The Expressive Workplace Doctrine: Protecting the Public Discourse from Hostile Work Environment Actions

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I. INTRODUCTION

Imagine a workplace filled with offensive expression. Pornographic images cascade from desks and walls. Talk revolves around body parts and erotic encounters. Employees fling dirty jokes back and forth, swapping ribald tales, trying to outdo one another in a race to the bottom. Parts of this scene are representative of the conditions described by the plaintiff in *Lyle v. Warner Bros. Television Productions*, a suit filed by a television writers' assistant on the popular sitcom *Friends* where writers drew in a sexually themed coloring book, made masturbatory gestures, and talked almost incessantly about their sex lives in hopes of helping them create storylines and jokes for the show.[1]

Or imagine another workplace where the workers, even African-American or Latino employees, are forced to read pamphlets espousing white-supremacist theories or advocating the expulsion of minorities from America.

The above workplaces would seem to be rich territory for hostile work environment claims made under Title VII or similar state laws. Or would they?

If either workplace were merely a factory making sprockets or cogs, there would be little practical justification for such racist or sexu-

[1] *See* Lyle v. Warner Bros. Television Productions, 38 Cal. 4th, 264 (2006).

ally charged speech.[2] But in expressive workplaces – enterprises where employees create, distribute, or come into regular contact with expression protected by the First Amendment – employees might have to encounter offensive expression to simply do their jobs.[3]

For example, African-American or Latino printing plant workers in a shop under contract to paginate and print materials for white supremacist, far-right-wing, or even mainstream publications would necessarily be exposed to racially demeaning speech hostile to their very presence in the United States.[4] Some sexual speech might have a legitimate place at a Web business that designs makes and markets sex toys.[5] And in an office of a pornographic magazine – where the production of pornographic pictures, racial fetishism, sexual stories and dirty jokes are objects of the enterprise – it seems appropriate that almost any employee speech should be allowed.[6]

However, workplace harassment actions make employers liable for religious, racial or sexual speech that a reasonable person would find severe or pervasive enough to alter the conditions of employment by creating a hostile work environment.[7] Courts have found that displays of pornographic images in a factory can constitute a hostile work envi-

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[2] Legally, such speech might be protected by the First Amendment even in private workplaces. *See infra,* Part III.

[3] Such workplaces could range from those where protected expression is actively created, like a television or movie studio or magazine, to those which merely distribute expression, like libraries or museums, to workplaces where employees come into contact with members of the public whose speech is protected, such as restaurants, bars, or other gathering places. *See infra* Part IV.

[4] Stories about affirmative action might feature at least one person expressing an opinion offensive to minorities, or a story about immigration might express the opinion that Mexican-Americans are not American and should move to Mexico.

See DeRochemont v. D & M Printing, No. EM 93-7427 (Minn. Dist. Ct. Nov. 1, 1993), aff'd on other grounds, No. C2-94-169, 1994 WL 51053 at *2 (Minn. Ct. App. Sept. 20, 1994) (unpublished), a harassment case in a printing business which partially arose from the plaintiff's objections to its handling of a project involving a nude photograph. *See also infra*, Part I.B, (discussing hostile work environment claims are at least partially based on protected expression or the production, distribution or facilitation of such expression).

[5] However, since commercial speech receives less First Amendment protection than non-commercial speech, perhaps a business like this might receive less leeway. *See infra* notes 53, 201.

[6] For example, see a magazine like Hustler, that not only features sexual content, but also racist humor/political commentary, etc. *See generally* ALLAN MACDONELL, PRISONER OF X (2006) (detailing two decades of production at Hustler Magazine, including tales of racially themed sexual pictorials).

However, courts have declined to hold that a business necessity defense or a creative necessity defense are available to businesses based upon the First Amendment. *See, e.g.,* Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264 (2006).

[7] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).

ronment[8] and that speech need not seriously affect a worker's psychological well-being or injure him to constitute a cause of action.[9] Under these rules it seems like any expressive workplace where employees regularly produce or encounter offensive speech could be subject to liability.[10]

This liability could chill expression in a variety of workplaces such as newspapers, magazines, print shops, libraries, television production companies, movie studios, fashion houses, museums, cabarets, video arcades, Internet cafes, even convenience stores, restaurants, or bars.[11] If interpreted aggressively, harassment laws could constitute a back-door restriction on offensive public expression dealing with race, religion or sex that would be problematic from a First Amendment perspective.[12]

Fear of hostile work environment litigation has led employers involved in expressive enterprises to institute speech codes that make it difficult for employees to participate in the sorts of off-color, graphic, or painfully honest discourse that the creative process demands. In the quest to protect litigious workers' sensitivities, adult comedy might be less edgy;[13] historical dramas might be less realistic;[14] advertising less effective;[15] the news of a political sex scandal might be less detailed;[16]

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[8] *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991).

[9] *See* Harris v. Forklift Systems 510 U.S. 17, 21 (1993).

[10] For additional examples of cases that have threatened expression, see below.

[11] Additionally, most workplaces have some department devoted to producing expression aimed at public dissemination that receives some degree of First Amendment protection like commercial speech. For samples of how workplaces like these have been subject to hostile work environment claims, see *infra* Part II.B.

[12] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that viewpoint-based speech restrictions are presumptively unconstitutional).

[13] Creativity is often offensive. For instance, in the recent film *The Aristocrats*, comedians competed with each other for the length of the film to see who could tell a funnier version of a joke that, depending on how it was told, featured incest, bestiality and scatological themes.

[14] For instance, the critically acclaimed HBO western *Deadwood* features a historically inspired character called "the nigger general," in addition to other characters referred to as "kike" and "chink." *See generally* Scott McLemee, *The Good, the Bad, and the Ugly*, INSIDE HIGHER ED. *available at* http://insidehighered.com/views/2006/08/30/mclemee. The dialogue is also ripe with stereotype: "Wave a penny under the Jew's nose; if they got living breath in them, brings them right around." Memorable quotes for "Deadwood" *(2004)*, The Internet Movie Database, http://www.imdb.com/title/tt0348914/quotes.

[15] Stroh's Brewing Company pulled its "Swedish Bikini Team" ad campaign after brewery workers filed a suit claiming it contributed to a hostile work environment at their plant. *See* Tony Kennedy, *Judge Says Stroh's Ad Strategies Won't Be Part of Harassment Trial*, STAR TRIBUNE, Nov. 9, 1993, at 1D.

[16] It is easy to imagine that forcing a writer to disclose and discuss details of the Starr Report on the Monica Lewinsky matter could create, at the very least, an uncomfortable work environment. *See* Eugene Volokh, *Cyberspace, Harassment Law and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, n. 2–3 (2000), (listing newspaper articles warning readers to be careful discussing the Lewinsky scandal at the office so as not to trigger a hostile work environment action from offended co-workers).

immigration debates might be less lively; even the nudes at a museum might be less nude.[17] Consequently, curtailing certain kinds of speech within a workplace might have the effect of curtailing speech outside it as well.

Courts and commentators have recognized that different workplaces should have different standards for appropriate behavior.[18] Some commentators have discussed the broad issues of conflict between the First Amendment and workplace harassment laws, but have not addressed the particular issues that arise in expressive workplaces.[19] Others have suggested that creative workplaces deserve special treatment, but have not articulated a detailed and workable rule to protect workers *and* free speech.[20] Most importantly, no court has promulgated an explicit rule to guide expressive employers struggling to strike the correct balance between protecting workers and creating a safe space where speech can flourish.

It is time to clarify these issues by adopting a clear rule delineating liability for employers whose workers produce, distribute, or come into contact with protected expression. A clear rule would discourage unsound claims and decrease the time expressive employers spend determining how (or how much) to restrict employee or patron speech. Additionally, an appropriate rule would better ensure that expressive workers' creative processes are given the breathing room they need to continue a tradition of lively entertainment and vibrant political discourse.

To decrease the extent to which harassment concerns deter constitutionally protected speech and to resolve the tension between the First Amendment and workplace harassment laws in expressive workplaces, legislatures and courts should give these employers a limited exemption from hostile work environment claims. The Expressive Workplace Doctrine would require that:

> The following material shall not form the basis of a hostile work environment claim:
>
> > Expression that is conceivably part of the process for creating or manufacturing protected expression; or

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[17] *See* Herberg v. Cal. Inst. of the Arts, 101 Cal. App. 4th 142 (2002); *See also infra* note 98, discussing an employee action against the display of a Goya nude in a college lecture hall.

[18] *See e.g.* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 – 82 (1998); Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264, 288 (2006).

[19] *See* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

[20] *See* Eugene Volokh, Comment, *Harassment Law and the Speech It Restricts*, 39 UCLA L. REV. 1791, 1798 (1992).

Expression that is incidental to the employer's public dissemination or exhibition of protected expression; or

The protected expression of third parties encountered during the commission of employment duties;

EXCEPT when:

The expression is directed at the plaintiff;[21] or

The employer could have made a reasonable accommodation that would allow the employee to avoid the expressive conduct.

The Expressive Workplace Doctrine tilts the hostile work environment balance toward greater speech protection. This is in line with First Amendment law's tendency to prioritize free expression over other interests when regulating liability for speech.[22] The proposal properly protects individuals' and expressive enterprises' abilities to disseminate and discuss their viewpoints, leading to a populace that is better able to seek out truth and make informed democratic choices.[23] Additionally, this rule contains safeguards designed to ferret out employers who would use an exemption as a pretense to discriminate against protected classes as well as incentives for employers to accommodate workers who might wish to opt out of jobs where they would have to regularly encounter offensive speech.

This Article shows how this rule would strike a needed balance between hostile work environment protections and First Amendment interests. Part II describes how hostile work environment actions have been prosecuted in expressive workplaces. Part III explains why the application of the hostile work environment cause of action is unconstitutional when applied to expressive workplaces, particularly because it is not supported by any of the exceptions to the First Amendment. Part IV looks at other scholars' proposals for solving the problems presented by the First Amendment's clash with the hostile workplace action, concluding that past proposals are neither broad nor nuanced enough to guard both the public discourse *and* workers' rights. Finally, Part V presents and illustrates this Article's solution to the conundrum, the Expressive Workplace Doctrine.

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[21] This would create a rebuttable presumption that the expression is not related to the creative process, which could then be defeated by a showing that the speech was integral to the creation of the protected expression.

[22] *See infra* Part II discussing how the proposed rule is in line with law governing other First Amendment doctrines.

[23] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

II. THE CURRENT STATE OF HOSTILE WORK ENVIRONMENT LAW

A. *The Hostile Work Environment in General*

Title VII[24] and similar state equal employment opportunity laws grew largely out of the civil rights movement. While it originally protected against outright employment discrimination, the doctrine grew to encompass causes of action like quid-pro-quo sexual harassment[25] and, eventually, the abusive or hostile work environment cause of action.[26] Such an action prohibits conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment," if it is unwelcome and based upon (or because of) the plaintiff's sex, race, color, religion or national origin.[27]

Later United States Supreme Court cases lent additional guidance. Under the current standard, set forth in *Meritor Savings Bank v. Vinson*,[28] harassment must be "sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment."[29] A "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee. . . ." does not violate Title VII.[30] Additionally, as explained in *Harris v. Forklift Systems*, the work environment must be both objectively and subjectively hostile or abusive.[31] Furthermore, the Court requires a fact finder to examine all the circumstances, including the frequency and severity of the conduct, whether it is physically threatening or humiliating, whether it is a mere offensive utterance, and whether it unreasonably interferes with an em-

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[24] Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988).

[25] In a case of quid pro quo harassment, an employer or superior made sexual favors a condition of employment or advancement. *See* 29 C.F.R § 1604.11(a)(2).

[26] The original purpose of these laws was to prevent employment discrimination against women and minorities. Title VII of the Civil Rights Act and the state and local statutes inspired by it prohibited discrimination in the "terms, conditions or privileges of employment." Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e (1988). Eventually, scholars, lawyers and policymakers realized that protection against discriminatory treatment probably was not enough to ensure equality in the workplace. Some workplaces, it was noted, tolerated behavior like groping of female employees. Other workplaces had supervisors who demanded sexual favors in exchange for promotion. Some businesses had environments that were so filled with sexual innuendo or racial speech that they were intolerable to women or minorities. For there to be truly equal access to the workplace for all, these hostile work environments had to be policed.

[27] EEOC guidelines, 29 CFR 1604.11.

[28] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[29] *See Id.* at 67.

[30] *Id.*

[31] Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

ployee's work performance[32] in addition to the ill-defined "social context" of the workplace.[33] Even as the Court has tried to clarify the standards for hostile work environment claims, it has acknowledged that it has not provided extremely clear guidance.[34]

Beyond their failure to provide clear guidance, courts and policymakers failed to provide appropriate avenues for those who might have a legitimate need to create a hostile work environment.[35] Congress did include a provision allowing employers to discriminate on the basis of religion, sex, or national origin, if membership in a certain group was a "bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation."[36] However, while this provision allows businesses to discriminate when they hire, it does not allow them to create or foster a work environment that could be subject to a hostile workplace action, even when such an environment might reasonably be necessary.[37] Outside of the sphere of BFOQs, business-necessity defenses have not been held to apply to hostile work environment claims.[38] Fur-

[32] *Id.* at 23. Furthermore, the Court has said that the conduct does not have to severely affect the plaintiff's psychological well-being or lead the plaintiff to suffer injury. *Id.* at 22.

[33] See Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 81 – 82 (1998). ("In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable Courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.").

[34] *See* Harris v. Forklift Sys., 510 U.S. 17, 23 (1998) ("This is not, and by its nature cannot be, a mathematically precise test.")

[35] While it is easy to say there is never a legitimate need to maintain a hostile work environment, this is much more difficult in practice. For instance, a neo-Nazi book store would seem to be a naturally hostile work environment for a Jewish employee. Similarly, a strip club might be a hostile work environment for a waitress, who could probably claim that the presence of sexually provocative, semi-clothed dancers all around led her to feel objectified.

