FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM MANER, *Plaintiff-Appellant*, v. DIGNITY HEALTH, f/k/a Catholic Healthcare West, *Defendant-Appellee.*	No. 18-17159 D.C. Nos. 2:16-cv-03651-DGC 2:16-cv-04054-DGC OPINION

On Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted May 7, 2021
Portland, Oregon

Filed August 20, 2021

Before: William A. Fletcher, Carlos T. Bea, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Title VII

Affirming the district court's award of summary judgment to an employer in a terminated employee's Title VII action alleging unlawful sex discrimination and retaliation in a case that presented the question whether an employer who exhibits preferential treatment toward a supervisor's sexual or romantic partner discriminates against other employees because of their sex, the panel held that discrimination motivated by an employer's "paramour preference" is not unlawful sex discrimination against the complaining employee within the ordinary meaning of Title VII's terms.

Affirming summary judgment on the claim of unlawful sex discrimination, the panel explained that the plaintiff's "paramour preference" reading of Title VII fails the test set forth in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), for assessing whether an adverse employment action violated Title VII—whether changing the employee's sex would have yielded a different choice by the employer. The panel noted that the motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees. The panel wrote that the plaintiff's contention that "sex" means sexual activity contradicts the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

their place in the overall statutory scheme." The panel disagreed with the plaintiff's reading of *Bostock* to bar as unlawful sex discrimination any effects on the individual that can be correlated with sex discrimination. The panel also disagreed with the plaintiff's assertion that the "paramour preference" theory of Title VII liability finds support in an EEOC regulation interpreting the statute to prohibit sexual harassment in the workplace.

Affirming summary judgment on the claim that the employer unlawfully terminated the plaintiff in retaliation for opposing instances of favoritism arising out of the relationship between the plaintiff's supervisor and the supervisor's romantic partner, the panel did not need to decide whether it was unreasonable to believe that the supervisor's favoritism to his romantic partner violated the law, because the plaintiff failed to establish any causal connection between the claimed protected activity and the termination decision.

COUNSEL

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OPINION

BEA, Circuit Judge:

Title VII of the Civil Rights Act of 1964 prohibits covered employers from discriminating against any individual because of that individual's sex and from retaliating against those who oppose unlawful employment practices. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). The main question presented in this case is whether an employer who exhibits preferential treatment toward a supervisor's sexual or romantic partner discriminates against other employees because of their sex. We hold that discrimination motivated by an employer's "paramour preference" is not unlawful sex discrimination against the complaining employee within the ordinary public meaning of Title VII's terms. We affirm the district court's award of summary judgment to the employer on that basis and for the additional reasons expressed herein.

I. BACKGROUND

William "Bo" Maner worked as a biomedical design engineer in the obstetric and gynecological laboratory of Dr. Robert Garfield for several decades.[1] Garfield's lab depends upon a steady stream of grant awards to fund employee salaries and performs research with an eye toward publishing data and developing marketable intellectual property. Maner contributed to the work of Garfield's lab by recruiting

[1] The material facts in this appeal from summary judgment are largely undisputed. Where factual disagreement exists, we side with Maner as the non-moving party. *Salisbury v. City of Santa Monica*, 998 F.3d 852, 854 n.1 (9th Cir. 2021).

research subjects, analyzing project data, preparing grant applications, and assisting with patent filings.

From 1999 to 2008, Garfield's laboratory operated out of the University of Texas Medical Branch in Galveston, Texas. Maner's coworkers included Dr. Yuan Dong, a male researcher, and Dr. Leili Shi, a female researcher. Maner learned shortly after joining the lab that Garfield and Shi were engaged in a long-term romantic relationship that began as a workplace affair while Garfield was married to another woman. Garfield and Shi lived together and occasionally demonstrated physical affection at workplace events. Garfield brought Shi with him to research conferences to which other employees were not invited and conferred upon Shi a greater share of workplace opportunities related to publications and intellectual property than Maner felt she should have received.

