Nine to Five

HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE

JOANNA L. GROSSMAN

CAMBRIDGE
UNIVERSITY PRESS

2

Too Hot to Be a Dental Hygienist?

In 2009, the Iowa Supreme Court made national news for its surprising and unanimous decision in *Varnum v. Brien*, in which it held that the state's ban on same-sex marriage violated the state constitution's guarantee of equal protection.[1] Iowa was not the first state to legalize same-sex marriage – Massachusetts came first in 2004,[2] followed by a handful of others in 2008 – but it was the first to do so outside the liberal confines of the Northeast.

Iowa's high court made headlines again in 2010, when three of the justices who joined the Varnum opinion were recalled from the bench because of the decision.[3] The three included the court's only woman, and all three vacancies were filled by men.

Now the court is back in the news, this time for an illogical decision that misinterprets governing civil rights statutes and reaches a preposterous result.[4] In this ruling, *Nelson v. Knight*, the court held that a male dentist did not violate a law banning sex discrimination when he fired his very competent female dental assistant because he found her to be an "irresistible attraction" whose very presence might incite him to commit sexual harassment and, perhaps ultimately, cost him his marriage.[5]

This ruling hearkens back to mistakes of the 1970s, when courts, including the U.S. Supreme Court, struggled to figure out just exactly what "sex discrimination" is. But forty years of antidiscrimination law later, we know it when we see it. And this is definitely it. The Iowa court has done women's workplace equality a colossal injustice by allowing men's inability to control themselves to define women's employment rights.

A DAY IN THE LIFE OF DR. KNIGHT'S DENTAL OFFICE

In 1999, dentist James Knight hired Melissa Nelson to be a dental assistant in his office. She was twenty years old and had just received a two-year college degree. She

worked in that position for more than ten years and was, according to Dr. Knight, a "good assistant." She, in turn, said he was a person of "high integrity" and that he generally treated her in a respectful manner. Both Knight and Nelson were married with children.

The tenor in the office seemed to change in the last year and a half of Nelson's employment. (The opinion does not reveal Knight's age, but a midlife crisis jumps out as one possible explanation.) Knight began to comment to Nelson that her clothing was "distracting," too tight, or too revealing. Nelson denied that her clothing was inappropriate, but she did put on a lab coat whenever he complained.[6] At some point, Knight and Nelson began texting each other about both work and personal matters. Some of these matters were innocuous – such as updates on their respective children's activities – and others were more intimate. According to the available evidence, the in-person comments and texts of a sexual nature seemed to emanate exclusively from Knight. Knight admits that he once told Nelson if she saw his pants "bulging," then she would know she was dressed in too sexy a manner.[7] He texted her once to complain that the shirt she wore that day was too tight. Nelson replied that she thought his complaint was unfair. His surreply? He told her it was a good thing she did not wear tight pants, too, because then he would get it coming and going.

A comment by Nelson about infrequency in her sex life met with this retort from Knight: "That's like having a Lamborghini in the garage and never driving it."[8] And Knight admits that once he texted Nelson to ask how often she experienced orgasms. Nelson did not complain about such comments, nor did she ask Knight to stop making them, but neither did she reciprocate with sexual innuendo of her own.

If this had been the end of the story, one might assume that Nelson had brought this case in order to complain about persistent sexual harassment by her supervisor, who was also the head of the office. She might not have won her case – either because a jury might have found that Knight's conduct was not unwelcome or was not sufficiently severe or pervasive to be actionable. But it would not have been a frivolous case.

ENTER MRS. KNIGHT AND THE FAMILY PASTOR

In 2009, Knight took his children to Colorado for a vacation. His wife, Jeanne, who also worked in his dental office, stayed behind. While home, Jeanne discovered that her husband had been texting with Nelson. She was upset about the texting, but also about Nelson's clothing and Nelson's alleged flirting with Knight. Jeanne also testified in court that Nelson would hang out at the office after work hours, which Jeanne characterized as "strange" – she questioned why Nelson "after being at work all day and away from her kids and husband . . . would not be anxious to get home like the other [women] in the office."[9]

Jeanne viewed Nelson as "a big threat to our marriage" and demanded that her husband fire her. Thus, in January 2010, Knight called Nelson to his office in order to terminate her employment. He brought a pastor with him as a witness, and he read Nelson a prepared statement, which said Nelson had become a detriment to his marriage and that it was in the best interests of the Knight and Nelson families for the two not to work together. Nelson cried upon learning that she had been let go, because she loved her job.