[36] 42 U.S.C.A. § 2000e-2 (e). Note that this list does not allow age or race discrimination.

[37] *See* Eric S. Tilton, *Business Necessity and Hostile Work Environment: An Evolutionary Step Forward for Title VII*, 34 HOFSTRA L. REV. 229, 246 (2005). ("Could the argument be made that being a 'tough-skinned' female is a BFOQ in those certain instances where the workplace is full of vulgarity and obscenity? The answer is definitely 'no,' but it is important to note that the courts are willing to extend some latitude to employers when they have legitimate reasons for certain discriminatory practices. This same latitude should also be extended to employers who have legitimate reasons for engaging in 'harassing' behavior."). *Id.* at 246.

[38] *See* Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264 (2006) (overturning a lower court ruling that a hostile work environment was a business necessity for the producers of *Friends*).

thermore, courts have not allowed assumption of risk defenses to Title VII claims.

An early case, *Robinson v. Jacksonville Shipyards*,[39] illustrates how expressive materials that would normally be protected by the First Amendment can support a successful hostile work environment action even when they are not specifically directed at the plaintiff. In that case, a female shipyard worker sued for gender discrimination after overhearing sexist and demeaning comments and being repeatedly exposed to a vast collection of pornographic drawings, photographs and graffiti.[40] Discussing whether the harassment occurred because of the plaintiff's sex, the court found that the pornography hanging up around the yard could form the basis for a suit although it was not displayed "with the intent of offending women in the workplace" because it clearly had a demeaning impact on the women working at the shipyard.[41] Additionally, the court held that sexist comments and jokes and male co-workers' shunning of their female colleagues, when combined with the copious displays of pornography, was severe or pervasive enough for a reasonable woman to find the environment abusive.[42]

Robinson was also one of the first cases to explicitly discuss how hostile work environment actions escape First Amendment scrutiny.[43] The Court said hostile work environment actions were permissible because they fell under several exceptions to the First Amendment.[44] These include the theory that speech, when it is severe or pervasive enough, becomes discriminatory conduct, subject to regulation.[45] The court also held such regulations are permissible because they are merely time, place and manner restrictions. Additionally, the court held they are allowable under the "captive audience" exception.[46] Finally, the court held that even if none of the exceptions were to apply, hostile work environment actions would still hold up to strict scrutiny

[39] 760 F. Supp. 1486 (M.D. Fla. 1991).

[40] *Id.* at 1522, 1495 – 97. The plaintiff documented at least the instances of exposure to various pornographic materials.

[41] *Id.* at 1523.

[42] *Id.* at 1524. Expression that would otherwise be protected by the First Amendment from government suppression has been a basis for hostile work environment harassment. For instance, a court found that bible verses printed on the front of paychecks constituted hostile work environment harassment of a Jewish employee. *See* Brown Transp. Corp. v. Commonwealth Pa. Human Relations Comm'n, 578 A.2d 555 (Pa. Commw. Ct. 1990).

[43] *Id.* at 1534 – 1537.

[44] For a detailed examination of how these exceptions are not valid when hostile work environment actions are applied to expressive workplaces, *see infra* Part III.

[45] *Id.* at 1535.

[46] *Id.* at 1535 – 1536.

because they are narrowly tailored to a compelling government interest.[47]

B. *Employers Have Been Sued for Activities Related to their Production of Protected Expression*

Given the result in *Robinson* and the murky definition of what can constitute the basis for a hostile work environment discrimination action, it is unsurprising that speech within expressive workplaces – those workplaces where protected communications are produced, distributed, or regularly encountered by employees – has given rise to hostile environment claims. After all, if pornography and sexual graffiti posted in a shipyard could be sufficient to form the basis of a hostile work environment claim, why wouldn't the same be true for pornography displayed for sale in a convenience store;[48] Internet pornography at a public library;[49] sexual cartoons, gestures and jokes in a situation comedy writers' room;[50] sexist nicknames given on-air to radio personalities;[51] Ku Klux Klan robes hanging on the door of a television studio;[52] or sexist or racist ads?[53] Over the last twenty years, each of these scenarios has formed the basis for a hostile work environment claim that

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[47] *Id.* at 1536.

[48] Stanley v. Lawson Co., 993 F. Supp 1084 (N.D. Ohio, 1997).

[49] *See infra*, notes 80 – 85 and accompanying text.

[50] Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264 (2006).

[51] Diana v. Schlosser, 20 F. Supp. 2d 348 (D. Conn., 1998).

[52] *See* Little v. Nat'l Broad. Co., 210 F. Supp. 2d 330, (S.D.N.Y. 2002). The court included Ku Klux Klan robes hanging on the door of the control room for the *Late Night with Conan O'Brien* television program as evidence toward a prima facie case of hostile work environment racial discrimination, even though it was unclear whether the robes were being used as props for the show. The robes were one incident that might have been involved in the actual creation of the program among several other incidents that were clearly unrelated to the creative processes in the company. Although the robes could have been related to the production of the show, the court used them as evidence in its decision.

[53] The Special Case of Advertising: In at least two hostile-workplaces disputes, Ozawa v. Hyster and Stroh's Brewing Co., plaintiff's sought to use the defendant's advertising campaigns as evidence of the company's discriminatory attitudes. In Ozawa, a Japanese-American man complained to the Equal Employment Opportunity Commission that his company's advertisements, combined with other slights and insults, created an unpleasant enough workplace environment that a reasonable person in his shoes would have felt compelled to resign. The ads featured traditional Japanese symbols like Sumo wrestlers and Kabuki performers referencing the company's competition. The EEOC determined that Ozawa was discriminated against, partially basing their opinion on the advertisements, which had been on display both inside and outside the facility. *See* EEOC determination letter for Charge No. 3808636519, Ronald B. Krueger, Dec. 15, 1987.

In *Stroh's Brewing*, several female brewery employees sued the company for hostile workplace sexual harassment, saying employees bad behavior inside the brewery was partially caused by the beer company's ads featuring "The Swedish Bikini Team." Responding to the suit, the company pulled the advertisements, although a judge later disallowed the advertisements as evidence.

has threatened to punish an employer for the expression it creates or distributes.[54] But First Amendment concerns played little or no role in the cases' dispositions.

Although most of the cases detailed in this Part did not lead to judgments against the defendants, they still present a cause for concern. In three of the following cases, at least one court or administrative body found that the creation or dissemination of protected expression *could* lead to hostile workplace liability for the employer.[55]

Additionally, since only 1.8 percent of all civil cases are decided by a trial,[56] it is a safe assumption that many of these disputes are resolved out of court. It is therefore impossible to determine how much money expressive enterprises have had to pay to settle hostile work environment suits of questionable merit. Given that average legal costs for the defense of hostile work environment lawsuits can balloon into the six-figure range,[57] employers have an interest in avoiding the mere possibility of a lawsuit. Furthermore, lawsuits carry the possibility of negative publicity. Therefore, the hostile work environment action gives rational business owners an incentive to curb the expression of their enterprises, even if that speech is clearly protected by the First Amendment and bound for the public sphere. Viewed through the eyes of an employer, especially the owner of a fledgling media outlet, the cases outlined below provide ample warning of the consequences of edgy expression.

Although these two cases and others like them do not take place in expressive workplaces per se, the do help illuminate the tension between the First Amendment and Title VII and similar state statutes. If, under commercial speech doctrine advertisements receive some First Amendment protection from government action through regulation (intermediate scrutiny) it seems appropriate that they receive the same amount of protection from government action through enforcement of Title VII and similar state laws. For more on this, *see infra* note 201.

[54] Even before the Supreme Court's decision in *Meritor* defined the contours of the hostile work environment action, other suits threatened to punish businesses for their distribution of expression that is probably protected by the First Amendment. *See* State Div. of Human Rights v. McHarris Gift Ctr., 52 N.Y. 2d 813, (1980) (overturning for lack of jurisdiction a state human rights board decision that a gift shop's distribution of novelty items making fun of people of Polish descent constituted violation of public accommodations laws because they offended a Polish-American customer).

[55] *See infra* notes 58-63, 75-84, and accompanying text.

[56] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 459-60 (2004).

[57] *See* Jay Finegan, *Law and Disorder*, INC., Apr. 1994, at 67-68 (stating that the average costs of defending a sexual harassment lawsuit range from $20,000 to $200,000).

1. *Diana v. Scholsser*

In *Diana v. Schlosser*[58] a radio traffic reporter sued a morning deejay, a rock station and her employer, a third-party traffic information contractor, after the deejay kept referring to her on the air as "Big Boobs."[59] The plaintiff, Angelina Diana, was a traffic reporter for a company called Traffic Net that provided on-air traffic reports to several Hartford-area radio stations. One of her assignments was to report for The Sebastian Show, a highly rated morning radio show hosted by one of the defendants, Joseph Schlosser.[60] Right before her on-air debut, Schlosser introduced Diana to radio listeners as "Big Boobs" and referred to her by this nickname twice more during the show, each time she did the traffic.[61] After Diana repeatedly refused to refer to herself as "Big Boobs" on the air, Schlosser no longer let her do the traffic report. Eventually, Traffic Net assigned another reporter to the station and transferred Diana to an off-air job at the same pay rate. She quit a month later.[62] Based on these facts, and additional evidence that Traffic Net employees joked with Diana about the nickname, the court found a prima facie case for hostile-work-environment discrimination.[63]

2. *Stanley v. Lawson Co.*

In *Stanley v. Lawson Co.*[64], the plaintiff (Delores Stanley) sued her employer Dairy Mart, a convenience store chain, for sexual harassment after she was terminated for refusing to sell adult magazines. While the plaintiff was selling adult magazines, customers made lewd sexual comments and propositions to her three times.[65] Once the plaintiff was promoted to store manager, she discontinued the store's sale of pornographic magazines, saying pornography violated her religious beliefs and victimized women.[66] When her supervisors became aware of this[67] they told her to start selling the magazines again. When she refused, they suspended her, tried to force her resignation, then offered to trans-

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[58] Diana v. Schlosser, 20 F. Supp. 2d 348 (D. Conn. 1998).

[59] *Id.* at 349.

[60] Who went by the on-air name "Sebastian."

[61] *Id.*

[62] *Id* at 350.

[63] Connecticut Law Tribune, Connecticut Opinions, Digest. Additionally, it seems Schlosser has learned little from this incident about treating employees with respect. The current traffic reporter on the show is known as "the assless yet enigmatic Don Steele." WCCC Web site, http://wccc.com/morningshow/.

[64] 993 F. Supp. 1084, 1086 (N.D. Ohio, 1997).

[65] *Id* at 1087.

[66] *Id.*

[67] Through Lawson's own announcement on a local television news broadcast. *Id.*

fer her to another store which did not sell pornography.[68] When she refused the transfer, saying that the position might have required her to float to different stores that did sell pornography, they assumed she was resigning.[69]

Stanley sued the company for sexual and religious discrimination, alleging that requiring her to sell and work in the presence of pornography, which she believed victimized women, created a hostile work environment for her.[70] In its decision to dismiss Stanley's sex discrimination claim on summary judgment, the court held that the three lewd propositions were not severe enough to pass the *Harris* standard because they were too intermittent to be pervasive.[71] Interestingly, although the magistrate judge who wrote the initial report recommending dismissal of Stanley's case found that Title VII and the Ohio Civil Rights Act would violate the First Amendment if they required Dairy Mart to remove the magazines,[72] the district court declined to discuss the First Amendment with regard to the sex discrimination claim. Briefly engaging the First Amendment argument in its discussion of the religious discrimination claim, the court acknowledges that the business owner, not its employees, has the right to decide what is stocked and sold; and does not have to stop selling an item simply because an employee is offended by it.[73]

Although the court cleared Dairy Mart of sexual harassment in this case, the result could still lead to the chilling of free speech. The court did not clearly say that the First Amendment protects magazine sellers from employee lawsuits related to the contents of their wares. In fact, it rejected Dairy Mart's First Amendment defense as to the claim of religious discrimination.[74] It only said that in *this* case, the speech encountered by Stanley was not severe or pervasive enough to support a claim. A cautious convenience store owner considering whether she should carry pornographic magazines would still have to calculate whether selling the magazines was worth the risk of an em-

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[68] *Id.* The transfer would have been to a "reserve manager" position that paid the same salary.

[69] *Id.*

[70] *Id.* at 1087.

[71] *Id.* at 1090. A religious discrimination complaint went forward because the Court found that there was a genuine material issue of fact as to whether the offer of transfer was a reasonable accommodation of religious belief. *Id.* at 1091.

[72] *Id.* at 1089.

[73] *Id.* at 1091. However, the court held the store still had to show that it could not accommodate Stanley's religious belief in a way that does not cause it hardship. *Id.*

[74] *Id.* at 1092.

ployee lawsuit. And the more explicit a magazine is, the more likely it would be to offend the clerk who is selling it.

3. *Smith v. Minneapolis Public Library*

In *Smith v. Minneapolis Public Library*[75] and related cases, librarians complained to the Equal Employment Opportunity Commission (EEOC) that repeated exposure to customers' Internet pornography created a hostile work environment for her, violating Title VII and the Minnesota Human Rights Act.[76] The library's policies allowed patrons unfiltered access to the Internet and allowed users to print out images free of charge at a printer near the librarians' work area.[77] Additionally, librarians were required to warn patrons using the Internet that their 30-minute time limits were about to expire.[78] As a result, librarians were forced to view a wide variety of sexually explicit images both on the printer and on patrons' screens.[79]

Based on these facts, the EEOC determined that the library subjected its librarians to a hostile work environment.[80] It suggested that the library pay each of the librarians $75,000.[81] After the Justice Department declined to act on the complaint, 12 of the librarians sued, seeking damages of $400,000 each.[82] The library and librarians settled for $36,000.[83] Additionally, the settlement required non-monetary measures like the posting of security guards and the creation of harsher penalties for patrons' Internet policy violations.[84] Additionally, the li-

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[75] EEOC Dec. No. 265A00651 (2001).

