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TOPIC:

PARAMOUR FAVORITISM IN THE COLLEGE WORKPLACE

INTRODUCTION:

In April of this year, in a much-publicized story, the University of Arkansas fired its head football coach, Bobby Petrino, for "unfairly hiring his mistress and intentionally misleading his boss about everything from their relationship to her presence at the motorcycle accident that ultimately cost him his $3.5 million-per-year job." [1] The University discovered that the coach had hired the young woman with whom he had been having an affair for the position of student-athlete development coordinator, selecting her over 159 other applicants for the position just sixteen days after it was posted – much quicker than the University's normal thirty-day hiring process. [2] In May, the University of California at Berkeley faced a similar incident and fired a former vice chancellor who had tripled the pay of her subordinate – and secret lover – from $41,000 to $120,000 in just five years. [3]

If you ask a busy college or university administrator whether this type of favoritism – namely, hiring or promoting a paramour [4] – is illegal, he or she might understandably respond: "Of course! It is unfair and it must be illegal!" This is a widely held and logical point of view; Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, and sexual favoritism seems to inherently discriminate against others based to some degree on their sex. [5] Nonetheless, almost all courts considering the sexual favoritism issue have rejected the idea that Title VII forbids sexual favoritism *as such*." [6] Claims by co-workers who are not treated as favorably as an employer's paramour typically do not implicate Title VII's protections because those co-workers suffer the same results of unfair favoritism whether they are male or female. [7]

More than twenty years ago, the Equal Employment Opportunity Commission ("EEOC") addressed paramour favoritism and provided direction in a policy guidance statement. [8] Soon thereafter, researchers began noting the problem in the literature concerning sexual harassment, [9] and research and discussion of sexual favoritism continues through today in law firms, [10] law review articles, [11] and the professional media. [12] Additionally, numerous cases – some involving colleges and universities – have reached the courts through the years and, although most of these decisions hold that there is no liability under Title VII for paramour favoritism, plaintiffs have explored various avenues to attempt to prove damages for employment discrimination.

While hiring or promoting a paramour may not be clearly illegal under Title VII, there are powerful reasons why colleges and universities may wish to draft a policy to discourage, prohibit, or at least manage such actions. This NACUANOTE will address the current state of the law and provide policy considerations for addressing potential cases of paramour favoritism in the workplace.

DISCUSSION:

Paramour Favoritism: Overview of Case Law and Policy

A. Paramour Favoritism in the Employment Context

The first appellate court to address "paramour favoritism" was the Second Circuit in *DeCintio v. Westchester County Medical Center*. [13] Seven male respiratory therapists sued the Medical Center for sex discrimination, claiming that their supervisor, in order to ensure that the woman with whom he was romantically involved was given a promotion, only considered those applicants who were certified by a specific professional organization. Since the favored woman was the only applicant who had the certification, the plaintiffs alleged the requirement was pretextual.

At trial, the district court found that the Medical Center had violated both the Equal Pay Act and Title VII. On appeal, the Second Circuit reversed both claims, holding: "The defendant's conduct, although unfair, simply did not violate Title VII . . . . The plaintiffs were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion." [14]

In 1990, the EEOC, under the direction of then-Chair Clarence Thomas, changed its position on sexual favoritism and adopted the view set forth in *DeCintio* that not all types of sexual favoritism violate Title VII. The Agency issued policy guidance [15] stating the following:

- That "isolated instances" of paramour favoritism, in the absence of other factors establishing the existence of sexual harassment, did not violate Title VII, because neither a male nor a female employee could show that he or she had been treated less favorably than another employee of the opposite sex based solely on the fact that a supervisor treated a paramour more favorably;

- That situations involving sexual relationships between employees and supervisors *could* give rise to Title VII liability if the sexual relationship were coerced or necessary for a member of a particular sex to obtain an employment benefit; and

- That widespread favoritism based on granting sexual favors also might be tantamount to a hostile work environment. [16]

