ROME O AND J ULIETS: A MODERN WORKPLACE TRAGEDY

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PROLOGUE

One supervisor, lacking in dignity,
Near fair Verona,1 where we lay our scene,
From years of abuse to a court’s sympathy,
Where civil relationships lead to civil suits non-routine.
From forth the judgment of the court,
A decision bringing star-cross’d employees strife,
And one that may cause employers to resort,
To more closely monitoring a supervisor’s sex life.

Shakespeare’s Romeo and Juliet starts out as a classic love story: boy meets girl, boy falls in love with girl, boy and girl get married. Of course, it turns into a tragedy when they realize that their relationship is destined to fail. Surprisingly, many offices in corporate America follow a similar—though less morbid—trend. A 2005 survey revealed that 58% of employees had dated someone at work; 14% of the employees dated a boss or superior; and 19% dated a subordinate.2 While relationships between supervisors and subordinates may start off well, their controversial nature can result in unfortunate consequences.

Paramour favoritism refers to a situation where a supervisor bestows special benefits upon a subordinate as a result of a sexual relationship between them.3 When the relationship is consensual, it generally does not

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1. Verona, California, is less than 200 miles from the city of Chowchilla, where both prison facilities at issue in the Miller case discussed throughout this Article, are located.
result in sexual harassment or discrimination. Although other employees in the office, both men and women, may feel that the situation is unethical or unfair, it is not sexual discrimination because both groups are disadvantaged for reasons other than their sex.

Most courts that have confronted this issue have held that paramour favoritism is not actionable under Title VII. Recently, however, the California Supreme Court "stir[red] the world of employment law" and unanimously held that widespread sexual favoritism in the workplace may have created a hostile work environment for the plaintiffs. In Miller v. Department of Corrections, the California Supreme Court reversed the appellate court's grant of summary judgment and held that the plaintiffs presented a prima facie case of sexual harassment.

The California Supreme Court’s decision in Miller was the first appellate decision to adopt the 1990 EEOC Policy Statement and hold that widespread sexual favoritism resulting from consensual relationships could create a hostile work environment. Although Miller came down from a state court, it was based on federal law; thus, Miller may serve as persuasive authority in future cases. The holding is troublesome, however, because it leaves many questions unanswered. Since it is the first appellate decision to apply the EEOC Policy Statement, future courts addressing similar issues may have trouble discerning the appropriate legal standard and following its precedent.

This article analyzes Miller to determine what standard it creates for hostile work environment claims based on widespread sexual favoritism, and examines the effect it may have on future employment law cases, especially in the area of sexual harassment. Part I introduces the concept of a hostile work environment claim and describes the plaintiff's burden of proof for bringing such a claim. Part II discusses the 1990 EEOC Policy Statement and its effect on subsequent court decisions. Part III delves into the Miller decision, to learn exactly why the court unanimously held that

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4. See infra Part II.A.
5. See infra Part II.A.
6. H.J. Cummins, Sex-Harassment Ruling Could Have National Impact; A Decision by California's High Court was Based on Federal Discrimination Law. A Similar Trial is Brewing in Minnesota, STAR TRIBUNE (Minneapolis, Minn.), Jan. 12, 2006, at 1D.
7. 115 P.3d 77 (Cal. 2005).
8. Id. at 80.
9. See David Kadue & Thomas Kaufman, A Tragedy of Manners: Flawed Reasoning Equates Workplace Sexuality with Gender Discrimination, RECORDER, Aug. 12, 2005, at 6 ("[U]ntil now--no appellate court has squarely adopted this EEOC litigation position.").
10. See Cummins, supra note 6 (explaining that "[s]ome lawyers foresee a big impact on employers nationwide").
the plaintiffs presented a prima facie case of hostile work environment sexual harassment. Part IV analyzes the standard that Miller created to try and determine which factors were most influential for the court. Finally, Part V looks to future implications that the decision may have for sexual harassment law, as well as other types of employment discrimination cases.

I. HOSTILE WORK ENVIRONMENT CLAIMS

Courts currently recognize two forms of sexual harassment: quid pro quo and hostile work environment.\(^{11}\) Quid pro quo sexual harassment occurs when a supervisor takes adverse employment actions against an employee who does not submit to his or her sexual advances.\(^{12}\) A claim for hostile work environment sexual harassment requires no such tangible action. Rather, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."\(^{13}\) A "hostile or abusive 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."\(^{14}\) In Meritor Savings Bank v. Vinson, the Supreme Court held that the plaintiff established a hostile work environment claim based on the following facts: her supervisor demanded sexual favors from her, both during and after business hours; he touched her inappropriately in front of other employees; he exposed himself to her in the women's restroom; and he forcibly raped her.\(^{15}\)

Less than a decade after the Supreme Court decided Meritor, it was faced with another hostile work environment claim and was forced to further clarify the meaning of "abusive work environment."\(^{16}\) While the Court did not provide an exact formula for determining whether an environment is "abusive," the Court applied both an objective and a subjective standard.\(^{17}\) For a work environment to be "abusive," it must be one that both a reasonable person would find hostile or abusive, and one that the plaintiff actually found to be abusive.\(^{18}\) Additionally, the Court enumerated a list of factors to consider: the frequency and severity of the discriminatory conduct, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the employee’s

\(^{11}\) See 45B AM. JUR. 2d Job Discrimination § 824 (2004).
\(^{12}\) See id.
\(^{14}\) Id. at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
\(^{15}\) Id. at 60.
\(^{17}\) Id. at 21-22.
\(^{18}\) Id.
performance.\textsuperscript{19} The Court acknowledged that psychological harm is another factor to consider, but psychological harm is not a required element of hostile work environment claims; an abusive work environment may detract from an employee's job performance, regardless of whether she suffers tangible psychological injuries.\textsuperscript{20}

Through its decisions, the United States Supreme Court has illustrated that it will not tolerate sexual harassment in the workplace. The Court has taken a "middle path"\textsuperscript{21} in holding that a few inappropriate statements do not create an abusive working environment on their own, but continual harassing conduct may cause a work environment to be hostile. Although the Court has considered many aspects of sexual harassment, it has not addressed the effect of paramour favoritism in the workplace. The EEOC, however, promulgated guidelines addressing that very issue.\textsuperscript{22}

II. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION POLICY STATEMENT AND CASES

The following section examines the background of paramour favoritism claims. It begins by analyzing the 1990 EEOC Policy Statement, and it discusses the cases on which the Policy Statement relied. This section then explains how courts have resolved paramour favoritism claims since the EEOC issued the Policy Statement.

