
CURRENT ISSUES IN SEXUAL HARASSMENT

I. INTRODUCTION

The Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*¹ recognized two forms of sexual harassment actionable under Title VII of the Civil Rights Act of 1964:² Quid pro quo³ and hostile environment.⁴ However, the Court refused to address the issue of

1. 477 U.S. 57 (1986).

2. 42 U.S.C. §§ 2000e-2000e-17 (1994). Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). See *Meritor*, 477 U.S. at 65.

3. 29 C.F.R. § 1604.11(a)(2)(1995). Quid pro quo harassment occurs when a job benefit or privilege is conditioned on an employee's toleration of sexual harassment. *Id.*

Although quid pro quo harassment usually involves an employer making unwelcome sexual advances or requests for sexual favors as a condition of job benefits, explicit sexual advances and requests are not the only forms of sexual harassment that may constitute quid pro quo harassment. See, e.g., *Bridges v. Eastman Kodak Co.*, 885 F. Supp. 495, 498 (S.D.N.Y. 1995) (holding that a plaintiff may state a claim for quid pro quo sexual harassment if her job benefits were "contingent upon submission to sexual harassment," citing *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989)).

The issue in a quid pro quo sexual harassment claim is not whether the supervisor made sexual advances toward an employee, but whether a "tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail." *Carrero*, 890 F.2d at 579.

4. *Meritor*, 477 U.S. at 65. Hostile environment harassment recognizes that Title VII also allows employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. *Id.*

In the wake of *Meritor*, circuit courts have applied the following requirements for hostile work environment sexual harassment: (1) the plaintiff must belong to a protected class; (2) the plaintiff must have been subject to unwelcome sexual harassment; (3) the

employer liability.⁵ In a quid pro quo harassment claim, if the court recognizes a violation, then the court will hold the employer strictly liable.⁶ The courts have yet to adopt a clear legal standard for holding an employer liable for hostile environment sexual harassment claims.⁷ Part II of this Section focuses on hostile environment sexual harassment and whether individuals should be held liable. This Section argues for an interpretation of employer that includes supervisors and others with "employer-like" responsibilities.⁸

A second unresolved issue in sexual harassment law concerns the role of the First Amendment in hostile environment cases.⁹ Recently, some defendants have argued¹⁰ that Title VII unconstitutionally permits a victim of sexual harassment to state a claim based entirely upon words

harassment must have been based on sex; (4) the harassment must have unreasonably interfered with the plaintiff's work performance; and (5) the employer must have known or should have known of the harassment and failed to take prompt action. *See, e.g., Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990).

5. *Meritor*, 477 U.S. at 72.

6. Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 MEM. ST. U. L. REV. 667, 670 n.5 (1994) (listing various decisions).

Although the issue of employer liability discussed in part II.B may apply to both forms of sexual harassment, this Section will focus on the recent developments in the law concerning employer liability and hostile environment sexual harassment claims. For recent cases discussing employer liability and quid pro quo sexual harassment claims, see *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994) (holding the employer liable for supervisor's conduct); *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1361-62 (11th Cir. 1994) (applying agency principles to hold corporation liable for sexual harassment by its contracted management company); *Johnson v. Indopco, Inc.*, 846 F. Supp. 670, 674 (N.D. Ill. 1994) (considering all defendant's sexual and suggestive comments together when examining whether plaintiff alleged enough facts to establish respondeat superior liability).

7. *See Lewis & Thomas, supra* note 6, at 670 (identifying the various legal standards).

8. *See infra* part II.B.

9. *See infra* part III.

10. For a discussion on the First Amendment defense see generally Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 531 (1991) (arguing "the current interpretation of Title VII cannot withstand scrutiny under modern First Amendment doctrine"); Jules B. Gerard, *The First Amendment in a Hostile Work Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1033 (1993) (concluding that speech protected under the First Amendment should not be allowed to demonstrate a hostile environment sexual harassment claim).

and symbolic expression.¹¹ Part III analyzes the fallacy of such an argument and explains the negative effects that such a view of hostile environment sexual harassment would have on the workplace.¹²

II. INDIVIDUAL LIABILITY OF AGENTS UNDER TITLE VII

Title VII of the Civil Rights Act of 1964¹³ prohibits an employer from discriminating against an employee because of the individual's sex.¹⁴ Title VII defines employer as "a person engaged in an industry . . . who has fifteen or more employees . . . and any agent of such person."¹⁵ Title VII, however, does not define agent. When an employee establishes a Title VII violation, federal courts usually hold the employer liable for the supervisor's illegal conduct.¹⁶ Federal courts may also hold employers liable for the acts of their employees occurring outside the scope of their employment.¹⁷ However, whether an agent or employee who harasses other employees may be held *individually* liable is an issue that is currently dividing the federal courts.¹⁸ Literal application of Title VII's definition of employer would extend liability to any individual employee who violates Title VII. For now, Congress has left the question of individual liability for non-employers to the federal courts.¹⁹

11. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995). For a discussion of the *DeAngelis* case, see *infra* notes 69-72 and accompanying text.

12. See *infra* part III.

13. 42 U.S.C. §§ 2000e-2000e-17 (1994).

