" in the workplace).
33. 36 Cal. 4th 446 (Cal. 2005).
34. *Id.* at 471-72.
35. *Id.* at 471.
36. *Compare* McGinnis v. Union Pac. Ry., 496 F.3d 868, 874 (8th Cir. 2007) (male dispatcher failed to allege claim for widespread sexual favoritism in the workplace where supervisor had sexual affair with female subordinate, treated women more favorably than men in terms of job opportunities and work shifts, and protected females who violated company rules).
37. 680 F. Supp. 2d 502 (S.D.N.Y. 2010).
38. *Id.* at 514.
39. *Id.* at 515.
40. 716 F.2d 1167 (7th Cir. 1983).
41. *Id.* at 1172.
42. Keppler v. Hinsdale Township High School Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989).
43. *Id.* at 869. *See also* Succar v. Dade County School Bd., 229 F.3d 1343, 1345 (11th Cir. 2000) (harassment of male teacher by coworker, a female teacher, was motivated by "contempt" following their failed relationship, not by gender).
44. 511 F.3d 225 (1st Cir. 2007).
45. *Id.* at 229.
46. 488 F.3d 739 (7th Cir. 2007).
47. *Id.* at 746.
48. *Id.* at 746-47. *See also* In re C.F. Smith & Assocs., Inc., 235 B.R. 153, 165 (D. Mass. 1999) (former paramour may recover against boss for sexual harassment in wake of soured relationship). ML

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constitutional warrantless entry at the time of the fire).
28. Jones v. Wildgen, 244 Fed. Appx. 859, 864 (10th Cir. 2007).
29. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
30. *See* Elkins v. District of Columbia, 527 F. Supp.2d 36, 47 (D.D.C. 2007) ("Punitive damages, however, are available against the [officers] where their conduct was 'motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others,'" quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). ML

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officers had a responsibility to exercise their own reasonable professional judgment.

The questions in this appeal are whether, under *Malley,* the officers were entitled to qualified immunity where they obtained a facially valid warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search. Second, whether the *Malley/Leon* standards should be reconsidered or clarified in light of the lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in the imposition of liability on officers for good-faith conduct and the improper exclusion of evidence in criminal cases.

The NRA and the ACLU have filed *amicus* briefs in support of the Millenders. The Court heard oral argument on December 05, 2011, with few clues as to how far it will go in allowing courts to second-guess probable cause determinations in this context. We'll know by June whether the Court will revise the existing standard. ML