In January 2008, Garfield decided to relocate the lab to an installation operated by Dignity Health in Phoenix, Arizona. Garfield persuaded Dignity Health to extend offers of employment at the new facility to the existing team. Maner accepted the offer and prepared to join Garfield, Dong, and Shi in Phoenix. That April, however, Maner was arrested at work in Galveston by state and local police for the alleged aggravated sexual assault of his seven-year-old daughter. Maner denied the allegations but pleaded guilty to a lesser included state law offense. Maner moved to Phoenix while the charges were pending and received several positive performance reviews and merit pay increases. For example, Garfield complimented Maner in one review as "solid as a rock" and thanked him for "[o]verall an outstanding performance."

In August 2010, a Texas trial court sentenced Maner to eight years' probation, the terms of which required Maner to

reside within the state of Texas and to check in monthly with probation officials in Galveston. In November 2010, Garfield approved a remote work arrangement whereby Maner would support Garfield's lab from a satellite office in Galveston while serving out his probation. Pursuant to this arrangement, Maner retained his position and promised to work full time on tasks conducive to independent and remote completion.

Garfield's lab soon began to suffer from a decline in the grant funding used to fund employee salaries and research projects. In 2010, Garfield recommended Dignity Health eliminate Dong's position to alleviate the lab's funding shortage. When the employer accepted this recommendation, Dong allegedly complained to Dignity Health officials about Garfield's ongoing romantic relationship with Shi. Dignity Health responded by assigning Dr. Ron Lukas to investigate the relationship. During an interview with Lukas about Garfield and Shi, Maner raised no concerns about the couples' relationship or its impact on other employees. Upon conclusion of the investigation, Dignity Health reassigned Shi to a different supervisor on paper but allowed Shi to continue working in the lab with Garfield.

In August 2011, Garfield submitted a highly negative review of Maner's performance since the beginning of the remote work arrangement. Garfield rated Maner as "Needs Improvement" across almost every evaluation metric and noted that although Maner "has helped occasionally on analysis of data . . . it is not always possible to contact him." Garfield recommended Maner "either return to Phoenix immediately or [that] his position be terminated." Maner responded to the performance evaluation in two emails sent to Dignity Health officials. The first was an email sent to

Lukas on August 27 ("the Lukas Letter") that urged Dignity Health to retain Maner's remote position because of his record of positive performance and the potential availability of new sources of grant funding. The second was a direct reply to the review on August 29 ("the Review Response") that challenged Garfield's claims, argued the negative review was prompted by funding concerns, and offered to take actions to improve his performance.

Dignity Health eliminated Maner's position on October 1, 2011, citing Maner's poor performance review and the lab's lack of funding. On October 11, Maner protested the termination in a letter sent to Dignity Health's Senior Vice President for Human Resources, Herbert Vallier ("the Vallier Letter"). In this post-termination letter, Maner challenged the rationales for his termination as pretextual and accused "management" of "fabricat[ing]" the negative performance evaluation, appropriating laboratory funds "in a nepotistic manner," "violat[ing] EEOC articles," and committing "unfair labor practices." Vallier responded on October 17 with a letter agreeing with the termination decision; Maner received his final paycheck on October 29, 2011.

Maner soon thereafter filed charges against Dignity Health before the federal Equal Employment Opportunity Commission ("EEOC"), the administrative agency tasked with enforcing Title VII's antidiscrimination provisions. *See* 42 U.S.C. § 2000e-4. The EEOC declined to act and issued a notice that confirmed Maner had exhausted administrative remedies as required by Title VII and permitted him to bring suit in federal court. Maner proceeded to file a complaint in the U.S. District Court for the District of Arizona. *See id.* § 2000e-5(e)(1), (f)(1).

In the operative complaint, Maner brought a Title VII sex discrimination claim alleging that Dignity Health protected Shi (a female employee) from the impacts of reduced lab funding by terminating Maner (a male employee). *See id.* § 2000e-2(a)(1). Maner also brought a Title VII retaliation claim alleging that Dignity Health terminated him for protesting Garfield's favoritism toward Shi at the expense of other employees. *See id.* § 2000e-3(a). To remedy these alleged violations, Maner sought compensatory and punitive damages, injunctive relief, and attorneys' fees and costs.

Dignity Health moved for summary judgment on the grounds that Maner failed to state a cognizable claim of sex discrimination, failed to establish a prima facie case of sex discrimination or retaliation, and failed to rebut the employer's explanations for the termination with evidence of pretext. The district court granted the motion and entered judgment for the employer. *See Maner v. Dignity Health*, 350 F. Supp. 3d 899 (D. Ariz. 2018).