Since 1990, most, but not all, federal and state courts considering the issue have followed *DeCintio* and the 1990 Policy Guidance. [17] The most common argument against recognizing paramour favoritism is the one adopted by the Second Circuit in *DeCintio* that because an employee of the opposite sex could have suffered the same fate, the plaintiff was not disadvantaged because of his or her gender. Other arguments posit that recognizing sexual favoritism as a valid cause of action under Title VII would be like "launching a missile to kill a mouse" and would provide a slippery slope for other supposedly less egregious forms of discrimination to enter the courtroom. [18]

Despite the prevailing view that Title VII's prohibition against sex discrimination in employment does not proscribe favoritism based on a sexual relationship, some courts have held that it does (or could). For example, the California Supreme Court, in a unanimous 2005 decision, *Miller v. Department of Corrections*, overturned two lower court decisions in favor of the employer and ruled instead that a triable issue of fact existed as to whether a prison warden's favoritism of the employees with whom he had sexual affairs constituted sexual harassment. [19] The facts in this case were particularly

egregious. Plaintiffs Edna Miller and Frances Mackey were employees of the California Department of Corrections. Lewis Kuykendall served in management positions and then as warden at two of the California correctional institutions. He engaged concurrently in sexual affairs with subordinate employees Bibb, Patrick, and Brown. When he transferred from one prison to another, he arranged to have his sexual partners transferred with him. He also promised and granted unwarranted and unfair employment benefits to the three women. He even granted Brown the power to abuse other employees who complained about the affairs.

There was also evidence that advancement for women at one of the prisons was based upon sexual favors, not merit. Kuykendall pressured the personnel committee to transfer Bibb to another prison with him and promote her, despite the conclusion that she was not eligible or qualified. On two occasions Kuykendall preferentially promoted Brown over plaintiff Miller, although Miller was more qualified. Even Brown acknowledged that affairs between supervisors and subordinates were common in the Department and were widely viewed as a method of advancement.

Miller and Mackey sued the Department, alleging that Kuykendall's conduct constituted sexual harassment in violation of the California Fair Employment and Housing Act (FEHA). The trial court granted summary judgment to the Department, concluding that the conduct did not support a claim of sexual harassment. The court of appeals affirmed.

In overturning the lower courts' decisions, the California Supreme Court relied heavily on the EEOC Policy Guidance observing that, although isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the message that managers view female employees as "sexual playthings" or that "the way for women to get ahead in the workplace is by engaging in sexual conduct." [20] The court concluded that "an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." [21]

To date, the United States Supreme Court has not addressed the sexual favoritism or paramour issue. In 1987, the Court denied *certiorari* in *DeCintio*, which left standing in the Second Circuit the holding that sexual favoritism is not actionable under Title VII. [22] In 1997, the Court again refused to grant *certiorari* in another case that raised the issue of sexual favoritism, *Becerra v. Dalton*, [23] thus leaving intact the Fourth Circuit's opinion that "a voluntary ongoing friendship or relationship was not the basis for a valid Title VII suit." [24]

Congress amended Title VII of the Civil Rights Act in 1991 by adding § 703(m), which states that "[e]xcept as otherwise provided" in Title VII, unlawful sex discrimination is established once the plaintiff demonstrates that sex "was a motivating factor for any employment practice, even though other factors also motivated the practice." [25]

Some commentators argue that this new "motivating factor" test has the potential to fully legitimize a cause of action for sexual favoritism if the courts are willing to accept the fact that gender plays a key role in sexual favoritism cases. [26] While scholarship in this area is sparse, there is division among those who have addressed the subject. [27]

B. Speaking Out in Opposition to Paramour Favoritism

Beyond prohibiting discrimination based on sex, Title VII also prohibits retaliation against an employee who seeks either to: (i) vindicate his or her rights under the Act by participating in an administrative or judicial investigation, proceeding or hearing; or (ii) express opposition to practices that the employee reasonably believes to be prohibited by the Act. [28]

In the paramour favoritism context, retaliation claims can arise (though they are largely unsuccessful)

when employees claim that an adverse action was taken against them for speaking out against alleged paramour favoritism. For example, in 2006, a Georgia district court found that an employer was not liable for retaliation under Title VII for any actions it took against a female employee for complaining that her male supervisor gave preferential treatment to a female co-worker with whom the supervisor had a romantic relationship. The court reasoned that: (i) the female employee did not have an objectively reasonable belief that the employer violated the law, given the unanimity with which courts have declared favoritism of a paramour to be gender-neutral; (ii) a reasonable person would have concluded that any hostile environment grew out of the employee's personal conflicts with the supervisor and co-worker; and (iii) the employee did not allege that she was evaluated or judged on the basis of her sexuality. [29]