A. 1990 EEOC Policy Statement

In 1990, the EEOC circulated a new policy statement regarding paramour favoritism and sexual harassment.\textsuperscript{23} The Policy Statement, which Supreme Court Justice Clarence Thomas signed when he was the EEOC Chairman, has served as a reference for many courts that have considered

\textsuperscript{19} Id. at 23.
\textsuperscript{20} Id. at 22. The Supreme Court reversed the Sixth Circuit and district court decisions, which had held that a workplace environment was not considered "abusive" unless the plaintiff suffered psychological harm. \textit{Id.}
\textsuperscript{21} Id. at 21.
\textsuperscript{22} Policy Guidance on Employer Liability, \textit{supra} note 3.
\textsuperscript{23} The 1990 Policy Statement modified the EEOC's former position on sexual favoritism. In 1980, the EEOC implied that an element of coercion was necessary for a plaintiff to state a claim for sexual favoritism. \textit{See} EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(g) (West 2007) (considering situations "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors") (emphasis added); \textit{see also} DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307-08 (2d Cir. 1986) (explaining that the word "submission," as used in the 1980 EEOC guidelines, implies that coercion is necessary to state a claim for sexual harassment based on paramour favoritism).
paramour favoritism claims.\textsuperscript{24} Although the 1990 EEOC Policy Statement
is not binding authority, the United States Supreme Court previously
defered to the EEOC’s position when the Court stated that the 1980 policy
guidelines “constitute a body of experience and informed judgment to
which courts and litigants may properly resort for guidance.”\textsuperscript{25}

In claims of paramour favoritism, generally an employee argues that a
supervisor violated Title VII when he awarded a job benefit or promotion
to a female employee who was engaging in sexual relations with that
supervisor.\textsuperscript{26} When considering claims of paramour favoritism, the EEOC
first divides the claims into two categories: situations in which women are
coerced into submitting to unwelcome sexual advances and those that
involve consensual relationships.\textsuperscript{27} The EEOC asserts that when a
supervisor coerces a female employee by offering her a job benefit in
exchange for sexual favors, other qualified women in the office who did
not receive the benefit may state a claim for paramour favoritism.\textsuperscript{28} This
situation constitutes sexual harassment because the female employee would
have been required to grant sexual favors to obtain the job benefit; this
requirement would not be imposed on men.\textsuperscript{29} Thus, any female employee
could bring a sexual harassment claim, because sex was a condition for
women to obtain that job benefit.\textsuperscript{30}

When the relationship between a supervisor and employee is
consensual, it is more difficult for plaintiffs to state an actionable claim of
paramour favoritism. The general consensus among courts, as well as the
EEOC, is that one instance of favoritism is not sexual harassment.\textsuperscript{31} One of

\textsuperscript{24} See, e.g., Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998) (referring to
the 1990 EEOC Policy Statement when deciding a claim of sexual favoritism).

Union Carbide Corp., 904 F.2d 853, 859 n.10 (3d Cir. 1990) (stating that the Third Circuit
would defer to EEOC guidelines in sexual harassment cases). But see Weldon v.
Weyerhaeuser Co., 1995 U.S. Dist. LEXIS 21486, at *19 n.6 (N.D. Ala. Nov. 8, 1994)
(“Unlike the [1980] EEOC Guidelines, the EEOC Policy Guidance on Sexual Favoritism
is an interpretive memorandum that was not issued pursuant to the notice and comment
rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553.”); David Kadue
& Thomas Kaufman, supra n. 9 at 6 (“The 1980 EEOC Guidelines cited by Meritor were
duly promulgated interpretative regulations, codified at 29 C.F.R. § 1604.11, while the pro-
plaintiff commentary in the 1990 policy guidance, by contrast, is essentially the EEOC’s
litigation position . . . .”).

\textsuperscript{26} Michael J. Phillips, The Dubious Title VII Cause of Action for Sexual Favoritism,

\textsuperscript{27} See Policy Guidance on Employer Liability, supra note 3.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id. See also Wilson v. Delta State Univ., 143 F. App’x 611, 614 (5th Cir. 2005)
(“When an employer discriminates in favor of a paramour, such an action is not sex-based
discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons
the leading cases in this area involved a supervisor in a New York hospital who created a new higher-level position for a female staff member with whom he was romantically involved.\(^{32}\) The male employees sued for sexual discrimination, alleging that the supervisor designed the requirements for the new position so that his paramour was the only employee eligible for it.\(^{33}\) The Second Circuit held that the male employees were not prejudiced because of their gender; they did not receive the position simply because the supervisor "preferred his paramour."\(^{34}\) Any other female applicant would have faced exactly the same barriers to receiving the position. Additionally, the court noted that the plaintiff's argument would require courts to police individuals' relationships, and the court was not willing to accept that burden.\(^{35}\) This case set forth the majority rule: when a supervisor in a consensual relationship promotes the woman with whom he is involved, and another employee--male or female--is denied the promotion, it is not sexual harassment because both men and other women are disadvantaged for reasons other than their gender.\(^{36}\)

Although one instance of paramour favoritism is not sexual harassment, the EEOC takes the position that multiple relationships in the workplace may create a hostile work environment. According to the EEOC Policy Statement:

> If favoritism based upon the granting of sexual favors is widespread in the workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment . . . regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual

\(^{32}\) DeCintio, 807 F.2d at 305-06.
\(^{33}\) Id. at 306.
\(^{34}\) Id. at 308.
\(^{35}\) Id.
\(^{36}\) One of the few cases that reached an opposite holding is King v. Palmer, 778 F.2d 878 (D.C. Cir. 1986). In King, the court suggested that a plaintiff could bring a claim for paramour favoritism where she was denied a promotion and a less qualified candidate, who was involved with her supervisor, received the position. This case, however, demonstrates the minority view. See Weldon v. Weyerhaeuser Co., 1995 U.S. Dist. LEXIS 21486, at *25 (N.D. Ala. Nov. 8, 1994) ("Since the decision in King, almost all courts considering the issue of sexual favoritism have followed DeCintio by rejecting the idea that Title VII prohibits sexual favoritism.").
favors.  
When the sexual favoritism is widespread, it conveys the message that the supervisors view women as "sexual playthings," and the workplace environment demeans all women who work there.  
Any male or female employee who finds this environment to be offensive may establish a violation if the conduct meets the "hostile or abusive" standard that the Supreme Court set out in *Meritor*.  
Furthermore, when managers engage in widespread sexual favoritism, they imply that women can advance in the workplace by engaging in sexual conduct.  
This could constitute an implicit "quid pro quo" harassment claim for female employees, and it may also allow a hostile environment claim for both men and women who are offended by this behavior.

