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Covenants Not to Compete and Liquidated Damages Clauses: Diagnosis and Treatment For Physicians

Michael R. Sullivan
University of South Carolina

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Note

Hostile Environments and The First Amendment: What Now After *Harris* and *St. Paul*?

James H. Fowles, III*

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I. INTRODUCTION

Voltaire once said, "I disapprove of what you say, but I will defend to the death your right to say it."¹ Many would place this philosophy at the heart of American free speech doctrine. Nevertheless, for equality's sake, support

* B.S. 1982, United States Naval Academy; candidate for J.D., May 1995, University of South Carolina. The author would like to thank Professor Thomas R. Haggard for his invaluable assistance in the creation of this article. His patience knew no bounds.

1. THE OXFORD DICTIONARY OF QUOTATIONS 717 (Angela Partington ed., 4th ed. 1992).

for the principle is waning. To proscribe hostile work environments pursuant to Title VII of the Civil Rights Act of 1964,² our legal system has constructed a doctrine that will severely test the First Amendment.³

This Note examines the First Amendment implications of hostile environment law.⁴ Part II examines the origin and development of the hostile environment theory. Part III evaluates the standing and state action requirements in hostile environment situations. Finally, Part IV analyzes the hostile environment theory under various First Amendment doctrines.

II. ORIGIN AND DEVELOPMENT OF TITLE VII'S HOSTILE ENVIRONMENT THEORY

Title VII prohibits an employer from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁵ Although the statute does not expressly proscribe discriminatory harassment, the courts eventually held that such behavior violates Title VII.⁶

The statute’s “because of” language supports these holdings. Harassment of a female employee because of poor work performance is not actionable. However, Title VII prohibits harassment of an employee because she is female. Thus, if the employer would not have harassed a poorly performing male in the same circumstances, the employer has discriminated by harassing the female.

In 1980 the Equal Employment Opportunity Commission (EEOC) promulgated sexual harassment guidelines.⁷ In 1982 the Eleventh Circuit

2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

3. U.S. CONST. amend. I.

4. This Note focuses primarily on sexually hostile environments. However, because of the common origins of the various hostile environments, the same principles also apply to other forms of harassment. *Cf. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (relying on cases prohibiting harassment based on race, religion, and national origin to expand the scope of Title VII to prohibit sexual harassment).

5. 42 U.S.C. § 2000e-2(a)(1) (1988).

6. *See, e.g., Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin); *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971) (race), *cert. denied*, 406 U.S. 957 (1972); *Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (religion). In early sexual harassment cases, judges often held that Title VII did not apply to sexually harassing behavior. *See, e.g., Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 235-36 (N.D. Cal. 1976), *rev’d*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 162-63 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

7. 45 Fed. Reg. 74,677 (1980). The guidelines provide in part:

indicated its approval of these guidelines in *Henson v. City of Dundee*.⁸ The court acknowledged the two forms of sexual harassment: "quid pro quo" and "hostile environment."⁹

Quid pro quo harassment occurs when an employer conditions a job benefit or detriment on whether an employee submits to sex with the employer.¹⁰ The male employer who fires a female employee for rebuffing his sexual advances commits a quid pro quo violation.¹¹

Few free speech concerns arise from quid pro quo harassment. The behavior is extortion and should receive no First Amendment protection.¹²

Unlike quid pro quo actions, hostile environment claims do not require a demand for sex in return for favorable job treatment.¹³ Instead, the hostile environment theory treats the work climate as a condition of employment.¹⁴

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1994) (footnote omitted).

8. 682 F.2d 897, 903 & n.7 (11th Cir. 1982); cf. *Meritor Sav. Bank*, 477 U.S. at 65 ("As an 'administrative interpretation of the Act by the enforcing agency,' [EEOC] Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance.'" (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (stating that EEOC guidelines "are 'entitled to great deference'") (quoting *Griggs*, 401 U.S. at 433-34) (citation omitted)).

9. *Henson*, 682 F.2d at 908 n.18 (citing CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 32-47 (1979); Herna H. Kay & Carroll M. Bradsky, *Bank Review Protecting Women from Sexual Harassment in the Workplace*, 58 TEXAS L. REV. 671 (1980).

10. *E.g.*, *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (citations omitted). In quid pro quo actions, employers are held strictly liable for a supervisor's actions. *E.g.*, *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.) (citing *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986)), *cert. denied*, 113 S. Ct. 831 (1992).

11. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990).

12. *See BARBARA LINDEMANN & DAVID D. KADUE*, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 592-93 (1992).

13. Quid pro quo demands can create a hostile environment. If a harasser threatens a job detriment with a demand for sex, but then fails to carry out the threat once the victim refuses to comply, a hostile environment will arise. *Cf. Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 n.1 (3d Cir. 1977) (acknowledging plaintiff's alternate theory of hostile environment, but finding it unnecessary to pass on its merits).

14. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986); cf. *Harris v. Forklift Sys.*, 114 S. Ct. 367, 371-72 (1993) (Scalia, J., concurring) (acknowledging that *Meritor* defined the work environment as a condition of employment).

Employers may not discriminate in a condition of employment because of sex.¹⁵ Therefore, any detrimental alteration in an employee's work environment because of gender violates Title VII.

The United States Supreme Court upheld Title VII hostile environment claims in *Meritor Savings Bank v. Vinson*.¹⁶ The Court noted a racial discrimination case as the origin of the theory¹⁷ and then equated sexual and racial harassment:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹⁸

Next, the Court defined an actionable hostile environment. To violate Title VII, the sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁹

15. 42 U.S.C. § 2000e-2(a)(1) (1988); see *Harris*, 114 S. Ct. at 370 (1993).

16. 477 U.S. at 66 (1986).

17. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the Fifth Circuit held that Title VII may proscribe a hospital's practice of racially segregating patients. The court allowed an EEOC investigation to continue in order to determine if the practice created a work environment racially hostile to minority employees. *Id.* at 240-41. Before 1980, one court discussed the concept of a sexually hostile environment, but did not reach the merits of the claim. See *Tomkins*, 568 F.2d at 1046 n.1. After the EEOC promulgated its sexual harassment guidelines, see *supra* note 7 and accompanying text, the theory surfaced in the lower federal courts. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 901-04 (11th Cir. 1982).

18. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902). The Court also noted with approval hostile environment claims based on national origin and religion. *Id.* at 66 (citing *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976)).

19. *Id.* at 67 (alteration in original) (quoting *Henson*, 682 F.2d at 904). The Court also provided other guidance. First, a plaintiff's consensual sex with an alleged harasser does not shield the employer from liability. See *id.* at 68. The heart of a sexual harassment claim is that the harassed employee found the alleged sexual advances "unwelcome." *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)). The finder of fact must inquire whether an employee's conduct indicates that the sexual advances were unwelcome, not whether the participation in sex was voluntary. *Id.*

Second, the Court addressed, but refused to establish, definitive employer liability standards. *Id.* at 72. The Court stated that "courts [are] to look to agency principles for guidance in this area." *Id.* The Court noted that some common-law agency principles may not transfer neatly into the Title VII hostile environment analysis. *Id.* In addition, a sexual harassment grievance procedure left unused by the victim does not per se insulate an employer

The federal circuits developed various hostile environment tests.²⁰ The basic analysis examines for objective and subjective harm, "considering the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff bringing the claim."²¹

Recently, in *Harris v. Forklift Systems, Inc.*,²² the Supreme Court resolved a circuit court split over the level of harm that can create a hostile environment.²³ Some courts demanded that a plaintiff receive a severe

from liability. *Id.* at 72-73. Finally, the court rejected strict employer liability for the harassment. *See id.* at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958)).

20. *See, e.g.*, *Boutros v. Canton Regional Transit Auth.*, 997 F.2d 198, 203 (6th Cir. 1993) (quoting *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)); *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992) (citing *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989)); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 195 (5th Cir. 1991) (citing *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1987)), *cert. denied*, 112 S. Ct. 968 (1992); *cf. Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) (citing *Henson*, 682 F.2d at 903-04); *Henson*, 682 F.2d at 903-05 (11th Cir. 1982); *BEOC v. Horizons Hotel Corp.*, 831 F. Supp. 10, 14 (D.P.R. 1993) (citing *Meritor*, 477 U.S. at 66-73).

The Third Circuit formulated its test in *Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990): "(1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." *Id.* at 1482 (citing *Rabidue*, 805 F.2d at 619-20) (footnote omitted).

To attach respondeat superior liability, the plaintiff "must show that the employer knew or should have known of the harassment . . . and failed to take prompt remedial action." *Henson*, 682 F.2d at 905 (citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986)). For a review of the employer liability issue, see Maria M. Carillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41 (1992-93); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991).

21. *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271-72 (7th Cir. 1991) (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989); *cf. e.g., Andrews*, 895 F.2d at 1482 (using a reasonable woman rather than a reasonable person standard); 58 Fed. Reg. 51,266, 51,267 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993) (providing that consideration shall be given to the victim's perspective when determining whether the reasonable person standard has been met). The reasonable woman standard has generated much discussion. *See, e.g.*, Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Women" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & INEQ. J. 285 (1992); Cheryl L. Dragel, Note, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard Be Adopted?*, 11 J.L. & COM. 237 (1992).

22. 114 S. Ct. 367 (1993).