As to the sex discrimination claim, the district court determined that Maner complained of discrimination based not on his sex, but on Garfield's preference for Shi as a romantic partner. The court construed the claim as arising under the "paramour preference" theory of Title VII liability, which posits that an employer engages in unlawful sex discrimination whenever a supervisor's relationship with a sexual or romantic partner results in an adverse employment action against another employee (here, against a male employee because of a female paramour). *Id.* at 903–04. The court noted that while our circuit had not yet foreclosed the availability of "paramour preference" claims under Title VII, nearly every other circuit and the EEOC had already rejected the theory as inconsistent with the statute and its implementing regulations. *Id.* at 904–05. Relying on these

out-of-circuit authorities, the court held that Maner's undisputed evidence of Garfield's relationship with and favoritism toward Shi did not establish a sex discrimination claim under Title VII. *Id.* at 906.

As to the retaliation claim, the district court concluded that Maner's references to "nepotism," EEOC articles, and labor law in the Vallier Letter of October 11, 2011, might reasonably be viewed by a jury as having put Dignity Health on notice that Maner opposed Garfield's relationship with Shi. *Id.* at 907. Relying on *Learned v. City of Bellevue*, 860 F.2d 928 (9th Cir. 1988), however, the court held that Maner failed to establish that he engaged in protected activity because his complaints in the Vallier Letter did not oppose an employment practice that "fairly f[e]ll within" the prohibitions of Title VII. *Maner*, 350 F. Supp. 3d at 909.

Maner timely appealed and filed a pro se opening brief. We subsequently appointed pro bono appellate counsel and requested additional briefing on whether romantic favoritism constitutes sex discrimination under Title VII. We have jurisdiction over this appeal from final judgment pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review grants of summary judgment de novo and may affirm on any ground supported by the record. *Oyama v. Univ. of Haw.*, 813 F.3d 850, 860 (9th Cir. 2015). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

III. DISCUSSION

A. Sex Discrimination Claim

As an initial matter, Maner concedes that the allegations and evidence in this case relate only to Garfield's romantic relationship with Shi and instances of favoritism toward Shi arising from that relationship. Maner never alleged that Garfield or anyone else at Dignity Health evinced animus against male employees, solicited sexual favors in exchange for job benefits, or created a hostile work environment through pervasive sexual harassment. Thus, we agree with the district court that Maner's sex discrimination claim can succeed only if Title VII bars employment decisions motivated by a "paramour preference."

In this appeal, we must decide whether the district court erred in adopting the consensus view among the other circuits and the EEOC that Title VII's prohibition on discrimination against any individual because of such individual's sex does not prohibit an employer's favoritism toward a supervisor's sexual or romantic partner. Maner argues that the text of Title VII gives rise to "paramour preference" claims because the statutory term "sex" encompasses sexual *activity* between persons as well as sex *characteristics*. Maner also argues that the "paramour preference" theory finds support in the Supreme Court's recent interpretation of Title VII in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Finally, Maner argues that Title VII's implementing regulations endorse the "paramour preference" theory as a form of sexual harassment that impacts third parties. For the following reasons, we reject these arguments and join the consensus view that an employer does not violate Title VII's prohibition on discrimination because of an individual's sex by favoring a supervisor's sexual or romantic partner over another

employee; that is, Title VII is not violated by exercising a "paramour preference" for one employee over another because of a workplace romance.

1.

Title VII makes it unlawful for a covered employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court and the lower courts have interpreted this language as giving rise to at least three types of sex discrimination claims: disparate treatment (adverse employment actions motivated by sex); quid pro quo sexual harassment (conditioning employment benefits on submission to sexual advances); and hostile work environment harassment (unwelcome sexual advances so severe as to alter the terms and conditions of employment). *See Bostock*, 140 S. Ct. at 1741; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). While each claim involves different elements, all proceed from the understanding that Title VII prohibits discrimination against an individual in whole or in part because of that individual's "protected characteristic." *See Bostock*, 140 S. Ct. at 1739 ("The only statutorily protected characteristic at issue in today's cases is 'sex.'"); *Vinson*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

The "paramour preference" theory of Title VII liability on which Maner relies would have us read the term "sex" broadly enough to encompass sexual activity between persons. Discrimination "because of . . . sex" includes adverse employment actions motivated by romantic and

sexual liaisons, the theory goes, because an employer who exhibits favoritism toward a supervisor's paramour over other employees has discriminated against other employees "because of" romantic relationships or sexual activity.