B. Cases Prior To the EEOC Policy Statement

The EEOC began its discussion of widespread favoritism by stating that widespread sexual favoritism in the workplace can form the basis of a hostile work environment claim for both male and female employees who object to the behavior. The EEOC compared this situation to one in which supervisors make frequent racial, ethnic, or sexual jokes, and it cited a Fifth Circuit decision for support: "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 . . . creates a hostile work environment for them."  
In making this comparison, the EEOC implied that its position was in accordance with previous case law. However, the EEOC cited only one case where a court held that consensual sexual relationships caused the plaintiff to be subjected to a hostile work environment.

When stating that widespread sexual favoritism may form the basis of a sexual harassment claim, the EEOC Policy Statement cited the 1988 District of Columbia case, *Broderick v. Ruder*.  
In *Broderick*, a female staff attorney at the Securities and Exchange Commission brought a sexual harassment claim based on the open sexual relationships between two of her supervisors and their secretaries.  
The supervisors awarded the
secretaries promotions, cash awards, and other job benefits. Additionally, a third supervisor was "noticeably attracted" to an attorney with whom he socialized, and he awarded her a promotion. Last, the plaintiff endured direct harassment, including an incident where one of her supervisors became drunk at a party, untied her sweater, and kissed her. Eventually the plaintiff's performance evaluations deteriorated and she received low marks in the category of respect for her supervisors and their authority.

The plaintiff claimed that numerous incidents caused the workplace to be a sexually charged environment, and as a result, she was unable to maintain respect for her supervisors. She found her supervisors' conduct to be "repugnant and offensive," and this affected both her motivation and her work performance. The court held for the plaintiff, because she was forced to work in an environment in which the WRO managers by their conduct harassed her and other WRO female employees, by bestowing preferential treatment upon those who submitted to their sexual advances. Further, this preferential treatment undermined plaintiff's motivation and work performance and deprived plaintiff, and other WRO female employees, of promotions and job opportunities.

Both the plaintiff and other female employees found the sexual conduct and accompanying rewards to be offensive, and the court agreed that the numerous relationships created a hostile workplace environment.

The Broderick court was the first court to hold that a plaintiff could bring a hostile work environment sexual harassment claim based on consensual relationships between supervisors and subordinates. Although many subsequent decisions have cited Broderick and agreed with its holding, none of those courts held that the plaintiff actually established a

45. Id.
47. Broderick, 685 F. Supp at 1274.
48. Id. at 1273.
49. Id. at 1272.
50. Id. at 1273.
51. Id. at 1278.
52. Id.
53. Id.
54. Although the plaintiff had been subjected to several instances of direct harassment, those events were not crucial to the court's decision. In its holding, the court stated, "Ms. Broderick was herself sexually harassed . . . [b]ut we need not emphasize these isolated incidents." Id. at 1278.
55. See, e.g., Ritchie v. Dep't of State Police, 805 N.E.2d 54, 60 n.12 (Mass. App. Ct. 2004) (citing Broderick and explaining that "there may be cases where the facts and circumstances of the favoritism and the office paramour's conduct rise to the level of creating a sexually hostile environment," but "[i]n the instant case, the allegations set forth in the plaintiff's complaint appear too thin to establish that she was exposed to an
a prima facie case for a hostile work environment claim based on widespread sexual favoritism.

C. Cases After Broderick and the 1990 EEOC Policy Statement

Since the EEOC issued its Policy Statement, several courts have recognized that a plaintiff may state a hostile work environment claim where the hostile environment results from the supervisor’s preferential treatment of his paramour. Although these courts accept that a plaintiff could establish a claim for hostile work environment based on paramour favoritism, they have been reluctant to hold that the case before them actually did satisfy the requirements for that claim. For example, in Drinkwater v. Union Carbide, the plaintiff argued that the relationship between her supervisor and coworker created an “oppressive and intolerable environment.” The Third Circuit acknowledged, in dictum, that a plaintiff could bring a hostile work environment claim if “the sexual relationship” makes the plaintiff “feel that she is judged only by her sexuality.” However, the Third Circuit held that the plaintiff in the current case did not prove that the workplace was a “sexually charged environment.” When examining the environment itself, the court stated, “[T]here is no evidence that [the supervisor and employee] flaunted the romantic nature of their relationship, nor is there evidence that these kinds of relationships were prevalent.” While the Drinkwater court recognized that a plaintiff could state a claim for sexual harassment based on widespread favoritism, the court found that the plaintiff’s facts did not

56. See, e.g., Badrinauth v. MetLife Corp., No. 04-2552, 2006 U.S. Dist. LEXIS 4790 at *12 (D.N.J. Feb. 6, 2006) (acknowledging that a cause of action for hostile work environment based on widespread favoritism is cognizable); see also Nicolo v. Citibank N.Y., N.A., 554 N.Y.S.2d 795, 799 (N.Y. Sup. Ct. 1990) (explaining that “sexual favoritism, which became pervasive to the extent of creating a hostile work environment, would also be actionable”) (citation omitted).

57. See Badrinauth, 2006 U.S. Dist. LEXIS 4790 at *12; see also Drinkwater v. Union Carbide Corp., 904 F.2d 853, 859 (3d Cir. 1990) (noticing that Broderick was the only case the Third Circuit found where a court held that the relationship between a supervisor and a co-worker created a hostile environment).

58. 904 F.2d at 861 (internal quotations omitted). The plaintiff asserted that the paramour “disregarded office hours, [and] plagiarized the work of other employees.” Additionally, the supervisor and paramour frequently fraternized in an unprofessional manner, and the supervisor reassigned work from his paramour to the plaintiff. Id. at 855. Furthermore, at the end of one meeting, the supervisor told the plaintiff that an additional criterion for her job performance would be her ability to get along with the paramour. Id. at 856.