23. *Id.* at 370.

psychological injury.²⁴ Others required an unreasonable interference with the plaintiff's work.²⁵

The Court resolved the conflict by taking "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."²⁶ Justice O'Connor wrote for the Court in holding that an employer violates Title VII "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.'"²⁷

After *Harris*, a sexually abusive environment that does not interfere with a plaintiff's work may nevertheless serve as the basis for a hostile work environment claim.²⁸ Justice O'Connor said:

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, *even without regard to these tangible effects*, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to *employees* because of their . . . gender . . . offends Title VII's broad rule of workplace equality.²⁹

Thus, a hostile environment can occur without any tangible effect on the plaintiff.

Justice Scalia acknowledged, "Accepting *Meritor's* interpretation [that the work environment is a condition of employment] as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."³⁰

24. *See, e.g.*, *Brooms*, 881 F.2d at 418-19; *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

25. *See, e.g.*, *Ellison v. Brady*, 924 F.2d 872, 878 n.8 (9th Cir. 1991). The *Ellison* decision also addressed the issue of the reasonable woman standard. *See id.* at 878-81.

26. *Harris*, 114 S. Ct. at 370. The employer, Forklift Systems, Inc., argued the First Amendment against adopting a merely offensive standard of harm. Brief for Respondent, 1993 WL 302223, at *50-*51 (June 1, 1993). Although the Court did not discuss the First Amendment concern, it did reject the merely offensive standard. *See Harris*, 114 S. Ct. at 370.

27. *Harris*, 114 S. Ct. at 370 (alteration in original) (citations omitted) (quoting *Mentor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

28. *See id.* at 371.

29. *Id.* at 370-71 (emphasis added).

30. *Id.* at 372 (Scalia, J., concurring). *But cf. id.* at 372 (Ginsberg, J., concurring) ("[T]he adjudicator's inquiry should center, *dominantly*, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance." (emphasis added)).

Hostile environment cases require a “totality of the circumstances” analysis. The finder of fact must consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”³¹ In addition, the Court retained the objective and subjective standards of harm.³²

The First Amendment has not fared well in hostile environment cases. Courts often fail to address apparent First Amendment issues.³³ Even when discussed, the First Amendment analysis is sparse.³⁴ The following cases present a few examples.

Courts often use their coercive power to suppress views found repugnant by the court. In *Stair v. Lehigh Valley Carpenters Local Union No. 600*³⁵ a federal court enjoined a union for creating a sexually hostile work environment.³⁶ The union purchased and distributed calendars containing pictures of nude women. The calendars also were posted at work sites. The calendars humiliated and embarrassed the plaintiff and affected her ability to communicate on the job.³⁷ The court defined the calendars as per se evidence of

31. *Id.* at 371.

32. *Harris*, 114 S. Ct. at 370 (“Conduct that [does not] create an objectively hostile or abusive work environment . . . is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, . . . there is no Title VII violation.”). The Supreme Court did not explicitly address the standard of the reasonable woman. The majority and both concurring opinions consistently referred to the “reasonable person,” *see id.* at 370-72, except when quoting the district court. *See id.* at 369-70 (“The court found that some of Hardy’s comments ‘offended [Harris], and would offend the *reasonable woman* A *reasonable woman manager under like circumstances* would have been offended by Hardy’” (emphasis added) (citations omitted) (alteration in original)). In not addressing the district court’s use of the reasonable woman standard, the Supreme Court may implicitly agree with the reasonable woman rule. Conversely, the Court’s express use of reasonable person implies acceptance of the reasonable person option. Thus, the issue remains unresolved.

33. *See, e.g., Stair v. Lehigh Valley Carpenters Local Union No. 600*, 62 Empl. Prac. Dec. (CCH) ¶ 42,602 (E.D. Pa. 1993), *aff’d*, No. 93-1738 (3d Cir. Nov. 7, 1994).

34. *See, e.g., Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993).

35. 62 Empl. Prac. Dec. (CCH) ¶ 42,602.

36. *See id.* at 77,270. Title VII also applies to unions. *See* 42 U.S.C. § 2000e-2(c) (1988) (“It shall be an unlawful employment practice for a labor organization—(1) to . . . discriminate against, any individual because of his . . . sex . . .”).

37. *Stair*, 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,267-68.

intentional discrimination.³⁸ The court then held that the calendars created a hostile environment.³⁹

The court attacked the union's views with its holding. First, the judge emphasized that the calendar's expressive content "*conveys the message* that [women] do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in the environment. That Title VII outlaws *such conduct* is beyond peradventure."⁴⁰ Thus the judge subtly, and without First Amendment discussion, characterized the calendar's message as conduct. Faced with conduct instead of speech, the court then enjoined the hostile environment.⁴¹

The court's injunction directly suppressed the union's expression.⁴² However, the injunction did not expressly prohibit the printing or publication of the calendars.⁴³ Perhaps the court recognized the First Amendment furor that awaited a prior restraint.⁴⁴ But the judge effectively imposed that restraint. The judge noted the calendar as the only evidence of a hostile environment and then enjoined that environment. The union had the choice to either discontinue publishing the calendars or violate the injunction. This choice constructively created a prior restraint.

38. *See id.* at 77,267-68 ("The intent to discriminate on the basis of sex in cases involving pornographic materials is 'implicit' and courts should recognize this 'as a matter of course.'") (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)). *Andrews* is distinguishable. In *Andrews* the Third Circuit Court of Appeals defined posted pornography as intentionally discriminatory. *See* 895 F.2d at 1482 n.3. The court also based its decision on other harassing conduct. *See id.* at 1486. In *Stair* the calendars provided the only proof of a hostile environment. *See* 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,267-69.

39. *See Stair*, 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,269.

40. *Id.* at 77,268 (emphasis added) (quoting *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991)).

41. *See id.* at 77,270. The injunction in *Stair* also forced the union to adopt a sexual harassment policy. *Id.*

42. The judge pointed out that "[t]he presence of . . . pornographic calendars detrimentally affected the plaintiff." *See id.* at 77,268. The union argued that local stores sold more graphic pictures. *Id.*

43. *See id.* at 77,270.

44. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."); *McLaughlin v. New York*, 784 F. Supp. 961, 977 (N.D.N.Y. 1992) ("In . . . arguing [for relief in the form of a prior restraint], plaintiff asks the court to ignore the overwhelming precedent militating against imposition of such 'gag orders.'" (citations omitted)); *State v. I, A Women—Part II*, 191 N.W.2d 897, 902-03 (Wis. 1971) ("[A]n invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the first amendment without there first being a judicial determination that the material does not qualify for first-amendment protection." (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *Near v. Minnesota*, 283 U.S. 697 (1931))).

In addition, the judge forced the union to adopt the government's viewpoint on sexist ideas. The court required the union to adopt a sexual harassment policy and to provide education about sexual harassment and the union's policy for union members.⁴⁵ The pornographic calendars were the only discriminatory conduct. Therefore, the court's demand for training forces the union to express the government's view on pornography.

Even when courts recognize a First Amendment issue, the analysis often is sparse. In *Jenson v. Eveleth Taconite Co.*⁴⁶ a class of female mine workers prevailed on a sexual harassment hostile environment claim. The court found as dispositive some posted pornographic materials, verbal and physical conduct, and the stereotypical views expressed by male employees.⁴⁷ Although the court acknowledged the workers's right to hold those views, the opinion emphasized the illegality of expressing those beliefs in the workplace.⁴⁸ The court then tersely addressed the First Amendment. The court recognized that an expression may be "swept up" in the illegal conduct; thus, no First Amendment violation would exist.⁴⁹ The discussion was limited to a footnote.⁵⁰

One court has acknowledged that the First Amendment may have more than a peripheral impact on hostile environment claims, especially those based on pure speech. In a case involving an allegedly sexually hostile environment created by male members of a union picket line, a New Jersey appellate court clearly confronted the free-speech issue.⁵¹ Although upholding the trial court's refusal to grant the union summary judgment on the hostile environment issue, the appellate court recognized that "the parties will have to deal with a difficult legal issue Because the acts of harassment which the plaintiffs allege were solely verbal, this case requires the resolution of an apparent conflict between [the hostile environment theory] and the free speech guaranty of the First Amendment."⁵²

45. *Stair*, 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,270.

46. 824 F. Supp. 847 (D. Minn. 1993).

47. *See id.* at 879-83. The court noted that an absence of expert testimony on stereotypes would not have changed the result. *See id.* at 882-83.

48. *See id.* at 884 n.89; *see also* *Parton v. GTE North, Inc.*, 802 F. Supp. 241, 252 (W.D. Mo. 1991) (listing evidence of sexual harassment and noting separately the expressed bias of the plaintiff's supervisor), *aff'd*, 971 F.2d 150 (8th Cir. 1992).

49. *See Jenson*, 824 F. Supp. at 884 n.89 (quoting *R.A.V. v. City of St. Paul*, Minn., 112 S. Ct. 2538, 2546 (1992)). *But see* *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430 (C.D. Cal. 1994) ("The County is, of course, free to proscribe offensive behavior or language which may result from the 'sex-role stereotyping.' Nevertheless, the County may not proscribe the communication of 'sex-role stereotyping' simply because it disagrees with the message.").

50. *See id.*

51. *Baliko v. Stecker*, 65 Fair Empl. Prac. Cases (BNA) 899, 903 (N.J. Super. Ct. App. Div. 1994).