As the district court correctly noted, every circuit to consider the question has rejected the "paramour preference" reading of Title VII. The leading case is the Second Circuit's decision in *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986). In *DeCintio*, seven male employees alleged that their employer discriminated based on sex by passing them over for promotion in favor of a female employee who had an affair with their supervisor. *Id.* at 305–06. The court rejected the argument that "sex" as used in the statute meant "sexual liaisons" and "sexual attractions." *Id.* at 306. Instead, the court interpreted "sex" in context alongside "race," "color," "religion," and "national origin," the "other categories afforded protection under Title VII," as a characteristic and not as an activity. *Id.* Ultimately, the court held that sex "logically could only refer to membership in a class delineated by gender" and that the complaint failed to state a sex discrimination claim under Title VII because the male plaintiffs "faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but [the paramour] could be considered for the appointment." *Id.* at 306, 308.

The Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have since adopted *DeCintio*'s holding and rationale to reject "paramour preference" claims as a standalone source of sex discrimination liability under Title VII. *See Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 908–10 (8th Cir. 2006); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003); *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Womack v. Runyon*, 147 F.3d 1298,

1300 (11th Cir. 1998) (per curiam); *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369–70 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145, 149–50 (4th Cir. 1996); *see also Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs*, 716 F.3d 10, 14 (2d Cir. 2013) (per curiam) (reaffirming *DeCintio*, 807 F.2d 304).[2]

The Eighth and Eleventh Circuits relied in part on a guidance document in which the EEOC took the position that "Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships." *See Tenge*, 446 F.3d at 908; *Womack*, 147 F.3d at 1300 (citing Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990)). The guidance distinguished "paramour preference" claims from quid pro quo sexual harassment and hostile work environment claims recognized by Title VII and the EEOC regulations promulgated to implement the statute. EEOC Notice No. 915-048 (citing 29 C.F.R. § 1604.11). "An isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII," the guidance explained, "since both are disadvantaged for reasons other than their genders." *Id.* (citing, *inter alia*, *DeCintio*, 807 F.2d 304).

The district court adopted the holding of these out-of-circuit authorities after concluding, correctly, that our circuit has yet to pass definitively on the "paramour preference"

[2] The Third and Sixth Circuits have affirmed similar reasoning in unpublished dispositions. *See McDaniels v. Plymouth-Canton Cmty. Sch.*, 755 F. App'x. 461, 470 (6th Cir. 2018); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa.), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

theory. The closest case on point is *Candelore v. Clark County Sanitation District*, 975 F.2d 588 (9th Cir. 1992) (per curiam), in which the plaintiff alleged that her employer violated Title VII and its implementing regulations by treating another employee more favorably because of that employee's affair with a supervisor. *Id.* at 590. We distinguished between the plaintiff's favoritism claim and a hostile work environment claim. *Id.* Because the plaintiff failed to allege "benefits or opportunities denied as a result of discrimination," however, we affirmed the dismissal of the complaint without passing on the validity of the "paramour preference" theory. *Id.*; *see also id.* at 592 (Kleinfeld, J., concurring) ("Our decision should not be read as . . . establishing any doctrine on whether discrimination on account of a coworker's consensual romantic relationship with a supervisor violates Title VII.").[3]

2.

The question whether employers may be liable under Title VII for the consequences of favoritism toward a supervisor's sexual or romantic partner is squarely presented for decision in this case. Binding precedent and ordinary principles of statutory interpretation compel us to agree with the other circuits and the EEOC that Title VII does not "prevent employers from favoring employees because of

[3] Our circuit has refused to countenance the "paramour preference" theory of Title VII liability in unpublished decisions issued since *Candelore*. *See, e.g.*, *Pullela v. Intel Corp.*, 467 F. App'x 553, 554 (9th Cir. 2012) (in context of retaliation claim); *Knadler v. Furth*, 253 F. App'x 661, 664 (9th Cir. 2007); *Oleszko v. State Comp. Ins. Fund*, 10 F. App'x 419, 420 (9th Cir. 2001); *Parker v. Otis Elevator Co.*, 9 F. App'x 615, 617 (9th Cir. 2001) (in context of retaliation claim); *cf. Kieffer v. Tractor Supply Co.*, 815 F. App'x 142, 143 (9th Cir. 2020) (rejecting "paramour preference" claim for lack of evidence).