[76] EEOC Charge of Discrimination, librarian Virginia Pear, May 2, 2000.

[77] *Id.* Librarians were often subjected to abusive and often vulgar language by patrons when they enforced the time limit. *Id.*

[78] *Id.*

[79] These included images depicting bestiality, homosexual and heterosexual acts of oral, anal and vaginal intercourse, and explicit photos of male and female genitals. Id.

[80] EEOC determination letter in *Smith* v. *Minneapolis Public Library.*

[81] Michael Rogers & Norman Oder, *Feds Back Minnesota Staffers' Complaint*, LIBRARY JOURNAL, July 1, 2001, at 20.

[82] *Adamson v. Minneapolis Public Library. Staffers Sue Minneapolis PL over Hostile Workplace*; 34 AMERICAN LIBRARIES 23 (2003).

[83] Oder, *Minneapolis PL Settles Porn Suit*, LIBRARY JOURNAL, Sept. 15, 2003, at 17.

[84] Jennifer Linney, *Library Employees Settle Internet Porn Suit*, TRIAL, Nov. 1, 2003 at 86. *See also* Thomas Corbett, *Courts Rule in Internet Cases*, *available at* http://www.silha.umn.edu/summer2003.htm#librarians:

> At the encouragement of Judge Jonathan Lebedoff working with new library director Kit Hadly, a settlement of $435,000 was awarded to the librarians. Even though a majority of the trustees of the Minneapolis public library oppose the installation of filtering software, as a condition of settlement, library officials will consider installing Internet filters, as well as making changes in policies regarding the printing of Internet materials and penalties for library patrons who access pornography on city library computers. Penalties may include banning individuals from city libraries for up to a year; viewers of child pornogra-

brary instituted fees for printing out material from the Internet and pledged to research filtering software.[85]

The Minneapolis Public Library cases provide another example of the danger to enterprises that distribute or provide access to offensive material. Given a choice between risking a suit or stocking offensive material, cases like this offer libraries incentives to restrict their offerings.

4. *Herberg v. California Institute of the Arts*

In *Herberg v. California Institute of the Arts*,[86] Herberg, an 82-year-old cashier at an art school, and three other employees[87] sued the California Institute of the Arts under California's Fair Employment and Housing Act (FEHA) for creating a hostile work environment by displaying a painting at a twenty-four-hour student art exhibit.[88] The painting, entitled *The Last Art Piece*, was a 25-by-40-inch pencil drawing of Herberg and other CalArts students and faculty performing various sex acts.[89] The drawing centered on a bare-breasted Herberg straddling a male faculty member as if she were engaged in intercourse with him.[90] Although Herberg did not actually see the drawing while it was on display, when told about it she left work immediately, suffered an asthma attack, and developed problems eating and sleeping.[91] She never returned to her job.[92] Despite complaints from the plaintiffs, the school did not take down the drawing before it became the dominant topic of conversation at the school and was shown at a reception attended by about 100 people.[93] The students who created the drawing

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phy could lose library privileges permanently. Under current policy, patrons who view obscene sites could have their privileges suspended for 90 days.

[85] *Supra* note 83.

[86] 101 Cal. App. 4th 142 (2002).

[87] The plaintiff's daughter, granddaughter and another woman who was not related to them. *Id.*

[88] *Id.* at 144. The school had a formal policy for the removal of objectionable art stating that:

> [The school] does not censor any work on the basis of content; nor is any work at the Institute subject to prior censorship. If any person objects to any exhibit or presentation, that person should convey the objection in writing to the student's dean. The person will receive a written answer to the objection within 48 hours. If the person is dissatisfied with the decision, he/she may appeal it to the [Exhibit Review] Committee. The decision of the Committee is final. *Id.*

[89] *Id.* at 146.

[90] *Id.*

[91] *Id.* at 147.

[92] *Id.*

[93] *See Id.* The piece as displayed:

> Provoked a substantial controversy among Cal Arts' faculty, students and staff. . Throughout the day, the student artists participated in formal and informal critique ses-

withdrew it from the exhibit on their own a few hours later because they "felt that [their] point had been made and the sketch had served its purpose."[94]

The court, reviewing the case on Herberg's appeal from an order of summary judgment, held that the one-time display of the picture was not severe or pervasive enough to constitute hostile-work-environment harassment.[95] While it acknowledged that a one-time incident can support a sexual harassment claim if it is severe enough, such as in some cases of physical assault, the single display of one drawing did not rise to the same level.[96] Aside from the short duration of the incident, the court also seemed to be persuaded by the artists' intent: "it is undisputed that the drawing was not intended to harass plaintiffs but rather to make a point about representational art."[97] Notably, this court explicitly acknowledged in a discussion of context that the First Amendment did weigh against finding that the painting was sexual harassment.[98]

5. *Lyle v. Warner Brothers Television Productions*

In *Lyle v. Warner Brothers Television Productions*,[99] a writers' assistant for *Friends,* an adult-oriented situation comedy, sued television

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sions about The Last Art Piece and its effect on Herberg and the rest of the CalArts community. *Id.*

[94] *Id.* at 147.

[95] *Id.* at 153 – 54.

[96] "The nature of the alleged harassment in this case does not begin to approach the severity of rape or violent sexual assault or even milder forms of unwanted physical contact." *Id.*

[97] *Id.*

[98] *See Id.* at 154 n.12 ("The context in which the alleged harassment took place also supports our decision. (See Fisher, *supra*, 214 Cal. App. 3d at 609-610.) We see a vast difference between posting obscene cartoons in a men's room, as was done in Bennett, supra, 845 F.2d 104, and the display of The Last Art Piece in the designated gallery area at an art school. CalArts's noncensorship policy was widely distributed to both students and employees. In our view it was reasonable to expect that exhibitions of student artwork would, from time to time, include sexually explicit material. Although we reject CalArts's contention that its anticensorship policy and the First Amendment exempt it from the laws against sexual harassment, in this case the context of the display further militates against a finding of severe or pervasive harassment.").

In a similar situation that never led to a lawsuit, Nancy Stumhofer, a professor at Pennsylvania State University had Francisco Goya's painting *Naked Maja* removed from her classroom because she felt sexually harassed by it. In a National Public Radio interview with Scott Simon, Stumhofer said that when she first taught there, she noticed some of the male students nudging each other as they looked at the painting. This made her feel embarrassed, and she also felt that "their behavior made the females in the room uncomfortable." It was difficult for her, Stumhofer added, to feel professional in the presence of that painting." Nat Hentoff, *Sexual Harassment by Francisco Goya,* WASH. POST, Dec. 27, 1991, at A21.

[99] Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264 (2006).

producers for hostile work environment discrimination after she was dismissed from her job.[100] Lyle's duties included sitting in on the writers' room and transcribing jokes and dialogue brainstormed by the writers.[101] Before beginning her job, she was warned that she would be listening to the writers' sexual jokes and discussions.[102] That bare warning might not have prepared her for what she encountered on the show, which included writers' masturbatory gestures; a coloring book depicting cheerleaders with their legs spread; discussions of the writers' own sexual experiences, preferences, and proclivities; speculation about, admiration and denigration of female *Friends* stars' anatomies; and sexual wordplay, all in the most graphic language both inside and outside the writers' room.[103] The subjects of the writers' discussions often mirrored themes on the show, which included sexual innuendo, discussions of oral sex, pornography and premature ejaculation, among other sexual subjects.[104] Lyle was fired from the show, ostensibly because she wasn't good at typing, after working there for four months.[105]

At trial, the court granted the defendants' motion for summary judgment, ruling that Lyle did not establish her discrimination claims under FEHA and awarded the defendants $415,800 in attorney's fees for defending a lawsuit it called "frivolous, unreasonable and without foundation."[106] However, on appeal, the California Court of Appeals found that triable issues of fact existed as to whether the *Friends* production was a hostile work environment. The defense appealed to the California Supreme Court, claiming that the speech and conduct of the writers did not rise to the level of discriminatory harassment and that, if the conduct did rise to that level, holding the writers and producers liable would infringe upon their First Amendment rights to free speech.[107]

The California Supreme Court found that the plaintiff did not establish a prima facie case for hostile workplace discrimination because

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[100] *Id.* at 271-272.

[101] *Id.*

[102] *Id.*

[103] *Id* at 275.

[104] *Id.* at 276.

[105] *Id.* at 272-273. Lyle, an African-American woman, originally sued for racial discrimination as well, saying that her firing was retaliation for a suggestion that the show have more African-American characters on it. The suit for wrongful termination was denied by the California Court of Appeals, and Lyle's appellate decision was not certified by the California Supreme Court.

The tenor of the discussions in the writers' room was unchanged before, after and during Lyle's tenure. *Id.*

[106] *Id.* at 273.

[107] *Id.*

she did not show that the conduct involved was severe or pervasive, in light of the requirement that the conduct supporting the claim had to be actionable *because of* the plaintiff's sex.[108] But the ruling is more subtle than it appears. The court referred to the "severe or pervasive" and "because of sex" requirments as "elements" of a hostile work environment claim, indicating that they are considered separately.[109] However, since most of the conduct described in Lyle's complaint was not directed at Lyle specifically or at women generally,[110] the court found that the conduct could not count toward the action because it was not committed because of sex. In the second step of the court's analysis, it considered whether the conduct that *was* committed because of sex[111] was severe or pervasive enough to constitute a prima facie case for hostile environment harassment. The court found that it did not.[112]

This approach, rooted in the court's reading of the California Fair Employment and Housing Act, requires that harassing speech must be directed at a person because of his or her membership in a protected class, or at the protected class as a whole, is a step toward protecting free speech. However, other jurisdictions approach the question of hostile work environment action in a slightly different way, analyzing it more subjectively by asking if the plaintiff found the conduct discriminatory because of her membership in a protected class. Under this more stringent standard, the court in *Lyle* could have easily allowed the suit to move forward.[113]

The *Lyle* court's decision was partially based on "the fact that the *Friends* production was a creative workplace focused on generating

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[108] *Id.* at 292.

[109] *Id.* at 279.

[110] As reasoned by the court:

> [C]onsidering the totality of the circumstances, especially the nature of the writers' work, the facts largely forming the basis of plaintiff's sexual harassment action-(1) the writers' sexual antics, including their pantomiming of masturbation, their drawing in the cheerleader coloring book, their altering words on scripts and calendars to spell out male and female body parts, (2) their graphic discussions about their personal sexual experiences, sexual preferences, and preferences in women, and (3) their bragging about their personal sexual exploits with girlfriends and wives-did not present a triable issue whether the writers engaged in harassment 'because of . . . sex.' *Id.* at 285.

[111] This conduct included admissions that writers discussed their sexual fantasies about female cast members, commented that one cast member had "dried twigs" or "branches" in her vagina, and, on two occasions, referred to women who displeased them as "cunts" or "bitches." *Id.* at 288 – 92.

[112] *Id.* at 292.

[113] This interpretation is inconsistent with the rule laid down by the court in Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991), and the approach taken by courts outside of California.

scripts for an adult-oriented comedy show featuring sexual themes. . ."[114] Explaining this further, the court stated:

> The circumstances pertaining to an employer's type of work and . . . her alleged harassers are properly considered in determining whether the harassers said or did things because of the plaintiff's sex and whether the subject conduct altered the terms or conditions of employment.[115]

However, it also states that the context is not particularly relevant because the plaintiff failed to make the case that "any such conduct was severe enough or sufficiently pervasive to be actionable."[116] Therefore, the court held,

> We have no occasion to determine whether liability for such language might infringe on the defendants' rights of free speech under the First Amendment to the federal Constitution or the state Constitution.[117]

While the majority found it unnecessary to consider the First Amendment implications of the suit, Justice Chin, in concurrence, did, holding that allowing the suit to go forward would violate the defendant's First Amendment rights.[118] Chin found it especially relevant that the harassing conduct occurred while writers were engaged in a creative process, an activity he believed is protected by the First Amendment.[119] To protect the creative process, the concurrence suggests that speech should not be actionable when: (1) an employer's product is protected by the First Amendment, and (2) the speech arose in the context of the creative process. (3) and it was not directed at the plaintiff.[120] To bolster its argument, the concurrence cites entertainment industry authorities discussing the mysteries, excesses, and cruelties of the creative process, saying that such protection is necessary to protect "the boldness of expression indispensable for a progressive society."[121]

This above concurrence from *Lyle* court is a rare opinion that acknowledges and attempts to solve the conflicts between the First Amendment and workplace harassment laws when they are applied to expressive workplaces. Most of the cases discussed above were dismissed at summary judgment because the expression in question did

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[114] *Id.* at 272.
[115] *Id.* at 292.
[116] *Id.*
[117] *Id.* at 294.
[118] *See Id.* at 295 ("This case has very little to with sexual harassment and very much to do with core First Amendment free speech rights.").
[119] *Id.*
[120] *Id.* at 299 – 300. For more on the Chin test and other proposed remedies to this problem, see Part IV.
[121] *Id.*

not rise to the levels of severity and pervasiveness necessary to support a hostile work environment action. It is true that none of the speech in these cases – pornography, racist or sexist advertising, raunchy morning radio shows and sexy sitcoms – is the kind of core political speech that would seem to be most deserving of protection. But make no mistake: art, entertainment and advertising that contain implicit, if unpopular, cultural and political viewpoints are protected by the First Amendment.

These cases should raise concerns about how generally protected expression could lead to hostile-workplace harassment suits and how these suits function to repress speech inside *and* outside the office. The mere fear of a lawsuit can make people and institutions reticent to express themselves and more likely to restrict public access to certain materials. Faced with such a suit, Stroh's pulled its Swedish Bikini Team ads, the Minneapolis Public library and other institutions have instituted more stringent Web surfing guidelines, sometimes running afoul of the First Amendment in the process,[122] human resources experts have warned business owners that they could be liable if employees were harassed by customers, urging managers to police patrons' offensive behavior, including the telling of ethnic or religious jokes.[123]

Protected speech continues to find its way into hostile work environment law suits: In October 2006, two African-American teachers sued a Seattle private high school alleging that inviting conservative commentator Dinesh D'Souza to speak on campus contributed, among other things, to a hostile work environment.[124] Until courts or legislators clearly define the way the First Amendment protects expressive workplaces from hostile work environment actions, suits like this will diminish institutions' and enterprises' willingness to create or discuss possibly offensive speech.