52. *Id.* (declining to further address the free speech question because of the lack of a factual

III. STANDING, STATE ACTION, AND FIRST AMENDMENT CLAIMS IN HOSTILE ENVIRONMENT SITUATIONS

When employee speech creates a hostile environment, the employer's standing to assert the employee's First Amendment rights is an issue.⁵³ In addition, the First Amendment potentially applies if an employer suppresses speech and if the employees claim First Amendment protection. Then, the issue is whether the employer who suppressed the speech was a "state actor."⁵⁴

A. Pleading Employee Free Speech Rights as a Defense to a Hostile Environment Claim

When employee speech creates a hostile environment, employers have standing to assert a First Amendment defense. The "standing to sue" doctrine requires that a party advancing a claim has sufficient stake in the outcome to warrant judicial resolution.⁵⁵ The issue addresses the jurisdiction of the federal courts to hear the case.⁵⁶ The party asserting standing must satisfy constitutional and prudential requirements.⁵⁷

The Supreme Court has provided three constitutional limits.⁵⁸ "First, the plaintiff must have suffered an 'injury in fact, . . .'"⁵⁹ Second, a causal connection between the injury and the challenged conduct must exist.⁶⁰

record on the issue).

53. If the employer's own speech creates the hostile environment, the employer has standing to assert a First Amendment defense. *Cf.* *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) ("No First Amendment concern arises when the employer has no intention to express itself" (citing *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y.1981))).

54. State action exists, by definition, if the government is the employer. *Cf.* *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987) (recognizing that in the context of a § 1983 action, "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech") (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)); *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430 (C.D. Cal. 1994) (enjoining fire department's ban on reading of *Playboy* in fire station).

55. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (quoting *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83 (1968)).

56. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 697 (E.D. Pa. 1973).

57. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

58. These limits arise from the "case or controversy" requirement of Article III of the Constitution. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citing *Allen v. Wright*, 468 U.S. 737 (1984)).

59. *Lujan*, 112 S. Ct. at 2136 (citing *Allen*, 468 U.S. at 756; *Warth*, 422 U.S. at 508; *Sierra Club*, 405 U.S. at 740-41 n.16).

60. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Finally, a favorable decision must “likely,” as opposed to speculatively, redress the injury.⁶¹

In a hostile environment suit, the employer will satisfy the constitutional criteria for standing. First, the employer will suffer an injury in fact. An injury in fact is “an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent.’”⁶² If an injunction bans a hostile environment, but also violates the First Amendment, compliance with the order illegally injures the employer. To comply, the employer must establish policies, provide training, and monitor results. Damage awards also cause injury. Thus, a court decision that violates the First Amendment invades the employer’s legal interest in company assets.

Second, the conduct the employer complains of is causally connected to the injury. The party asserting standing must identify a nexus between his injury and the challenged conduct of the opposing party.⁶³ The injury must not be “‘th[e] result [of] the independent action of some third party not before the court.’”⁶⁴ If employees create a hostile environment, the court may enjoin the defendant-employer and award damages. If the court finds for a plaintiff over the employer’s valid First Amendment defense, the court and the plaintiff-employee injure the employer. Thus, the parties that cause the injury are before the court.

The employer will satisfy the final constitutional requirement. The relief provided by a favorable decision will likely, as opposed to speculatively, remedy the alleged injury of the party asserting standing. If the court allows the employer to assert successfully a First Amendment defense to a hostile environment claim, no liability attaches, and the employer will suffer no injury.⁶⁵

The employer also will overcome the nonconstitutional restrictions on standing. In *Warth v. Seldin*⁶⁶ the Supreme Court provided two prudential limits:

First, . . . when the asserted harm is a “generalized grievance” shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged [sufficient injury], this Court has held that the plaintiff generally must assert his own legal rights and interests, and

61. *Id.* (quoting *Simon*, 426 U.S. at 38, 43).

62. *Id.* (citations omitted).

63. See *Lujan*, 112 S. Ct. at 2136 (citing *Simon*, 426 U.S. at 41-42).

64. *Id.* at 2136 (quoting *Simon*, 426 U.S. at 38, 43 (alteration in original)).

65. The imposition of hostile environment liability is not the disputed conduct. The employer complains of hostile environment liability imposed in violation of the First Amendment.

66. 422 U.S. 490 (1975).

cannot rest his claim to relief on the legal rights or interests of third parties.⁶⁷

The generalized grievance restriction is not an issue. The employer does not share his injury with anyone.

The prohibition against third-party standing presents a larger obstacle. When a party asserts a third party's right, standing becomes more difficult to establish.⁶⁸ The employer who asserts an employee's First Amendment right is not subject to the government's suppression of speech; the employee is.⁶⁹ Thus, the third-party limitation apparently precludes standing.

Nonetheless, the courts have jurisdiction to hear the employer's defense because hostile environment liability indirectly violates employees' First Amendment rights. The Supreme Court permits "standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of the third parties' rights."⁷⁰ If a court finds a hostile environment, the employer must suppress the harassing speech of coworkers. If the employer does not, additional liability likely will accrue through contempt proceedings or further hostile environment litigation. Thus, the government indirectly suppresses employee speech, giving the employer standing to assert the employee's First Amendment rights.

In *Robinson v. Jacksonville Shipyards*⁷¹ a United States district court in Florida did not agree. The court issued an injunction against an employer who asserted a First Amendment defense.⁷² The judge emphasized that the employer neither expressed the disputed language nor adopted the speech as its own.⁷³

67. *Id.* at 499 (citations omitted).

68. *Lujan*, 112 S. Ct. at 2137 (citing *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Simon*, 426 U.S. at 44-45; *Warth*, 422 U.S. at 505).

69. *But see infra* notes 73, 207 and 208 and accompanying text (suggesting that governmental coercion forcing an employer to suppress employee speech constitutes a direct violation of employer speech rights).

70. *Warth*, 422 U.S. at 510 (citing *Doe v. Bolton* 410 U.S. 179 (1973); *Griswold v. Connecticut* 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953)). The remaining third-party exceptions do not readily apply to the employer who asserts employee speech rights. *See id.*

71. 760 F. Supp. 1486 (M.D. Fla. 1991).

72. *See id.* at 1534-37 (stating that "[t]he first amendment guarantee of freedom of speech does not impede the remedy of injunctive relief" but conducting no First Amendment analysis).

73. *See id.* at 1534 (citing *BEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 610 & n.17 (S.D.N.Y. 1981)). Compare *Robinson* with *Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991). Professor Browne, drawing on *Wooley v. Maynard*, 430 U.S. 705 (1977), states that regardless of whether the employer is speaking or adopts the speech of the co-workers, the employer is actually pleading its own First Amendment right: "The government may no more compel a person to censor the protected speech of those over whom he has control on the ground that the

Another federal court did not follow *Robinson* on this issue. In *Jenson v. Eveleth Taconite Co.*⁷⁴ the United States District Court for the District of Minnesota implicitly found standing for the employer. In response to a First Amendment defense based on employee speech, the court recognized that the Constitution permits governmental suppression of workplace speech through Title VII.⁷⁵ By thus addressing the First Amendment issue, the court tacitly acknowledged employer standing.

B. First Amendment Claims Against Employers

If an employer suppresses workplace speech to prevent a hostile environment, the workers may possibly assert a First Amendment claim against the employer. "State action" becomes an issue if the employer is a private entity. If the employee works for the government, the state action issue disappears, and other concerns arise.⁷⁶

Normally, private employees receive no First Amendment protection for their workplace speech. A private employer is not the government, and the government must suppress the speech before the First Amendment will apply.⁷⁷ Under certain circumstances, however, state involvement so permeates private action that the private party becomes a state actor and the constitutional limits apply.⁷⁸

government finds it offensive, than the government may compel a person to express a message that he chooses not to express." Browne, *supra* at 511-12.

74. 824 F. Supp 847 (D. Minn. 1993).

75. *See id.* at 884 n.89.

76. *See infra* notes 194-97 and accompanying text (discussing the public employee speech doctrine).

77. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.") (citing *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)).

78. *See, e.g., Andrews v. Federal Home Loan Bank*, 998 F.2d 214, 217 (4th Cir. 1993). State action occurs under four theories:

(1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state [(the coercion theory)]; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor [(the delegation theory)]; (3) when the state has delegated a traditionally and exclusively public function to a private actor [(the public functions theory)]; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen [(the government intervention theory)].

Id. The final three theories do not readily apply in the private-employee speech context.

The government intervention theory raises an interesting question, however. State action occurs with government intervention if the government commits an unconstitutional act while enforcing a private citizen's right. *Id.* In addition, the private party "may be held accountable for invoking the state's authority." *Id.* at 219. If a district court enjoins workplace speech in violation of the First Amendment, the government commits an unconstitutional act. Does an

The employer who suppresses workplace speech in response to a court order becomes a state actor. If the state commands a particular result, it reserves the power to decide the outcome and removes the decision from the realm of private choice.⁷⁹ Clearly, an injunction or damage award that forces an employer to limit workplace speech is an act of governmental coercion.⁸⁰ The employer must either comply or face further penalty.⁸¹

employee with suppressed speech now have a cause of action against the harassed employee whose suit caused the First Amendment violation? The harassed employee invoked the state's authority to enforce an individual right to a discrimination-free environment. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982) (holding that a joint action between a private party and the state that violates due process of law gives rise to a civil rights action against the private party).

79. *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (stating the "coercion" theory of state action).