personal relationships . . . as long as [such favoritism] is not based on an impermissible classification." *Schobert*, 304 F.3d at 733 (citing *DeCintio*, 807 F.2d at 306). We hold that an employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Our analysis of the text of Title VII begins, and pretty much ends, with the Supreme Court's decision in *Bostock*. In *Bostock*, the Court interpreted the "ordinary public meaning" of the phrase "because of . . . sex" to determine whether employers violated the law by discharging employees on account of their sexual orientation and gender identity. 140 S. Ct. at 1738. The Court began by observing that the "[t]he question isn't just what 'sex' meant, but what Title VII says about it." *Id.* at 1739. Next, the Court proceeded to derive an all-purpose test for assessing whether an adverse employment action violated Title VII:

> If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.

Id. at 1741. Applying this test, the Court concluded that discrimination based on sexual orientation and gender identity is sex discrimination under Title VII. If an employer fires a male employee "for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." *Id.* Similarly, if an employer fires an employee who was born male but now identifies as female, "the employer

intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* In both cases, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* at 1741–42.

Maner's "paramour preference" reading of Title VII fails *Bostock*'s test. To determine whether an employer discriminated based on sex in violation of Title VII, we ask "if changing the employee's sex would have yielded a different choice by the employer." *Id.* at 1741. In the "paramour preference" scenario, the answer is no. The employer discriminates in favor of a supervisor's sexual or romantic partner and against all other employees because they are not the favored paramour, no matter the sex of the paramour or of the complaining employees. Changing the sex of the complaining employees would not yield a different choice by the employer because the identity of the favored paramour would remain the same. The motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees.

Maner's contention that "sex" means sexual activity also contradicts the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Statutory language surrounding a word or phrase with multiple possible meanings "typically establishes" which meaning controls or "that one of the possible meanings would cause the provision to clash with another portion of the statute." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 168 (2012).

Application of this principle leaves no room for doubt that Title VII's prohibition on discrimination because of an individual's "sex" does not encompass consensual sexual activity or romantic relations between persons.

To begin with, Title VII bars discrimination "against any individual . . . *because of such individual's* . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Use of the singular possessive "individual's" means "sex" is something the individual personally owns or possesses. *Cf. Barber v. Gladden*, 327 F.2d 101, 103 (9th Cir. 1964) (use of "the apostrophe 's', denot[es] possession or ownership" by the preceding term of those that follow). Ordinary speakers of English would say an individual possesses "sex" as a characteristic and that multiple "individuals" can "have sex." But no one would use "such individual's . . . sex" to refer to sexual activity between persons without converting sex into an adjective and appending a noun ("sex*ual* activity") or creating a compound noun ("sex *act*"). The United States Code is replete with examples of the latter formulations when referring to sexual relations between persons.[4] But statutes using "sex" as a standalone term, many of which cross-reference Title VII, similarly indicate through context that "sex" refers to an individual's characteristics, not an

[4] *See, e.g.*, 18 U.S.C. §§ 1737 (barring "sexually related mail matter"), 2241–44 (punishing "sexual abuse," "sexual act[s]," and "sexual conduct"); 2421–27 (punishing coercion, enticement, or transportation "to engage in . . . sexual activity" or "illicit sexual conduct"); 34 U.S.C. § 20913 (requiring "sex offender" registration for sex offenses); *cf.* FED. R. EVID. 412(a)(2), (b)(1)–(2) (restricting evidence of "a victim's sexual predisposition" and "a victim's sexual behavior").

activity.[5] *See* Reading Law 172–73 ("The presumption of consistent usage applies also when different sections of an act or code are at issue. . . . [T]he more connection the cited statute has with the statute under consideration, the more plausible the argument becomes.").