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[122] *See* Mainstream Loudoun v. Bd. of Trustees of Library, 24 F. Supp. 2d 552, 570 (E. D. Va. 1998) (holding that a library board's code that restricted the use of the Internet to view pornography and required filtering on all computers violated the First Amendment).

[123] Diana L Deadrick, Scott W. Kezman & R. Bruce McAfee, *Harassment by Non-Employees: How should employers respond?* HR MAGAZINE (Dec. 1, 1996).

[124] *See* complaint for damages, Sims v. Lakeside School, No. C06-1412RSM, 2007 WL 3254455, at *6, (D. Wash. Oct. 10, 2006); John Iwasaki, *Teachers accuse Lakeside School of Bias*, SEATTLE POST-INTELLIGENCER, Oct. 13, 2006.

III. The First Amendment, Expressive Workplaces and the Hostile Environment Action: Illustration of a Conundrum

A. *The First Amendment Conundrum*

When applied in expressive workplaces, hostile work environment laws can violate the First Amendment. They are state actions that burden speech because of its racial, sexual, or religious content. They do not fall under any established exception to the First Amendment. They are not justified by strict scrutiny. Therefore, they are unconstitutional. Additionally, expressive workplaces have a special quality: their employees produce and encounter speech not only for internal consumption by fellow workers, but for external consumption for and with the general public. This creates an even greater First Amendment conundrum than a hostile work environment action applied to a private workplace[125] because it places a greater burden on speech in general. If hostile workplace laws chill offensive speech in private workplaces, the application of these laws to expressive workplaces chill this offensive expression everywhere by cooling it off at its source.

B. *Hostile Work Environment Laws Are State Action*

The laws enabling hostile work environment suits are state actions that restrict speech based on its offensive content. They are state action regardless of whether they are enforced by private lawsuits, suits filed by the U.S. Justice Department, by a state, or by a local agency charged with civil rights enforcement. No matter who files them, these suits are still state action because the laws allowing the cause of action as well as the Court enforcing the action are products of government institutions.[126] In these suits, the state, through its laws, is applying pressure to employers to suppress their possibly offensive speech or the speech of their employees to avoid being sued.

A brief illustration might be helpful. Suppose Congress finds that pervasive workplace criticism of American cars was helping to increase the foreign trade deficit. Seeking to increase esteem for these goods, Congress passes a law making employers liable for damages to any employee who owns a Ford, Chevy[127] or Chrysler and is offended by a

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[125] Workplaces that do not come into contact, generally, with the public and are not involved in the creation, manufacture or dissemination of protected expression.

[126] *See, e.g.*, N. Y. Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (holding that a private libel suit was a state action that entitled defendants to some degree of First Amendment protection. *See also* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (holding that a promissory estoppel action demanded First Amendment analysis.).

[127] Or any other General Motors automobile.

negative on-the-job comment about them. The law allows an employee to sue his or her employer for on-the-job exposure to these anti-domestic-auto comments regardless of whether the exposure came from the employer, an employee or a third party. Responding to the law, the employer would almost certainly ban employees from criticizing American cars. An extremely cautious employer might even bar all workplace discussion of automobiles, just to be on the safe side. Furthermore, it would be difficult, if not impossible for newspapers and automotive publications to publish honest criticism of American cars, lest an offended employee sue. Thus, the state action of passing the law, enforced directly by the employer seeking to minimize liability, would result in the suppression of criticism of American autos, both inside and outside the workplace.

Hostile workplace laws operate in a similar way. The state or federal government has found that certain kinds of expression, at a certain frequency or severity, amount to discrimination. The government has passed a law making employers liable if employees are subjected to a certain amount of this expression. Seeking to avoid liability, employers restrict the expression even if it chills discussions that might not be in the realm of liability. Thus, hostile work environment laws are an indirect state action that burdens certain kinds of expression.

C. *Hostile Work Environment Laws are Presumptively Unconstitutional Content-Based Regulations*

Hostile work environment actions based on protected expression are problematic in general because they are a viewpoint-based restriction on speech: that is, they subject speech to punishment based on its offensive racist or sexist content.[128] In general, such bans are problematic because they suppress the availability of expression within the marketplace. It is this concern that makes the application of hostile work environment rules in expressive workplaces more problematic than their application to private employers with no expressive function.

When the government suppresses speech inside a private employer, it disappears from a machine shop or an accounting firm. But

[128] *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 – 597, (5th Cir. 1995) (Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."). *See also* Rosenberger v. University of Virginia, 515 U.S. 819, 828-29 (1995) (stating that it is "axiomatic" that the government cannot regulate speech based upon its content or message and that the government may not financially burden some kinds of speech because of its message).

when such expression is suppressed in expressive workplaces, it not only chills the inside of the newsroom or the print shop. It reduces the ability of those employers to produce expression which might be offensive on the basis of race, sex, national origin, religion, or age.[129] So, it quells the ability of enterprises to project that speech onto news stands and breakfast tables, or for people to discuss such speech in public. Although many workplaces function as a site for employees to engage in political discussions with one another, the application of hostile work environment laws in expressive workplaces threatens a much larger proportion of the public discourse than similar applications to private workplaces. Therefore, it would be more likely to "drive certain ideas or viewpoints from the marketplace." Since hostile work environment actions only punish expression that is offensive on the basis of its effect on certain classes of people, it should be invalidated, at least as applied to expressive conduct.[130]

For example, imagine a natural history museum choosing between two lecturers. One is a controversial scholar who has concluded that the evolutionary differences between men and women make each gender better suited to different professions. Another is a less controversial lecturer who studies the evolutionary relationship between humans and dogs. The museum would have a legal incentive to hold the program about our canine companions.[131] This is because the views presented in the lecture, if offensive to women, could be used as evidence of a hostile work environment for female employees.[132] Hostile work environment actions do not discourage all speech; they only discourage speech that might be offensive because of gender, race, age, nationality, or religion.[133]

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[129] It is easy to list current political topics that might include content that is offensive on these bases: the fitness of a woman to be the president; Sen. Barak Obama's racial authenticity; illegal immigration; outsourcing of jobs; affirmative action; gay marriage; the Israeli-Palestinian conflict; the War on Terror.

[130] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 409 – 411 (1992) (White, J. concurring) ("Under the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional.").

[131] This would be especially true if there was any sort of history or present allegations of sex discrimination at the institution where the lecture is taking place.

[132] There is currently a case pending in Washington in which two African-American high school teachers are suing their school for racial discrimination based, in part, on a claim that inviting the conservative author Dinesh D'Souza contributed to a hostile work environment at the school, even when the invitation to D'Souza was withdrawn. *See supra*, note 124 and accompanying text.

[133] Similarly, a conversation between employees about the good and bad qualities of Long John Silver's restaurant would probably not expose a business to liability from hostile work environment suits. But a similar conversation about the career of pornographic movie star Long Dong Silver might be grounds for a hostile work environment action. A conversation

The Supreme Court has stated several times that one of the First Amendment's functions is to prevent inappropriate government interference in the marketplace of ideas. In *Rosenberger v. University of Virginia*[134] the Court held that a public university's blanket denial of support to religious student groups violated the First Amendment because it was impermissible viewpoint-based discrimination.[135] To justify its decision, the Court declared that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[136]

In *R.A.V. v. City of St. Paul*[137] the Court held that laws burdening expression based on its content are presumptively unconstitutional. Striking down an ordinance that punished racially, ethnically or religiously offensive expression,[138] the Court held that laws prohibiting speech are facially unconstitutional when they discriminate against speech on the basis of its subject matter.[139] It did so even though the Court accepted, for the purposes of argument, the premise that only expression already covered under the "fighting words" exemption to the First Amendment was prohibited.[140] Additionally the law struck down in *R.A.V.* burdened speech much further from mainstream public discourse than expression chilled by hostile work environment actions.

The Court's opinion is meant to make clear that the First Amendment limits the State's ability to discriminate against speech on the basis of content.[141] "Content discrimination," the majority writes, "raises the specter that the Government may effectively drive certain ideas or

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in general is not restricted by hostile work environment action. A conversation about pornography probably is.

[134] 515 U.S. 819 (1995).

[135] This is especially notable because the court was balancing First Amendment free speech rights against First Amendment rights from the Establishment Clause. *Id.* at 842 – 843. If the prohibition against viewpoint-based discrimination is strong enough to balance out constitutional concerns, it should certainly be strong enough to balance out statutory ones.

[136] *Id.* at 829.

[137] 505 U.S. 377 (1992). The R.A.V. Court mentions Title VII in passing, postulating that there may be an exception to its viewpoint-based rule for "fighting words among others" that lead to a discriminatory work environment. *Id.* at 389 – 390. For a discussion of how this affects the analysis, see *infra* at notes 146-50 with accompanying text.

[138] The ordinance read, in part, that:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. *Id.* at 380.

[139] *Id.* at 382.

[140] *Id.* at 381.

[141] *Id.* at 387.

viewpoints from the marketplace."[142] Yet this specter is precisely the one that haunts the hostile work environment action, especially when it is applied to expressive workplaces.

D. *Hostile Work Environment Laws, When Applied to Expressive Workplaces, Do Not Fall Under Any Established Exception to the First Amendment*

Courts and legal scholars have sought to justify workplace harassment laws by arguing that they fall under one or more exceptions to First Amendment protection. These include[143] purported exceptions for regulations that restrict speech: (1) because it constitutes conduct or it causes a "secondary effect" as in *R.A.V. v. City of St. Paul*[144]; (2) because the audience is captive; (3) because it is in the workplace; (4) because of its time, place and manner, regardless of content.[145] These exceptions may or may not be valid when applied in non-expressive workplaces: compelling arguments exist on both sides. However, expressive workplaces – because of their function in the creation and dissemination of material that is protected by the First Amendment, or because of their employees' contact with such expression by third parties – do not fit within these exceptions. Showing how hostile work environment actions, as applied to expressive workplaces, do not fit into any of these proposed exceptions offers further illustration of the way this application of the law runs afoul of the First Amendment.

1. The Supreme Court's Dictum in *R.A.V. v. City of St. Paul* Does Not Provide an Exception for Hostile Work Environment Actions, Only for the Regulation of Conduct and Secondary Effects

Those supporting the hostile work environment action point to a sentence in the Court's opinion in *R.A.V. v. City of St. Paul* as proof that Title VII and similar laws are excepted from First Amendment scrutiny.[146] The Court states:

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[142] *Id.*

[143] Other exceptions, including fighting words, government speech, and public forum analysis are extremely unlikely to provide an exception. *See* Eugene Volokh, *Harassment Law and the Speech It Restricts*, 39 UCLA L. REV. 1791 (1992).

[144] *See infra* note 147.

[145] *See* Volokh, *supra* note 143, at 1819-48.

[146] *See, e.g.,* Appellant's Consolidated Answer to Amici Briefs Filed in Support of Defendants/Respondents, at 3-4, Lyle v. Warner Bros., 38 Cal. 4th 264 (2006), 2005 WL 1031429 [hereinafter *Answer*]; Russell Robinson, 12 UCLA ENT. L. REV 169, 178-79. *See also* Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of NY, Inc., 968 F.2d 286, 296 (2d Cir. 1992)

Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribeable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [citations omitted] 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, . . .[147]

Within the context of the opinion it is clear that the Court is citing Title VII as one example of a law which, through its regulation of certain conduct (employment discrimination), might incidentally sweep some speech into its reach.[148] The opinion is reiterating its distinction between laws that regulate conduct and laws which regulate the marketplace for speech.

Those who believe this passage offers a general exception to the First Amendment for hostile work environment suits would expand on this argument as follows: Title VII and similar state statutes outlaw job discrimination on the basis of membership in a protected class. Speech that creates a hostile work environment has the secondary effect of discriminating against workers in protected classes. The *R.A.V.* dictum says that laws that commit incidental content-based discrimination are constitutional. Therefore, if speech rises to the level of causing the secondary effect of protected-class discrimination by creating a hostile work environment, it can be suppressed despite the First Amendment.

However, an analysis of the characteristics of the hostile work environment action makes it clear that the dictum does not provide these actions with safe harbor. Title VII and related state hostile workplace suits make speech actionable when it creates an environment that is so unpleasant as to constitute discrimination against protected classes *because of* their membership in that class.[149] The laws do not burden all workplace harassment, or all speech that would create a harassing environment. They only burden speech that has an adverse communicative effect on protected classes.

(invoking the passage in *R.A.V.* to show that a state public accommodations' law passes First Amendment muster).

[147] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992).

[148] *Id.* at 389.

[149] This analysis mirrors, to a large extent, the arguments put forth in Justice White's concurring opinion in *R.A.V.*, in which Justice White explains how the dictum does not offer a real First Amendment exception to hostile work environment actions. *R.A.V.*, 505 U.S. at 409–11.

To illustrate, compare hostile work environment laws with espionage laws. Espionage laws legitimately sweep some expression – speech that passes government secrets – in their general prohibition against conduct aiding an enemy. Espionage laws can punish speech because the speech they prohibit has a secondary performative impact of betrayal of the speaker's country. But the speech subjected to government regulation in hostile work environments is being punished not because of its performative nature – not because of its action – but because of its communicative effect: it offends people in protected classes.[150]

In hostile work environment actions, it is not the secondary effect of the speech that is being regulated; it is the speech itself. Several Courts and scholars have interpreted the *R.A.V.* dictum accordingly and have given it little significance.[151] The hostile workplace action,

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[150] Additionally, the dictum suggests that such expression could be regulated if it falls within another exception, such as fighting words, which much of the speech actionable in hostile work environment suits do not. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1293 n.74 (2005).