80. *Cf. Stair v. Lehigh Valley Carpenters Local Union No. 600*, 62 Empl. Prac. Dec. (CCH) ¶ 42,602 (E.D. Pa. 1993) (enjoining union to adopt sexual harassment policy and to avoid creating hostile environment), *aff'd*, No. 93-1738 (3d Cir. Nov. 7, 1994); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888-89 (D. Minn. 1993) (requiring the employer to adopt a sexual harassment policy); *Cronin v. United Serv. Stations*, 809 F. Supp. 922, 933 (M.D. Ala. 1992) (compelling employer to adopt policies and procedures to rid the workplace of its sexually hostile environment); *Saxton v. American Tel. & Tel. Co.*, 785 F. Supp. 760, 766-67 (N.D. Ill. 1992) (allowing employer to avoid hostile environment liability because employer transferred alleged harasser), *aff'd*, 10 F.3d 526 (7th Cir. 1993); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1213-14 (D.R.I. 1991) (requiring employer "to designate an officer . . . to receive and process sexual harassment complaints"); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1537 (M.D. Fla. 1991) (requiring the shipyard "to adopt, implement, and enforce a policy and procedures for the prevention and control of sexual harassment"). The coercive power of the government is aptly demonstrated as well by a court's power to grant attorney's fees. *See Stair v. Lehigh Valley Carpenters Local Union No. 600*, 64 Empl. Prac. Dec. (CCH) ¶ 43,032 (E.D. Pa. 1994) (awarding plaintiffs \$74,000 in fees on hostile environment claim based on union calendars even though plaintiff failed to carry any other claim of specific intentional harassment).

81. One commentator suggests that the state-action doctrine in conjunction with employment at will gives the government the power to suppress workplace speech. *See Amy Horton, Comment, Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 419 (1991). The comment asserts without analysis that the state action doctrine removes any First Amendment concern for workplace speech. The comment argues that the employment-at-will doctrine, thus, effectively enables the employer to regulate workplace speech with the threat of dismissal to employees who do not comply. *Id.* Therefore, because the employer can constitutionally suppress workplace speech, the government may in turn constitutionally coerce the employer into the suppression. *See id.* at 432 ("The mandate of Title VII to eradicate discrimination simply takes precedence over an employee's individual right to free expression—which is, in any case, virtually non-existent . . ."). This reasoning attempts to cloak the government with the private character of the employer. The federal government has attempted similar devices before and failed. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-16 (1989) (rejecting contention that private drug testing of train crews shielded governmental regulations supporting the tests from Fourth Amendment review; stating "that the Government did more than

The government also acts through the employer who preemptively restricts employee speech to avoid Title VII liability. Courts often force employers who lose hostile environment suits to establish sexual harassment policies.⁸² This judicial response strongly suggests that employers without plans eventually will face and lose a hostile environment suit.⁸³ The fear of liability undoubtedly will affect employers. First, careful employers probably will establish strong antiharassment policies. Second, managers likely will overreact to marginally offensive speech.

These effects will combine to suppress speech on the job. A male worker may strongly believe that the increasing number of working women severely harms American society. On coffee breaks, the male chauvinist delivers an expletive-laden tirade, and asserts ideas such as, "Women belong in the bedroom, not the boardroom." Employers with strong sexual harassment policies would quickly quash this employee's speech. Even if the employee presented the same message without creating a hostile environment, the employer likely would respond to the complaints of female coworkers because the potential monetary losses are too great. Thus, the hostile environment theory suppresses more than grossly sexist language; the doctrine also chills milder, potentially nonhostile expressions of the same viewpoint.

The case for governmental coercion weakens if an employer restricts workplace speech for some reason other than Title VII. The Supreme Court has stated, "It would intolerably broaden . . . the notion of state action . . . to hold that the mere existence of a . . . law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law."⁸⁴ Some employers would limit discriminatory speech even if Title VII did not exist. Altruistic concerns, morale problems, or other motives might compel the employer's actions. Nevertheless, proof of an alternate motive is difficult, and the difficulty magnifies if the employer follows a policy that closely resembles antidiscriminatory plans created in response to Title VII.

As the discussions of standing and state action demonstrate, hostile environment liability places employers in a tenuous position. On one hand, standing principles will allow the employer to assert the First Amendment rights of employees as a defense. On the other hand, the same First Amendment right may result in liability through the state action doctrine if the employer suppresses speech because of Title VII.

adopt a passive position toward the underlying private conduct").

82. *See supra* note 80.

83. The mere presence of a plan however is not a per se defense. *See supra* note 19.

84. *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10 (1978).

IV. FIRST AMENDMENT ANALYSIS OF THE HOSTILE ENVIRONMENT

Hostile environment law developed with little concern for the First Amendment.⁸⁵ Many decisions appear suspect on First Amendment grounds.⁸⁶ Even when courts acknowledge the free speech issue, they give it cursory treatment.⁸⁷ The issue has, however, generated much academic debate.⁸⁸

One judge acknowledged the constitutional challenge to the hostile environment and provided a perspective for addressing the issue:

We may one day conclude that some workplace speech—for instance, a bigoted political poster—is protected even if it creates a hostile work environment. . . . [S]urely the right answer is to save as much of workplace harassment law as we can, not to throw it all out just because a few courts, not faced with First Amendment defenses, may have read it too broadly.⁸⁹

Judge Kozinski's position contains two underlying propositions. First, the judge recognizes that the hostile environment requires First Amendment review. Second, the judge indicates that the hostile environment probably proscribes the expression of sexist political views.

85. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (Kozinski, J., dissenting) (citations omitted), *rev'd*, 115 S. Ct. 464 (1994).

86. *Id.* (Kozinski, J., dissenting) (citing *Tunis v. Corning Glass Works*, 747 F. Supp. 951 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 910 (2d Cir. 1991); *Snell v. Suffolk County*, 611 F. Supp. 521 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986)).

87. *See Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm'n*, 581 N.E.2d 1169, 1177 (Ohio Ct. App. 1990) (refuting without analysis appellant's First Amendment defense, reasoning that because Title VII creates a right to be free from a hostile work environment, verbal sexual abuse "does not constitute protected speech under these circumstances."); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) ("Eveleth Mines fails to acknowledge that Title VII . . . is concerned with regulating the work place, not society generally. As a result, acts of expression which may not be proscribed if they occur outside of the work place may be prohibited if they occur at work.").

88. *See, generally* LINDEMANN & KADUE, *supra* note 12, at 592-600; Adler & Pierce, *supra* note 21; Browne, *supra* note 73; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 COLUM. J.L. & SOC. PROBS. 387 (1993); Amy Horton, Comment, *supra* note 79; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

89. *X-Citement Video*, 982 F.2d at 1296 n.7 (Kozinski, J., dissenting), *rev'd*, 115 S. Ct. 464 (1994).

The Supreme Court has not addressed the First Amendment in a hostile environment context.⁹⁰ This Part analyzes various First Amendment doctrines that may arise.⁹¹

A. Conduct, Expressive Conduct, or Speech?

Courts often justify a suppression of speech by classifying the speech or message as conduct or expressive conduct.⁹² Judges in hostile environment cases follow this pattern as they presumptively define expressions of bias as conduct.⁹³ Expressive conduct receives less constitutional protection than pure speech, and conduct that lacks expression receives no protection at all.⁹⁴ Therefore, the distinctions between conduct, expressive conduct, and pure speech are critical.

To receive First Amendment protection, conduct must contain a sufficient element of communication.⁹⁵ The Supreme Court looks for an intent to

90. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (reiterating that the First Amendment does not protect a freedom to associate in a discriminatory manner).

91. The analysis that follows focuses primarily on speech not contained in a per se prohibited category of speech. For a discussion of the application of these categories to workplace speech, see Gerard, *supra* note 86; Strauss, *supra* note 86.

92. See, e.g., *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993) (“[T]he statute in this case is aimed at conduct unprotected by the First Amendment.”); *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (“We must first determine whether [the conduct] constituted expressive conduct, permitting [invocation of] the First Amendment”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

93. See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (“In this way, Title VII may legitimately proscribe conduct . . . which creates[s] an offensive working environment.”); Cf. *Mitchell*, 113 S. Ct. at 2200 (“[R]ecently, in *St. Paul*, we cited Title VII . . . as an example of a permissible content-neutral regulation of conduct.”); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (describing Title VII as a statute targeting conduct). The EEOC makes the same presumption:

Harassment is *verbal* or physical *conduct* that denigrates or shows hostility or aversion toward an individual because of his/her [protected status].

. . . .

Harassing *conduct* includes . . . [w]ritten or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer’s premises, or circulated in the workplace.

58 FED. REG. 51,266, 51,269 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993) (emphasis added).

94. See, e.g., *Johnson*, 491 U.S. at 404, 406-07.

95. See *id.* at 404. The Supreme Court places the burden of demonstrating the expressive element of the conduct on the party claiming the First Amendment violation. *Clark v.*

convey a particularized message and a great likelihood that the message is understandable.⁹⁶ In addition, the context of the conduct is important.⁹⁷ Courts find expression in many forms of behavior.⁹⁸

Discriminatory behavior can range from pure conduct to pure speech. An employer may post a political flyer for a candidate with a “Women Belong in the Home” platform. The flyer contains pictures of seminude women. This action potentially creates an environment hostile to a woman.⁹⁹ If the bigoted poster contained no expression and, thus, was only conduct, the Constitution would not apply.¹⁰⁰

Calling speech conduct does not make it so. The poster is not conduct; at the very least, it contains a large expressive element. The First Amendment must apply.¹⁰¹

When courts presumptively classify speech as conduct, they create a legal fiction. The Supreme Court has rejected a similar fiction in another Title VII context. To uphold various fetal protection policies, some circuit courts have applied the analysis for facially neutral company policies to facially discrimina-

Community for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984).

96. *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

97. *Id.* at 405.

98. *Id.* at 397 (flag burning); *Tinker v. DeMoines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing of arm bands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning of a draft card); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (cross burning); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029 (S.D.N.Y. 1992) (begging), *aff'd*, 99 F.2d 699 (2d Cir. 1993); *Hernandez v. Superintendent, Fredricksburg-Rappahanock Joint Sec. Ctr.*, 800 F. Supp. 1344 (E.D. Va. 1992) (wearing a mask).