14. *Id.* § 2000e-2(a)(1).

15. *Id.* § 2000e-(b). An "employer" is defined in Title VII as: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such person." *Id.* (emphasis added).

16. For a discussion of the different standards used to determine employer liability, see Lewis & Thomas, *supra* note 6, at 673-87. Victims may sue for compensatory and punitive damages, see Civil Rights Act of 1991, § 102(b)(1), 42 U.S.C. § 1981a-(b)(1), or seek equitable relief, such as back pay, reinstatement, or injunction. 42 U.S.C. § 2000e-5(g).

17. RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (discussing an employer's liability under common law agency principles).

18. See *infra* notes 20-43 and accompanying text.

19. See *infra* part II.A.

A. *Confusion in the Courts*

Some courts hold Title VII imposes liability broadly not only on actual employers, but also on individual supervisors or management personnel who sexually harass co-employees.²⁰ In *Johnson v. University Surgical Group Associates of Cincinnati*,²¹ a dental assistant sued both her supervisor and the medical practice for which she worked, alleging that she was sexually harassed on the job.²² The court for the Southern District of Ohio acknowledged that neither the Sixth Circuit nor the United States Supreme Court had spoken definitively on the issue of individual liability under Title VII.²³ However, the court noted a case in which the Sixth Circuit upheld a lower court's award of damages against individuals for sexual discrimination as tacit approval of individual liability.²⁴ After conducting its own analysis, the court held the co-employee supervisor liable under Title VII for his individual acts of intentional discrimination.²⁵

In its analysis, the *Johnson* court examined the language of Title VII, the express intent of Congress, and the Supreme Court's language in *Meritor*.²⁶ First, the court noted that Title VII explicitly assigns

20. See, e.g., *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (holding supervisors liable when they ignored racist antics and intentionally discriminated against the plaintiff); *Gregory v. Southern New England Tel. Co.*, 896 F. Supp. 78 (D. Conn. 1994) (finding a manager and a supervisor individually liable under Title VII for sexual harassment); *Johnson v. University Surgical Assocs. of Cincinnati*, 871 F. Supp. 979 (S.D. Ohio 1994) (holding a supervisor individually liable under Title VII); *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802 (C.D. Ill. 1994) (holding individual employees liable under Title VII); *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992) (holding managing agent liable under Title VII).

21. 871 F. Supp. 979 (S.D. Ohio 1994).

22. *Id.* at 980. The sole issue for the court was whether the plaintiff's co-employee supervisor could be held liable under Title VII for his sexual harassment of her and for the retaliatory termination. *Id.* at 981.

23. *Id.* at 981, 983.

24. *Id.* at 984 (citing *Romain v. Kurek*, 772 F.2d 281, 282 (6th Cir. 1985)). See generally Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571 (1994).

25. *Johnson*, 871 F. Supp. at 987. See *infra* notes 26-30 and accompanying text for the court's analysis.

26. *Johnson*, 871 F. Supp. at 985-86. See also *infra* part II.B (discussing a similar analysis).

liability to employers and agents of employers.²⁷ Second, the court found that Congress expressly intended to provide "appropriate remedies" for victims of sexual harassment.²⁸ The *Johnson* court concluded that in certain instances denying individual liability for a co-worker supervisor might leave the plaintiff without a remedy, which would subvert the remedial purpose of Title VII.²⁹ Third, the court examined the *Meritor* opinion which has suggested that courts should follow agency principles when determining a supervisor's liability under Title VII.³⁰

At the other extreme are courts that strictly apply respondeat superior principles and refuse to hold individuals liable under Title VII.³¹ These courts narrowly construe the term employer and hold individuals do not fit within Title VII's definition of employer.³² In doing so, these courts interpret the word agent in Title VII as imputing the discriminatory acts of individual non-employers to the employing agency, thereby making the employer the only suable entity.³³

The Ninth Circuit has been the most adamant in its refusal to allow individual liability for non-employers. In *Miller v. Maxwell's International, Inc.*,³⁴ the plaintiff brought discrimination claims against six defendants in their individual capacities.³⁵ Like the court in *Johnson*,

27. *Johnson*, 871 F. Supp. at 985.

28. *Id.* The court noted that in the Civil Rights Act of 1991, Congress extended Title VII remedies to include compensatory and punitive damages. *Id.*

29. *Id.* at 986. Specifically, the *Johnson* court examined *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992) in which the "Sixth Circuit affirmed the district court's dismissal of her hostile environment claim because 'Allied Signal was protected from liability because its response upon learning of [the supervisor's] harassment was adequate and effective.'" *Id.* at 986 (quoting *Kauffman*, 970 F.2d at 185).

30. *Johnson*, 871 F. Supp. at 986.

31. *See, e.g.*, *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (limiting Title VII liability to respondeat superior principles); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (holding a suit against the employee as agent is a suit against the employer); *Redman v. Lima City Sch. Dist. Bd.*, 889 F. Supp. 288, 292 (N.D. Ohio 1995) (same); *Gastineau v. Fleet Mortgage Corp.*, 884 F. Supp. 310, 312 (S.D. Ind. 1994) (finding individual liability inconsistent with the remedial scheme of Title VII).