The Fifth Circuit rejected a similar claim in *Wilson v. Delta State University*, [30] where a male sued, contending that the University declined to renew his contract in retaliation for his complaints to the president that an unqualified female received an appointment to a high level position because she was having an affair with a vice-president. The plaintiff argued that he reasonably believed the female got the job because of the affair and that this favoritism amounted to discrimination in violation of Title VII. Affirming the district court's judgment as a matter of law in favor of the University, the court said: "Because it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII, [Plaintiff's] alleged belief to the contrary could not have been reasonable." [31] Many courts denying plaintiffs' retaliation claims have based their decisions on the ground that the plaintiffs could not have had a "reasonable belief" that sexual favoritism violated Title VII in light of existing case law. [32]

One of the few cases decided in favor of the plaintiff in a sexual favoritism retaliation claim is *Perron v. Secretary, Dept. of Health and Human Services*. [33] There, the Federal District Court for the Eastern District of California denied summary judgment to defendant, holding that it could not rule out that the plaintiff engaged in protected activity when voicing her opposition to her supervisor regarding his affair with a co-worker upon whom he bestowed benefits because of her good faith belief that such favoritism was unlawful. [34]

II. Practical Policy Considerations

While hiring or promoting a paramour may not be clearly illegal under Title VII, there are powerful reasons why colleges and universities may wish to draft a policy to discourage, prohibit, or at least manage such actions. Paramour favoritism can lower workplace morale, create conflicts of interest, and if enough "isolated incidents" of paramour favoritism occur, it could bring the institution closer to the "hostile work environment" situation imagined by the EEOC's policy guidance. Institutions must balance these considerations with respecting the privacy and associational rights of their employees to engage in consensual relationships. [35]

Typically, institutions of higher education can develop one of three broad positions regarding employee relationships.

At one end of the spectrum, an institution could enact a strict policy prohibiting office romances. Such policies set a clear standard that makes it easier for institutions to take action against employees whose relationships may put the institution at risk for sexual harassment or discrimination claims. However, blanket policies like this tend to be difficult to enforce. Perhaps more importantly, they implicate the free association and privacy rights of employees, can come off as paternalistic or antiquated to employees, and promulgate a culture of rumor and suspicion around office relationships which may be more harmful than helpful.

At the other end of the spectrum, some institutions adopt no paramour or consensual relationship policy at all, relying instead on existing nepotism or sexual harassment policies. Yet typical nepotism policies do not capture the paramour relationship, as they are drafted to prevent advantageous employment decisions with respect to direct relatives rather than paramours. And while a sexual

harassment policy may address situations that rise to the level of traditional sexual harassment, it does little to help institutions recognize and address workplace relationships that may not rise to that level, but are nonetheless unfair or harmful to the institution by causing conflicts of interest or creating the beginnings of a hostile work environment. Moreover, having no policy at all can cloud the position of the university if an adverse action against one of the employees ever becomes necessary in the future.

For these reasons, institutions should consider drafting a clear policy that states the institution's commitment to a discrimination-free workplace, encourages open communication when potentially problematic relationships arise, and focuses on managing romantic relationships that cause a conflict of interest or a power imbalance, such as those between supervisors and those they oversee. These policies will let employees know the ground rules of their employment and make them feel more comfortable in the workplace. Effective policies will be tailored to the particular institution's own culture, but should likely include:

- **A statement of the institution's commitment to a nondiscriminatory work environment.**

- **A statement prohibiting or strongly discouraging sexual favoritism of any kind.** As noted above, the EEOC and most courts are clear that isolated incidents of sexual favoritism are not illegal discrimination, so how strongly this section of the policy is worded will depend upon the institution's own culture and its desire to meet or exceed federal policies.