99. *See United States v. X-Citement Video*, 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (Kozinski, J., dissenting), *rev'd*, 115 S. Ct. 464 (1994); *see also supra* notes 28-32 and accompanying text.

100. *Cf. Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (1993) (“Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance which create an offensive working environment. That expression is ‘swept up’ in this proscription does not violate First Amendment principles.” (quoting *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992))).

101. *See Baliko v. Stecker*, 65 Fair Empl. Prac. Cases (BNA) 899, 903 (N.J. Super. Ct. App. Div. 1994) (“In light of *R.A.V.* . . . , the question must be addressed whether the [anti-discrimination law] can constitutionally be interpreted as punishing speech which is bigoted and sexually, racially, or religiously offensive if that speech is *unaccompanied by illegal, non-verbal conduct.*”) (emphasis added); LINDEMANN & KADUE, *supra*, note 12, at 598 (“Although workplace pornography might resemble conduct in its power to interfere with a women’s job performance, the fact remains that displaying pornographic pictures is expression, particularly if it is intended to offend and demean female co-workers.”).

tory policies.¹⁰² The distinction allowed the courts to apply a more lenient employer defense.¹⁰³ The Supreme Court rejected the fiction.¹⁰⁴

*B. Will United States v. O'Brien Apply
in Hostile Environment Cases?*

In *Texas v. Johnson*¹⁰⁵ Justice Brennan provided a framework to evaluate laws that regulate expressive conduct. The analysis contains two threshold questions. A court must first decide if the conduct is expressive.¹⁰⁶ Then, if expressive elements exist, the court must analyze the government's basis for regulation. The state receives the benefit of "[*United States v. O'Brien's* relatively lenient standard . . . [in] those cases in which 'the governmental interest is unrelated to the suppression of free expression.'"]¹⁰⁷

The hostile environment doctrine will not always satisfy these threshold requirements. Like the bigoted political poster, much discriminatory behavior consists of speech alone. Employees who claim harassment must show that the speech was not speech, but expressive conduct.¹⁰⁸

The requirement for no express governmental interest in the suppression of speech also presents a roadblock. Title VII's expressed goal, the creation of a discrimination-free workplace, facially shows no interest in the suppression of free speech.¹⁰⁹ Nonetheless, difficulties arise if the discriminatory conduct expresses the harasser's ideas and beliefs. To address the discrimination, the state must then attack expression.¹¹⁰ This shift in focus strongly

102. See *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991). But see *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547-54 (11th Cir. 1984) (setting out and applying the facially neutral analysis, but concluding that the employer's policy was facially discriminatory and affirming the damages awarded to the employee).

103. *Johnson Controls*, 499 U.S. at 198 (stating that the business necessity defense is more lenient than the statutory BFOQ, bona fide occupational qualification, defense).

104. See *id.* at 198-200.

105. 491 U.S. 397 (1989).

106. See *id.* at 403.

107. *Id.* at 407 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) (citation omitted).

108. Certain facts might support such an argument: Was the speaker a coworker with some control over the plaintiff? Was the frequency of the message intolerable? Did the speaker intentionally direct the dialogue toward the plaintiff? Did the plaintiff have an opportunity to avoid the speech? Was the speaker browbeating the plaintiff?

109. See 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991). A counterargument exists. To "discriminate" is "to act on the on the basis of prejudice." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (1976). "To act," however, is to "do something." *Id.* at 13. "Something" obviously includes expressing a point of view. See *id.* at 1231. Thus, "discriminate" implies expressing beliefs. Therefore, by prohibiting expressions of belief, Title VII is facially discriminatory and interested in the suppression of expression.

110. Cf. *United States v. Lee*, 6 F.3d 1297, 1301 (8th Cir. 1993) (per curiam) (Gibson, J.,

suggests that the hostile environment doctrine relates to the suppression of free expression. When a governmental interest in suppression exists, the analysis is “outside of *O’Brien’s* test altogether,”¹¹¹ and “[the Court] must therefore subject the State’s asserted interest . . . to ‘the most exacting scrutiny.’”¹¹²

Courts differ drastically on whether a governmental interest exists. Two recent non-Title VII racial discrimination cases illustrate the problem. Faced with almost identical facts and statutes, the Seventh and Eighth Circuits reached diametrically opposed conclusions on whether the government intended to suppress speech.¹¹³ Each court initially noted that crossburning was expressive conduct.¹¹⁴ The courts then asked if *O’Brien* applied to the crossburnings.¹¹⁵ One court found a governmental interest in suppression,¹¹⁶ while the other court did not.¹¹⁷ The court finding no interest applied *O’Brien* and upheld a criminal conviction.¹¹⁸ The court that found a governmental interest refused to apply *O’Brien* and overturned the appellant’s conviction.¹¹⁹

Sometimes, though, proof of a governmental interest in the suppression of ideas presents no problem. The judges themselves provide the evidence: “By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.”¹²⁰ The jurists ignore an important distinction. Benign education provided by the government does not censor opposing viewpoints; Title VII’s coercive liability does.¹²¹

concurring) (“The statute [18 U.S.C. § 241] as written is broad, but as targeted toward Lee, it relies on the subjective reactions of [the victims] [W]e cannot say that, under the circumstances before us, the governmental interest is unrelated to the suppression of free expression.” (citing *United States v. O’Brien*, 391 U.S. 367 (1968)), *cert. denied*, 114 S. Ct. 1550 (1994)).

111. *Johnson*, 491 U.S. at 410.

112. *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

113. Compare *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994) with *Lee*, 6 F.3d at 1297 (Gibson, J., concurring). *Lee’s* per curiam opinion reversed the circuit’s earlier affirmance of Lee’s conviction and remanded the case for retrial in accordance with Judge Gibson’s concurrence. *Id.*

114. See *Hayward*, 6 F.3d at 1249-50; *Lee*, 6 F.3d at 1300.

115. See *Hayward*, 6 F.3d at 1250; *Lee*, 6 F.3d at 1301.

116. See *Lee*, 6 F.3d at 1301.

117. *Hayward*, 6 F.3d at 1251.

118. *Id.* at 1250-52.

119. *Lee*, 6 F.3d at 1301, 1304.

120. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

121. See *supra* notes 79-81 and accompanying text.

If the initial requirements are satisfied, the expressive conduct test of *United States v. O'Brien*¹²² controls. The regulation must be “within the constitutional power of the Government;” the law must further “an important or substantial governmental interest;” and “the incidental restriction on alleged First Amendment freedoms” must be no greater than essential in furthering that interest.¹²³

Passed pursuant to the Commerce Clause, Title VII is within the constitutional power of the government.¹²⁴ The eradication of sex discrimination in the workplace probably presents not only a substantial government interest, but possibly a compelling one.¹²⁵

The hostile environment doctrine does not narrowly restrict speech. The *Harris* standard causes the problem. Hostile environments are created by something more than merely offensive conduct.¹²⁶ But the line between merely offensive speech and something more than merely offensive speech is not a line at all.¹²⁷ As a result, employers probably will overreact to quell merely offensive speech.

C. Title VII as Viewpoint Discrimination

The hostile environment theory probably is a viewpoint-based regulation of speech. The bedrock principle underlying the First Amendment provides “that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹²⁸ Generally, “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”¹²⁹

Title VII sends the message that discrimination because of race, color, religion, sex, or national origin is unacceptable.¹³⁰ The hostile environment

122. 391 U.S. 367 (1968).

123. *Id.* at 377.

124. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-50 (1964) (discussing Title II).

125. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (“Minnesota’s compelling interest in eradicating [sex discrimination] justifies the impact . . . of the statute . . .”). *But cf. Dayton Christian Sch. v. Ohio Civil Rights Comm’n*, 766 F.2d 932, 954 (6th Cir. 1985) (holding that although the state’s interest was compelling, the state was “not constitutionally compelled to enact the statute at issue”), *rev’d on other grounds*, 477 U.S. 619, 628 (1986) (characterizing the state’s interest as “sufficiently important”).

126. *See Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993).

127. *See id.* at 371 (1993) (providing a totality of circumstances test to determine if the work environment was abusive).

128. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

129. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citations omitted).

130. *See* 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991).

theory broadcasts an additional view: The government will not tolerate expressions of negative stereotypes. Title VII prohibits negative comments toward men or women based on gender, but allows positive expressions. However, many workers retain negative, bigoted viewpoints. The hostile environment doctrine imposes liability on the employer who permits the expression of those views. The threat of liability forces employers to stifle workplace speech. Thus, Title VII suppresses views disfavored by the majority.

One commentator has argued that the hostile environment theory is viewpoint neutral:

[A]ny regulation that references speech or verbal conduct inspires the appearance of censorship. However, Title VII focuses on the result of verbal conduct, not on the message. . . . Title VII . . . dictate[s] only the impermissible result; the message is irrelevant. Consequently, Title VII . . . [does] not operate to regulate viewpoints or censor communication.¹³¹

This reasoning goes too far when it claims that Title VII's lack of viewpoint suppression equates with a lack of censorship. The logic ignores the requirement for content neutrality.

D. Is the Hostile Environment Doctrine a Content-Based Regulation of Speech?

In *R.A.V. v. City of St. Paul*¹³² the Supreme Court classified Title VII as a content-based statute regulating conduct, not speech.¹³³ Less than a year later, in *Wisconsin v. Mitchell*,¹³⁴ the Court classified Title VII as a *content-neutral* statute.¹³⁵ The difference in classification is critical. The presence or absence of content neutrality in a statute often determines whether a given First Amendment doctrine applies. Title VII is a facially content-based law. A statute is content based if it regulates, not on the view espoused, but on the subject addressed.¹³⁶ If the government “‘must necessarily examine the content of the message that is conveyed’” before applying a

131. Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 132-33 (1990) (footnotes omitted).