Moreover, Title VII's bar on sex discrimination appears within a list of related prohibitions on discrimination because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This is a textbook case for applying the principle of *noscitur a sociis*, "a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). When a word appears in a list of similar terms, each term should be read in light of characteristics shared by the entire list to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)); *see also* Reading Law 195 ("When several nouns . . . are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar."). The only common denominator among "race, color, religion, sex, or national origin" is that each refers to a characteristic that signals membership in a protected class. *See DeCintio*, 807 F.2d at 306 (concluding "'[s]ex' . . . logically could only refer to membership in a class delineated by gender"). Just as "such individual's race" refers to membership in a class and not participation in an

[5] *See, e.g.*, 42 U.S.C. § 2000e(k) (defining "because of sex" to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by" the same); 20 U.S.C. § 1681(a) (prohibiting discrimination in federally funded education programs "on the basis of sex" and distinguishing between institutions that admit "one sex" and "both sexes").

athletic event, so too does "such individual's . . . sex" refer to a characteristic and not sexual activity.

3.

Maner reads the Supreme Court's decision in *Bostock* to bar as unlawful sex discrimination any "effect[s] on an individual" that can be correlated with sex regardless of causation. Relying on the Court's statement that "our focus should be on individuals, not groups," 140 S. Ct. at 1740, Maner argues that *Bostock* requires the lower courts to find a Title VII violation whenever an employer's preferential treatment for a supervisor's paramour increases the statistical chance that male or female employees will be subject to an adverse employment action. If an employer protects a supervisor's female paramour from termination in a reduction in force, the argument goes, the chance that a male will be selected for termination increases because fewer females are available for termination. We disagree with this reading of *Bostock* and reject the implication that the consensus view among the circuits against the "paramour preference" theory of Title VII liability is inconsistent with *Bostock*'s rationale.

Maner's statistical argument flatly contradicts the Supreme Court's emphasis on the individual claiming discrimination. The gravamen of *Bostock*'s reasoning is that courts must focus on the causal relationship between an individual employee's sex and the employer's decision to take an adverse employment action against that individual. "So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* at 1739. Because this causal relationship is distinct in every case, "our focus should be on individuals, not groups." *Id.* at 1740.

It may be true that, all else being equal, protecting a female employee from termination in a reduction in force would make it more likely that a male will be terminated. But this statistical observation tells us nothing about the employer's motivation as to the individual ultimately selected for termination, who could end up being another female employee. Without evidence that the employer selected the employee for termination "because of such individual's . . . sex," we cannot know whether "the individual employee's sex play[ed] an unmistakable and impermissible role in the discharge decision" or whether the case is one of the "countless others where Title VII has nothing to say." *Id.* at 1741–42.

To be sure, the district court and the circuits which have previously addressed the "paramour preference" theory of Title VII liability lacked the benefit of the Supreme Court's decision in *Bostock*. But the Court relied in *Bostock* on the same well established Title VII principles that animated the outcome in those prior decisions. *Compare id.* at 1743–44 (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978)), *with DeCintio*, 807 F.2d at 307 (citing *Manhart*, 435 U.S. at 707 n.13). The other circuits effectively anticipated *Bostock*'s rationale by concentrating on the causal relationship between the plaintiff's sex and the employer's adverse employment decision. In *DeCintio*, for example, the court rejected the plaintiffs' sex discrimination claims because there was no "causal connection" between the plaintiffs' sex and the employer's decision to pass them over for promotion in favor of a supervisor's paramour. 807 F.2d at 307. Changing the plaintiffs' sex would not have produced a different outcome because they would still have "faced exactly the same predicament as that faced by any woman applicant for the promotion." *Id.* at 308.

4.

Finally, Maner asserts that the "paramour preference" theory of Title VII liability finds support in an EEOC regulation interpreting the statute to prohibit sexual harassment in the workplace. *See* 45 Fed. Reg. 74,677 (Nov. 10, 1980), *as amended* 64 Fed. Reg. 58,333 (Oct. 29, 1999). 29 C.F.R. § 1604.11(g) provides:

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

Maner reads this regulation to impose liability whenever a qualified employee is denied opportunities extended to a supervisor's sexual or romantic partner because, in Maner's view, any such relationship entails "submission" by that partner to sexual advances. We disagree.

Subparts (a) through (f) of the EEOC regulation are consistent with our case law recognizing two sources of Title VII liability for sexual harassment: quid pro quo sexual harassment claims and hostile work environment claims. *See Brooks*, 229 F.3d at 923. Employers engage in quid pro quo sexual harassment when an employee is subject to a "tangible employment action" and the employer "explicitly or implicitly condition[s] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054 (9th Cir. 2007) (cleaned up); *accord* 29 C.F.R.