That night, Nelson's husband, Steve, called Knight to ask why his wife had been fired. They met in person – again, with the pastor as a witness – to discuss the situation. Knight told Steve Nelson was the best dental assistant he had ever had, and that she had done nothing wrong or inappropriate. But Knight told Steve *he* was getting too attached to *her* and, in the court's words, "feared he would try to have an affair with her down the road if he did not fire her."[10]

Knight replaced Nelson with another female dental assistant. He had never, in his practice, had a male assistant.

IS THIS SEX DISCRIMINATION? THE RIGHT ANSWER IS YES, BUT THE COURT FAILS TO SEE IT

Nelson filed suit under the Iowa Civil Rights Act, a statute analogous to Title VII, the main federal antidiscrimination law. (Iowa courts have held repeatedly that the Iowa act is coextensive with Title VII and should be interpreted the same way.[11]) She sued for sex discrimination, arguing that she was terminated because of her gender.

The Iowa Supreme Court held, by a vote of 7–0, that Nelson's firing did not constitute sex discrimination. The court's reasoning reveals an almost comical misunderstanding of the concept of sex discrimination. The question under Title VII – and the analogous Iowa statute under which this claim was brought – is whether Nelson was fired "because of sex."[12] Under the statutes the question is this: Would Nelson have been fired if she were a man? The answer is clearly no. In reaching the opposite conclusion, the court made a series of logical and doctrinal missteps.

WHEN IS DISCRIMINATION "BECAUSE OF SEX"?

Under Title VII, an employment action is unlawful if sex is a motivating factor, even if other factors were relevant. In many employment discrimination cases, the employer's true reasons behind an adverse employment action are unknown – or at least unadmitted. The plaintiff-employee thus has to rely on a procedure established by the U.S. Supreme Court called "pretext analysis." This procedure is designed to smoke out the employer's true motivations for taking the adverse employment action in question.

To utilize this approach in a wrongful termination case, the plaintiff must make out a prima facie case by showing that she was subject to an adverse employment action, that she was qualified for the job, and that a person of the opposite sex was not fired or was hired to replace her. The burden of producing evidence then shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for her termination. The plaintiff then bears the ultimate burden of proving that the employer's reason is unworthy of credence, or that discrimination is the real reason for the firing.[13]

Here, however, the employer admitted his reasons. (Although this case was decided on summary judgment, which means that a full airing of the facts never occurred, most of the key facts appear to be undisputed.) Knight concedes that he fired Nelson, in the court's words "because of the nature of their relationship and the perceived threat to Dr. Knight's marriage."[14] Is that unlawful discrimination?

Knight argues that this had nothing to do with Nelson's sex. Nelson, on the other hand, contends that "neither the relationship nor the alleged threat would have existed if the employee had been male."[15] The Iowa court erroneously resolved this dispute in favor of Knight by making three basic mistakes.

WHY THIS IS NOT ANALOGOUS TO A CASE OF SEXUAL FAVORITISM

First, the Iowa court looked to "sexual favoritism" precedents to say that actions based on sexual *relationships* in the workplace are not "based on sex."[16] Sexual favoritism occurs when a supervisor is engaged in a consensual, romantic relationship with a subordinate and provides her with benefits, or protects her from employment detriments, because of the relationship. Although this seems unfair, especially to other subordinate employees who are losing out on the perks of sleeping with the boss, courts have struggled to figure out how this conduct can be deemed "because of sex" vis-à-vis the adversely affected employees. In most cases, the subordinate will have been chosen for the relationship because of sex, but the coworkers who suffer its effects will typically be of both sexes. Thus the discrimination – being treated less favorably than a coworker – does not really occur because of sex.