132. 112 S. Ct. 2538 (1992).

133. *See id.* at 2546.

134. 113 S. Ct. 2194 (1993).

135. *See id.* at 2200.

136. *See St. Paul*, 112 S. Ct. at 2538 (1992) (invalidating prohibition of fighting words addressing race, religion, sex); *Boos v. Barry*, 485 U.S. 312 (1988) (striking down viewpoint-neutral, but content-based, prohibition of speech against foreign governments).

regulation, the law is not content-neutral.¹³⁷ A content-based regulation is presumptively invalid.¹³⁸ Title VII does not regulate all harassment. The statute only prohibits discrimination against a protected classification.¹³⁹ Thus, the statute forces the government to focus on the content of speech to decide if the statute applies.

Although facially content based, Title VII could still be content-neutral. In *City of Renton v. Playtime Theatres, Inc.*¹⁴⁰ Chief Justice Rehnquist confronted a facially content-based regulation. The Court analyzed *Renton*'s statute under the "time, place, and manner" doctrine.¹⁴¹ The doctrine does not apply to content-based regulations.¹⁴² The Chief Justice solved the dilemma with a legal fiction.¹⁴³ He held that a facially content-based statute directed at the secondary effects of speech was content neutral.¹⁴⁴ Thus, the time, place, and manner doctrine applied, and the Court upheld the statute.¹⁴⁵

Notwithstanding *Renton* and the Title VII dicta in *Mitchell*, the hostile environment theory is not content neutral.¹⁴⁶ In *Boos v. Barry*¹⁴⁷ the Supreme Court clarified *Renton*, and said, "Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."¹⁴⁸

The hostile environment standard inherently focuses on the emotive impact of speech. Sexist expressions may cause a hostile environment as

137. See *Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992) (holding as impermissible the content-based discretion given the administrator to set a fee for public demonstration where the discretion was based on the expected impact of the demonstration) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)); see also, *Arkansas Writers' Project*, 481 U.S. at 230 (1987) (striking down a newspaper tax determined by the content of the paper); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (invalidating state statute regulating public television and radio editorials because applying the regulation required a governmental determination of content).

138. *St. Paul*, 112 S. Ct. at 2542 (citations omitted).

139. See 42 U.S.C. § 2000e-2 (1988).

140. 475 U.S. 41 (1986).

141. *Id.* at 46.

142. See *id.* at 46-47.

143. See *supra* notes 101-04 and accompanying text.

144. See *Renton*, 475 U.S. at 48 ("[T]he *Renton* ordinance is completely consistent with our definition of 'content-neutral' speech regulations . . .").

145. *Id.* at 54-55.

146. Cf. *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430 (C.D. Cal. 1994) (holding that policy that banned only sexually oriented magazines was "undoubtedly content based").

147. 485 U.S. 312 (1988).

148. *Id.* at 321.

readily as a demand for sex.¹⁴⁹ But the violation of Title VII does not occur when the sexist remark is made. The violation occurs when the expression harms the listener,¹⁵⁰ thus, the test must focus on the victim's reactions.

E. Does the Hostile Environment Theory Satisfy St. Paul?

As a content-based regulation of speech, the hostile environment doctrine is presumptively invalid.¹⁵¹ However, in *St. Paul* the Court recognized exceptions that allow content-based regulations of speech in some circumstances.¹⁵² Justice Scalia stated in dicta that Title VII, as a statute directed at conduct, would satisfy an exception.¹⁵³ The remaining question is whether the hostile environment doctrine satisfies a *St. Paul* exception, especially when the doctrine is directed toward pure speech.¹⁵⁴

In *St. Paul* the Supreme Court revisited the content-neutrality doctrine. The regulation in dispute prohibited the expression of “‘fighting words that insult or provoke violence,’ on the basis of race, color, creed, religion or gender.”¹⁵⁵ The Court held that the ordinance regulated the content of speech and was, thus, invalid.¹⁵⁶ While the government can regulate fighting words, the government cannot regulate subsets of fighting words on the basis of content.¹⁵⁷

Justice Scalia provided exceptions to the general rule against content-based discrimination. The hostile environment theory may not satisfy any of them. First, the basis for regulating a subset of prohibited speech may be the very reason for proscribing the entire class of speech; if so, the First Amendment

149. Compare *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) with *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

150. *Harris*, 114 S. Ct. at 370 (1993) (affirming the use of objective and subjective tests for harm).

151. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992).

152. *Id.* at 2543-46.

153. See *id.* at 2546.

154. *Baliko v. Stecker*, 65 Fair Empl. Prac. Cases (BNA) 899, 903 (N.J. Super. Ct. App. Div. 1994) (requiring trial court to address claim that pure speech created a hostile environment “[i]n light of *R.A.V.*”). Too much reliance on *St. Paul*’s Title VII dicta to salvage the hostile environment theory would be unwise. The characterization saves the statute as a whole from invalidation; however, unconstitutional applications of the hostile environment are most likely fair game. Cf. *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993) (per curiam) (leaving intact federal antidiscrimination law, but striking down an unconstitutional application of the statute to a given defendant), cert. denied, 114 S. Ct. 1550 (1994).

155. *St. Paul*, 112 S. Ct. at 2547.

156. See *id.* at 2550.

157. See *id.* at 2553 (White, J., concurring) (concluding that the regulation questioned in *St. Paul* is unconstitutionally overbroad). The government may regulate obscenity; the government cannot, however, choose to regulate only obscenity espousing political ideas. See *id.* at 2555-56.

will not protect the subclass.¹⁵⁸ Thus, a state may prohibit “obscenity which is the *most patently offensive* in its *prurience*.”¹⁵⁹ This exception would not apply in a hostile environment case unless the employers or coworkers expressed their sexist views as obscenities or fighting words. Even if the speech did contain fighting words or obscenities, the government could not justify Title VII on a same-basis reason.

Second, content discrimination is valid if the regulation is aimed at the secondary effects associated with the subclass of speech.¹⁶⁰ The hostile environment theory will not satisfy the secondary effects exception nor will any regulation that focuses on the emotive impact of speech.¹⁶¹

The final exception provides that “since words can in some circumstances violate laws directed not against speech but against conduct . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”¹⁶² Justice Scalia declared that Title VII met the “aimed at conduct” exception: “Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.”¹⁶³

158. *Id.* at 2545-46.

159. *St. Paul*, 112 S. Ct. at 2546 (emphasis added); cf. *Miller v. California*, 413 U.S. 15, 23-24 (1973) (defining obscenity as appealing to the prurient interest, portraying “sexual conduct in a patently offensive way,” and, failing to have a “serious literary, artistic, political, or scientific value” when taken as a whole). A nudist right’s party might distribute obscene political flyers. The government could proscribe the group’s obscenity because it contained extremely prurient material. However, if the political content of the obscenity provoked the regulation, the government would not satisfy the same-basis exception.

160. *St. Paul*, 112 S. Ct. at 2546. Compare Chief Justice Rehnquist’s treatment of the secondary effects exception in *Renton* with Justice Scalia’s approach in *St. Paul*. Chief Justice Rehnquist concluded that if a facially content-based regulation attempts to regulate a secondary effect, no content-based regulation exists. *Renton*, 475 U.S. at 48 (“*Renton*[’s] ordinance is completely consistent with our definition of ‘content-neutral’ speech regulations . . .”). Justice Scalia probably concedes that *Renton*’s regulation is content discriminatory, but supports the *Renton* holding with an exception. See *St. Paul*, 112 S. Ct. at 2549. Similarly, Scalia classified Title VII as a valid *content-based* statute. See *id.* at 2546.

161. See *supra* notes 145-48 and accompanying text.

162. *St. Paul*, 112 S. Ct. at 2546 (citations omitted).

163. *Id.* at 2546 (citing 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982, 2000e-2; 29 C.F.R. § 1604.11 (1991)). The Title VII discussion in *St. Paul* could limit the scope of the hostile environment. When Justice Scalia wrote, “sexually derogatory ‘fighting words,’ among other words, may produce a violation of [Title VII],” *Id.* at 2546, Scalia implied that he would only allow the proscription of sexually derogatory language that also constitutes fighting words. This interpretation recently surfaced in a non-Title VII racial discrimination case. See *United States v. Lee*, 6 F.3d 1297, 1302 (8th Cir. 1993) (per curiam) (Gibson, J., concurring) (citing *St. Paul*, 112 S. Ct. at 2546-47, *cert. denied*, 114 S. Ct. 1550 (1994)).

Another interpretation exists. Justice Scalia did not just say “fighting words;” he said “fighting words, *among other words*.” *St. Paul*, 112 S. Ct. at 2546 (emphasis added). Thus, the aimed at conduct exception may allow the proscription of a larger category of speech than just

Justice White pointed out that the majority opinion “glosse[d] over the . . . regulation governing hostile working environment, which reaches beyond any ‘incidental’ effect on speech.”¹⁶⁴

Justice White is correct.¹⁶⁵ The hostile environment theory does not always neatly satisfy the exception. The awkwardness of the fit is amplified when government attacks conduct that expresses a belief or a point of view. In *Stair v. Lehigh Valley Carpenters and Joiners Local Union No. 600*¹⁶⁶ the views expressed by the union calendar constituted the only conduct found to create a hostile environment.¹⁶⁷ The court’s injunction effectively prevented the union from expressing itself.¹⁶⁸ Therefore, speech was not incidentally suppressed; it was the only thing suppressed.