- **Specific provisions discouraging or prohibiting relationships involving imbalances of power or conflicts of interest.** Again, this will depend on the institutional culture.

- **A method for reporting a romantic relationship, when appropriate, so that steps may be taken to avoid conflicts of interest or harm to the institution.**

The following two policies exemplify this middle-of-the road approach that both recognizes the reality of workplace romances, but also sets forth a procedure for dealing with them when they could be potentially problematic. The University of Arizona's policy states:

> No University employee shall engage in a romantic or sexual relationship with another employee when one of those employees supervises or evaluates the other employee. . . . When an employee is involved in a relationship with another employee or student whom s/he supervises, teaches or evaluates, such that a conflict of interest arises, as defined herein, then that relationship shall be subject to the disclosure and management of conflicts provision of this policy. [36]

Princeton University's policy on nepotism and personal relationships in the workplace similarly states:

> Conflict of interest also exists when there is a consensual romantic or sexual relationship in the context of employment supervision or evaluation. Therefore, no supervisor may influence, directly or indirectly, salary, promotion, performance appraisals, work assignments or other working conditions for an employee with whom such a relationship exists.
>
> Any supervisor involved in a consensual romantic or sexual relationship, in the context of employment supervision, must discuss the matter on a confidential basis

> with his or her own supervisor or with the Office of Human Resources to assess the implications for the workplace and make arrangements to ensure that employment-related decisions are made in an appropriate and unbiased setting. [37]

Policies like these, which draw clear lines for employees and provide guidance on steps to take if employees do enter into a relationship, are especially helpful. Universities or system boards that wish to design such policies to address paramour favoritism should explore the issues particular to their own campuses, survey other policies, and determine what best balances employee rights against efficient operations.

And of course, if an institution does implement a policy, it is critical to uniformly and consistently apply it, make it easily accessible, and train campus leaders on the policy. Deans, department heads, athletic directors, and countless others on campus will have to know how to handle these potentially personal conversations with the employees they supervise, so training on paramour favoritism for these individuals should be built into any existing training on sexual harassment or discrimination issues.

CONCLUSION:

Although courts have largely held that paramour favoritism does not violate Title VII's prohibition on gender discrimination, the issue remains robust for college and university attorneys, administrators, and faculty members. Cases such as *Miller* and *Perron* suggest that some courts disagree with this flat proscription, reasoning that widespread favoritism could create a hostile work environment or that employees may not be aware that complaining of such favoritism is not a protected activity.

While adopting policy language addressing paramour favoritism may seem reasonable, crafting such a policy also dips the college or university into the murky waters of defining and policing employee relationships. Nonetheless, college and university counsel should, at minimum, be aware of the possibility of litigation surrounding circumstances in which paramours are favored over qualified applicants for employments decisions, and should consider drafting policies to address these situations before they occur.

FOOTNOTES:

FN1.
Petrino Fired as Arkansas Football Coach, CLARION-LEDGER, April 11, 2012, at C1.

FN2.
Andy Staples, *Review of Resumes Shows Petrino Had Many More Qualified Applicants*, SPORTS ILLUSTRATED (April 13, 2012).

FN3.
Secret sex partner's pay gets former UC Berkeley vice chancellor fired, SILICON VALLEY MERCURY NEWS, May 4, 2012.

FN4.
The word "paramour" is defined in RANDOM HOUSE WEBSTER'S DICTIONARY (1993) as "an illicit lover" or "any lover."

FN5.

42 U.S.C. § 2000e, *et. seq.*

FN6.
Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 559 (1994).

FN7.
See Douglas R. Richmond, *Changing Times and the Changing Landscape of Law Firm Disputes*, 2009 PROF. LAW 73 (2009).

FN8.
EEOC, NOTICE N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990).

FN9.
See, e.g., Augustus B. Cochran, SEXUAL HARASSMENT AND THE LAW (2004); Billie Wright Dziech & Michael W. Hawkins, SEXUAL HARASSMENT IN HIGHER EDUCATION (1998); Michele A. Paludi (ed.), SEXUAL HARASSMENT ON COLLEGE CAMPUSES (1996); Ellen J. Wagner, SEXUAL HARASSMENT IN THE WORKPLACE: HOW TO PREVENT, INVESTIGATE, AND RESOLVE PROBLEMS IN YOUR ORGANIZATION (1992).