[151] *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 n.7 (5th Cir. 1995). This case struck down a verdict in favor of a female police officer, who claimed that a police union was creating a hostile work environment for her by writing satirical anonymous articles about her in a union newsletter. The Court found the behavior in question was not severe or pervasive enough to constitute a hostile work environment, so it did not rule on whether the speech was protected by the First Amendment. *Id.* at 596. However, the Court does opine that *R.A.V.* does not carve out a new exception to the First Amendment for Title VII. "The Court's pronouncement in *R.A.V.*, that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" does not mean that Title VII trumps First Amendment speech rights. Rather, as the next sentence in *R.A.V.* explains, conduct not targeted on the basis of its expressive content may be regulated. R.A.V. v. City of St. Paul, 505 U.S. 377, (1992). Citing *R.A.V.*, the Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), reiterated that conduct not targeted on the basis of its expressive content may be regulated by Title VII. However, application of Title VII to the "conduct" in the case sub judice would do precisely that-regulate speech on the basis of its expressive content.

See also Saxe v. State Coll. Area Sch. Dist. 240 F.3d 200, 209 (3d Cir. 2001). This case struck down a school district's anti-harassment policy on First Amendment grounds. The defendant school district argued that the *R.A.V.* dictum offered the regulation an exception to shield it from First Amendment scrutiny. The Court dismissed this argument, writing "[f]or this reason, we cannot accept SCASD's contention that the application of anti-harassment law to expressive speech can be justified as a regulation of the speech's 'secondary effects.'" *R.A.V.* did acknowledge that content-discriminatory speech restrictions may be permissible when the content classification merely "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'" *R.A.V.*, 505 U.S. at 389, (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). The Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener: "'Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. The emotive impact

when based upon otherwise protected expression, does not find an exception to First Amendment protection in *R.A.V.*

2. The Captive Audience Exception Does Not Apply

Scholars, practitioners, and judges have argued that the captive audience exception to the First Amendment can justify hostile work environment actions' chilling of speech inside the workplace.[152] The doctrine was first invoked by the Supreme Court in *Rowan v. United States Post Office Dept.*,[153] which held that a law forcing the Post Office, at a resident's request, to stop home delivery of "erotically arousing or sexually provocative" advertisements. The rationale was that because people are forcibly exposed to – captives – of others' speech outside the home, they have the right to filter that content out at their doorstep[154] and, theoretically, other places where they cannot turn away. From there, the doctrine has been invoked to justify restriction of political ads on public buses,[155] restriction of picketing outside of private homes,[156] and possibly the restriction of broadcast vulgarity.[157]

The court in *Robinson v. Jacksonville Shipyards* also invoked this exception, holding that a person is captive in their workplace and arguing that free speech doctrine offers "great latitude in protecting captive audiences from offensive speech."[158] Although it can be debated whether the captive audience doctrine is correctly applied in *Robin-*

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of speech on its audience is not a 'secondary effect.'" *R.A.V.*, 505 U.S. at 394 (citation omitted).

But see Burns v. City of Detroit, 660 N.W. 85, 94 (Mich. Ct. App. 2003) (holding that *R.A.V.* can be read as providing an exception to First Amendment protection for speech which has the effect of discriminating).

[152] *See Answer, supra* note 146, at 13–14. *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535–36 (1991).

[153] 397 U.S. 728 (1970).

[154] *Id.* at 736.

[155] *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality). Although this case discusses the "captive audience" doctrine, the holding is complicated by the fact that the Court held that government-operated buses were a private forum and therefore had greater power to restrict the kind of speech displayed in them.

[156] Frisby v. Schultz, 487 U.S. 474 (1988). However, this precedent is not as strong as it seems. Although this law was intended to quell anti-abortion protests outside doctors' homes, it was facially content-neutral. Additionally, the Court also held this was a valid time, place, and manner restriction.

[157] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that a radio station could be sanctioned for the broadcast of George Carlin's "Filthy Words" monologue). This decision, however, is also problematic to the larger proposition that the so-called "captive audience" doctrine could be used to regulate speech outside the home. The decision was predicated, in part, on broadcasting's unique ability to reach inside the home and, without notice or warning, confront viewers with offensive content. Additionally, the Court phrased the holding of *Rowan* as "the right to be left alone." *Id.* at 748.

[158] *See Robinson*, 760 F. Supp. at 1534.

son,[159] it is clear that the doctrine cannot provide an exception that allows the wholesale application of the hostile work environment action to the expressive workplace. This is because the Court, in cases like *Erznoznik v. City of Jacksonville*[160] and *Cohen v. California*,[161] has refused to apply the captive audience doctrine to the public discourse at large.[162]

Erznoznik and *Cohen* are especially instructive because they show that the limits of the captive audience exception end when they place even modest burdens on the public discourse outside the home. In *Erznoznik,* the Court struck down a law prohibiting the depiction of nudity at a drive-in theater, despite the fact that viewers were "captive" to it.[163] In *Cohen,* the Court considered whether the arrest of the defendant in a California courthouse for disturbing the peace by wearing a jacket emblazoned with the words "Fuck the Draft" was a violation of his First Amendment rights.[164] The Court ruled it was, holding that the captive audience exception did not justify the prosecution.[165] These results illustrate how the hostile work environment action, when applied to expressive workers who are exposed to the protected expression of third parties, is problematic.

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[159] *See* Volokh, *supra* note 20, at 1832-40 (arguing that the captive audience doctrine is limited to protecting residents in and around their homes, not at their workplaces). Examining *Rowan, Lehman, Frisby,* and *Pacifica*, it is difficult to escape this conclusion, if not for the *Robinson* Court's adoption of this rationale. Each of the precedent cases involve either protection of home privacy or a secondary exception to free speech: government acting as manager of a private forum, regulator of the airwaves, or content-neutral regulator of the time, place and manner of speech.

[160] 422 U.S. 205 (1975).

[161] 403 U.S. 15 (1971).

[162] An additional argument against the application of the captive audience exception in expressive workplaces is inspired by the analogy the FCC lawyers in *Pacifica* make to nuisance law. In that case, the lawyers for the Commission argued that the offensive speech on the radio constituted a public nuisance, so the government would be right to regulate it. FCC v. Pacifica, 438 U.S. 726 (1978). The Court responded that "nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard." *Id.* at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

This is telling in two ways: (1) It acknowledges the importance of context for determining what speech is appropriate for what time. While it is extremely difficult to imagine a situation where discrimination is appropriate, it is much less difficult to imagine a situation where it would be appropriate to discuss viewpoints that could lend support to a hostile work environment claim. (2) Viewing the application of hostile work environment action to expressive workplaces through the lens of nuisance analysis opens up questions of assumption of risk. In traditional nuisance doctrine, one party who is found to be "coming to a nuisance" is generally disfavored. It would be easy to argue that a writer on an adult comedy television show or a clerk at an convenience store that sold pornographic magazines would have reduced recourse in a nuisance analysis because they came to the nuisance.

[163] *See Erznoznik,* 422 U.S. at 210-11.

[164] *See* Cohen v. California, 403 U.S. 15 (1971).

[165] *See Id.* at 21-22.

To further illustrate this point, assume that instead of wearing a "fuck the draft" jacket to court at least once, Cohen (improbably) was a neo-Nazi who wore a jacket with a Nazi swastika and the statement "Hitler was Right" and showed up at the courthouse every day to do research at the clerk's office. If a Jewish assistant clerk complained to her superior about the jacket, and the superior refused to do anything, the clerk might be able to sue the county for fostering a hostile work environment for her, especially if she was forced to look at the jacket all day as part of her job servicing requests for documents. Thus, to protect against that clerk's hostile-work-environment lawsuit, a Court employee might force Cohen to remove his "Hitler was Right" jacket in violation of Cohen's First Amendment rights.

3. The Workplace Exception Does Not Apply

Labor law contains the most explicit government regulation of non-commercial speech in the workplace. In *NLRB v. Gissell Packing*[166] the Supreme Court explicitly acknowledged that, given the power dynamics between employers and employees, courts need to balance employers' free speech rights with employees' tendency to infer employer action from them.[167] Professor Eugene Volokh interprets this narrowly to mean that the government allows some governmental regulation of speech in the workplace: performative speech that either makes threats or promises to employees within the specific context of the formation of unions. However, in the eyes of other commentators, even this interpretation does not preclude regulation of the sexist or racist speech that can form the basis for a hostile work environment action. Offensive speech, made or tolerated by a manager, may indeed contain an implicit threat: that one's job might be imperiled due to his or her race, religion, or gender.[168] If the private discourse between employees and employers can be regulated by labor law, it is reasonable to argue that civil rights law would be equally potent. In workplaces that do not produce expressive content, then, it is an open question as to whether cases such as *Gissell* create a general exception allowing government regulation of workplace speech.

However, the application of the hostile work environment action to expressive workplaces does not fit under this possible exception because of the special quality of the expressive workplace to create, dis-

[166] *See* NLRB v. Gissell Packing Co., 395 U.S. 575 (1969).

[167] *Id.* at 617.

[168] *See* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and The First Amendment: No Collision in Sight,* 47 RUTGERS L. REV. 461, 518–21 (1995).

tribute and facilitate protected expression externally. When the hostile work environment action is applied to an expressive workplace, it restricts speech both in the workplace *and* outside of it. Even if this exception allowed the government to regulate an employer's speech to its employees, it does not allow the general regulation of an employer's speech to the public. Yet this is the effect when the hostile workplace action is applied to expressive employers. Therefore, this application does not fit within the proposed workplace exception.

4. Time, Place, and Manner Exceptions Do Not Apply

Courts generally have been willing to uphold restrictions on the time, place and manner of speech when they are not based on the content of the speech. Whether this exception covers hostile work environment actions based on expression in private workplaces is an unsettled issue. Some scholars contend hostile work environment actions do not fall under this exception because they regulate speech based on its content.[169] The Florida district court in *Robinson*, however, held that harassment law is a valid restriction of this sort, even if it tends to disfavor some content, like pornography, over others.[170]

However, even if the hostile work environment action is a constitutional "time, place and manner" restriction when applied to private workplaces such as the shipyard in *Robinson*, it ceases to be permissible when it is applied to an expressive workplace because when applied in this way, its burdens escape the spatial and temporal boundaries of the workplace. The reasoning behind time, place, and manner restrictions is that the rules place only a partial burden on affected speech: speech that is restricted in one time or place can be found in another, more appropriate venue. This reasoning evaporates when these rules are applied to the expressive workplace because of these workplaces' function of disseminating speech. If certain offensive materials are restricted in the workplace, and that workplace is their point of production, those materials might not show up in the marketplace at all.

To illustrate, the holding in *Robinson* probably discourages the shipyard from allowing a worker to view pornography or leave it sitting around where other co-workers could find it. In fact, it would probably lead the employer to ban pornography from the workplace altogether. The ruling has effectively restricted the viewing of pornography at the workplace. Now, substitute the shipyard for the office of a pornographic magazine. If a worker could not leave pornographic pictures

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[169] *See, e.g.*, Volokh, *supra* note 20.

[170] *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

sitting out in the open at that workplace, then it would be difficult to produce and disseminate that material at all. Thus, a restriction of time and place has become a general restriction based on content.

E. *Although Compelling Justifications Exist for Creating a New Exception to First Amendment Law, They Do Not Outweigh the Potential Damage to the Public Discourse When Hostile Work Environment Laws are Applied to Expressive Workplaces*

If workplace harassment rules, especially when they are applied to expressive workplaces, do not fall under any of the exceptions to First Amendment protection, the Court could create a new exception to cover them. Although there are strong arguments for restricting such speech, they do not outweigh the value of a free and open public discourse. This is especially true when considering the especially vital function of the expressive workplace: to create, disseminate and facilitate ideas in the marketplace. However, a review of the likely arguments in favor of creating a new exception will help illuminate the reasons why this Article does not propose a blanket ban on any hostile work environment suits from employees in expressive workplaces.

Arguments in favor of allowing hostile work environment suits in expressive workplaces tend to take several forms. Given the continued vibrancy of the public discourse after more than a decade of hostile work environment actions, they assume the public discourse is hearty enough to thrive even if harassment suits are prosecuted in expressive workplaces.

One such argument is that potentially harassing speech has little value in the public discourse, and can, therefore, be regulated. A second, related argument is that the interest in increasing the diversity of workplaces, especially communicative workplaces, is important enough to sacrifice some free speech. A third argument posits that without an exception for expressive workplaces, a great number of workplaces could claim that they were engaged in protected expression as a pretense for their discriminatory actions. Finally, a fourth argues that Title VII doctrine already implicitly accounts for First Amendment concerns. Each of these will be discussed in turn.

1. Potentially Harassing Speech has Little Value in the Public Discourse

It is possible to argue that sexist, racist and other biased speech has so little value in the marketplace of ideas that it does not deserve pro-

tection.[171] Furthermore, such speech might actually be destructive in the public discourse. For one, much of this speech is likely to be false or hyperbole, and therefore might mislead people. Stereotypes tend to mislead and encourage people to act in irrational ways.[172] Sexist and racist epithets convey very little or no useful information, making it unlikely that they will either enlighten or educate. In some situations, it is likely that they will have the opposite effect. By its intimidating nature, the use of offensive speech could silence those protected who have traditionally been marginalized in society. Because of the low value of offensive speech in exchanging ideas, allowing such speech to flourish might lead to more misunderstandings and confrontations between men and women, or people of different races or religions. The coarsening of dialogue could further polarize our society along these lines.[173]

These objections have even more strength when they are magnified through the prism of the expressive workplace. Because of their functions in creating, distributing and facilitating protected expression, these workplaces have the power to shape our public discourse. They provide a forum to disseminate both facts and opinions. They set the agenda for our political and social debates. Removing yet another restriction on coarse or offensive speech in public places like restaurants or bars could encourage the continued breakdown of polite society. Expressive workplaces also create and distribute content to entertain, which also shapes attitudes. Media also shape national identities.[174] As information technologies become even more integrated into everyday

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[171] *See, e.g.,* Sangree, *supra* note 168, at 546 (claiming that most of the content that hostile work environment actions regulate is low value speech such as epithets, threats, coercion and borderline harassment).