The “aimed at conduct” exception already has surfaced in a hostile environment case. The District Court of Minnesota, in *Jenson v. Eveleth Taconite Co.*,¹⁶⁹ used the exception to reject an employer’s First Amendment defense.¹⁷⁰ The plaintiffs offered as evidence the stereotypical views held by male employees.¹⁷¹ The employer asserted that the First Amendment prevents Title VII from regulating bigoted speech without some showing of conduct toward an individual. The court disposed of the issue by defining the expression of bias as proscribable behavior when it occurs in the workplace, where Title VII applies.¹⁷²

fighting words.

164. 112 S. Ct. at 2557 (White, J., concurring) (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

165. Justice White believes that the secondary effects exception includes the aimed at conduct exception. See *id.* at 2556-58 (White, J., concurring); see also *Lee*, 6 F.3d at 1301-03 (Gibson, J., concurring) (citing *St. Paul*, 112 S. Ct. at 2546). Justice Scalia also analyzed the exceptions as listed by Justice White. See *St. Paul*, 112 S. Ct. at 2548-2549. Notwithstanding, *Boos v. Barry* demonstrates that the secondary-effects exception cannot apply when the regulation focuses on the emotive impact of the speech. See 485 U.S. 312 (1988). Regulation of expression with the potential for creating a hostile environment is predicated on precisely that. Thus, a hostile environment Title VII claim does not fit into the secondary-effect exception. Therefore, the aimed at conduct exception probably stands alone. If however, as Justice White suggests, the two exceptions are not distinct, there may be yet another explanation. Possibly, the Court attempted to show that the hostile-environment theory is suspect when the First Amendment is an issue. See *supra* note 163.

166. 62 Empl. Prac. Dec. (CCH) ¶ 42,602 (E.D. Pa. 1993), *aff’d*, No. 93-1738 (3d Cir. Nov. 7, 1994).

167. See *id.* at 19 (“The intent to discriminate on the basis of sex in cases involving pornographic materials is ‘implicit’ and courts should recognize this ‘as a matter of course.’”) (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)).

168. See *supra* notes 42-44 and accompanying text.

169. 824 F. Supp. 847 (D. Minn. 1993).

170. *Id.* at 884 n.89.

171. *Id.* at 880-84.

172. *Id.* at 884 n.89.

The court's discussing of First Amendment concerns was conclusory at best: "Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment. That expression is 'swept up' in this proscription does not violate First Amendment principles."¹⁷³ If the conduct consists primarily of speech and the speech expresses a viewpoint, the hostile environment theory does not sweep up anything except the speech itself—and, perhaps, the First Amendment as well.

F. Time, Place, and Manner Regulation

If a court classifies the hostile environment doctrine as content neutral, then the time, place, and manner doctrine would apply. The government may impose reasonable limits on the time, place, and manner of protected speech under certain conditions.¹⁷⁴ First, the state must justify the restriction without reference to the content of the speech. Second, the government must narrowly tailor the regulation "to serve a significant governmental interest."¹⁷⁵ Finally, the government must "leave open ample alternate channels for communication."¹⁷⁶ Developed for restrictions on speech in public forums,¹⁷⁷ the doctrine also applies to speech occurring on private property.¹⁷⁸

The "narrowly tailored" element does not require the government to choose the least restrictive means of accomplishing its purpose.¹⁷⁹ As a result, employers cannot defeat a time, place, and manner regulation by proposing alternate regulations that are less intrusive.

173. *Id.* (quoting *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992)). *But cf.* *Baliko v. Stecker* 65 Fair Empl. Prac. Cases (BNA) 899, 903 (N.J. Super. Ct. App. Div. 1994) (directing trial court to determine if *St. Paul* prevents proscription of hostile environment claims based on pure speech).

174. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

175. *Clark*, 468 U.S. at 293.

176. *Id.* (citing *Members of City Council v. Vincent*, 466 U.S. 789 (1984); *United States v. Grace*, 461 U.S. 171 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980)).

177. *See Ward*, 491 U.S. at 790-91.

178. *See Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

179. *Ward*, 491 U.S. at 800. Thus, the government is not required to prove that no alternative is better than its choice.

Ample alternate channels of communication might not exist. Working America spends much of each day on the job. Moreover, hostile environment liability can possibly accrue for views expressed outside the workplace.¹⁸⁰

The court in *Robinson v. Jacksonville Shipyards*¹⁸¹ held that the time, place, and manner doctrine justified speech restrictions caused by the hostile environment theory. The court ignored the content-neutrality requirement: "To the extent that the regulation here does not seem entirely content neutral, the distinction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles."¹⁸² This treatment implicitly holds that workplace speech deserves less protection than other speech.¹⁸³

G. The Captive Audience Doctrine

The captive audience doctrine provides a compelling argument in favor of workplace speech regulation. An audience that cannot turn off its speaker is "captive."¹⁸⁴ The government may prohibit offensive speech when the captive audience cannot avoid the speech.¹⁸⁵ The doctrine requires a substantial invasion of a privacy interest that occurs "in an essentially intolerable manner."¹⁸⁶

The hostile environment theory might satisfy the substantial invasion of privacy contemplated by the captive audience doctrine. The rule in *Harris* requires an abusive environment before establishing liability. For an abusive environment to exist, the plaintiff must show more than mere offense.¹⁸⁷ A court might find that the *Harris* level of harm is substantial enough. In addition, one's sex is often closely related to one's sense of self. Thus, an

180. Cf. *Poff v. Oaktree Mortgage Corp.*, 61 Fair Empl. Prac. Cas. (BNA) 1562 (E.D. La. 1993) (holding an employer potentially liable for a joke told after working hours at a local restaurant).

181. 760 F. Supp. 1486 (M.D. Fla. 1991).

182. *Id.* at 1535 (citing *Reuton v. Playtime Theatres*, 475 U.S. 41 (1986); Case R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589).

183. Professor Browne contends that this attitude comes from the generally low esteem given workplace speech because of its "working class" character. Browne, *supra* note 71; cf. Lindemann & Kadue, *supra* note 12, at 600 ("From a First Amendment standpoint, there is a very important difference between the college campus and the workplace: The primary purpose of a college . . . is learning through the explanation of ideas. Although the exploration of ideas is not always foreign to the workplace, that is not its primary purpose."). The basis of the distinction for workplace speech is not clear. Academia does not monopolize political discussion. A work force not discussing the political issues of the day would be rare indeed.

184. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

185. *Id.*

186. *Cohen v. California*, 403 U.S. 15, 21 (1971).

187. See *supra* notes 26-30 and accompanying text.

environment that abuses an employee because of sex arguably commits an invasion of privacy.

Nevertheless, the captive audience doctrine is not broadly applied. Laurence Tribe cautions that the idea of a captive audience “is dangerously encompassing.”¹⁸⁸ He further contends that “the Court has properly been reluctant to [find a captive audience] whenever a regulation is not content-neutral.”¹⁸⁹ More, not less, constitutional protection is needed for speech the majority finds offensive.¹⁹⁰ The Court often mentions potential captive audiences,¹⁹¹ but generally will apply the doctrine only to persons captive in their homes.¹⁹²

In addition, not all employees are captive. Many employment settings exist. A per se employee-as-captive rule likely would protect some employees who need no protection. But this logic cuts both ways. Just as some employees are not captive, others probably are.¹⁹³ Many employees work under strict controls, with no freedom of movement. These employees cannot avoid unwanted speech and, thus, belong to a captive audience.

H. Public Employees and the Hostile Environment

Hostile environments can occur in public and private workplaces. If a public employee creates a hostile environment with speech, presumably the government would restrict the speech. If the employee alleges a First Amendment violation, the “public employee speech” doctrine will apply. The doctrine balances two competing interests: “the employee’s interest, as a citizen, in commenting upon matters of public concern and the [state’s interest], as an employer,” in providing efficient public services.¹⁹⁴

The public employee speech doctrine allows the state to limit a wide range of speech. First, the doctrine only protects the employee’s interest in speech

188. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-19, at 950 n.24 (2d ed. 1988).

189. *Id.* (citing *Eroznik v. City of Jacksonville*, 422 U.S. 205 (1975)).

190. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

191. *See, e.g., Eroznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975); *Cohen*, 403 U.S. at 21; *NLRB v. United Steel Workers*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting) (“Employees during working hours are the classic captive audience.”); *Kunz v. New York*, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting) (characterizing pedestrians as captive audience).

192. *See, e.g., Frisby*, 487 U.S. at 474; *Pacifica Found.*, 438 U.S. at 749 n.27; *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 127-28 (1973).

193. *Cf. United Steel Workers*, 357 U.S. at 368 (Warren, C.J., dissenting) (“Employees during working hours are the classic captive audience.”).