The Equal Employment Opportunity Commission (EEOC) issued a policy guidance on sexual favoritism that has been largely followed by courts.[17] According to the guidance, isolated incidents of sexual favoritism are not actionable. Sexual favoritism that is rampant or widespread, however, can violate Title VII by creating a sort of implicit quid pro quo – giving other female employees the impression that they must sleep with the boss to get ahead – or creating a hostile environment for all members of one sex.[18]

The Iowa court makes two mistakes with this body of law. First, it reasons that if it is not actionable to treat an employee favorably because of a consensual sexual relationship, then it is also not actionable to treat an employee *unfavorably* because

of a consensual relationship that may have triggered personal jealousy or created other complications at work. The two situations, however, are not analogous.

In the former case, as explained above, the discrimination complaint comes from third parties who have been adversely affected by the favoritism. The "because of sex" problem relates to their claim, not to a claim by the subordinate in the relationship who presumably was chosen "because of sex."

In the latter case – the employee suing for discrimination is the one chosen by the boss for a personal relationship – a selection that very much turned on gender. Moreover, and perhaps even more importantly in the *Knight* case, the subordinate employee who is treated unfavorably was *not* involved in a consensual sexual relationship with her supervisor. Knight and Nelson were not sexually or romantically involved, and, to the extent that their relationship involved sexual innuendo or explicit sexual conversation, it was both initiated and carried out by Knight. Nelson was thus not fired because of her relationship with her boss. As she correctly argued to the Iowa Supreme Court, she "did not do anything to get herself fired except exist as a female."[19]

WHY THIS CASE IS MORE AKIN TO A SEXUAL HARASSMENT CASE THAN A SEX DISCRIMINATION CASE

When the head of a company sexually harasses a subordinate employee, the company is automatically liable (there are no affirmative defenses) based on an alter ego theory of liability -- he *is* the company.[20] And if that same man engaged in a series of unwelcome sexual advances against that same female subordinate, we would have no trouble concluding that his actions were "because of sex." The law is clear that if a man is motivated to harass a woman because of heterosexual desire, then he is discriminating against her on the basis of sex.

Dr. Knight's actions fit neatly into this conception of sex discrimination. He found Nelson "irresistibly attractive" because she was a woman. He feared he might try to have an affair with her (as he allegedly told her husband) because she was a woman. And his wife was jealous of Nelson's presence in the office because Nelson was a woman.

If a supervisor's sexually harassing an employee constitutes sex discrimination, why doesn't his firing her to stop himself from sexually harassing her constitute discrimination, as well? In either case, a similarly situated male dental assistant would not find himself subjected to such consequences. (I can't help but recall here being told once by a male lawyer he doesn't work with women because if they are attractive, he's too tempted to come on to them, and if they're not attractive, what's the point?) If the Iowa court has this right, then could a man with a very jealous wife be excused for having a "no women in the office" policy? The Iowa court claims it would be a different case if Knight had fired more than one woman because of alleged personal relationship issues. But why?

SEX-PLUS DISCRIMINATION IS STILL UNLAWFUL DISCRIMINATION

The Iowa court seems impressed by the fact that after Nelson was fired, Knight hired another woman as a dental assistant. And, in fact, Knight had only ever employed women in that position. Thus, the court inquired, how could Nelson's firing be "because of sex"? The answer is that whether Nelson was preceded or succeeded by another woman is irrelevant. Such evidence can be relevant to a prima facie case that relies on pretext analysis, because it helps support an inference that the adverse action was taken "because of sex." Here, as discussed above, pretext analysis was unnecessary, because Knight freely admitted his reasons for firing Nelson.

Moreover, an employer who discriminates against a subset of one gender – for example, women with small children – violates antidiscrimination law just as clearly as if it had discriminated against all members of that gender. This type of discrimination, termed "sex-plus discrimination," has been clearly held to violate Title VII and analogous state antidiscrimination laws.[21] Thus, even if Knight fired Nelson not merely because she is a woman but also because she is an attractive, sexy woman, his conduct is still actionable.