32. *See Miller*, 991 F.2d at 587-88.

33. *Id.* at 588.

34. 991 F.2d 583 (9th Cir. 1993).

35. *Id.* at 584. The defendants were the CEO of Maxwell's International, two general managers of the restaurant, and three lower level employees. *Id.*

the Ninth Circuit looked to Title VII's statutory scheme to determine whether Congress intended individual liability.³⁶ The *Miller* court reasoned that by limiting Title VII liability to employers with fifteen or more employees, Congress intended to protect small entities from the costs associated with litigating discrimination claims.³⁷ Therefore, the court concluded it was "inconceivable" that Congress intended to hold individual employees liable.³⁸ Moreover, the court refused to expand the liability of individual employees beyond respondeat superior principles.³⁹

Still other courts have chosen to take the middle ground between *Johnson* and *Miller*, and instead examine the non-employer's authority over the harassed employee.⁴⁰ In *Ball v. Renner*,⁴¹ the Tenth Circuit imposed strict liability upon certain supervisors and managerial employees if they exercised "employer-like authority."⁴² However, if the court finds that certain employees do not have enough power over the plaintiff's employment, they will not be held individually liable under Title VII.⁴³

36. *Id.* at 587.

37. *Id.*

38. *Id.* at 587.

39. *Miller*, 991 F.2d at 588.

40. Compare *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986) (finding supervisors in charge of staffing and assignments to be agents and therefore individually liable) with *Grant v. Lone Star Co.*, 21 F.3d 649, 651-52 (5th Cir. 1994) (holding that the branch manager of a private employer could be sued only in his official capacity).

Compare *Cross v. Alabama*, 65 Fair Empl. Prac. Cas. (BNA) 1290, 1300-01 (11th Cir. 1994) (holding that an employee-agent may be sued in his individual capacity under Title VII) with *Quillen v. American Tobacco Co.*, 874 F. Supp. 1285, 1296 (M.D. Ala. 1995) (holding that an employee-agent may not be sued in his individual capacity, and arguing that *Cross* "made a sharp departure from past precedent").

41. 54 F.3d 664 (10th Cir. 1995).

42. *Id.* at 667-68 (defining employer to mean those "who exercise employer-like functions vis-à-vis the employees who complain of those persons' unlawful conduct"). See also *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989) (concluding the agency language used in Title VII's definition of employer indicates Congress' intent to impose personal liability on individuals who serve in supervisory positions and exercise "significant control" over hiring, firing, and conditions of employment).

43. See, e.g., *Ball*, 54 F.3d at 668. In *Ball*, a police dispatcher brought a Title VII action against the city and against the police officer who allegedly sexually harassed her. *Id.* at 664-65. The district court granted summary judgment for both the city and the police officer. *Id.* at 664. On appeal, the Tenth Circuit, after admitting "the waters are not entirely clear" on the issue of individual liability, stated that the relationship between

B. *The Correct Solution: Imposing Individual Liability on "Agents"*

Courts that argue that the word agent incorporates the doctrine of respondeat superior fail to recognize that agent liability appears in the plain language of Title VII.⁴⁴ Because employers must act through its agents,⁴⁵ a statute prohibiting discrimination by an employer necessarily includes respondeat superior principles.⁴⁶ Therefore, there would be no reason for Congress to include the word agent in the definition of the term employer. Yet Title VII specifically identifies agent as a suable and separate entity.⁴⁷ Congress must have included agent so as to impose individual liability upon non-employer agents.⁴⁸

The *Miller* court's reasoning is flawed in other respects as well. The Ninth Circuit wrongly assumed that because Congress limited Title VII's coverage to large employers, it must have also intended to excuse individual discriminators from liability.⁴⁹ However, the legislative history indicates Congress excluded small employers from Title VII to immunize family-run businesses that hire friends and family members,

the plaintiff and the employee needed to be equivalent to an employer-employee relationship in order to trigger individual liability. *Id.* at 667-68. The court concluded the plaintiff failed to show such a relationship existed. *Id.* at 668.

44. See *supra* note 15 for the definition of employer. See also *Ball*, 54 F.3d at 667 (arguing that using respondeat superior principles to impose Title VII liability only on the actual employer "makes little sense in analytical terms").

45. *Ball*, 54 F.3d at 667.

46. *Id.* (noting that by definition a corporate employer can act only through its agents: "[W]hat other meaning can be given to the concept that [the corporation] has engaged in employment discrimination?").

47. See *supra* note 15 for the definition of employer.

48. Courts that oppose individual liability argue that had Congress intended to provide for such liability, it would have substituted the word "person" for the word employer. See *Gastineau v. Fleet Mortgage Corp.*, 884 F. Supp. 310, 312 (S.D. Ind. 1994).

49. *Goldberg*, *supra* note 24, at 577-78. The *Miller* court's reasoning is as follows:

Title VII limits liability to employers with fifteen or more employees, . . . in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims. If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.

Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).

not to shield individual sexual harassers from liability.⁵⁰

Furthermore, as the *Johnson* court argued, imposing individual liability on agents promotes the objectives of Title VII.⁵¹ There are two primary objectives of Title VII: eliminating discrimination from the workplace and compensating victims.⁵² Permitting liability for non-employer individuals would further Title VII's objectives by providing compensation for victims when they cannot sue their employers⁵³ or when they are discouraged from suing their employers.⁵⁴

Finally, in *Meritor*, the Supreme Court suggested lower courts apply agency principles when determining employer liability under Title VII.⁵⁵ Because the law of agency recognizes personal liability for agents,⁵⁶ it seems logical that the Supreme Court would impose individual liability if faced with this issue.

III. SEXUAL HARASSMENT AND THE FIRST AMENDMENT

A. *History of the First Amendment Defense in Hostile Environment Cases*

Scholars have recently begun to argue that hostile environment claims are inconsistent with modern First Amendment doctrine.⁵⁷ They

50. Goldberg, *supra* note 24, at 578 (citing *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528 (D.N.H. 1993)).

51. *Johnson v. University Surgical Assocs.*, 871 F. Supp. 979 (S.D. Ohio 1994). See also Goldberg, *supra* note 24, at 580-87.

52. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

53. Goldberg, *supra* note 24, at 583. Goldberg notes that suing bankrupt employers or others who lack sufficient funds may be "monetarily fruitless." *Id.* See also *Johnson*, 871 F. Supp. at 985-86 (suggesting that an employee may not have a remedy if the employer was not liable because the employer's response to the harassment was effective).

54. Goldberg, *supra* note 24, at 583-84. Goldberg explains that employees would often rather sue agents than an employer, either out of fear of the consequences, or simply because the agents are more responsible. *Id.*

55. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

56. The Restatement (Second) of Agency provides that a "[p]rincipal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent . . . and a judgment can be rendered against each." RESTATEMENT (SECOND) OF AGENCY § 359c(1) (1958). See also *Gastineau v. Fleet Mortgage Corp.*, 884 F. Supp. 310, 313 (S.D. Ind. 1994) (conceding that its refusal to allow agent liability "creates some tension with" *Meritor*).

57. See, e.g., Gerard, *supra* note 10, at 1004-07. The EEOC regulations define sexual harassment as "other verbal or physical conduct of a sexual nature." 29 C.F.R.

argue that the speech involved in harassment cases is protected under the First Amendment and that any restriction of that speech is viewpoint-based and thus unconstitutional.⁵⁸ Defendants in hostile environment sexual harassment cases are using this argument when faced with a claim that rests on speech or symbolic expression.⁵⁹

Scholars and defendants who assert that Title VII unconstitutionally restricts speech often focus on the EEOC Guidelines.⁶⁰ These Guidelines specify that sexual harassment is a form of sex discrimination prohibited under Title VII.⁶¹ The Guidelines emphasize that in determining whether sexual harassment exists, the trier of fact must examine "the record as a whole" and "the totality of the circumstances," including the nature of any sexual advances and the context in which they occurred.⁶² Since the passage of Title VII, the courts have used these Guidelines as a basis for determining if sexual harassment took place.⁶³

In *Robinson v. Jacksonville Shipyards*,⁶⁴ the defendant raised this defense, but the court found it unsound.⁶⁵ The *Robinson* court recognized that authority existed to support the defendant's contention that sexually-oriented pictures and sexual remarks alone cannot form the basis for Title VII liability.⁶⁶ The court nevertheless rejected the defendant's

§ 1604.11(a) (1995).

58. See Gerard, *supra* note 10, at 1007-10 (discussing the First Amendment). The First Amendment prohibits the government from regulating speech based on the contents of the speech. *Id.* at 1007. This principle prevents the government from censoring speech. *Id.*

59. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). See also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 414-28 (predicting an increase in the number of First Amendment defenses).

60. See, e.g., Gerard, *supra* note 10, at 1033-34 (concluding that the Guidelines are "probably unconstitutional" as substantially overbroad and are often applied unconstitutionally).

61. See 29 C.F.R. § 1604.11.

62. *Id.* The kind of workplace conduct that may be actionable includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* § 1604.11(a).

63. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

64. 760 F. Supp. 1486 (M.D. Fla. 1991).

65. *Id.* at 1534-36.

66. *Id.* at 1525 (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986)).

argument,⁶⁷ because the work environment, viewed as a whole, was abusive and hostile.⁶⁸

However, in 1995, the Fifth Circuit did not dismiss the defendant's First Amendment argument as easily as the *Robinson* court did. In *DeAngelis v. El Paso Municipal Police Officers Association*,⁶⁹ the defendant appealed the jury's finding of sexual harassment, claiming, *inter alia*, the verdict abridged his First Amendment free speech rights.⁷⁰ The First Circuit reversed the district court's judgment after it found the evidence insufficient to support the jury's verdict.⁷¹ Unfortunately, the court limited its analysis to the insufficiency of the evidence making it difficult to determine whether the First Amendment defense actually played in its decision.⁷²

The First Amendment argument rests on the assertion that the EEOC

67. *Id.* at 1525-27. In doing so, the court relied on the Eleventh Circuit precedent to reject the "social context" argument relied upon in other circuits. *Id.* at 1526. The social context argument, relied upon by such courts as the Sixth Circuit in *Rabidue*, is that Congress did not design Title VII to change the existing social contexts of certain work environments. *Rabidue*, 805 F.2d at 621. Such environments include those in which "[s]exual jokes, sexual conversations and girly magazines may abound." *Id.* at 620-21. The *Robinson* court, however, concluded that "the *Rabidue* analysis violates the most basic tenet of the hostile work environment cause of action, the necessity of examining the totality of the circumstances." *Robinson*, 760 F. Supp. at 1527.