[172] *See generally* Jerry Kang, *Trojan Horses of Race,* 118 HARV. L. REV. 1489 (2005). Recent psychological studies have shown that media images, more than people consciously realized, can subconsciously shape attitudes about race. With these facts in mind, it could be argued that it makes little sense to make it even easier to create raunchier or more offensive comedy products, more racially offensive dramas, more stereotypical fictional characters or more inflammatory political coverage. *See id.* at 1547 (discussing how news and entertainment can shape subconscious opinions).

[173] All one has to do is turn on shows like John and Ken on Los Angeles' KFI Radio to hear nonstop denigration of the City's Latino immigrants and African-American residents. It is difficult to imagine that listening to such a program would actually lead to productive discourse on divisive issues like illegal immigration, police brutality and race relations. However, much of the speech, while offensive, conveys serious (if, to this writer, wrongheaded) ideas about immigration policy, American identity, and the loss of historical privilege for some in society.

[174] *See generally* BENEDICT R. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991). Through case studies and an analysis of the history of formations of nations, this author postulates that national identities are largely socially constricted distinctions created largely by media.

lives, media will have a greater influence over the public discourse. Because of the great power of expressive workplaces to shape the public discourse, society could be ill-served by the relaxation of rules that will allow more sexist or bigoted expression.

2. Given Expressive Workplaces' Power in Shaping the Public Discourse, it Is Even More Important that These Workplaces Reflect Society's Diversity

Since expressive workplaces are so institutionally powerful, it is especially vital to our society's quest for race and gender equity that they welcome workers of both genders and all races, religions and ethnicities. Historically and in the present, both the electronic and print media have done a poor job reflecting the diversity of our culture in their workforces.[175] Recent studies show that minorities are not represented in expressive industries in numbers that are proportional to their representation in society. In newspapers, only 14 percent of news staff members were members of a racial minority group.[176] Women made up 38 percent of newsroom employees.[177] On television, 73 percent of primetime roles went to white people.[178] Television writers seemed to be the least diverse group of all: 93 percent of staff writers were white[179] and 73 percent were men.[180]

To increase diversity and achieve gender equity in these industries, one might argue, these workers need the full protection of Title VII and related state and local statues. In the wake of the now overturned *Lyle* appellate ruling that allowed the use of a "creative necessity defense,"[181] commentators predicted the ruling would make it even more difficult for women and minorities to break into and stay in expressive

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[175] *See generally* Russell Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 18-19 (2007). *See also* Robinson, *supra* note 146.

[176] American Society of Newspaper Editors, ASNE Census Shows Newsroom Diversity Grows Slightly (Apr. 25, 2006) *available at* http://www.asne.org.

[177] *Id.*

[178] CHILDREN NOW, FALL COLORS: PRIME TIME DIVERSITY REPORT 2 (2003–04). The study also found that nearly half of all Arab/Middle Eastern characters were portrayed as criminals, that Latino characters were four times as likely as white characters to be domestic workers, and that male characters outnumbered female characters two to one.

[179] NAACP, OUT OF FOCUS, OUT OF SYNC, TAKE 3: A REPORT ON THE FILM AND TELEVISION INDUSTRY 12 (2003), http://www.naacpimageawards.net/PDFs/focusreport1_master.pdf.

[180] *See* Sarah Pahnke Reisert, *Let's Talk About Sex Baby: Lyle v. Warner Brothers Television Productions and the California Court of Appeal's Creative Necessity Defense to Hostile Work Environment Sexual Harassment*, 15 AM. U.J. GENDER SOC. POL'Y & L. 111, 142 n.186 (2006).

[181] See Lyle v. Warner Bros., 12 Cal. Rptr. 3d 511 (2d Cir. 2004).

industries.[182] Professor Russell Robinson argues that the negative effects of crude sexual banter in the television industry fall disproportionately on female writers. Female writers, he argues, face the dilemma of either playing along and risking the appearance of sexual availability, or objecting and risking their livelihoods.[183] Choices like this might become even more common if expressive workers and their employers felt more confident in their ability to avoid liability for creating a hostile work environment. Any proposed expressive exemption to hostile workplace actions should acknowledge and seek to defray these risks.[184]

3. If Hostile Work Environment Actions are Invalidated by the First Amendment, it Would Open the Door to Pretextual Expressive Workplace Defenses

Scholars and practitioners have also expressed concern that unless expressive workplaces are subject to the full force of hostile work environment actions, it will lead to two different types of pretexts that could erode the foundations of workplace discrimination laws.[185] The first risk is that, since most information-age businesses are involved in communicating their message on the Web or in more traditional ways, most businesses could claim to be expressive workplaces and seek greater autonomy from workplace harassment laws.[186] This risk hinges on the difficulty of determining what constitutes an expressive or creative workplace. The second risk is that businesses could make pretextual claims that behavior that was actually discriminatory was related to the creation, dissemination or facilitation of protected expression, thereby receiving protection.[187] This risk is grounded in the difficulty of deter-

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[182] *See* Reisert, *supra* note 180. *See also* Robinson, *supra* note 146, at 186. *But see* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment – Avoiding a Collision*, 37 VILL. L. REV. 757, 777 (1992) (arguing that fear of hostile work environment suits actually discourages producers and others from hiring minority and female workers. She argues, counter-intuitively, that the removal of hostile work environment actions might lead to more jobs for women).

[183] *See* Robinson, *supra* note 146, at 183. *See also* Reisert, *supra* note 180, at 142.

[184] *See infra* Part IV for a discussion of how the Expressive Workplace Doctrine seeks to weed out pre-textual claims.

[185] *See, e.g.,* Robinson, *supra* note 146, at 186-87; *Answer, supra* note 146.

[186] *See Answer*, *supra* note 146, at 13 (questioning where the line between a communicative and a non-communicative workplace should be drawn, and claiming that a sitcom writers' room is not so different from a factory floor). *See also* Reisert, *supra* note 180, at 142 (claiming that vagueness in application of a creative necessity defense could allow non-expressive industries to claim expressive status) *and* Robinson, *supra* note 146, at 184.

[187] *See e.g.,* Robinson, *supra* note 146, at 181–82 (discussing how very little of the graphic sexual discussion in the *Friends* writers' room actually was linked to the development of storylines or jokes for the program); Reisert, *supra* note 180, at 143-44, "a creative necessity

mining what is and is not related to the creation, dissemination or facilitation of protected expression.

4. Case Law Interpreting Title VII and Related Statutes Implicitly Incorporates First Amendment Concerns Through Contextual Analysis and the "Because of" Prong

Courts applying the hostile workplace action are required to account for the totality of the circumstances when determining if discrimination took place. One of the factors in this analysis is the "social context" of the workforce: "a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[188] One of these surrounding circumstances is a workplace's constitutionally protected expressive function.[189]

Defenders of the hostile work environment action also argue that discrimination law's requirement that the expression creates the hostile work environment *because of* the plaintiff's membership in a protected class gives adequate First Amendment cover. This argument implicitly maintains that the requirement sorts out discriminatory conduct from protected expression, preserving First Amendment protection.[190] If current case law implicitly protects First Amendment interests, then adding a new exception to make them doctrinally legitimate will not result in the suppression of speech.

5. The Above Arguments do not Justify a New Exception Because Such an Exception Would Chill the Public Discourse and Allow the Government to Interfere Inappropriately with the Marketplace of Ideas

Many of the most important, but controversial, issues in this country's contemporary political discourse may include speech that could form the basis of a hostile work environment suit. For instance, ongoing discussion of the war on terror has included vigorous discussions of the tenets of Islam, whether the religion itself justifies terrorism, and whether American interests would best be served by forcibly con-

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defense could insulate all sexually themed discussions or displays of pornography, even when it is unrelated to job performance."

[188] Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75, 81–82 (1998).

[189] *See* Robinson, *supra* note 146, at 186–87; Reisert, *supra* note 180, at 130; *Answer, supra* note 146 at 15–16.

[190] *See* Reisert, *supra* note 180, at 129. For further discussion of how this distinction has a key function in the analysis of hostile work environment laws, see the discussion of R.A.V. v. City of St. Paul, *supra* notes 146-51 and accompanying text.

verting Muslims to Christianity. These views would certainly be deeply offensive to Muslims. But, as hyperbole, it has a legitimate decision in the public discourse. Similarly, a debate about affirmative action in a law school might include the position that African-American students are less capable of performing at a high academic level than white students. Such a view would undoubtedly be offensive to an African-American professor at the school because it contains the implicit message that she should not be at the school.

Such problems might not be limited to institutions that are usually though of as expressive. A brief illustration might bring this into focus. An Arizona restaurant with several Latino employees is approached by two groups who wish to hold regular breakfasts there: the local chapters of the Rotary Club and the Minutemen. Hosting a monthly Rotary Club meeting, the owner probably has little to worry about in the way of liability. However, a facility hosting a regular meeting of the anti-immigration group The Minutemen might be subject to a hostile work environment suit from Latino employees. This is because members of the group are probably especially hostile to Latino immigrants and might say offensive things to one another that employees could overhear. If all restaurant owners in this situation acted to minimize liability, the Minutemen might be forced to hold their meetings in private homes or basements, burdening their ability to get their message out.[191]

In each of these situations, a dean, editor, producer or restaurant owner has a legal interest in suppressing the speech to shield the institution from liability. In this way, the public sphere could be at least partially sanitized of viewpoints that are offensive because they are racist or sexist. This would be unproblematic if our hypothetical restaurant owner were motivated by his own viewpoints or desire not to be associated with a militant or possibly racist group. However, in these hypotheticals, it is the state, through the threat of liability, that is actually burdening the speech in question because it is likely to offend members of a certain group. That seems like a state burden based on offensiveness and subject matter that robs the marketplace of certain ideas, the exact things prohibited by the Court in cases such as *R.A.V.* and *Cohen*.

Although the arguments for the hostile work environment action's application to expressive workplaces are compelling, they do not justify a new exception to the First Amendment to allow the application of the hostile work environment claim to expressive workplaces. The interest

[191] It is easy to imagine that this concern would apply anywhere a public accommodation is employing Latino workers, not just restaurants.

in maintaining a vibrant public discourse outweighs the interests in protecting expressive workers' rights. These concerns are particularly acute because of expressive workplaces' role in creating, disseminating and facilitating expressive materials in the public sphere. If the Court created such an exception, it would implicate a wide variety of speech that currently receives First Amendment protection.

For example, the Court in *Cohen* has formally recognized the value of offensive speech. In addition to narrowly defining the "captive audience" exception to the First Amendment law, the Court refused to find that speech was unprotected because it was offensive. Because it is difficult for the government to distinguish purely offensive speech from speech with political value, offensive speech must receive protection, as described by the court below:[192]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[193]

In the above quote, the Court reasoned that a vigorous public debate is vital to democratic self government. It implicitly recognizes that speech exists in a marketplace in which offensive views can be combated by other views. Given the Court's strong embrace of First Amendment values, it is inappropriate for the government to choose which views should be banished to less convenient venues and blunted from being expressed in the strongest terms possible.

6. A New First Amendment Exception is Inconsistent with Other Areas of the Law that Appropriately Favor Free Speech over Protection of Other Important Interests

Where the public discourse is concerned, the Court has set the balance in favor of free speech, giving primacy to free speech over other interests, including even extremely important issues like maintaining peace and protecting children. The standard for incitement protects inflammatory speech, even speech advocating violence, by requiring that the speech must be intended and likely to produce imminent lawless

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[192] *See Cohen*, 403 U.S. at 25.

[193] *Id.* at 24.

action in order to be prosecutable.[194] Fashioning this doctrine, the Court declared that the First Amendment forbids the state from banning speech that advocates violence except in special circumstances.[195] By setting such a high standard for incitement that might cause violent action or lawlessness, the Court has shown that the interest in maintaining peace should be subordinate to interests in public discourse.

Similarly, the state's interest in protecting children has also been abrogated in favor of maintaining a vibrant public debate. In *Reno v. American Civil Liberties Union*[196] the Court struck down provisions of a law that sought to protect children by outlawing the electronic transmission of obscene or indecent materials to them because it suppressed "a large amount of speech that adults have a constitutional right to send and receive."[197] The interest in protecting the most vulnerable members of society was outweighed by the fact that the law not prohibited, but merely *suppressed* constitutionally protected speech. It is difficult to imagine interests more important than the protection of children or the maintenance of a peaceful society, but the Court has been willing to abridge, or at least balance those interests in order to protect free speech.

If the hostile work environment action, when applied in expressive workplaces, does suppress free speech in the public arena, it is difficult to see that how that suppression can be justified by the interest at stake. The interest of this application of the law, protecting expressive workers from indirect discrimination that stems from working in a hostile environment, does not seem to be as important as protecting children or a maintaining peaceable society. Although preserving equal access to the workplace is a laudable goal, few would argue that goal is as important as the interest in protecting society from violent overthrow. And while the workers traditionally protected by Title VII and similar laws are in a vulnerable position due to both their general status as employees (as opposed to owners) and their specific status as members of oppressed groups, it would be difficult to argue that these workers are as worthy of protection as children.[198] If these interests are not powerful enough to legitimize suppression of public speech, surely the

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[194] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[195] *Id.*

[196] 521 U.S. 844 (1997).

[197] *Id.* at 846.