WITH THE IOWA SUPREME COURT'S RULING IN KNIGHT'S FAVOR, AND NO TITLE VII CLAIM AT ISSUE, NELSON HAS NO FURTHER LEGAL RECOURSE, THOUGH SHE OUGHT TO

When the first cases alleging sexual harassment as a violation of Title VII were brought in the 1970s, courts did not know what to make of them. The question that troubled them was whether unwelcome sexual advances were a form of "discrimination." A few early opinions from federal courts said things like this: (1) sexual harassment is a necessary consequence of letting women into the workforce unless men are to suddenly become asexual; and (2) rape isn't a form of employment discrimination just because it happens to occur in an office rather than a back alley.[22]

We look on those cases now with horror, or at least with an understanding that they were reflective of courts' fumbling their ways through uncertain legal terrain. But those days are gone. When women are treated worse than men are because they are women, as was the case for Nelson, then discrimination law must come to the rescue. Because this suit was brought only under the Iowa antidiscrimination law, without a parallel claim under Title VII, it cannot be appealed any further. The Iowa Supreme Court is the final arbiter of the meaning of Iowa statutes, even if they are interpreted by analogy to Title VII and interpreted bizarrely. Thus, Ms. Nelson has no further avenues to complain about being fired for being, in her employer's eyes, too sexy for this job.

A version of this chapter appeared on January 8, 2013, at verdict.justia.com.

Update: The Iowa Supreme Court, perhaps responding to criticism like this, vacated the opinion and reissued a new opinion several months later.[23] *In the new opinion, however, the court reached the same conclusion, but with a more bare-bones opinion that left the court less vulnerable to criticism. In the end, it stuck to its guns, holding, in essence, that being "irresistibly attractive" is a fireable offense. In her own defense, Nelson told one reporter she wore nothing but T-shirts and medical scrubs to work.*[24]

12

Workplace Affairs and Sexual Favoritism

When a married supervisor conducts long-standing, concurrent affairs with three female subordinates at work and grants them professional favors over more deserving employees, does it constitute unlawful sexual harassment?

In *Miller v. Department of Corrections*, the California Supreme Court has held that it does, despite a long-standing reluctance by courts to recognize claims of so-called sexual favoritism.[1]

THE PLAINTIFFS' ALLEGATIONS ABOUT WORKING CONDITIONS AT THE VALLEY STATE PRISON FOR WOMEN

The case was brought by two former employees at the Valley State Prison for Women (VSPW) – Edna Miller, a correctional officer, and Frances Mackey, a records manager who passed away while the litigation was pending. Miller and Mackey alleged that they were subjected to discrimination and harassment as a result of the chief deputy prison warden's multiple workplace affairs and related conduct.

Although the case involved numerous allegations, the crux of the complaint is its allegation that the deputy warden, Lewis Kuykendall, openly carried on three affairs with female employees at the prison (Bibb, Patrick, and Brown), all subordinate to him, and granted those women undeserved privileges and promotions because of his relationship with them. At the same time, the suit alleges, female employees who complained about these relationships were punished, and retaliated against, for their objections.

Although the facts of the case are too numerous and complicated to recount in detail, a few notable examples will provide a sense of the ways in which, according to the plaintiffs' allegations, these sexual relationships pervaded the workplace and disadvantaged those not involved in them.

When Kuykendall was transferred from another facility to VSPW, the plaintiffs allege that he gradually had all three of his paramours transferred so they would once

again be working under him. Once there, the paramours all allegedly benefited in tangible ways from their relationship with Kuykendall.

One paramour, for example, was allegedly granted a promotion over the objection of the committee appointed to make the decision because Kuykendall ordered them to "make it happen." A second paramour was allegedly permitted to report directly to Kuykendall in lieu of her immediate supervisor. A third was allegedly given a series of promotions over more qualified applicants, and, according to plaintiffs, remarked that Kuykendall had no choice but to give them to her lest she "take him down" by revealing "every scar on his body." The culture at the facility, the plaintiffs claim, was such that employees repeatedly questioned whether this was the kind of workplace in which they would have to "'F' my way to the top." There was good reason to think the answer was yes.

The sexual relationships allegedly affected the workplace in other undesirable ways, as well. Kuykendall allegedly engaged in open displays of affection with at least one of the women at work, and the three women allegedly were sometimes heard to be squabbling over their competing affairs in emotional scenes.