§ 1604.11(a) (harassment occurs when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment"). Relatedly, employers create a hostile work environment by subjecting an employee to unwelcome verbal or physical conduct of a sexual nature that was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Craig*, 496 F.3d at 1055 (cleaned up); *accord* 29 C.F.R. § 1604.11(a) (harassment occurs when "conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment").

Subpart (g) extends the scope of Title VII liability for quid pro quo harassment in cases where "an individual's *submission* to *the employer's* sexual advances or requests for sexual favors" deprives third parties of job benefits for which they were otherwise qualified. 29 C.F.R. § 1604.11(g) (emphases added). On its own terms, the regulation does not apply until and unless an employer makes sexual advances or requests to which an employee submits. That means Title VII liability cannot attach for the indirect harms of quid pro quo harassment without evidence that the employer coerced *someone* into exchanging the "quid" of sexual favors for the "quo" of workplace benefits. *Cf. McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (explaining the concept of "quid pro quo" exchange in the context of political corruption). The regulation's "submission" requirement indicates such a case "clearly involves a lack of consent and implies a necessary element of coercion or harassment" that is absent from consensual workplace relationships. *DeCintio*, 807 F.2d at 307–08; *see also Tenge*, 446 F.3d at 909 (distinguishing "consensual sexual conduct with a supervisor" from "claims of coercion or widespread sexual favoritism").

The EEOC took the position in the 1990 Policy Guidance discussed above that the sexual harassment claims covered by 29 C.F.R. § 1604.11 "may take the form of implicit 'quid pro quo' harassment and/or 'hostile work environment' harassment." EEOC Notice No. 915-048. But the EEOC determined that "isolated" instances of favoritism toward a supervisor's consensual sexual or romantic partner fall outside the scope of Title VII and its implementing regulations. Workplace romance crosses the line into "widespread" sexual harassment under the terms of the EEOC regulation when, for example, "a message is implicitly conveyed that the managers view women as 'sexual playthings'" or "that the way for women to get ahead in the workplace is by engaging in sexual conduct . . . [as] a prerequisite to their fair treatment." *Id.*

Maner argues that the district court relied on the 1990 Policy Guidance in error because the document is an interpretive rule that cannot bind private parties. To be sure, courts may not defer to an agency's interpretation of its own regulation unless the regulation is genuinely ambiguous and the interpretation is reasonable, authoritative, and reflective of the agency's substantive expertise. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019). Moreover, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 2415 (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984)). But it is well established that courts may take judicial notice of an agency's position to the extent that it carries the "power to persuade." *Id.* at 2414 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The EEOC's 1990 Policy Guidance reflects the agency's longstanding and considered view on the meaning of Title VII and its

implementing regulations, and the district court did not err in referencing it as part of a broader statutory analysis.

Setting aside the fact that they are not controlling here, none of the district court authorities on which Maner relies persuade us that 29 C.F.R. § 1604.11(g) endorses the extension of Title VII liability to "paramour preference" claims. In *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983), the court found that an employer coerced an employee into submitting to sexual advances in exchange for a promotion which, in turn, was denied to another otherwise qualified employee. Submission to employer coercion distinguishes that case from the consensual relationships involved in "paramour preference" claims. *See DeCintio*, 807 F.2d at 307. Similarly in *Thompson v. Department of State*, 400 F. Supp. 2d 1, 20, 20 n.26 (D.D.C. 2005), the court held that an agency had the right to obtain the plaintiff's personnel files to assess whether the agency could be liable under Title VII because the plaintiff "submitted to her supervisor's sexual advances." By contrast, the court in *Prowell v. Oregon*, No. Civ. 03-80-HA, 2003 WL 23537979, at *7 (D. Or. Aug. 11, 2003), indeed cited 29 C.F.R. § 1604.11(g) to deny a motion to dismiss a claim based on favoritism toward a supervisor's romantic partner. But the court reached this conclusion with precious little analysis and without considering Title VII's text or then-existing out-of-circuit authorities reaching the opposite conclusion.