59. Id. at 861 n. 15.

60. Id. at 862

61. Id.
support such a claim.

III. MILLER V. DEPARTMENT OF CORRECTIONS

In Miller v. Department of Corrections, the California Supreme Court unanimously held that the plaintiffs established a prima facie case of sexual harassment, based on the widespread favoritism that pervaded their workplace environment.\(^6\) This section examines the facts of the case, which are crucial to understanding why the court unanimously held for the plaintiffs, and analyzes the court’s rationale for its decision.

A. Background and Facts of Miller

Miller involved a suit by two plaintiffs, Edna Miller and Frances Mackey, who alleged that the widespread favoritism that their supervisor engaged in created a hostile workplace environment for them.\(^6\)

1. Edna Miller’s Story

Edna Miller, one of the two plaintiffs in the case, began working at a prison facility for the California Department of Corrections (Department) in 1983.\(^6\) In 1994, she learned that the chief deputy warden, Lewis Kuykendall, was having sexual affairs with three women: 1) Kathy Bibb, his secretary, 2) Debbie Patrick, an associate warden, and 3) Cagie Brown, another employee at the facility.\(^6\) Miller complained to Kuykendall’s superior officer about the inappropriate relationships, and the superior reassured Miller “that she had addressed the issue.”\(^6\) The following year, the Department transferred Miller to a different facility, where Kuykendall had been appointed warden.\(^6\) For the next four years, Miller was forced to endure numerous instances of overt favoritism and harassment.\(^6\)

As warden, Kuykendall used his authority to reward and promote his paramours, sometimes even over the opposition of other employees.\(^6\) Patrick, the associate warden, enjoyed unusual privileges, such as reporting to Kuykendall and not to her immediate supervisor.\(^6\) In 1995, after an

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\(^6\) 115 P.3d 77, 90 (Cal. 2005). The appellate court had affirmed summary judgment in favor of the defendants. Id. at 80.

\(^6\) Id.

\(^6\) Id. at 81.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id. at 82.
interview committee declined secretary Bibb’s application for a promotion, which would have relocated her to the facility where Kuykendall was warden.\footnote{71} Kuykendall indicated that the committee should “make [the transfer] happen.”\footnote{72} Miller, who was a member of that committee, commented that this incident made her “feel somewhat powerless because of Kuykendall and his sexual relations with subordinates.”\footnote{73} Moreover, Brown and Miller directly competed for promotions twice, and both times Brown secured the promotion, despite Miller’s “higher rank, superior education, and greater experience.”\footnote{74} After Brown was promoted to associate warden within a year and a half, an unusually short period of time for this sort of promotion,\footnote{75} other employees began asking, “[W]hat do I have to do, ‘F’ my way to the top?”\footnote{76}

Kuykendall’s women were not discreet about their relationships, and many other employees at the facility were aware of Kuykendall’s activities.\footnote{77} Bibb bragged about her power over Kuykendall.\footnote{78} Brown not only bragged about her ability to control Kuykendall, but she also clearly stated her intention to extract benefits from him.\footnote{79} When Miller competed with Brown for the first promotion, Brown stated that she would receive it; otherwise, she would “‘take [Kuykendall] down’ with her knowledge of ‘every scar on his body.’”\footnote{80} In addition to hearing about the affairs from Brown and Bibb, many employees witnessed first-hand proof of it. At three work-related social events, employees witnessed Bibb and Kuykendall fondle each other, and employees also watched Patrick, Bibb, and Brown argue over Kuykendall.\footnote{81} Brown even “acknowledged that there were widespread rumors that sexual affairs between subordinates and their superior officers were ‘common practice in the Department of Corrections’ and that there were rumors that employees, including Bibb, secured promotion in this way.”\footnote{82} Other employees viewed the relationships as “unethical from a business practice standpoint” and believed they could earn special employment benefits by engaging in

\footnote{71}{Id. at 81.}
\footnote{72}{Id. Bibb eventually received the promotion, even over Patrick’s opposition. Id. at 82.}
\footnote{73}{Id. at 81.}
\footnote{74}{Id. at 82. The officers involved in the selection process had actually recommended Miller, not Brown for the promotion. Other employees attributed Brown’s promotion to her affair with Kuykendall. Id.}
\footnote{75}{Id.}
\footnote{76}{Id.}
\footnote{77}{Id.}
\footnote{78}{Id.}
\footnote{79}{Id.}
\footnote{80}{Id.}
\footnote{81}{Id. at 83.}
\footnote{82}{Id. at 82.}
sexual affairs with Kuykendall.83 These affairs not only created an uncomfortable environment for Miller, but the relationships also enabled the paramours to directly harass her, both verbally and physically.84 When the new chief deputy warden, Vicky Yamamoto, arrived at the facility, she interfered with Miller’s access to Kuykendall.85 Miller suspected that the hostility arose from her rejection of Yamamoto’s dinner invitation.86 Moreover, after a telephone conversation between Miller and Brown, Brown entered Miller’s office, physically assaulted Miller, and held her captive for two hours.87 Another employee asked Yamamoto to intervene while this was happening, but Yamamoto refused the request.88 Miller reported the incident, but no action was taken against Brown.89

Although Miller continued working at the facility, she made several complaints regarding the relationships and the resulting harassment. In 1997, when she complained to a sexual harassment advisor about the behavior at the facility, she told the advisor that the relationships between Brown and Kuykendall, as well as Brown and Yamamoto, created a hostile working environment for her.90 She also complained to Kuykendall himself about Brown and Yamamoto’s interference with her job.91 In 1998, she spoke with the Office of Internal Affairs as part of its investigation into the behaviors of Kuykendall, Yamamoto, and Brown.92 Rather than ameliorating her concerns, her complaints resulted in even more harassing conduct directed at her. When Brown and Yamamoto learned of her complaint to Kuykendall, they began “countermanding her orders, undermining her authority, reducing her supervisory responsibilities, imposing additional onerous duties on her, making unjustified criticisms of her work, and threatening her with reprisals.”93 Furthermore, because of her cooperation with the Office of Internal Affairs, Kuykendall withdrew disability accommodations that Miller previously enjoyed, and Brown followed Miller home to confront her about statements made in the course

83. Id.
84. Id. at 91. (“Kuykendall explained to Miller that, because of his intimate relationship with Brown, he would not protect plaintiffs.”).
85. Id. at 83.
86. Id. There were also rumors of a relationship between Yamamoto and Brown. Id.
87. Id.
88. Id.
89. Id. at 84. Instead of correcting the problem, Kuykendall just awarded Miller a promotion. Id.
90. Id. at 83.
91. Id.
92. Id. at 84. When Miller spoke with the representative for the Office of Internal Affairs, she had been assured that she would receive some level of confidentiality. Id.
93. Id. at 83.
of the investigation. Miller resigned in August of that year, due to the increased stress.