FN10.
See Ron Chapman, Jr., & Denise C. Villani, *Love is in the Air – Evaluating Office Romance Policies*, THE EMPLOYMENT LAW AUTHORITY (February/March 2007); Phelps Dunbar, *Fifth Circuit Holds "Paramour Favoritism" Is Not Prohibited By Title VII*, H.R. ALERT (April 2006); Ropes & Gray, *Sexual Favoritism Claims Given New Life*, CLIENT ALERT: LABOR & EMPLOYMENT (September 13, 2005).

FN11.
See, e.g., Meghan E. Bass, Note: *Dangerous Liaisons: Paramour No More*, 41 VAL. U.L. REV. 303 (2006); Cheryl L. Howard, *Romeo and Juliets: A Modern Workplace Tragedy*, 9 U. PA. J. LAB. & EMP. L. 805 (2007); Stephen Dacus, *Note: Miller v. Department of Corrections: The Application of Title VII to Consensual, Indirect Employer Conduct*, 59 OKLA. L. REV. 833 (2006); Douglas R. Richmond, *Changing Times and the Changing Landscape of Law Firm Disputes*, 2009 PROF. LAW. 73; Mary Kate Sheridan, *Just Because It's Sex Doesn't Mean It's Because of Sex: The Need for New Legislation to Target Sexual Favoritism*, 40 COLUM. J.L. & SOC. PROBS. 379 (2007); Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & LAW 269 (1996); and J. Kevin West, *Does Paramour Favoritism Equal Sexual Harassment?*, 6 IDAHO EMP. L. LETTER 1 (2011).

FN12.
See, e.g., California Ruling on Workplace Romance Sends Employers Scrambling for Cover, BUSINESS WIRE (August 10, 2005); Jason Bent, *David Letterman, ESPN, and the Sexual Favoritism Mess*, Workplace Prof Blog (October 28, 2009); Robert Covington, *Paramour Problem Returns: A Smoking Bed?*, SOUTHERN BUSINESS REVIEW (Spring 2006); Howard L. Magee, *Minimizing the Legal Risks of Workplace Romance*, BUSINESS MANAGEMENT DAILY (July 20, 2007); and James B. Thelen, *Sexual Favoritism May Create Hostile Work Environment*, HR MAGAZINE (October 2005).

FN13.
807 F.2d 304, 308 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987).

FN14.
Id.

FN15.
EEOC, NOTICE N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990). Although the Guidance does not bind the courts, it provides a useful framework

for describing Title VII sexual harassment law.

FN16.
Id. at *3 ("In these circumstances, a message is implicitly conveyed that managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women").

FN17.
See, *e.g.*, *Tenge v. Phillips Modern Ag Co*., 446 F.3d 903, 909 (8th Cir. 2006) (holding that Title VII not implicated when employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee); *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005) (paramour favoritism not actionable in the 7th Circuit); *Wilson v. Delta State Univ*., 143 Fed. App. 611, 614 (5th Cir. 2005) ("'[w]hen 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 other than gender'") (quoting *Ackel v. Nat'l Communications, Inc*., 339 F.3d 376, 382 (5th Cir. 2003)); *Schobert v. Illinois Dept. of Transp*., 304 F.3d 725 (7th Cir. 2002) ("Whether the employer grants employment perks to an employee because she is a protege, an old friend, a close relative or a love interest, that special relationship is permissible [under Title VII] as long as it is not based on an impermissible classification"); *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998) ("Title VII does not encompass a claim based on favoritism shown to a supervisor's paramour"); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997) (holding that sexual favoritism although "unfair" and "unwise" does not violate Title VII); *Becerra v. Dalton*, 94 F.3d 145, 150 (4th Cir. 1996) (holding that sexual favoritism is not actionable under Title VII); *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588 (9th Cir. 1992) (holding that female employee failed to state actionable claim based on allegations that co-worker had romantic affair with one or more of employee's supervisors); *Card v. Fred's Stores of Tenn*., 2010 U.S. Dist. LEXIS 74502 *12-13 (N.D. Miss. July 11, 2011) (extending 5th Circuit's reasoning in *Wilson v. Delta State Univ*. to ADEA case); *Nielsen v. Trofholz Technologies*, 750 F. Supp. 2d 1157, 1166 (E.D. Cal. 2010) (holding that "[w]hile favoritism with more might constitute discrimination under the paramour theory in California, plaintiff has failed to meet his burden"); *Treat v. Tom Kelley Buick Pontiac GMC*, 710 F. Supp. 2d 762, 772 (N.D. Ind. 2010) (finding no retaliation for reporting sexual favoritism because sexual favoritism not actionable in 7th Circuit); *McDowell v. Cornell Univ*., 2004 U.S. Dist LEXIS 1312, *9 (N.D.N.Y. Jan. 27, 2004) (holding that preferential treatment on basis of intimate relationship is unfair, it does not violate Title VII). For a state court case agreeing that paramour favoritism does not violate Title VII, *see Patterson v. Dept. of Health & Welfare*, 256 P.2d 718, 727 (Idaho 2011) (holding that while the supervisor's conduct violated the agency's policy regarding intra-office relationships, the favoritism affected all concerned on a gender-neutral basis and did not serve as the basis for a claim for hostile work environment).

