

The Federal Employee Advocate

EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism

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The Federal Employee Advocate is publishing here the EEOC's Guidance No. N-915-048 issued March 8, 1994 on issues on Employer Liability for Sexual Favoritism. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees in sexual harassment cases.

Disclaimer

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

Employer Liability for Sexual Favoritism

1. Purpose: This EEOC policy document is intended to provide guidance on the extent to which an employer should be held liable for discriminating against individuals who are qualified for but are denied an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests.
2. Expiration Date: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

Background

The Commission and the courts have declared that sexual harassment violates Section 703 of Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 40 EPD ¶ 31,159 (1986); EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a). EEOC's Guidelines define two kinds of sexual harassment: "quid pro quo," in which "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and "hostile environment," in which unwelcome sexual conduct "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile or offensive working environment." 29 C.F.R. §§ 1604.11(a)(2) and (3).

Subsection (g) of EEOC's Guidelines provides:

where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit.

As discussed below, sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or "hostile work environment" harassment.

Discussion

A. Isolated Instances of Favoritism Towards a "Paramour" Not Prohibited

Not all types of sexual favoritism violate Title VII.¹ 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.² A female charging party who is denied an employment benefit because of such 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. See *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 47 EPD ¶ 38,112 (W.D. Pa.), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988);³ *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), *cert. denied*, 108 S.Ct. 89, 44 EPD ¶ 37,425 (1987).⁴ *But see King v. Palmer*, 778 F.2d 878, 39 EPD ¶ 35,808, *reh'g denied*, 39 EPD ¶ 36,036 (D.C. Cir. 1985).⁵

B. Favoritism Based Upon Coerced Sexual Conduct May Constitute Quid Pro Quo Harassment

If a female employee⁶ is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit.⁷ Thus; in order for a woman to have obtained the job benefit at issue, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men. This is substantially 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.⁸ For example, in *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199-1201, 32 EPD ¶ 33,848 (D. Del. 1983), the court found a violation of Title VII based on the fact that the granting of sexual favors was a condition for promotion. Although the individual who was granted preferential treatment was engaged in a consensual affair with her supervisor, there was evidence that the supervisor made telephone calls to proposition several female employees at home, phoned employees at work to describe his supposed sexual encounters with female employees under his supervision, and engaged in suggestive behavior at work.⁹

Many times, a third party female will not be able to establish that sex was generally made a condition for the benefit in question. For example, a supervisor may have been interested in only one woman and, thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced. See EEOC amicus brief (filed Sept. 30, 1988) in *Clayton v. White Hall School District*, 875 F.2d 676, 50 EPD ¶

39,048 (8th Cir. 1989), in which the Commission argued that a white employee had standing under Title VII to challenge her employer's decision to deny her an employment benefit pursuant to an employment policy which it allegedly enforced for the purpose of denying the same benefit to a black employee; although the plaintiff was not the object of racial discrimination, she was injured as a result of the race discrimination practiced against the black employee.¹⁰ See also *DeCintio v. Westchester County Medical Center*, 807 F.2d at 307-08 (by implication) (male plaintiffs' claims of favoritism rejected not because of lack of standing but because the woman who received the favorable treatment was not coerced into submitting to sexual advances); *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690 n.2, 27 EPD ¶ 32,202 (5th Cir. 1981) (white plaintiffs could challenge discrimination against blacks provided that they could establish a personal injury); *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 42 EPD ¶ 36,911 (N.D. Ind. 1986) (males who lost their jobs due to their employer's discrimination against female co-workers suffered an injury as a result of the discrimination, and therefore had standing to sue under Title VII).

C. Widespread Favoritism May Constitute Hostile Environment Harassment

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 ¶ 32,993 (11th Cir. 1982)].¹¹ 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. See *Rogers v. EEOC*, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 EPD ¶ 7838 (1972) (discriminatory treatment of medical patients created hostile work environment for plaintiff employee); Commission Decision No. 71-969, CCH EEOC Decisions (1973) ¶ 6193 (supervisor's habitual use of racial epithet in referring to Black employees created discriminatory work environment for White Charging Party); Compliance Manual Volume II, Section 615.3(a)(3) Examples (1) and (2) (sexual harassment of females may create hostile work environment for other male and female employees).

Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment.¹² This can form the basis of an implicit "quid pro quo" harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.¹³

The case of *Broderick v. Ruder*, 685 F. Supp. 1269, 46 EPD ¶ 37,963 (D.D.C. 1988) illustrates how widespread sexual favoritism can be found to violate Title VII. In *Broderick* a staff attorney at the Securities and Exchange Commission alleged that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits. Another of her supervisors allegedly promoted the career of a staff attorney with whom he socialized extensively and to whom he was noticeably attracted. In addition, there were isolated instances of sexual harassment directed at the plaintiff herself, including an incident in which her supervisor

became drunk at an office party, untied the plaintiff's sweater, and kissed her. The court found that the conduct of these supervisors "created an atmosphere of hostile work environment" offensive to the plaintiff and several other witnesses. It further stated that the supervisors' conduct in bestowing preferential treatment upon those who submitted to their sexual advances undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. *Broderick*, 685 F. Supp. at 1278. While the court in *Broderick* grounded its ruling on the hostile environment theory, it is the Commission's position that these facts could also support an implicit "quid pro quo" harassment claim since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct. See also *Spencer v. General Electric*, 697 F. Supp. 204 (E.D. Va. 1988).¹⁴

Example 1 - Charging Party (CP) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. EEOC's investigation discloses that the relationship at issue was consensual and that the supervisor had never subjected CP's co-worker or any other employees to unwelcome sexual advances. The Commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders.

Even if CP is genuinely offended by the supervisor's conduct, she has no Title VII claim.

Example 2 - Same as above, except the relationship at issue was *not* consensual. Instead, CP's supervisor regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about his "conquest." In these circumstances, CP may be able to establish a violation of Title VII by showing that in order to have obtained the promotion, it would have been necessary to grant sexual favors. In addition, she and other qualified men and women who were denied the promotion would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination levelled against their co-worker.

Example 3 - Same as Example 1, except CP's supervisor and other management personnel regularly solicited sexual favors from subordinate employees and offered job opportunities to those who complied. Some of those employees willingly consented to the sexual requests and in turn received promotions and awards. Others consented because they recognized that their opportunities for advancement would otherwise be limited. CP, who did not welcome this conduct, was not approached for sexual favors. However, she and other female and male coworkers may be able to establish that the conduct created a hostile work environment. She can also claim that by their conduct, the managers communicated to all female employees that they can obtain job benefits only by acquiescing in sexual conduct.

1/12/90
Date

Approved: /s/
Clarence Thomas
Chairman

¹ The material in § 615 of the Compliance Manual on subsection (g) of the Guidelines (at pp. 615-10 and 11) is superseded by this Policy Guidance.

² See *Benzies v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148, 39 EPD ¶ 35,870 (7th Cir.), cert. denied, 107 S.Ct. 3231 (1987) (denial of promotion to woman is not violation if motivated by personal or political favoritism or a grudge); *Bellissimo v. Westinghouse*

Electric Corp., 764 F.2d 175, 180, 37 EPD ¶ 35,315 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035, 39 EPD ¶ 35,875 (1986) (discharge of female employee violates Title VII only if it is done on a basis that would not result in the discharge of a male employee)

³ The plaintiff in *Miller* alleged that her supervisor treated her less favorably than her co-worker because the supervisor knew that the co-worker was engaged in a romantic relationship with the plant manager. *Miller*, 679 F. Supp. at 500-01. The lower court held that in order to establish a Title VII claim, the plaintiff would have to show that her employer would have or did treat males differently. *Id.* at 501. Since the plaintiff's male co-workers shared with her the same disadvantage relative to the co-worker who was engaged in the affair with the manager, the plaintiff could not show that she was treated differently than males. *Id.* On appeal to the Third Circuit, the Commission filed an amicus brief supporting the ruling of the district court on the basis that favoritism toward a female employee because of a consensual romantic relationship with a male supervisor is not sex discrimination against other female employees within the meaning of Title VII. The Court of Appeals summarily affirmed.

⁴ In *DeCintio*, seven male respiratory therapists claimed that they were unlawfully disqualified for a promotion that went to a woman who was engaged in a romantic relationship with the department administrator. The court held that the department administrator's conduct, though unfair, did not violate Title VII. *DeCintio*, 807 F.2d at 308. The court reasoned that the prohibition of sex discrimination in Title VII refers to discrimination on the basis of one's sex, not on the basis of one's sexual affiliations; the therapists' claims were not cognizable under the Act since they were denied promotion because the administrator preferred his "paramour," rather than because of their status as males. *Id.* The court distinguished EEOC's Guidelines by stating that they address the granting of employment benefits because of an individual's "submission" to sexual advances or requests, and the word "submission" connotes a lack of consent. Since the department administrator did not force anyone to submit to sexual advances in order to win promotion, his conduct was not within the purview of the Guidelines. *Id.* at 307-08. *Accord, Handley v. Phillips*, 715 F. Supp. 657, 675 (M.D. Pa. 1989).