2. Frances Mackey's Story

Frances Mackey was the other plaintiff in this case. She too was aware of Kuykendall's relationships, and also suffered harassment, by both Brown and Kuykendall, as a result of those relationships. Brown believed that Mackey had complained about Brown's affair, so Brown withdrew Mackey's additional "inmate pay," verbally abused Mackey in front of Mackey's coworkers, and interfered with Mackey's job responsibilities. Additionally, Kuykendall reduced Mackey's responsibilities and did not permit her to gain the work experience that she would have needed to obtain a promotion.

Mackey became extremely stressed and took time off from work. When she returned, she had been demoted and was subjected to continuing mistreatment and humiliation. She resigned several months later, when the employment conditions became absolutely unbearable.

B. The Court's Decision

The court began by analyzing the standard for hostile work environment sexual harassment. In considering whether the conduct was severe or pervasive so as to "alter the conditions of employment and create a work environment that qualifies as hostile or abusive," the court considered the direct harassment against the plaintiffs. It noted that Kuykendall's sexual relationship with Brown, combined with his refusal to reprimand her, gave her the ability to verbally and physically harass the plaintiffs without fear of any negative repercussions. "In this manner, his sexual favoritism was responsible for the continuation of an outrageous

94. Id. at 84. Miller subsequently obtained a court order prohibiting Brown from approaching Miller. Id.
95. Id.
96. Id. at 85.
97. Id. "Inmate pay" refers to increased salary benefits that result from dealing directly with inmates.
98. Id.
99. Id. Mackey felt that her failure to receive the promotion resulted from the fact that she was not sexually involved with Kuykendall. Id.
100. Id.
101. Id.
102. Id.
103. Id. at 87-88.
104. Id. at 91 (noting that "Kuykendall refused or failed to control [Brown's behavior] even after it escalated to physical assault").
campaign of harassment against plaintiffs.\textsuperscript{105}

The court then considered the 1990 EEOC Policy Statement, and it relied on the EEOC's position that widespread favoritism could create a hostile work environment.\textsuperscript{106} It explained that Kuykendall's actions regarding Bibb, Brown, and Patrick, including the unfair employment benefits and promotions, indicated that he viewed female employees as "sexual playthings."\textsuperscript{107} Furthermore, his actions conveyed the message that advancement at the facility was based on sexual favors, rather than merit.\textsuperscript{108}

Throughout its analysis, the court stressed that the sexual favoritism was actionable because of its effect on the work environment, not the relationships themselves.\textsuperscript{109} When considering the effect of the relationships on the environment, the court explained that the plaintiffs alleged more than just a situation where a supervisor granted unfair benefits to his sexual partner; they demonstrated how Kuykendall's relationships were on public display and created a hostile environment.\textsuperscript{110}

The court also considered prior California case law. Although the court did not find any cases directly on target, one California appellate decision suggested in dictum that sexual favoritism by a manager may be actionable when it leads employees to believe that "they [can] obtain favorable treatment from [the manager] if they became romantically involved with him," the affair is conducted in a manner "so indiscreet as to create a hostile work environment," or the manager has engaged in "other pervasive conduct . . . which created a hostile work environment."\textsuperscript{111}

The court did not definitively hold that Miller and Mackey were victims of sexual harassment, but it stated that the plaintiffs presented a prima facie case and created at least a triable issue of fact as to whether Kuykendall's sexual favoritism created a hostile work environment for them.\textsuperscript{112}

In reaching this conclusion, the California Supreme Court became the first appellate court to apply the EEOC Policy Statement and hold that the widespread sexual favoritism may have created a hostile work environment.\textsuperscript{113}

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 88-89.
\textsuperscript{107} Id. at 91.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 93.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 90 (citing \textit{Proksel v. Gattis}, 49 Cal. Rptr. 2d 322 (Cal. Ct. App. 1996) (internal citations omitted)).
\textsuperscript{112} \textit{Miller}, 115 P.3d at 91.
\textsuperscript{113} See Kadue & Kaufman, \textit{supra} n. 9.
IV. FACTORS THAT INFLUENCED THE COURT'S DECISION

The egregious facts in *Miller* presented an easy case for the California Supreme Court to hold that the plaintiffs presented a prima facie case of hostile work environment sexual harassment, derived from the widespread sexual favoritism at the prison facility. Not only was the supervisor openly engaging in three concurrent relationships with subordinates, but his relationships permitted his paramours to verbally and physically abuse the plaintiffs. With these extreme facts, it would have been surprising if the court had not held for the plaintiffs.  

Although the court reached the right holding in this case, it did not set a clear standard for a hostile work environment claim based on widespread sexual favoritism. Kuykendall's actions, as well as those of his paramours, were so outrageous that the court was able to look at the totality of the circumstances and determine that the relationships may have created a hostile work environment. But what if a similar case arises, where one or two facts present in *Miller* are absent? *Miller* surpassed the high standard for this type of claim, but what exactly is the standard? The following section analyzes six elements to determine which ones a plaintiff must satisfy to make a prima facie case of hostile work environment based on widespread sexual favoritism.

A. Number of Workplace Paramours

Most courts before *Miller* held that one relationship between a supervisor and subordinate would not create an actionable claim, and *Miller* probably will not change that.  

In its decision, the California Supreme Court focused on the effect of the multiple relationships on the environment. For example, in explaining that Kuykendall's behavior suggested that he viewed female employees as "sexual playthings," the court noted that both Bibb and Brown bragged to other employees about their power to control Kuykendall, and the court also considered the "[j]ealous scenes between the sexual partners [that] occurred in the presence of Miller and other employees." In this case, Kuykendall's lack...
of control over the employees with whom he was involved, coupled with his handing out favors and ignoring workplace rules and procedures, had a major impact on the workplace environment. The plaintiffs' case would likely have been more difficult if they were claiming a hostile working environment created by Kuykendall’s relationship with just one woman in the office.118

Similarly, if a plaintiff is trying to prove quid pro quo harassment based on the favoritism, she would almost certainly need to show the existence of more than one relationship. Both Miller and the EEOC Policy Statement explained that a manager who

engage[s] 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 . . . . 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.119

It is doubtful that a supervisor’s relationship with only one employee would convey the message that other employees could obtain promotions by engaging in sexual conduct.