[198] Although the Court has also restricted some speech to protect children, notably child pornography, obscenity as to minors, and commercial speech that advertises products harmful to minors, such as cigarettes. However, these regulations are not as analogous because they are designed to protect minors from harm, not to shield them from offensive material at the price of adults' access to the material.

interest in protecting a diverse workforce at expressive workplaces cannot justify the abrogation of the First Amendment.[199]

F. *Strict Scrutiny Analysis*

The above argument implicitly, but informally, mirrors a strict-scrutiny analysis that the Court could apply to hostile work environment actions when applied in expressive workplaces. To pass strict scrutiny, a law must be shown to be narrowly tailored to a compelling government interest. The foregoing analysis shows that the Court could conceivably decide that protecting the rights of workers in expressive work environment to be free of discrimination in the form of severe or pervasive offensive speech is a compelling interest. However, it is unlikely that the Court would find that the law was narrowly tailored because (1) it is likely overinclusive; and (2) it is not the least speech-restrictive means of achieving this goal.

1. When Applied to Expressive Workplaces, Hostile Environment Suits are Overinclusive

A law is overinclusive when it regulates speech that does not advance the interest it seeks to promote. As discussed above, the application of this doctrine to expressive workplaces not only implicates speech inside the workplace, but also the ability of the expressive workplace to create, distribute and facilitate protected expression. Therefore, a law requiring an expressive work environment to be free of discrimination in the form of severe or pervasive offensive speech would restrict speech outside the workplace as well, even when the speech has left its source and is circulating in the public. Thus, it is conceivable that when applied to expressive workplaces, hostile work environment actions regulate speech that is potentially offensive to employees who are members of protected classes even when there are no protected employees present (or no employees present at all). This regulates speech that does not advance the interest of the non-discrimination law.

To illustrate briefly: seeking to avoid a hostile work environment suit by a Latino typesetter who lays out a weekly opinion page, a newspaper editor removes a regular column. The column's author regularly engages in crude stereotyping and makes offensive and racist claims

[199] Additionally, on two occasions that the Court has discussed discrimination in relation to the First Amendment, it has held that First Amendment rights of expressive association trump the prohibition on discrimination. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

about undocumented Mexican immigrants and Mexican-Americans alike.[200] Inside the workplace, the removal of this column follows the law, protecting the copy editor from the weekly experience of reading the column several times.

But outside the workplace, when the newspaper arrives at subscribers' homes, the column's censorship results in the suppression of speech that no longer advances the employee's interest in avoiding discrimination. That speech cannot create a hostile work environment for the employee, as he is not present in the subscriber's home to be offended. Applied to an expressive workplace, the hostile work environment action implicates speech both inside *and* outside of the workplace, regardless of whether that speech, when disseminated, functions as employment discrimination in any way. Thus, the hostile workplace action is overinclusive.

2. The Hostile Work Environment Action is not the Least Speech-Restrictive Means of Achieving the Goal of Protecting Workers

It has already been shown that the hostile work environment action has the potential to place a government burden on speech that should receive full First Amendment protection. This might be justified if it could be shown that there are no alternative ways to protect expressive workers that do not burden so much speech. However, there are alternatives available. The government already bans workplace discrimination. The government might require expressive workplaces to give reasonable notice to workers that their job description might involve repeated encounters with offensive speech. The government could require expressive workplaces to accommodate workers who request to be insulated from offensive material. All of these measures would advance the interest of protecting workers from discriminatory

[200] For instance, the satirical column *!Ask a Mexican!*, runs regularly in the OC Weekly, an alternative weekly newspaper. It features a racialized caricature (seen below) and regularly prints racist letters from readers as well as Arellano's own self-parodying responses. An example: "My friend and I were wondering why Mexican girls are so beautiful when they are teenagers, then over the years, they become fat, old bags?" Gustavo Arellano, *Ask A Mexican,* OC WEEKLY, Jan. 13, 2005, *available at* http://www.ocweekly.com/columns/ask-a-mexican/ask-a-mexican/19246/.

workplaces while restricting less speech outside the workplace. Since such measures are available, it is likely that the application of hostile work environment laws to expressive workplaces is unconstitutional.[201]

IV. Other Proposed Solutions to the First Amendment Conundrum

Scholars, judges and even existing workplace law propose several different solutions to the problem posed by applying the hostile workplace action to the expressive workplace. Options include declaring some or all hostile work environment harassment unconstitutional as a viewpoint-based restriction on free speech,[202] offering a general business necessity defense to creative workplaces,[203] creating a narrow exception from hostile workplace actions for creative workplaces engaged in the act of creating protected content[204] or simply leaving the law as it is, maintaining that there is no First Amendment problem. However, these options do not provide employers clear enough guidance as to what behavior might not be protected by the First Amendment, do not adequately protect workers, or and do not adequately protect speech because they do not protect all types of expressive workplaces.[205]

Much of the scholarship discussing the conflicts between workplace harassment law and the First Amendment has focused on the broader question of whether it is constitutional for the government to create liability for non-directed hostile-workplace speech at all.[206] Hostile work environment liability, this argument goes, does not fit neatly into the exceptions already carved out of free speech law. Therefore, the cause of action should be declared unconstitutional when deployed in situations in which the harassing behavior is not directed at the plain-

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[201] The Special Case of Advertising, Pt. 2: Advertising can also have political overtones and value. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding that a law banning the free mailing of contraceptives was unconstitutional). *See also* Carey v. Population Servs. Int'l., 431 U.S. 678 (1977) (overturning a similar law).

[202] *See e.g.* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991); Eugene Volokh, *Harassment Law and the Speech It Restricts*, 39 UCLA L. Rev. 1791 (1992).

[203] *See infra* note 212.

[204] *See infra* note 210.

[205] Additional options that have not been directly suggested by scholars for solving the clash between the First Amendment and the hostile work environment action include enlarging bonafide occupational qualification defense to give added protection to expressive businesses. Another option that has been suggested for sex workers but not discussed in light of the First Amendment would be including a reasonable expectation/assumption of risk element in harassment law's calculus for those who work in expressive workplaces. However, saying that expressive workers waive their rights when they accept a job is problematic from a public policy standpoint.

[206] *See* Volokh, *supra* note 20.

tiff,[207] especially because the workplace is a primary (and maybe the exclusive) site for regular folks to engage in political discourse.[208] While this argument has merit, courts have, thus far, largely declined to follow this interpretation of the First Amendment.[209] Regardless, the scope of this argument goes far beyond this paper.

One scholar has acknowledged the conflict between the First Amendment and the hostile work environment action as applied specifically to expressive workplaces but has not proposed satisfactory solutions to that problem. Professor Miranda McGowan suggests that the standards for what constitutes hostile work environment harassment should be higher for those within workplaces that are "communicative," which generate or facilitate the public discourse.[210] Her proposal is not detailed enough to give clear guidance to expressive businesses or to be of much use to Courts or legislators.[211] Additionally, it neglects to protect those employers whose employees might sue based on the speech of third parties encountered while on duty.

Other opinions have coalesced around a so-called "creative necessity" framework.[212] This could offer businesses an affirmative defense for workplace harassment that occurs during the creative or editorial

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[207] *See* Browne, *supra* note 202, at 484.

[208] *See* Volokh, *supra* note 20, at 1849 ("The average American does not go to public demonstrations, or burn flags outside the Republican party convention, or write books, or go to political discussion groups. A great part, maybe even the majority, of most Americans' political speech happens in the workplace, where people spend more of their waking hours than anywhere else except (possibly) their homes.")

[209] Although most courts have been silent on First Amendment Issues, some have held or intimated that there is at least one, if not many First Amendment exceptions that accommodate hostile work environment actions. *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991); Burns v. City of Detroit, 660 N.W. 85 (Mich. Ct. App. 2003).

A few courts have held that there is, at least, a possibility that there are First Amendment problems with hostile workplace doctrine. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); Lyle v. Warner Bros., 38 Cal. 4th 264 (2006) (Chin, J., concurring).

[210] *See* Miranda McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong*, 19 CONST. COMMENT 391, 441 (2002). "In these workplaces, the law should protect some harassment to protect speech that matters." *Id.* at 441.

[211] Professor McGowan suggests that actual malice is the appropriate standard for determining liability, but does not adequately explain the mechanics of the test. The test proposed by Professor McGowan would have courts inquire whether the speaker or business being accused of harassment acted with a reckless, knowing or purposeful intent. That would mean that a court would have to find that the defendant knew or should have known that his or her statement or behavior created a hostile work environment and that statement was demonstrably false. *Id.* at 437.

[212] *See* Daniel E. Eaton, *Writers Gone Wild: "The Muse Made Me Do It" as a Defense to a Claim of Sexual Harassment*, 12 UCLA ENT. L. REV. 1, 7–8 (2004). The article suggests providing a "creative privilege" defense; Eric S. Tilton, *Business Necessity and Hostile Work Environment: An Evolutionary Step Forward for Title VII*, 34 HOFSTRA L. REV. 229 (2005).

process, as long as the speech is not directed at or was not about the plaintiff. Justice Chin's concurrence in *Lyle v. Warner Brothers* articulates the test succinctly:

> Where, as here, an employer's product is protected by the First Amendment – whether it be a television program, a book, or any other similar work – the challenged speech should not be actionable if the court finds the speech arose in the context of the creative and/or editorial process, and it was not directed at or about the plaintiff.[213]

This test is closer to the one proposed in this Article. It offers excellent First Amendment protection to expressive workplaces. However, it has flaws. It does not protect against hostile-work-environment suits that arise from non-creative but just-as-necessary parts of the expressive process: those that involve printing, non-creative mechanical production, and distribution or sale. Additionally, it does not protect an important category of expressive workplaces: workplaces where workers regularly come into contact with the protected expression of third parties. Finally, it does not respond to any of the concerns outlined Part II: it would make expressive employees extremely vulnerable to pretextual abuses and possibly decrease diversity at expressive workplaces. Furthermore it offers little incentive for employers to seek to accommodate diverse workers who might be able to make valuable contributions to the public discourse through their duties at an expressive workplace.

While the interests of those who would like to continue with the status quo or hope for more stringent enforcement of the hostile work environment action in expressive workplaces are important,[214] it is undeniable that increasing the risks of liability for this action in a hostile work environment could lead to suppression of speech. Additionally, the status quo is not an option: it is in direct conflict with First Amendment doctrine. It is likely only a matter of time before another case like *Lyle v. Warner Bros.* comes down, and a court seizes the opportunity to strike a blow for the First Amendment. A far better option would be for legislatures or courts to adopt a standard to protect expressive workplaces that contains provisions that are designed to protect workers from discrimination and purposeful harassment.

V. The Solution: The Expressive Workplace Doctrine

The solutions proposed in the section above are a good starting point, but none are complete. To protect both public discourse and

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[213] *Lyle*, 38 Cal. 4th at 299.

[214] For a discussion of these interests, see Section IV, part E.

workers, it is necessary to formulate a more nuanced rule, but also one with a wide scope. A new rule to govern the application of the hostile workplace action to expressive workplaces should cover the production and dissemination of protected expression as well as public encounters with third parties' protected expression. It should also shield workers to the extent permissible without trespassing across First Amendment lines.

The following proposal, which I call the Expressive Workplace Doctrine, would accomplish this goal. It exempts non-directed speech that arises in most expressive contexts from being used as a basis for hostile work environment actions.[215] It protects workers by requiring workplaces to make reasonable accommodations for them if they find their encounters with protected expressions create a hostile environment. It is important to note that this proposal does not seek to strip expressive workers of their rights to sue for hostile work environment discrimination, it simply does not allow them to use protected expression, or speech related to the creation of protected expression, as a basis for their suits. With the above goals in mind, the following rule should be adopted as amendment to Title VII and similar state statutes, added to federal and state regulations and adopted by courts as First Amendment doctrine when applying hostile workplace actions:

The Expressive Workplace Doctrine

The following material shall not form the basis of a hostile work environment claim:

Expression that is conceivably part of the process for creating or manufacturing protected expression; or

Expression that is incidental to the employer's public dissemination or exhibition of protected expression; or

The protected expression of third parties encountered during the commission of employment duties;

EXCEPT when:

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[215] The formation of above rule began with an inquiry into the likely times and places that a person might encounter protected expression or speech related to the creation of clearly protected expression. Such encounters seem most likely to occur in the workplace at points of creation, manufacture, distribution/dissemination and in encounters with the public. Private, non-expressive workplaces are workplaces that do not come into contact, generally, with the public and are not involved in the creation, manufacture or dissemination of protected expression. These generally would not be covered by the doctrine. *But see* Volokh, *supra* note 20, for an argument that these interactions are every bit as vital to the public discourse and First Amendment protection as those in expressive workplaces. It is important to note that these contextual categories are not exclusive: one situation may feature all three types of encounters. For instance, a newspaper reporter covering the Monica Lewinsky scandal might have to discuss the details of the scandal with editors in the office, then go out and collect information for the story, encountering the public, then actually look at the paper as it comes off the press to make sure it is correct, then, the next day, find people who are reading the paper to get their reaction to the new developments.

The expression is directed at the plaintiff;
Creating a rebuttable presumption that it is not related to the creative process that can be defeated by a showing that the speech was integral to the creation of the protected expression.
OR,
The employer could have made a reasonable accommodation that would allow the employee to avoid the expressive conduct.

A. *Defining the Rule*

1. Protected Expression

For the purposes of this rule, protected expression is any speech that does not fit into one of the already recognized exceptions to First Amendment protection,[216] and is a product of the enterprise under legal scrutiny.[217] Examples of this would include newspapers, magazines and movies, posters and flyers, television shows, Web sites, and art work as well as speeches and presentations. Third-party conversations that are overheard by employees as part of their duties are also included in this definition. This definition of "protected expression" makes sense because it aligns the rule with modern First Amendment jurisprudence. The rule, like the Court's decisions, seeks to protect expression in the public sphere to a greater extent than private workplace discourse[218] among employees.[219]

2. Conceivably Part of the Creative Process

This exemption is meant to provide a strong presumption that speech in expressive workplaces is part of the creative process. It would put the burden on the plaintiff to show that the expression in question was not related to the creative process.

In most situations, it would be easy to determine whether speech is conceivably related to the process for creating or manufacturing protected expression. Deciding which photographs to put into a publication or setting up press plates for a print run are both clearly part of the manufacture of protected expression. Some speech, like the lines of a play uttered in rehearsal or a discussion of the facts in a salacious news

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[216] Such as libel, obscenity, fighting words and incitement among others.