68. *Robinson*, 760 F. Supp. at 1527. The environment included sexual remarks, sexual jokes, and sexually-oriented pictures of women posted in supervisors' offices and central gathering places around the shipyard. *Id.* at 1491-1503.

69. 51 F.3d 591 (5th Cir. 1995).

70. *Id.* at 593.

71. *Id.* at 597. The *DeAngelis* court characterized the evidence supporting the sexual harassment case as "a few written jibes, at women and police officers generally and the plaintiff in particular, published in the police association newsletter." *Id.* at 592. Even though 1,000 copies of the newsletter were printed monthly, and distributed to at least 700 police officer members of the Association, the court found that the columns "were not severe or pervasive enough to create an objectively hostile or abusive work environment." *Id.* at 595-96 (citing *Meritor*, 477 U.S. at 67, and *Harris*, 114 S. Ct. at 370). The court noted that after *Harris*, "sexually discriminatory verbal intimidation, ridicule and insults may be sufficiently severe or pervasive to . . . create an abusive working environment," and warned that an extremely high standard must be met ("a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace") before a hostile work environment exists. *Id.* at 593.

72. Although the court found the evidence to be "rife . . . with first amendment overtones" it limited its holding to the sufficiency of the evidence issue. *DeAngelis*, 51 F.3d at 592.

Guidelines discriminate on the basis of viewpoint.⁷³ Under the Guidelines, a particular type of speech (i.e., speech that forms a basis for sexual harassment) is singled out and may be restricted and/or punished, whereas any other kind of speech (i.e., words of encouragement) is permissible in the workplace.⁷⁴ Hence, this amounts to blatant viewpoint discrimination.⁷⁵

Although viewpoint restrictions on speech are in some cases constitutional, the Guidelines do not fit into any of the four exceptions for permissible content regulation: advocating illegal conduct, libel, obscenity, and "fighting words."⁷⁶ If a viewpoint-based law does not fit easily into one of the non-protected categories, it will be strictly scrutinized.⁷⁷ For the proponents of the First Amendment defense, the analysis ends there⁷⁸ because the Guidelines do not fit neatly into any category.⁷⁹ Nevertheless, courts have difficulty in affirming the First Amendment defense.⁸⁰

73. Gerard, *supra* note 10, at 1010.

74. See 29 C.F.R. § 1604.11(a).

75. Gerard, *supra* note 10, at 1010 ("The government's interest in the hostile-environment cases is entirely one of suppressing offensive or disagreeable ideas. . .").

76. See *id.* at 1010-25 (analyzing the Guidelines under each category of permissible content regulation).

77. *Id.* at 1010. See *infra* notes 81-85 and accompanying text for further discussion and criticism of this point.

78. Gerard, *supra* note 10, at 1033-35.

79. *Id.* Professor Gerard characterizes hostile-environment law as "overbreadth run amok." *Id.* at 1028. The overbreadth principles of First Amendment jurisprudence work to strike down legislation that covers too much speech (i.e., speech that may be regulated as well as speech that is constitutionally protected). See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

Professor Gerard is apparently concerned that restricting speech in the workplace potentially allows government officials to abuse their discretion by vastly suppressing any and all information they so desire. Gerard, *supra* note 10, at 1007 (arguing that "[i]f government could regulate speech because of its content, officials could outlaw all speech on whatever topics they chose and could suppress information they would rather conceal or points of view with which they disagree"). Such a slippery slope argument is inappropriate in the hostile environment sexual harassment context where courts require the harassment to be frequent, severe, or pervasive. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

80. See *supra* notes 64-72 and accompanying text.

B. *The Fallacy of the First Amendment Defense
for Hostile Work Environment Claims*

Modern First Amendment doctrine subjects viewpoint-based restrictions to the strictest scrutiny.⁸¹ Courts will only uphold a restriction on speech if the regulation serves a compelling governmental interest and it is narrowly tailored to serve that interest.⁸² Courts must guard against a government that attempts to usurp power by censoring particular ideas or by preventing public access to government criticism.⁸³ However, Title VII does not pose these dangers because Congress, when it designed Title VII, had a compelling governmental interest to prevent discrimination and harassment in the workplace.⁸⁴ Congress did not design Title VII as a means to censor viewpoints.⁸⁵

Moreover, modern First Amendment doctrine allows restrictions of many types of speech, even when the restrictions are viewpoint-based.⁸⁶ For example, certain labor laws,⁸⁷ regulations of bribery and threats, and

81. *Church on the Rock v. City of Albuquerque*, No. 95-2009, 1996 U.S. App. LEXIS 11837, at *11-*12 (11th Cir. May 23, 1996) (noting viewpoint discrimination is a form of content discrimination, which is subject to strict scrutiny (citing *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990))).

82. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549-50 (1990). See Gerard, *supra* note 10, at 1007-08 (discussing *Niemotko v. Maryland*, 340 U.S. 268 (1951)). The *Niemotko* case involved a permit to use a public park. *Niemotko*, 340 U.S. at 269-70. The officials in charge of issuing the permits allowed certain uses of the park, but denied Jehovah's Witnesses from obtaining a permit. *Id.* The court held this to be a prior restraint on the Jehovah Witnesses and therefore unconstitutional. *Id.* at 273. However, the *Niemotko* case is easily distinguishable from a Title VII hostile environment claim because Title VII claims fit better into the "time, place and manner" category of First Amendment jurisprudence. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (discussing time, place, and manner). See also *infra* notes 110-13 and accompanying text (discussing time, place, and manner).

83. See generally Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 610-613 (examining the rationale for judicial hostility towards viewpoint restrictions).

84. See *supra* text accompanying note 52.

85. See *supra* text accompanying note 52.

86. See Sunstein, *supra* note 83, at 613. Sunstein notes that "[r]egulation based on point of view is common in the law. The terms 'viewpoint-based' and 'viewpoint-neutral' often represent conclusions rather than analytical tools." *Id.* at 616.

87. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Supreme Court upheld certain restrictions on an employer's speech before a union election because certain statements might be misinterpreted by employees as a threat of retaliation.

restrictions on false or misleading commercial speech are all viewpoint-based, yet are all constitutional.⁸⁸ These regulations serve a compelling government interest because Congress designed them in order to prevent substantial harms.⁸⁹ Similarly, combating sexual harassment in the workplace is a compelling government interest and should withstand any First Amendment attack.⁹⁰

Proponents of the First Amendment defense to hostile environment sexual harassment claims, however, omit several factors which deserve a place in the analysis.⁹¹ These include the purposes and public policies underlying Title VII,⁹² which is to punish discriminatory

Id. at 618. In so holding, the Court acknowledged that even truthful statements may be perceived as threatening to employees due to the disparity of power between employers and employees. *Id.*

There are similarities between such labor disputes described in *Gissel* and hostile work environment cases. Nevertheless, some authors attempt to distinguish the two types of cases on the basis that sexual "[h]arassment by coworkers . . . does not involve [the] imbalance in power [which is involved in labor cases]." Browne, *supra* note 10, at 515. Arguments such as this one ignore the inherent inequality between the genders in the workplace; inequality which sexual harassment laws were designed to eradicate. See, e.g., *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (discussing the imbalance of power in sexual harassment claims).

88. Sunstein, *supra* note 83, at 613-14.

89. *Id.* at 614-15.

90. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (stating that "[t]he eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest"). See also *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (affirming that the state has a compelling interest in eliminating discrimination against women); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (upholding content-based restrictions where there is a compelling state interest) (citing *Perry Educ. Ass'n v. Perry Local Ass'n*, 460 U.S. 37, 45 (1983)). See also Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What is it and How Should it be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 415 (1995) (arguing that "[t]he free speech defense fails to acknowledge that a compelling government interest may counterbalance the First Amendment concerns [and that] [t]he elimination of employment discrimination should be regarded as such a compelling government interest").

91. See generally Aileen V. Kent, Note, *First Amendment Defense to Hostile Work Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 HOFSTRA L. REV. 513 (1994).

92. For a discussion of the purposes underlying Title VII, see text accompanying *supra* note 52.

conduct, not speech.⁹³ One objective of Title VII is to compensate the victim,⁹⁴ therefore, the evidence must be weighed partially in terms of the harm to that victim.⁹⁵ In *Harris*, the Supreme Court reaffirmed that the environment as a whole must be considered when determining whether a hostile or abusive work environment exists.⁹⁶ Consequently, if a First Amendment defense were allowed to stand, evidence of the expressive conduct which created the hostile environment would be moot. Defendants could easily destroy many harassment claims and hide their discriminatory conduct behind the cloak of the First Amendment.⁹⁷

93. See Keith R. Fentonmiller, Note, *Verbal Sexual Harassment as Equality-Depriving Conduct*, 27 U. MICH. J.L. REF. 565, 574-75 (1994). Mr. Fentonmiller states:

Degrading comments and epithets based on sex have meaning beyond the dictionary definitions of their linguistic parts. Their use captures a painful historical context of powerlessness, rape, and lack of legal and social identity. . . [a]lthough such words literally express hatred in a gender-specific way, their true power lies in their ability to invoke instantaneously an entire history of subjugation, as well as the present day realities of rape, incest, and domestic violence.

Id.

94. See *supra* text accompanying note 52.

95. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). In *Harris*, the Supreme Court held that:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, *if the victim does not subjectively perceive the environment to be abusive*, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Id. at 370 (emphasis added). See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in *WORDS THAT WOUND* (1993) (urging courts to focus on the effects of racist speech).