FN18.
For a presentation of arguments for and against recognizing paramour favoritism as a form of sex discrimination, *see* Mitchell Poole, *Paramours, Promotions, and Sexual Favoritism: Unfair, But Is There Liability?* 25 PEPP. L. REV. 819, 846-59 (1998).

FN19.
36 Cal. 4th 446 (Cal. 2005). For in-depth analysis of this "groundbreaking development," *see* Meghan E. Bass, *Dangerous Liaisons: Paramour No More,* 41 VAL. U. L. REV. 303, 328 (2006).

FN20.
Id. at 464 (quoting EEOC Policy Guidance (Jan. 12, 1990)).

FN21.
Id. at 464. For other cases addressing the "widespread favoritism" analysis put forward by EEOC Policy Guidance, *see Neilsen*, 750 F. Supp. at 1166 (observing that "[w]hile favoritism with more might constitute discrimination under the paramour theory in California," the plaintiff in this case did

not meet that burden of showing "widespread favoritism"); *Tumbling v. Merced Irrigation Dist.*. 2009 U.S. Dist. LEXIS 100134, *3-4 (E.D. Cal. Oct. 13, 2009) (finding that plaintiff did not demonstrate a widespread sexually hostile work environment or that the alleged affair between his supervisor and another employee was sufficiently severe or pervasive to alter conditions of plaintiff's own employment); *Badrinauth v. Metlife Corp*., 2006 U.S. Dist. LEXIS 4790 (D.N.J. 2006) (acknowledging EEOC Policy Guidance statement that sexual favoritism can be basis for hostile work environment claim under Title VII if the favoritism is widespread, but finding that conduct here not severe or pervasive enough to give rise to cause of action).

FN22.
See DeCintio, 807 F.2d at 308, *cert. denied*, 484 U.S. 825 (1987).

FN23.
94 F.3d 145 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1087 (1987).

FN24.
Id. at 150. The Supreme Court likewise denied *certiorari* in *Badrinauth v. Metlife Corp*., 2006 U.S. Dist. LEXIS 4790 (D. N.J., Feb. 6, 2006), ***aff'd*** 368 Fed. App. 320 (3rd Cir. 2010), *cert. denied* 131 S. Ct. 834 (Dec. 13, 2010), *reh. denied*, 131 S. Ct. 1559 (Feb. 22, 2011).

FN25.
42 U.S.C. § 2000e-2(m) (1964). Title IX has not been a vehicle for paramour favoritism claims because the issue is identified with workplace controversies. A Westlaw search for "paramour favoritism and Title IX" yielded no results.

FN26.
See Poole, *supra*, n. 18.

FN27.
Compare Michael J. Levy, *Sex, Promotions, and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination*, 45 HASTINGS L.J. 667, 696 (1994) ("While the practice of a supervisor promoting an employee with whom he is romantically involved is unfair to those employees not chosen for the promotion, this practice is nonetheless outside the purview of Title VII since it does not involve discrimination on the basis of sex") *with* Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 177 (1991) (criticizing EEOC and the *DeCintio* and *Miller* decisions for not recognizing sexual favoritism as a distinct cause of action under Title VII).