B Openness of the Relationships

Although Miller left many questions unanswered, one thing is clear: for a claim of widespread favoritism to be actionable, the sexual relationships must be overt.120 The court stated that it would not examine any relationships between Kuykendall and his sexual partners that were private.121 After all, “it is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard.”122 If Kuykendall had been discreet about the relationships and other employees were not aware of them, the relationships would not have left employees feeling like they needed to be sexually involved with him to obtain a promotion.123

118. As discussed supra n. 31, the general rule is that a plaintiff cannot state a claim for paramour favoritism based solely on a supervisor’s romantic relationship with a subordinate.
120. See Baker & Levine, supra note 114, at 4 (“Miller does not suggest that a discreet affair between a supervisor and subordinate will provide just any third-party employee with an actionable claim.”).
121. Miller, 115 P.3d at 94.
122. Id.
123. Id. at 82.
C. Rank of the Employees and Effect of Promotions

Kuykendall was involved with women who were his subordinates, and as a result, he was in a position to award them promotions at the expense of their peers. Conversely, future courts may encounter cases where plaintiffs allege a hostile work environment based on either the relationships between multiple co-workers, or supervisory relationships where the supervisor refuses to hand out illicit benefits. The court would need to decide whether these situations support a hostile work environment claim under the standard set forth in Miller.

Both Miller and the EEOC Policy Statement refer to situations of "favoritism." The use of this word implies that someone is receiving special benefits as a result of the relationship. Furthermore, both Miller and the EEOC Policy Statement directly examine the effects of relationships between supervisors or managers and subordinates, in which the subordinates receive employment benefits resulting from the relationships. On their faces, these authorities indicate that a hostile work environment claim must involve a situation where supervisors grant promotions or other job benefits to subordinates. On the other hand, both the Miller court and the EEOC Policy Statement imply elsewhere that favoritism is not a required factor for stating a hostile work environment claim based on consensual sexual relationships.124

The Miller court stressed the fact that it was the environment itself, not the relationships, that was actionable.125 With this in mind, it is very likely that employees could bring a hostile work environment claim, not based on 'favoritism,' but based on the sexually charged environment that numerous consensual office relationships could create. This would hold true, regardless of whether the relationships occurred between supervisors who granted benefits to their paramours, supervisors who did not grant benefits to the paramours, or coworkers. So long as the relationships create a workplace that is demeaning to women, both male and female employees would likely be able to maintain a cause of action,126 even in the absence of "unwarranted and unfair employment benefits."127

Likewise, the EEOC Policy Statement also indicates that a plaintiff could bring a claim for hostile work environment sexual harassment based on a sexually charged work environment, regardless of whether the hostile

124. See Miller, 115 P.3d 77; Policy Guidance on Employer Liability, supra n. 3.
125. Miller, 115 P.3d 77 at 94 ("[I]t is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard.").
126. See Policy Guidance on Employer Liability, supra n. 3 ("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 . . . .").
127. Miller, 115 P.3d 77 at 91.
environment results from a superior granting unfair promotions or job benefits to a subordinate with whom he is involved. Though the Policy Statement focuses on paramour favoritism—thus implying that favoritism is required—in one footnote, the EEOC indicates that favoritism is not a prerequisite to bringing a hostile work environment claim. Citing a previous district court decision, the EEOC explained that although the case "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 no sexual conduct is directed at the persons bringing the claim."128

Although a claim of hostile work environment sexual harassment need not involve favoritism or promotions, a quid pro quo action for sexual harassment based on hostile work environment cannot exist unless it involves a supervisor granting employment benefits to subordinates. As mentioned in Part II, a quid pro quo action could be based on the implicit message that women can get ahead by engaging in sexual activities with a supervisor. If the supervisor does not promote the women with whom he is involved, he would not be conveying the message that other women could obtain promotions by engaging in sexual activities with him.

D. Physical Abuse

Throughout its opinion, the court mentions the instances of physical harassment directed at the plaintiffs, but the court does not fully rely on those instances for reaching its conclusion.129 Under the Miller standard, a plaintiff is not required to prove that she was physically abused, nor is physical abuse sufficient to state a claim for sexual harassment based on widespread sexual favoritism.130 However, when a plaintiff is physically harassed, this increases the abusiveness of the environment; the plaintiff’s evidence regarding other factors need not be as compelling. Applying the Harris standard,131 the California Supreme Court stated that the conduct must be severe enough to alter the conditions of employment.132 A physical assault increases the severity and, considering the totality of the circumstances, a plaintiff who endures physical harassment as a result of a supervisor’s favoritism may have a lower burden in the other areas.

128. Policy Guidance on Employer Liability, supra n. 3.
129. See Miller, 115 P.3d 77.
130. Id. See also Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (explaining that the standard for sexual harassment "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury").
131. Id.
132. Miller, 115 P.3d at 87 (citing Harris, 510 U.S. at 21).
E. Retaliation

Under California’s employment law, as well as federal law, an employer is prohibited from retaliating against an employee who complains about that employer’s discriminatory conduct.\textsuperscript{133} Although retaliation may form the basis for a separate claim, and in this case it actually did, it was also intertwined with the hostile environment claim because of the environment it created. Many of the abusive actions taken against Miller and Mackey were actually retaliation for their complaints. For example, after Miller made several complaints about the relationships, Brown and another employee “made Miller’s work life miserable and diminished her effectiveness by frequently countermanding her orders, undermining her authority, reducing her supervisory responsibilities, imposing additional onerous duties on her, making unjustified criticisms of her work, and threatening her with reprisals.”\textsuperscript{134} Additionally, after Mackey made statements to an internal affairs investigator about the hostile environment she was working in, Kuykendall “reduced her responsibilities and denied her access to the work experience she needed in order to be promoted.”\textsuperscript{135} Although retaliation was not required for Miller and Mackey to demonstrate a hostile work environment, since retaliation is not an element of a hostile work environment claim, the retaliatory acts increased the severity of the situation and likely made it easier for the court to find that the plaintiffs presented a cognizable claim.