Here, Maner presented no evidence that Garfield implicitly or explicitly conditioned Shi's favorable treatment on the receipt of sexual favors or that Shi submitted to coercion by consenting to the couples' ongoing relationship. The existence of a consensual relationship between a supervisor and an employee is insufficient as a matter of law to establish a claim for sex discrimination under Title VII

and its implementing regulations. *See Craig*, 496 F.3d at 1054 (requiring the employer "condition" a benefit on the "acceptance of sexual conduct" (cleaned up)); *Brooks*, 229 F.3d at 923 ("A quid pro quo claim . . . occurs when a supervisor demands sexual favors in return for a job benefit.").

* * *

Workplace favoritism toward a supervisor's sexual or romantic partner is certainly unfair to similarly situated workers and more than likely harms morale. But "Title VII is not a 'general civility code,'" and employment practices are not unlawful simply because they are unwise. *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998 (9th Cir. 2010) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). For the foregoing reasons, we agree with the district court and the broad consensus of out-of-circuit authorities that "paramour preference" claims are not cognizable under Title VII's prohibition on sex discrimination.

B. Retaliation Claim

Maner's retaliation claim asserts that Dignity Health terminated him in retaliation for opposing instances of favoritism arising out of the relationship between Garfield and Shi. Title VII prohibits retaliation against any individual "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). To establish a retaliation claim, the plaintiff must show that he "engaged in a protected activity; [] suffered an adverse employment action; and [that] there was a causal connection between the two." *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008).

The district court held that Maner failed to establish the protected activity element of his retaliation claim because the conduct he opposed did not "fairly fall within the protection of Title VII." *Maner*, 350 F. Supp. 3d. at 909 (citing *Learned*, 860 F.2d 928). While the conduct alleged in this case does not violate Title VII, our precedents have long recognized that the statute protects an employee who opposes employer conduct in the mistaken but reasonable belief that the conduct is unlawful. *See Learned*, 860 F.2d at 932; *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). We need not decide whether it was unreasonable to believe Garfield's favoritism toward Shi violated the law, however, because we conclude that Maner failed to establish any causal connection between the claimed protected activity and the termination decision.

To establish a causal connection between opposition to employer conduct and a retaliatory action, the plaintiff must show "the defendant was aware that the plaintiff had engaged in protected activity." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003). The record leaves no doubt that Dignity Health eliminated Maner's position on October 1, 2011. Logically, only events taking place before the decision to take an adverse employment action and known to the employer at the time could have caused the employer's decision. Maner protested the termination in the Vallier Letter of October 11, received a response agreeing with the decision on October 17, and received his last paycheck from the employer on October 29. None of these post-termination events could have played a causal role in the adverse action here.

The district court concluded, and we agree, that Maner first voiced opposition to Garfield's relationship with Shi in the Vallier Letter of October 11. *Maner*, 350 F. Supp. 3d. at

907. While the statements in the Vallier Letter lacked detail, a reasonable jury could conclude that Maner put Dignity Health on notice of his opposition to workplace favoritism by referencing "EEOC articles," "unfair labor practices," and the "nepotistic" allocation of funds. However, the statements in the Vallier Letter could not have motivated Maner's termination because they clearly post-date the October 1 termination decision.

Communications between Maner and Dignity Health officials prior to October 1 in which Maner could have raised the issue contain no references to "nepotism" or favoritism. Maner concedes that he never complained about Garfield's relationship with Shi during Lukas's investigation of the lab after Dong's termination. Neither Maner's Review Response nor the Lukas Letter referenced sex discrimination, sexual harassment, preferential treatment for Shi, or any discrimination or labor laws. These communications were insufficient to put the employer on notice of Maner's opposition to Garfield's relationship with Shi. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1035 (9th Cir. 2006) (affirming summary judgment because the protected activity occurred after the challenged adverse employment action); *Raad*, 323 F.3d at 1197 (affirming summary judgment because of the lack of evidence that employers were aware of the prior protected activity). Because there is no evidence that retaliation motivated Dignity Health's termination decision, Maner failed to establish the "causal connection" element of his retaliation claim.

IV. CONCLUSION

Maner failed to adduce evidence sufficient to support Title VII claims for sex discrimination or retaliation. We

therefore **AFFIRM** the district court's award of summary judgment to Dignity Health.