Complaints about the sexual relationships, the plaintiffs allege, were met with derision or worse. Allegedly, when plaintiff Miller confronted one of the paramours, Brown, about the relationship and the harm it had caused other employees, Brown physically assaulted her and held her captive in a closed office for two hours.

Then, when Miller complained to Kuykendall and threatened to file a harassment suit, he allegedly said there was nothing he could do to control Brown because of his relationship with her, and told Miller he should have "chosen" her instead. The other plaintiff, Mackey, allegedly had her pay reduced when she complained about the sexual affairs.

SEXUAL FAVORITISM AS A FORM OF SEX DISCRIMINATION: THE TITLE VII ISSUE

First recognized as a potentially valid claim in the 1980s, sexual favoritism has proved an elusive cause of action for most plaintiffs. Courts have struggled with the question whether the prohibition against sex discrimination in Title VII's prohibition on discrimination in employment is violated when, for example, a supervisor grants preferential employment treatment to a paramour based on their intimate relationship. Does this conduct render other employees victims of sex discrimination?

The struggle comes because Title VII does not apply to all conduct that is immoral, unethical, distasteful, or even demonstrably unfair; it applies only to discrimination. The *New York Times*'s "Ethicist" would surely find it objectionable for a supervisor to hand out promotions only to subordinates he was sleeping with, at the expense of more deserving candidates. But under the law, more analysis is necessary: to prove a violation of Title VII, a plaintiff must show the act was discriminatory – that it was taken because of sex, race, or some other protected characteristic.[2]

When a male supervisor grants favors to his female girlfriend, *all* other employees, both male and female, are disadvantaged. But, arguably, none are disadvantaged *by their gender per se*. So it is not the case that such favoritism is always sex discrimination. However, a variety of theories have developed under which a sexual relationship between two employees might constitute discrimination against other employees.

CIRCUMSTANCES WHEN A SEXUAL RELATIONSHIP MAY CONSTITUTE DISCRIMINATION

First, if the sexual relationship is coerced, it may constitute implicit "quid pro quo" harassment for other employees. "Quid pro quo" harassment occurs when a supervisor demands sexual favors in exchange for an employee's gaining job benefits or avoiding adverse employment actions, and it is a clear and serious violation of Title VII. An "implicit" quid pro quo might exist if employees understand, after learning of a coerced relationship between their supervisor and another subordinate, that sexual submission is expected of them as a condition of job advancement.

If the sexual relationship is consensual, then other theories might apply instead. Men, for example, might claim that they were discriminated against in that they were deprived of the opportunity to use sex to get ahead, because male supervisors are presumably, at least in most cases, only interested in sexual relationships with female subordinates. The men's lost opportunity could thus be considered discriminatory on the basis of sex. (The same argument could work, of course, for claims by female subordinates deprived of opportunities by female supervisors who have sexual relationships with men, and then favor them in the workplace.)

When a male supervisor favors a particular female employee with whom he has a sexual relationship, do other *female* employees face discrimination? One might contend that they have been denied access to job benefits not because of their sex, but because the boss happened to choose a different woman with whom to have an affair. That, in our conventional understanding of Title VII, does not constitute unlawful discrimination. And a few courts have denied sexual favoritism claims on this reasoning.[3]

But what if favoritism based on sexual favors is so widespread, in a given workplace, that women as a group are demeaned? That, according to a Policy Guidance published by the EEOC in 1990, constitutes a form of illegal gender-based harassment.[4]

The EEOC's Policy Guidance, approved during the period when now Justice Clarence Thomas served as EEOC chairperson, states the agency's position on when sexual favoritism constitutes illegal harassment or discrimination. It recognizes the potential for an implicit quid pro quo claim, discussed above, but it also recognizes the possibility that widespread favoritism can create a hostile environment for both male and female employees.

Isolated incidences of sexual favoritism, while clearly inappropriate, are not considered unlawful by the EEOC. Employers should be careful when it comes to such conduct, though; city or state antidiscrimination provisions could still be interpreted to reach these instances. The safe thing, then, for employers to do is prohibit such favoritism, just as they often have policies banning nepotism.