F. Gender of the Plaintiffs

If the genders were reversed, and the supervisor was female and the plaintiffs were male, the plaintiffs still would have been able to bring a hostile work environment sexual harassment claim.\textsuperscript{136} The more

\textsuperscript{133} See California Fair Employment and Housing Act, CAL. GOV’T CODE, § 12940(h) (West 2004) (stating that it is unlawful “[f]or any employer . . . to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part”); see also 42 U.S.C. § 2000e-3(a) (2000) (“It shall be an unlawful employment practice for any employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice . . . .”). An employee may have a retaliation claim, even if the employer’s conduct was not prohibited, so long as the “employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” Miller, 115 P.3d 77 at 95.

\textsuperscript{134} Miller, 115 P.3d 77 at 95.

\textsuperscript{135} Id.

\textsuperscript{136} The only difference between a male bringing a claim and a female bringing a claim is that a male would need to show that the conduct would be offensive to a reasonable male, whereas female plaintiffs need to show that the conduct would be offensive to a reasonable female. See Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (explaining “that
problematic question is whether other males at the facility would have been able to bring a sexual harassment claim based on Kuykendall’s favoritism of his paramours. The Miller court was not forced to confront this question directly, since both plaintiffs were female, but it chose to opine on the issue. The court stated that “as the EEOC policy statement observes, an atmosphere that is sufficiently demeaning to women may be actionable by both men and women.” Thus, the court indicated that a sexual harassment claim based on widespread favoritism in the workplace could have been brought by male employees if they had also been exposed to the harassment.

When reaching its decision, the California Supreme Court cited the 1990 EEOC Policy Statement, and it quoted the passage in the statement that said that both men and women who were offended by the conduct could establish a hostile work environment claim. Additionally, in making its decision, the court did not focus on any factors that specifically related to the gender of the plaintiffs, focusing instead on the environment. Any employee--male or female--that witnessed the conduct, and was offended by the environment, probably could have brought a claim for hostile work environment sexual harassment.

V. THE AFTERMATH OF THE COURT’S HOLDING

As discussed in Part III, Miller was the first appellate court decision since the EEOC Policy Statement was issued to find that the plaintiffs may have been subjected to a hostile work environment based on widespread favoritism. Many commentators believe that the effects of this holding will be far-reaching. Although the decision leaves unanswered

the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’

). The Court then gave examples of how the context in which the behavior occurs may affect the reasonableness of the plaintiff’s claim. Id. at 81-82.

137. Miller, 115 P.3d 77 at 93.

138. Id.

139. See supra Part II.A.

140. See Policy Guidance on Employer Liability, supra n. 3.

141. See Kadue & Kaufman, supra note 9.

142. See Cummins, supra note 6 (stating that some lawyers predict this decision will impact employers nationwide, because the California judges based their decision on federal discrimination law, not state statutes). See also Karen Ertel, Warden’s Consensual Affairs Created Hostile Prison Workplace, CALIFORNIA TRAIL, Oct. 1, 2005. The author acknowledged that the decision was under California law, but she stated that it had broader implications. She quoted Jan Stiglitz, a law professor at California Western School of law, as stating, “Since it is based on EEOC guidelines, it can be precedent for the application of those guidelines, where the plaintiff can allege that a superior has had multiple sexual partners in the workplace and has favored those partners.” Id.
questions, it indicates where sexual harassment law is headed. Additionally, the decision may carry over to other areas of employment law.

A. The Future of Sexual Harassment Law

Numerous commentators were disturbed by the *Miller* decision, and they have predicted dire consequences in the areas of both employer liability and privacy concerns. Several authors caution that *Miller* greatly expands the law of sexual harassment. A writer for the New York Times predicted, “Not only will management have to worry about who is sleeping with whom, but about who among them gets a bigger office, a better assignment, a promotion.” Another author, fearing the decision will cause employers to violate the privacy rights of their employees, stated, “[T]he Court’s decision will likely have deleterious effects upon employee privacy and impose significant and what may seem as unfair burdens upon employers to monitor employee personal relationships in an effort to avoid sexual harassment--as defined by the Court in *Miller*--from developing in the workplace.”

Conversely, other authors underestimate the effect that *Miller* will likely have. One article explained that *Miller* will not have an enormous effect on sexual harassment law, because California courts had already decided similar issues in prior cases. “It is even less newsworthy that a defendant’s ‘sexual activity’ directed toward someone else can create a sufficiently severe and pervasive effect on a plaintiff’s workplace as to

143. See, e.g., Kadue & Kaufman, supra note 9, at 6 (“The *Miller* decision continues a legislative and judicial process of conscripting employers into a war on sexual immorality.”).

144. See, e.g., Navarro, supra note 2 (stating that *Miller* “significantly expands the law on sexual harassment”); see also Jack Steven Sholkoff, *California Supreme Court Expands Definition of Sexual Harassment; Court Imposes New Duties on Employers to Monitor Effects of Consensual Relationships Between Employees*, MONDAQ BUS. BRIEFING, July 25, 2005 (warning that this decision “[d]ramatically increas[es] the potential breadth of sexual harassment law”); Ann K. Smith & Breann Swann, *2006 California Labor and Employment Law Update*, MONDAQ BUS. BRIEFING, Jan. 11, 2006 (explaining that the decision greatly increases the scope of sexual harassment law).


146. Sholkoff, supra note 144; see also Navarro, supra note 2 (“[Employees] involved in a relationship may find out that a lot more of their private life is going to be exposed.”); see also Smith & Swann, supra note 144 (stating that employers may have to implement non-fraternization policies, which “implicate a whole host of privacy concerns and, if required, will force employers to walk what may prove to be an impossibly fine line between preventing hostile work environment sexual harassment and violating the civil liberties of their employees”).

147. Baker & Levine, supra note 114.
create a hostile work environment." In support of this argument, the author cited Fisher v. San Pedro Peninsula Hosp., a previous California sexual harassment case.

Both positions misinterpret the effect that Miller will have on future sexual harassment cases. The authors who claim Miller will not have an enormous impact on employment law place undue emphasis on Fisher, which is crucially different from Miller: Fisher involved sexual harassment directed at the plaintiff and uninvited sexual actions toward other employees, whereas Miller involved consensual sexual activity. Fisher does not implicate a potential duty on employers to monitor consensual relationships, and so Miller may impose on the employer a new obligation to keep aware of consensual relationships in the office or other workplace. Thus, the Miller decision is 'newsworthy' for employers and others in the employment law community.