96. *Harris*, 114 S. Ct. at 371.

97. See Amicus Curiae Brief of Andrea Dworkin at 18-19, *Hudnut v. American Booksellers Ass'n, Inc.*, 475 U.S. 1001 (1986) (No. 85-1090). Dworkin notes:

All any exploiter has to do is to interject speech into any practice of exploitation, however malignant, and hide the whole practice behind the First Amendment. By isolating the speech elements in other practices of discrimination and asserting their absolute protection, the discrimination can be made to disappear. Consider, for example, a common situation in sexual harassment in employment, where a 'speech' element . . . is part of a chain of events leading to an adverse employment consequence. . . . No court has held that the mere presence of words in the process of discrimination turns the discrimination into protected activity.

Id. at 18-19. See also Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 430 (1992) (noting that an employer who defends a hostile environment claim on First Amendment grounds is "simply defending its right to plenary control of the workplace").

Furthermore, proponents of the First Amendment defense in hostile environment sexual harassment cases “mischaracterize” the harm resulting from verbal sexual harassment.⁹⁸ Sexual harassment goes beyond “mere offense” or emotional distress: it furthers an institution of degradation and disempowerment—a system in which women are inferior to men.⁹⁹ Allowing sexually harassing speech to invade the workplace disadvantages victims economically, by directly interfering with their ability to perform their jobs.¹⁰⁰ Refusing to regulate such speech systematically perpetuates the subordination of women in the workforce.¹⁰¹

These proponents also overestimate the “chilling effect” that Title VII has and will have on protected speech.¹⁰² The only speech restrict-

98. Fentonmiller, *supra* note 93, at 569-73 (arguing that equality interests outweigh First Amendment interests in the hostile environment sexual harassment context). *See also* Ann E. Cudd, *When Sexual Harassment is Protected Speech: Hostile Environment Sexual Harassment Policy in the University*, 4 KAN. J.L. & PUB. POL'Y 69, 73 (1994) (describing sexual harassment as being “about domination . . . not a kind of ‘mere offense’ like witnessing someone doing something obscene or scatological in nature”); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 532-58 (1995) (arguing that the hostile work environment debate should focus on recognizing women’s continuing subjection to sex discrimination in the workplace).

99. Fentonmiller, *supra* note 93, at 574-81. Mr. Fentonmiller describes sexual harassment as coercion, and notes that courts also regard it as such:

The correlation between verbal sexual harassment in the workplace and the economic displacement and sexual degradation of its victims is so strong that courts presume discriminatory intent—a requirement for recovery under Title VII—from the presence of sexually derogatory words and expression.

Innumerable combinations of words exist which can degrade and disempower in an instant. Because sexually harassing words immediately invoke a context, history, and a set of stereotyped assumptions about women, they often are perceived as threats by women. A woman can never be certain that harassing words will not escalate into more harassing words or physical assault.

Id. at 577 (footnotes omitted).

100. *See* Jay W. Waks & Michael G. Starr, *The “Sexual Shakedown” in Perspective: Sexual Harassment in its Social and Legal Contexts*, 7 EMPLOYEE REL. L.J. 567, 570-71 (1982) (explaining the adverse economic consequences of sexual harassment).

101. *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 14 (1990) (commenting that “sexist speech reinstitutionalizes barriers in the workplace based on gender”).

102. Sangree, *supra* note 98, at 532-36. Professor Sangree also asserts that these commentators “underestimate the forces working against regulation of harassment in the workplace.” *Id.* at 534 (emphasis added).

ed by hostile environment sexual harassment law is discriminatory speech within the employment context.¹⁰³ As noted above, it is always in an employer's best interest to maintain a non-abusive work environment.¹⁰⁴ Thus, when the government's interests are balanced with an individual's First Amendment interests, the possibility that some discriminatory speech will be prohibited must yield to the compelling state goal of eliminating sexual harassment in the workplace.¹⁰⁵

Yet, the question remains as to what happens when a statute aimed at discriminatory conduct incidentally interferes with a person's right to free speech? In dictum, the Supreme Court recently tried to shed some light on this difficult issue of First Amendment jurisprudence. In *R.A.V. v. City of St. Paul*,¹⁰⁶ the Court struck down an ordinance that criminalized the display of any symbol which the defendant knew or "had reason to know would arouse[] anger, alarm, or resentment in others bas[ed] on race, color, creed, religion, or gender."¹⁰⁷ A majority of the Court found the ordinance an unconstitutional, viewpoint-based restriction of speech.¹⁰⁸ In striking the ordinance down, the Court specifically stated that its holding would not apply to statutes, such as Title VII, which are designed to regulate conduct because government interference with such speech would merely be a "secondary effect" of the statute.¹⁰⁹

103. See 29 C.F.R. § 1604.11(a). Courts have often held would-be protected speech may be regulated within the employment context. See, e.g., *Snell v. Suffolk County*, 611 F. Supp. 521, 528 (E.D.N.Y. 1985) (stating "[t]he workplace is different because it is governed by Congress' mandate that discrimination in employment will no longer be tolerated in this country").