THE COURT'S REASONING IN *MILLER V. DEPARTMENT OF CORRECTIONS*

The California Supreme Court followed the EEOC in determining that widespread sexual favoritism can create an actionable hostile work environment. The case was brought under California's Fair Employment and Housing Act (FEHA).[5] And California has always erred on the side of broader protection for victims when construing its antidiscrimination statutes than federal courts tend to grant under Title VII. For example, the California Supreme Court showed greater empathy for victims than federal law when it granted employers a much more limited affirmative defense to liability for supervisory harassment than is available under Title VII.[6]

California law also gives discrimination plaintiffs access to compensatory and punitive damages without caps.[7] In contrast, Title VII caps combined damages at $300,000 for even the largest employer-defendants – meaning that employees who are high salaried, unable to find other work for a long time, and/or treated so horribly that punitive damages are appropriate can be seriously undercompensated.[8]

Considering the validity of a FEHA sexual favoritism claim, the California Supreme Court held that "when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is to engage in sexual conduct with their supervisors or the management."[9] Given the facts alleged – many of them uncontested – the court remanded the case for a jury trial to see whether the legal standard could be met.

THE PLAINTIFFS IN THE MILLER/MACKEY CASE ARE LIKELY TO WIN AT TRIAL

The plaintiffs are likely to meet with success at trial, assuming that they can convince a jury of the truth of the allegations of their complaint. Rightfully so, given that if their allegations are proven, they would establish a rather extreme clash between Kuykendall's personal relationships at the workplace, and workplace conditions for those around him who were not engaged in such relationships.

As the California court noted, according to plaintiffs, "Kuykendall's sexual favoritism not only blocked the way to merit-based advancement for plaintiffs but also caused them to be subjected to harassment at the hands of [his girlfriend], whose

behavior Kuykendall refused or failed to control even after it escalated to physical assault."[10]

Sexual favoritism, as a claim, is often met with skepticism because of fear that it might require employers to monitor, or even restrict, consensual office romances. But that is a misunderstanding. Office romances are not, standing alone, problematic – and certainly are not illegal or discriminatory. Indeed, it would be a shame to prevent all such relationships, given the increasing time and importance of work in our daily lives. Sexual relationships, including those begun at work, can be a positive force in women's and men's lives. But such relationships should not go beyond providing personal fulfillment to the participants, to providing a free ticket to career success at the expense of others equally, or more, deserving. In an egalitarian workplace, sex is no way to get ahead – good work is.

Society's interest in preventing exploitation and abuse of subordinates provides an important counterweight to the value of allowing office romances to flourish. Fortunately, given the way both the EEOC's and California's standard is crafted, both interests can be served. Employers need not prohibit office romance. It is only an office romance (or, perhaps, two or three) combined with *repeated* and *widespread* instances of favoritism, to the detriment of other employees, which begins to near the threshold for sex discrimination liability. Commonsense policies by employers designed to guard against abuses of power like those committed by Kuykendall ought to be par for the course – and, as noted above, cautious employers will often have such policies or informal norms in place. As Martha Chamallas has suggested, little sexual liberty is lost when an employer prohibits "amorous relationships in which one party has direct authority to affect the working . . . status of the other."[11]

The dangers of permitting such obvious conflicts of interest to flourish are amply demonstrated by the *Miller* case. An environment like the one alleged to have existed at VSPW not only makes life miserable for women who work there but also reinforces deeply entrenched stereotypes about women who sleep their way to the top.

When sexual favoritism is as pervasive and unfettered as it is alleged to have been at VSPW, no woman can get a fair evaluation on the basis of her abilities and work-related talents. That is the essence of sex discrimination, and the *Miller* court was right to put a stop to it.

A version of this chapter appeared on July 28, 2005, at writ.findlaw.com.

Update: A former CBS Broadcasting employee who worked on the popular game show The Price Is Right *cited the* Miller *case in support of her own sexual favoritism lawsuit. She argued, based on alleged relationships involving the CEO and other high-ranking executives, that there was an "unwritten rule" that women must date executives in order to get ahead. But without sufficient evidence to support her claim, she lost on summary judgment. See* Curling v. CBS Broadcasting, Inc., 2012 WL 182112.