Still, the critics who fear Miller will have a tremendous impact on sexual harassment law overestimate the scope of the Miller decision. These commentators believe that "employers now have a heightened burden to control consensual romantic relationships between supervisory employees and their subordinates." While top executives may feel more inclined to monitor workplace affairs between employees, employers are not required to prohibit the relationships, and they will not need to become intimately involved in the details of the relationships. In fact, the Miller court did not contradict the longstanding rule allowing paramour favoritism; it favorably cited a lower court decision, which held that one instance of paramour favoritism in a small office did not create a hostile work environment.

Two critics predicted that Miller would result in a "workplace that is more polite and less sexual, if more sterile and less fun." The same authors discussed Lyle v. Warner Brothers Television Productions, a sexual harassment case that was pending in the California Supreme Court.

148. Id.
150. Id. at 600.
151. See Cummins, supra note 6 (explaining that a plaintiff could bring a sexual harassment claim based on the relationships of other employees, "even if all of the affairs are consensual, and even if the boss never looks your way").
152. Smith & Swann, supra note 144.
155. See Kadue & Kaufman, supra note 9, at 6.
156. 132 P.3d 211 (Cal. 2006).
when they wrote the article. The plaintiff in *Lyle* was a production assistant on the set of the television show, *Friends*, and she claimed that she was subjected to a hostile work environment based on the “writers’ use of sexually coarse and vulgar language and conduct.” The authors of the article stated, “After *Miller*, it seems doubtful that the California Supreme Court would pass up a chance to promote further litigation against sexual conduct in the workplace, on the ground that it could send a ‘demeaning message’ to women.” The authors’ fears were unfounded. In rejecting the plaintiff’s claim, the *Lyle* court cited *Miller* and acknowledged that “the prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex.” Nonetheless, the court rejected the plaintiff’s claim because “the record discloses that most of the sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace.” Thus, after the California Supreme Court expanded the scope of a hostile work environment claim in *Miller*, the court used *Lyle* to clarify that a plaintiff must still satisfy the basic requirements of a sexual harassment claim based on a hostile work environment.

Furthermore, contrary to several authors’ contentions, *Miller* will not lead to the destruction of employees’ privacy rights. As discussed above in Part III, the *Miller* court was concerned about the workplace environment, not the individual relationships themselves. The affairs in *Miller* were problematic, mainly because they were openly displayed so that everyone in the facility knew of their existence. Accordingly, any relationships having such a detrimental effect on the workplace environment, so as to satisfy the *Miller* standard for hostile work environment sexual harassment based on widespread favoritism, will not require an employer to dig deep into its employees’ private lives because *Miller* requires that the relationships are not discreet.

157. *Id.* at 215.
158. See Kadue & Kaufman, *supra* note 9, at 6.
160. *Id.* at 215.
161. See *supra* Part IV.B.
162. The defendants in *Miller* raised this potential privacy intrusion as part of their defense, but the *Miller* court explicitly rejected the defense and stated that it did not believe that “defendants’ concerns about regulating personal relationships are well founded, because it is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard. Thus, [the court did not discuss] those interactions between Kuykendall and his sexual partners that were truly private.” *Miller*, 115 P.3d at 94.
B. Miller's Effect on Other Areas of Employment Discrimination

Miller involved an allegation of sexual harassment based on widespread favoritism, but both the Miller decision, as well as the 1990 EEOC Policy Statement, suggest that a plaintiff in other areas of employment law might be able to bring a claim based on discriminatory conduct that was not specifically directed at them. For example, the EEOC Policy Statement explained,

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.  

The Miller court favorably cites this paragraph in its decision, and although it seemingly extends the court's holding to other protected groups under Title VII, the cited passage is not a radical departure from prior case law. In fact, the EEOC based the above paragraph on a 1971 5th Circuit decision. The Rogers decision has been widely cited, and in Meritor Sav. Bank v. Vinson, the Supreme Court cited Rogers and acknowledged that "a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." In another case, an African-American employee claimed that he was subjected to a hostile work environment because he had walked into his supervisor's office and saw a noose hanging on the wall. Although the plaintiff did not present evidence that the noose was specifically meant to insult him, the court considered the noose to be severe enough to create a hostile work environment, and it denied the employer's motion for summary judgment.

164. Id. (referring to Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972), rev'd on other grounds).
166. Id. at 66. But see Epelbaum v. Elf Atochem, N. Am., Inc., 40 F. Supp. 2d 429, 433 (E.D. Ky. 1999) (rejecting the plaintiff's hostile work environment claim; although some of the ethnic jokes were directed at the plaintiff based on his ethnicity, the court did not consider the discriminatory statements about females, African-Americans or Asians, because it would "consider only the references directly relating to the decedent").
168. Id. at 826.
EPILOGUE

The California Supreme Court’s decision in *Miller* is important both because it is the first appellate decision to follow the EEOC’s position in its 1990 Policy Statement, in which it allows for a claim of sexual harassment based on widespread favoritism, and the decision adds a new facet to the body of existing case law regarding hostile work environment sexual harassment. The decision does not, however, dramatically reverse established case law regarding paramour favoritism. Rather, it brings a new element to the issue, and it creates a new cause of action for plaintiffs who work in such a hostile environment.

While it is not likely that the next case to deal with this issue will have facts that are as egregious as those in *Miller*, at least one similar case is already brewing.\(^{169}\) Thus, it is important for courts to realize exactly which factors were most influential for the *Miller* court, so that they can decide whether the allegations in the cases they confront provide cognizable claims.

\[A \text{ new standard this case with it brings}\\Kuykendall, \text{ for sorrow, should not show his head}\\Go \text{ hence, to have more talk of these sad things;}\\Some \text{ shall be pardon’d, and some punished;}\\For \text{ never was there a case of such misbehaviors}\\Than that of Kuykendall and his paramours.\]

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169. See Cummins, *supra* note 6 (discussing a case in Minnesota, in which an employee argued that her employer’s public affair with a subordinate, as well as the favoritism he accorded the paramour, created an environment that was “so sexually charged that the collective effect was severe and pervasive”). Although some of the elements of the Minnesota case are similar to those in *Miller*, and the plaintiff will likely cite *Miller*, *Miller* probably will not support her argument, since she is basing her claim on only one relationship in the workplace.