FN28.
Harold S. Lewis, Jr. and Elizabeth J. Norman, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE (2nd ed.), § 2.40 at 141-42.

FN29.
See Sherk v. Adesa Atlanta, LLC, 432 F. Supp.2d 1358, 1373 (N.D. Ga. 2006).

FN30.
143 Fed. App. 611 (5th Cir. 2005).

FN31.
Id. at 614. For cases reaching the same conclusion, see *Robben v. Runyon*, 2005 WL 123421 at *4 (10th Cir. 2005) (holding that "a party cannot maintain a Title VII claim when the alleged conduct that is the subject of the complaint, even if true, is not actionable under Title VII"); *Treat v. Tom Kelley Buick*, 710 F. Supp. 2d 762, 772 (N.D. Ind. 2010) (finding no retaliation arising from reporting of sexual favoritism because such not actionable in 7th Circuit); *Delon v. LCR-M Ltd. Partnership*, 2006

U.S. Dist. LEXIS 88298, *23 (W.D. La. Dec. 5, 2006) (holding that that plaintiff could not have held a "reasonable belief" that the opposed practice [sexual favoritism] was an unlawful employment practice under Title VII in the 5th Circuit).

FN32.
See, e.g., Equal Employment Opportunity Comm'n v. Con-Centra Health Serv., 2006 U.S. Dist. LEXIS 67125, *13 (N.D. Ill. July 12, 2006) ("[W]e again hold that because Title VII does not prohibit a supervisor from giving preferential treatment to a supervisee with whom she has a relationship, [plaintiff] could not have reasonably believed that the alleged affair he reported violated Title VII"); *McDowell v. Cornell Univ*., 2004 U.S. Dist. LEXIS 1312, *9 (N.D.N.Y. Jan. 27, 2004) ("While it may have been reasonable to believe that such an allegation could constitute discrimination prior to the Second Circuit's decision in *DiCintio*, it was no longer reasonable to believe so over ten years later"); *Patterson v. Department of Health & Welfare*, 256 P.3d 718, 729 (Idaho 2011) (holding that because the great weight of the case law did not support plaintiff's position that she spoke out in opposition to protected activity [sexual favoritism as violative of Title VII], "she had no grounds to believe that she was engaging in protected activity").

FN33.
2008 WL 5101577 (E.D. Cal. Dec. 2, 2008).

FN34.
Id. at *7

FN35.

Also, it should be noted that while this NACUANOTE focuses on paramour favoritism in the employment context, campus attorneys should be aware of the reality of paramour favoritism from the faculty-student perspective, which is a related, but separate, issue. Some campuses have begun to craft consensual relationship policies that regulate faculty-student relationships, and the scope of these policies is broad. *See* Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 SYRACUSE L. REV. 55 (2004). As one author noted regarding faculty-student policies:

> Consensual relationship policies range from advisory statements to absolute bans applicable when the professor exercises no academic or supervisory authority over the student. Institutions differ on reporting and disclosure standards and on whether the policy merely discourages relationships with students or subjects offending faculty members to disciplinary action. Policies also vary over whether all students are covered or extend only to undergraduate students or to students over whom the professor exercises a supervisory role. A college or university—likely in step with the majority of institutions—may also have no formal consensual relationship policy.

See Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411, 418 (2003).

FN36.
See University of Arizona, Policy for Management of Personal Conflicts of Interest for the University of Arizona.

FN37.
See Princeton University Polity on Nepotism & Personal Relationships in the Workplace.

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RESOURCES:

- NACUA Resource Page on Sexual Harassment
- Meghan E. Bass, *Dangerous Liaisons: Paramour No More*, VAL. U. L. REV. 303, 328 (2006).
- Helena Amaral, *Fraternization*, Schmidt Labor Research Center Seminar Research Series (2006).
- University of South Florida, Diversity & Equal Opportunity Office, Sex Discrimination – What Supervisors Need to Know

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