⁵ In *King*, the plaintiff claimed she had been denied a promotion that went to a less qualified co-worker who was engaged in an intimate relationship with the selecting official. Although the issue of whether Title VII applied to preferential treatment was not raised on appeal, the court stated that it agreed with the lower court's conclusion that the case was within the purview of Title VII. *King*, 778 F.2d at 880. The court ruled in favor of the plaintiff on the basis of its finding that her co-worker was promoted because of the sexual relationship. *Id.* at 882. In a concurring opinion to the decision denying a suggestion for rehearing *en banc*, it was emphasized that the issue of whether Title VII applied to the facts of the case was not raised on appeal or in the petition for rehearing. 39 EPD ¶ 36,036.

⁶ Although this Policy Guidance uses female pronouns to refer to individuals who are treated favorably because they engage in sexual conduct, it also covers situations in which men are granted favorable treatment based on sexual conduct.

⁷ The employer would also be liable for "quid pro quo" harassment with regard to the individual who was coerced into submitting to the advances.

⁸ See Section 1604.11(I) of EEOC's Guidelines on Sexual Harassment, which states that a violation will be found when submission to unwelcome sexual conduct is made "either explicitly or implicitly" a term or condition of an individual's employment.

⁹ See also *DeCintio v. Westchester County Medical Center*, 807 F.2d at 307, in which the court stated that the claim in *Toscano* was premised on the coercive nature of the employer's acts, and therefore that the case lent no support to the contention that a voluntary amorous involvement may form the basis of a Title VII claim.

¹⁰ In *Clayton*, the court ruled that the plaintiff did have standing, but it based that standing on her allegation of a hostile work environment. 875 F.2d at 679.

¹¹ See EEOC's Policy Guidance on Current Issues of Sexual Harassment (10/25/88) at 13-18 for standards governing the determination of whether a work environment is "hostile". That Policy Guidance makes clear that the Commission will evaluate the totality of circumstances on a case-by-case basis, employing the objective perspective of a "reasonable person" in the context in which the challenged conduct took place. Some factors that could be considered in determining whether a hostile environment is established are the number of incidents of favoritism, the egregiousness of the incidents, and whether or not other employees in the office were made aware of the conduct.

¹² See, e.g., *Priest v. Rotary*, 634 F. Supp. 571, 39 EPD ¶ 35,897 (N.D. Cal. 1986), in which the defendant gave preferential treatment to his consensual sexual partner and to those female employees who reacted favorably to his sexual advances and other conduct of a sexual nature, and he disadvantaged those employees, including the plaintiff, who reacted unfavorably to his conduct. The court found a violation of Title VII in part because the defendant's conduct implied that job benefits would be conditioned on an employee's good-natured endurance of his sexually-charged conduct or sexual advances. *Id.* at 581.

¹³ In *Miller v. Aluminum Co. of America*, 679 F. Supp. at 501- 502, the court rejected a claim that sexual favoritism based on a consensual relationship can create a hostile environment for others in the workplace. The court found that the favoritism itself did not violate Title VII since it was voluntary, and that "[h]ostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim." *Id.* at 502. However, it is the Commission's position that had the sexual favoritism been widespread, the fact that it was exclusively voluntary and consensual would not have defeated a claim that it created a hostile work environment for other people in the workplace. As indicated above at n.11, the question of whether actions complained of are sufficiently widespread or egregious to constitute a hostile environment must be decided case-by-case.

¹⁴ In *Spencer*, the supervisor of an office engaged in virtually daily horseplay of a sexual nature with female subordinates. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. The subordinates joined in and generally found the horseplay funny and inoffensive. With the exception of one incident (which may have been time-barred and was not critical to the court's decision), none of the horseplay was directed at the plaintiff. The supervisor additionally engaged in consensual relations with at least two of his subordinates. The court found that the supervisor's conduct would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable employee, and on that basis it found a violation of Title VII. 697 F. Supp. at 218. Although *Spencer* did not involve sexual favoritism, the case supports the proposition that pervasive sexual conduct can create a hostile work environment for those who find it offensive even if he targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim.

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