194. *Id.* at 384 (quoting *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

of a public concern, a smaller subset of speech than that normally receiving First Amendment protection. Second, courts must consider the content and the time, place, and manner of the speech.¹⁹⁵ Finally, the employee's relative position in the organization is important.¹⁹⁶

Under the doctrine, the courts will allow the government to suppress sexually harassing speech. Most harassing speech does not address matters of a public concern. Requests for sex, gross jokes, and comments on female anatomy do not qualify. Even if the harassing employee addresses a matter of public concern, and does so in a severe enough manner, the courts likely will defer to the governmental desire to maintain an efficient workplace.¹⁹⁷

The judge in *Robinson v. Jacksonville Shipyard*¹⁹⁸ used the public employee speech doctrine to justify governmental regulation of private employee speech. The court recognized that the public employee speech cases "lend a supportive analogy."¹⁹⁹ The court conceptualized its decree "as a governmental directive concerning workplace rules that an employer must carry out."²⁰⁰ The court, with no justification other than the analogy, asserted, "[T]he present inquiry is informed by the limits of a governmental employer's power to enforce workplace rules impinging on free speech rights."²⁰¹

The court's reasoning is problematic. First, the case cited as analogous, *McMullen v. Carson*,²⁰² does not address the government's power to interfere in a private workplace. In *McMullen* the court did not direct a private employer to suppress workplace speech. The court merely acquiesced in the government's firing of an employee who expressed disruptive views as a recruiter for the KKK.²⁰³ Even if one assumes that the court directed the government to suppress the views, the analogy fails. The judge is a governmental official, and his acts are the acts of the state.²⁰⁴ Thus, if a court imposes hostile environment liability on the government, the state is just

195. *Id.* at 385, 388 (citing *Connick*, 461 U.S. at 152-53; *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)).

196. *Id.* at 390 ("[S]ome attention must be paid to the responsibilities of the employee within the agency.").

197. *See, e.g., Connick*, 461 U.S. at 138.

198. 760 F. Supp. 1486 (M.D. Fla. 1991).

199. *Id.* at 1536.

200. *Id.*

201. *Id.*

202. 568 F. Supp. 937, 943-45 (M.D. Fla. 1983), *aff'd*, 754 F.2d 936 (11th Cir. 1985); *see Robinson*, 760 F. Supp. at 1536.

203. *McMullen*, 568 F. Supp. at 945.

204. *See Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

telling itself what to do.²⁰⁵ The Constitution was not created to protect the government from the government.

Second, application of the doctrine to the private sector without justification presumes that the government can dictate the morale and efficiency of the private workplace. That presumption should require independent constitutional justification. The courts created the doctrine to allow the government to act like a private employer,²⁰⁶ not to interfere with private enterprise.

Finally, if a court mandates that an employer adopt the government's workplace standards, the government forces the employer to acquiesce to a view the employer may dislike. This action potentially violates the employer's First Amendment right not to speak.²⁰⁷

Thus, the public employee speech doctrine fails as an independent justification for the hostile environment's regulation of workplace speech. But the doctrine still can assist the debate. The courts eventually might affirm some governmental control over speech in the private workplace. One hopes the courts will attempt to protect speech near the heart of the First Amendment.

The public concern element of the public employee speech doctrine could provide the needed security.²⁰⁸ The Supreme Court has "recognized that not all speech is of equal First Amendment importance."²⁰⁹ "[S]peech on 'matters of public concern' lies 'at the heart of the First Amendment's protection.'"²¹⁰ The First Amendment fundamentally guarantees "the free flow of ideas and opinions on matters of public interest and concern,"²¹¹ and political speech demands the highest degree of First Amendment protection.²¹² The courts could draw on already established public concern principles.²¹³

205. Cf. *McMullen*, 568 F. Supp. at 944 (upholding a sheriff's decision to protect the credibility of his office by firing an employee who was also a KKK recruiter).

206. Cf. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("This balancing is necessary to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.").

207. Cf. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (citing *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *Barnette*, 319 U.S. at 641 ("Compulsory unification of opinion achieves only the unanimity of the graveyard.")).

208. Cf. *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430 (C.D. Cal. 1994) (holding that "reading of *Playboy* amounts to expression relating to matters of public concern").

209. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (footnote omitted).

210. *Id.* at 758-59 (quoting *First Nat'l Bank v. Belotti*, 435 U.S. 765, 776 (1978)).

211. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

212. See *Boos v. Barry*, 485 U.S. 312, 321 (1988).

213. See *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138

Under this standard, the private workplace would remain open to political discussions. Some forms of political speech probably would create a hostile environment. However, because political speech addresses a matter of public concern, the court could not attach liability.

For the public concern standard to protect political speech, courts must avoid using the public employee speech balance. If the balancing occurred, a court might attempt to weigh the balance in favor of the government's view of workplace efficiency over the interest in expressing views of a public concern. Speech would then receive less protection.

1. The Impact of Harris on the First Amendment Analysis

In *Harris v. Forklift Systems, Inc.*²¹⁴ the Supreme Court did not address a First Amendment issue. Nevertheless, the Court adopted a hostile-environment standard that will affect the First Amendment. In addition, *Harris's* impact is magnified when viewed in context with the jury trials and punitive damages now available under Title VII.²¹⁵

As the level of harm required to create an actionable hostile environment lowers, the potential for conflict between the hostile environment theory and the First Amendment rises. Barbara Lindemann and David Kadue implicitly acknowledge this nexus between the two doctrines. They propose that courts generally require high levels of outrageous conduct. The authors then suggest that the higher level effectively incorporates most First Amendment concerns.²¹⁶

Harris and the Civil Rights Act of 1991²¹⁷ combine to severely weaken Lindemann and Kadue's position. First, the authors based their argument on *Rabidue v. Osceola Ref. Co.*²¹⁸ The *Rabidue* court developed the severe psychological injury standard expressly rejected by *Harris*.²¹⁹ Second, even with slight evidence of a hostile environment, some judges refuse to grant summary judgment.²²⁰ Third, with jury trials now available in Title VII

(1983); cf. *Dun & Bradstreet*, 472 U.S. at 759 (using the *Connick* definition of speech of public concern in a defamation action).

214. 114 S. Ct. 367 (1993).

215. See 42 U.S.C. § 1981a (Supp. III 1991).

216. LINDEMANN & KADUE, *supra* note 12, at 594.

217. Pub. L. No. 102-166, 105 Stat. 1072 (codified as amended in scattered sections of 42 U.S.C.).

218. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

219. Lindemann & Kadue, *supra* note 12, at 594 n.154; see *Harris*, 114 S. Ct. at 370-71.

220. In *Poff v. Oak Tree Mortgage Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1562 (E.D. La. 1993), the plaintiff, a loan officer for the defendant employer, complained that the company president created a hostile environment by telling a risqué joke at a dinner party celebrating the plaintiff's new promotion. The president used the plaintiff's name in telling the joke. *Id.* The

cases,²²¹ judges may defer more marginal cases to the jury. Finally, the recent ability of plaintiffs to claim punitive damages²²² may increase the number of borderline claims and thus foster more conflicts between Title VII and the First Amendment. Similarly, the ambiguity of the *Harris* standard of liability might cause more litigation, further bringing the two bodies of law into conflict.

V. CONCLUSION

This Note attempts to illustrate a few of the potential First Amendment issues raised by Title VII's proscription of a hostile environment. Under Title VII workers have a right to a workplace free from harassing conduct. In protecting a worker's right, Title VII proscribes speech creating a hostile environment. However, any governmental suppression of speech requires a firm constitutional basis. Unfortunately, hostile environment law developed with no First Amendment review.

With the merely offensive standard of *Harris v. Forklift Systems*²²³ the Supreme Court chose a rule that bodes ill for the First Amendment. The low level of harm required for liability and the uncertainty of the standard will cause an increase in First Amendment conflicts. Any standard expressed as greater than mere offensiveness but less than severe psychological damage leaves much to be desired.²²⁴

Title VII coercively suppresses workplace speech. Thus, employers have standing to argue a First Amendment defense. The same coercion probably allows employees with suppressed speech to show state action and, thus, allege a First Amendment violation by their employer.

Even when courts acknowledge the First Amendment, they proceed by classifying pure speech and expressive conduct as proscribable conduct. Such treatment deadens the free speech debate before it begins.

If the discriminatory speech is expressive conduct and if the government has no interest in suppressing speech, the less stringent *O'Brien* analysis will apply. However, the analysis for the governmental interest is complex, a situation aggravated if the conduct at issue expresses beliefs or opinions.

court refused summary judgement, holding that the trier of fact could find a hostile environment was created by the telling of one joke. *Id.* at 1563. *But cf.*, *Rennie v. Dalton*, 3 F.3d 1100 (7th Cir. 1993) (holding that one off-color joke and a conversation about a strip bar is not enough to state a hostile environment claim), *cert. denied*, 114 S. Ct. 1054 (1994).

221. See 42 U.S.C. § 1981a(c) (Supp. III 1991).

222. See *id.* § 1981a(b).

223. 114 S. Ct. 367 (1993).

224. *Cf. Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993) (Scalia, J., concurring) (stating that test provided "adds little certitude" and opens "more expansive vistas of litigation").

St. Paul's content-discrimination standard may provide the proper First Amendment analysis. However, even though Justice Scalia said that Title VII met the aimed at conduct exception, the hostile environment theory does not fit neatly into that, or any other, exception.

The time, place, and manner doctrine is not an easy fix for the First Amendment problem. Notwithstanding the Title VII dicta in *Wisconsin v. Mitchell*,²²⁵ the hostile environment standard is a content-based regulation of speech.

The captive audience doctrine may provide a solution to the workplace speech dilemma. A strong argument exists for applying the doctrine when employees have no control over the speech they receive.

Commentators have cited Title VII as precedent to justify other governmental speech regulations.²²⁶ Unfortunately, this trend has occurred before Title VII and the hostile environment have received adequate First Amendment review. In light of America's strong commitment to free speech, the hostile environment doctrine desperately needs that scrutiny.

225. 113 S. Ct. 2194, 2200 (1993).

226. Cf. Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (suggesting criminal sanctions for expressions derogatory to women spoken on the street); Lange, *supra* note 131 (positing Title VII as a viable ideological model for the regulation of campus speech).