[217] This can be construed to cover third-party speech in workplaces such as restaurants and bars because the conversations of customers – their mirth and the ability to have a good time – is part of what these establishments sell.

[218] For a longer discussion of how First Amendment doctrine favors speech aimed at the public sphere over that conducted in private workplace settings, see *supra* Part IV.

[219] *See supra* Part IV.

story, are obviously related to the creative process. But other behavior might not be so clearly related to the final expressive product, like the *Friends* writers' puerile behavior, a director's abuse of his cast,[220] or a studio artist who feels she must paint in the nude.[221]

To determine whether speech is related to the creative product, defendants could put forth evidence that the expression is reflected in the product bound for public dissemination. This would establish the speech's relation to the creative process. The defendant could also explain how the speech at the heart of a lawsuit inspired the creation of the protected expression.

However, these showings might not be terribly important because the "conceivably related" standard is a very low bar. While in theory, there might be a triable issue of fact about expression's conceivable relationship with the creative process, it would be difficult for a plaintiff show. In light of this daunting task, it is far more likely that a plaintiff would attempt to show that the expression was also targeted.

This "conceivable part" standard is meant to give expressive employers great leeway to adequately protect the creative process. The strong interests in protecting free speech and the legal necessity to make the doctrine constitutional dictate this standard. However, this standard's severity is somewhat blunted by the worker safeguards in the second part of the doctrine.

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[220] For an excellent portrait of the strange behavior which sometimes becomes part of the creative process, see Sharon Waxman, *The Nudist Buddhist Borderline-Abusive Love-In,* N.Y. TIMES, Sept. 19, 2004, at E1, detailing the director David O. Russell's behavior on the set of I Heart Huckabees.

> To get the performances he was after, Mr. Russell did all he could to raise the level of tension on set, unapologetically goading, shocking and teasing his actors. Sometimes these techniques prompted reactions that were less than photogenic. . . . Mr. Russell starts the day wearing a suit, but it's slowly coming off: first the jacket, then the shirt. Also, he keeps rubbing his body up against the women and men on the set – actors, friends, visitors. Is this behavior part of the creative process or is it hostile workplace harassment.

Russell would probably say that it was necessary to set the tone for a somewhat nonsensical and lighthearted movie that featured, among other things, a scene where one actress has sex in the mud with an actor nearly a decade younger than her, or with another actor being forced to punch himself repeatedly in the face.

[221] In an unscientific Internet poll, 25 percent of 570 respondents said they preferred to paint while wearing nothing at all. About.com, Poll: What Do You Wear When Painting?, http://painting.about.com/gi/pages/poll.htm?linkback=LINKBACKURL&poll_id=0954566611 (last visited Dec. 10, 2007). A painter's assistant, subject to his or her bosses' constant nudity, might have grounds for a hostile workplace suit.

3. Incidental to the Employer's Public Dissemination or Exhibition

This part of the rule exempts employees' encounters from employees that result from the sale or delivery of the protected expression to the general public. What distinguishes this category from the next is that this speech is encountered because the employer facilitates or encourages the speech. It covers situations like *Herberg,*[222] *the Minneapolis Public Library cases*[223] *and Stanley vs. Lawson.*[224] In each of these cases, the alleged hostile work environment resulted from the dissemination of protected expression by the employer. Other examples of employees who might regularly experience this kind of situation include museum guards, theater ushers, video shop clerks or shippers and mail carriers. This prong would cover employees who might be offended by a lecture series, or somebody like a teaching assistant who feels like a professor's lectures create a hostile environment inside the classroom. Furthermore, since advertising is an employer's protected expression,[225] this prong would also put a presumptive bar on hostile environment suits predicated on the employer's display of advertising.

4. Encounter with the Protected Speech of Third Parties During the Commission of Employment Duties

This prong protects the public discourse from being tamped down by business owners who might be motivated to control offensive speech of patrons in hopes of avoiding liability for hostile work environment suits. For example, imagine a group of pro-Israel Jews meets every week for dinner at a Middle Eastern restaurant in Brooklyn to catch up on each others' lives. The conversation ranges from the personal to the political, especially when the Israeli-Palestinian conflict flares up. On these occasions, one member of the group, whose aunt was killed in a Tel Aviv bus bombing, becomes agitated, curses Muslims and Arabs, calling them names and saying they do not deserve to live. Although other members of the group usually argue with him, the weekly discussions begins to concern the owner, who knows that one of the waitresses usually working on the night the group eats there, is Palestinian. Although he knows it will alienate the group and would prefer to keep their business, he asks that they not discuss Middle Eastern affairs.

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[222] Herberg v. CA Inst. of the Arts, 101 Cal. App. 4th 142 (2002).

[223] *See supra* notes 75-85 and accompanying text.

[224] Stanley v. Lawson Co., 993 F. Supp. 1084 (N.D. Ohio 1997).

[225] *See supra* notes 53, 201, The Special Case of Advertising, Pts. 1 & 2.

This is the sort of situation that the Expressive Workplace Doctrine probably exempts from liability.[226]

B. *Exceptions to the Rule*

1. Speech Is Not Protected when it Targets the Plaintiff

If a Plaintiff can show that the speech was targeted at him or her, he or she creates a presumption that the expression was not related to the creative process. The possible inquiries described below are designed to detect speech that is actually discrimination[227] against somebody because of his or her membership in a protected class.[228] This exception is necessary to address concerns about employers using the Expressive Workplace Doctrine as a pretext to defend against practices which purposely make it more difficult for employees in protected classes to succeed in their jobs simply because of their race, ethnicity or gender.

A fact-finder can look at several factors to determine whether if the speech targeted the plaintiff. Most clearly, speech that was calculated to provoke, insult, demean or disadvantage the plaintiff because of the plaintiff's membership in a protected class fits under the exception. Additionally, speech that discusses the way the plaintiff fits into racial or ethnic stereotypes likely fits into this exception. Speech discussing a plaintiff's body parts or likely sexual proclivities also might come under this exception. Finally, a plaintiff might be able to make a showing that speech targeted him or her if the alleged harassers only said offensive things when he or she was present.[229] This would indicate that the offensive comments or gestures were being made to harass or intimidate the plaintiff in a discriminatory way.

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[226] Which is not to say the doctrine would require the owner to tolerate the offensive speech of his patrons. It merely says that the owner would not have to fear hostile work environment liability if he allows the speech to occur continuously at the price of distressing the waitress. This is the sort of situation that Human Resources professionals are recommending litigation-fearful employers seek to avoid. Diana L. Deadrick, Scott W. Kezman & R. Bruce McAfee, *Harassment by Non-Employees: How Should Employers Respond?,* HR MAGAZINE, Dec. 1, 1996, at 108.

[227] Discrimination in this case would mean speech that is made with the intent to materially affect working conditions in an adverse way because of membership in a protected class.

[228] This standard is designed to operate in a similar manner to the way the *Lyle* Court applied the "because of" standard in that case. *See supra* notes 108–13 and accompanying text.

[229] For the Palestinian waitress in the above hypothetical, it would be very difficult to prove that the patrons' comments were targeted at her as long as they did not discuss her specifically. She would probably have to show that the table only said offensive things about Palestinians when she was in earshot.

If a plaintiff can show that the speech was targeted, an expressive employer can overcome this by showing that the expression was integral to the creation of the protected expression or actually part of the expression. The "integral" standard is much more stringent than the "conceivable" standard of the rule's first prong. To pass this, an employer would have to show that without the speech in question, it would be very difficult, if not impossible, to produce the finished product – a product that conveys the same view that the employer wants to convey.

A variation on *Lyle* illustrates how this provision lessens the possible discriminatory effects of the proposal. Suppose that, in addition the constant stream of sexual banter, the writers persisted in calling the plaintiff sexually loaded nicknames in the writers room, summoning her by calling her "wench" and "whore." Additionally, if they leered at Lyle while making their masturbatory gestures instead of staring straight ahead, or if they labeled their naked cheerleader cartoon drawings "Amaani Lyle," it would be clearer that their harassing speech targeted the plaintiff. In this scenario, it is likely that the suit will move forward.

A second variation on *Lyle* provides a more difficult situation. In this scenario, after Lyle has served for a time in a somewhat tense capacity as a writers' assistant, the writers tell her that they've come up with a scandalous new character, and the character is going to light up the next episode. Later, in the editing room, Lyle pops in a tape of the episode and sees that a character named Amaani Lyle was a single-episode character on that night's *Friends*. To her horror, the character bearing her name has sexual relations with Ross, Joey, Chandler *and* Rachel,[230] causing all the characters to conclude that "Amaani Lyle is a big slut," and have a nice laugh. Humiliated, Lyle goes back to the producers, demanding the episode be removed. It airs that night over her objections. Infuriated, she quits, claiming that the episode, combined with the generally unfriendly treatment she received at the hands of male writers, created a hostile work environment for her.

It is clear that the speech in question falls under the first and second prongs of the rule, that her encounter with the speech in question was both conceivably related to the creation or manufacture of the episode and incidental to the episode's distribution. However, Lyle would successfully claim the episode was targeted at her. A court could find that naming the character after her was intended to humiliate her and discriminate against her. But the production could claim that naming the character Amaani helped them to write the episode and changing

[230] All characters on the sitcom *Friends*.

the character's name would also change the episode. This case would turn on whether the court finds that the naming of the character was integral to the creation of the episode. Naming the character Amaani likely has little significance to the plot of the episode. Changing the name would have a minimal effect on the view conveyed to the consuming public. Therefore, this would likely be considered directed speech, and the suit would probably be allowed to move forward.

The *Herberg* case provides a clearer example to illustrate the mechanics of this exception.[231] There is a good chance that Herberg could show that the painting in question targeted her: It contained her nude likeness.[232] However, she is such a central figure in the painting that removing her would have made it impossible to produce. Additionally, part of the painting's satirical value to the viewing public was the presence of school employees.[233] To take Herberg out would significantly diminish the painters' ability to get their message out to the viewing public. So, this exception probably would not aid Herberg's case, leaving her suit to likely be thrown out under the Expressive Workplace Doctrine.

2. Reasonable Accommodation

The second exception to the Expressive Workplace Doctrine would still hold employers liable even when a plaintiff's encounter with the speech falls within expressive exemptions if the employer could have reasonably accommodated the employee, allowing him or her to avoid the expressive conduct as long as it does not cause the employer undue hardship (more than *de minimis* costs) or violate others' First Amendment rights.[234] This standard would require expressive employers to have some degree of sensitivity to their employees' needs.

In the Brooklyn restaurant hypothetical above, the reasonable accommodation prong might make the employer more likely to

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[231] *Diana v. Schlosser,* 20 F. Supp. 2d 348 (D. Conn. 1998), also seems to fall into this category of apparently directed speech that is necessary to the production of a raunchy morning radio show.

[232] The artists' explanations of their intent might also weigh against the finding that the expression targeted the plaintiff.

[233] It seems likely that including an elderly female employee recognizable to their viewing audience helped the painters maximize the shock value of their piece, allowing them to make their point with greater emphasis. This is unlike the above *Lyle* hypothetical, in which the viewing audience would be highly unlikely to recognize the significance of the name Amaani Lyle. Even if writers claimed the use of the name was integral to the message of the show, the fact that almost no-one in the audience would get that message weighs toward a finding that the targeting was not really related to the creative process.

[234] This standard is partially based on the standard for reasonable accommodation of religious practices laid out in *Transworld Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977).

reschedule the hours of the Palestinian waitress, or at least allow her to wait on parties other than the ones having an offensive discussion. In the Minneapolis Public Library case, the library still might have been found liable for not equipping their computers with privacy screens or not moving the printers away from the librarians' work areas. In *Lyle,* the plaintiff could try to complain that the show did not move her to another job in which she would not have to have contact with the writers.

VI. CONCLUSION

When it is applied to expressive workplaces, the hostile work environment discrimination action violates the First Amendment. It is a state action. It selectively suppresses speech based on its viewpoints. It does not fall under any constitutional exceptions.

Disturbingly, the action has already led to several lawsuits for activities that are related to the creation, dissemination or facilitation of protected expression.[235] Because of this, employers who produce or disseminate protected expression, or those whose employees regularly come into contact with third parties whose expression is protected, are likely on guard against liability. This means they likely enforce more-strict-than-necessary workplace harassment policies. Restaurateurs might police the speech of their patrons. Newspaper editors might avoid covering certain sensitive topics or printing offensive viewpoints to protect employees from taking offense. Universities and museums might forego controversial lecturers or exhibits, for fear that their presence might someday end up as a bullet point in a plaintiff's complaint.

Such results, when they are caused by the government's action, go against the ideals of free expression that are the foundation of both the First Amendment and democracy. However, this Article offers a solution: The Expressive Workplace Doctrine, which would shield expressive employers from liability for non-targeted speech that is related to the creative process. It would give employers clear guidance as to what speech is allowable and what speech is not. It would give media outlets the breathing room they need to create, distribute and facilitate the speech that drives our national conversation.

As the rule works in the service of the First Amendment, it goes further than other proposed solutions to protect workers' rights: it still

[235] Additionally, judging from the amount of media coverage given to *Lyle* and the possible amount of embarrassment caused by the disclosure of similar cases, it seems likely that unknown numbers of similar suits have been threatened or have settled without being made public as media companies would rather such suits just go away.

protects workers from directed harassment and requires employers to try to shield workers from offense.

Liberal democracy isn't easy. It demands the participation of educated citizens. To be educated, citizens must be exposed to a variety of viewpoints. And they must be able to respond to those viewpoints with equal volume and vigor. That is why free speech is vital to democracy. However, democracy also requires those that those citizens be empowered by the equal protection they enjoy under the law. That is why the law must outlaw workplace discrimination. The Expressive Workplace Doctrine harmonizes those equal protection interests with our constitutional requirement of free speech.