104. See *Waks & Starr*, *supra* note 100, at 569-70. See *supra* note 100 and accompanying text.

105. See Sangree, *supra* note 98, at 534-35. As Professor Sangree states, "is the tradeoff between allowing some speech to be curtailed while furthering employment equality a positive one for democracy, and, thus, a positive tradeoff in terms of the First Amendment?" *Id.* at 535.

106. 112 S. Ct. 2538 (1992).

107. *Id.* at 2547. The defendant allegedly burned a cross on the property of a black family that lived across the street from him. *Id.* at 2541.

108. *Id.*

109. *Id.* at 2546. Justice Scalia, who wrote the majority opinion, responded to the concern that the opinion would make hostile work environment claims unconstitutional:

[S]ince 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 proscribable

The secondary effect distinction is critical. If a regulation that prohibits speech in the workplace is understood to have a secondary effect of preventing sexual harassment, then that regulation must be analyzed under this "time, place, and manner" exception of the First Amendment.¹¹⁰ Time, place, and manner restrictions constitute a distinct category of First Amendment jurisprudence in which a lower level of scrutiny applies.¹¹¹ Clearly, the primary purpose of sexual harassment legislation is to eliminate gender-based discrimination in the workplace.¹¹² How else can the consequent restriction of speech be characterized if not as a secondary effect of such legislation?¹¹³

Finally, opponents of the First Amendment defense can argue that victims of sexually harassing speech in the workplace are a "captive

class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . 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. . . .

Id. at 2546.

The Court stated that the ordinance in *R.A.V.*, on the other hand, was meant to impermissibly prosecute speech which the First Amendment is meant to protect. *Id.* at 2547-50. See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 11 (commenting that the case indicates "a general acceptance that at least the main elements of the hostile environment cause of action should survive First Amendment challenge"). But see Jeffrey M. Laurence, Comment, *Minnesota Burning: R.A.V. v. City of St. Paul and First Amendment Precedent*, 21 HASTINGS CONST. L.Q. 1117, 1143-46 (1994) (arguing that the majority's conception of Title VII as constitutional under the "secondary effects" doctrine is incorrect).

110. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (recognizing that a state may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (setting the standard for time, place, and manner regulations by requiring a legitimate governmental interest unrelated to the suppression of speech, content neutrality, and a tailoring of the means to accomplish this interest).

111. See *Perry Educ. Ass'n*, 460 U.S. at 45. See also Strauss, *supra* note 101, at 14 ("[B]anning sexist speech in the workplace does not censor such speech everywhere and for all time.").

112. See *supra* text accompanying note 52.

113. In contrast, commentators such as Browne reach a different conclusion. Browne argues that "if the reaction of the audience is considered a 'secondary effect' of expression, then virtually any restriction of expression can be justified." Browne, *supra* note 10, at 522. The argument, however, is not that the victim's reaction is secondary, but rather that the restriction on speech itself is secondary.

audience," thus allowing for less stringent scrutiny of Title VII.¹¹⁴ When the expression of another forces an unwilling person¹¹⁵ to view or listen to that expression, then the captive audience doctrine allows restrictions on speech.¹¹⁶ Proponents of the First Amendment defense in hostile work environment cases argue that the captive audience theory applies exclusively to the home.¹¹⁷ On the contrary, simply because the Supreme Court has not yet held employees in the workplace as a captive audience does not mean that employees do not fit within the category.¹¹⁸

IV. CONCLUSION

As courts struggle with the recent issues concerning hostile work environment sexual harassment, it will behoove them to consider the congressional purposes behind Title VII. Individual liability furthers these goals by offering victims recovery where suing the employer is either impossible or less desirable. Perhaps more importantly, individual liability allows the victim the opportunity to confront her harasser, thereby granting victims emotional as well as financial compensation.

The objectives of eliminating discrimination in the workplace and compensating the victims of such discrimination also deserve consideration when courts are faced with the First Amendment defense. Sexually abusive speech must be examined in light of the historical and social context in which the speech occurred and in conjunction with any harm it causes. When such interests are balanced against the minor chilling

114. See generally RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 1.02(F) (1984).

115. *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[T]he degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.").

116. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding an ordinance which restricts picketing in front of a person's home).

117. See Browne, *supra* note 10, at 520 (arguing that "[e]xtension of the captive-audience doctrine to the workplace, where workers often spend one-third to one-half of their waking hours, would leave very little time for the free expression that under our system is supposed to be the rule rather than the exception"); Gerard, *supra* note 10, at 1031 ("The captive audience concept has been employed to sustain restrictions of speech only when the speech somehow intruded into the home. A workplace is not a home.").

118. In fact, in discussing the captive audience theory, both Browne and Gerard fall back on the argument that Title VII is viewpoint-based. Browne, *supra* note 10, at 518; Gerard, *supra* note 10, at 1031-32. For reasons why the viewpoint-neutrality requirement does not apply to Title VII, see *supra* notes 73-80 and accompanying text.

effect caused by the speech restrictions of Title VII, it is apparent that the need for equality in the workplace is paramount.

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