STATE OF MICHIGAN

IN THE COURT OF APPEALS

LYNETTE BURNS,

Plaintiff-Appellee,

v.

CITY OF DETROIT, a municipal corporation, DEREK HICKS, individually and in his official capacity, TERRANCE HILL, individually and in his official capacity, and DARRYL HOPSON, individually and in his official capacity,

Defendants-Appellants.
_____/

Court of Appeals
No. 98-213029

Lower Court
No. 95-529767-CL

MARY KATHERINE NORTON (P32059)
ELIZABETH A. CABOT (P36677)
Attorney for Plaintiff-Appellee
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

JUNE BOYD (P43283)
Attorney for Defendants-Appellants
1650 First National Building
Detroit, Michigan 48226
(313) 237-3010

KINGSLEY R. BROWNE
Pro hac vice
Attorney for *Amicus Curiae*
Center for Individual Freedom
Wayne State University Law School
471 W. Palmer Avenue
Detroit, Michigan 48202
(313) 577-0476

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM

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Defendant-Appellants answer, "Yes."

Plaintiff-Appellee answers, "No."

Amicus Curiae answers, "Yes."

The trial court did not address this issue.

II. IS SECTION 103(i)(iii) OF THE ELLIOTT-LARSEN ACT, M.C.L. 37.2103(i) (iii), M.S.A. 3.548(103)(i)(iii), UNCONSTITUTIONALLY VAGUE?[1]

Defendant-Appellants answer, "Yes."

Plaintiff-Appellee answers, "No."

Amicus Curiae answers, "Yes."

The trial court did not address this issue.

III. IS SECTION 103(i)(iii) OF THE ELLIOTT-LARSEN ACT, M.C.L. 37.2103(i) (iii), M.S.A. 3.548(103)(i)(iii), UNCONSTITUTIONALLY OVERBROAD?

Defendant-Appellants answer, "Yes."

Plaintiff-Appellee answers, "No."

Amicus Curiae answers, "Yes."

The trial court did not address this issue.

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[1] In its remand order, the Michigan Supreme Court framed the question as whether "basing a finding of liability on [the challenged] remarks would raise vagueness and overbreadth concerns." Because vagueness and overbreadth are doctrines used in analyzing statutes, it appears that the Court was requesting an analysis of the constitutionality of the governing statute rather than the finding of liability.

INTEREST OF AMICUS CURIAE

The Center for Individual Freedom is a non-partisan, non-profit organization with the mission of protecting and defending individual freedoms guaranteed by the United States Constitution and state constitutions, including due process rights, free speech rights, property rights, privacy rights, freedom of association, and religious freedom. The Center has filed amicus briefs in a variety of First Amendment cases, including *Watchtower v. Stratton* (United States Supreme Court) (a lawsuit challenging a village ordinance requiring door-to-door canvassers to obtain permits and disclose their names); *Zelman v. Simmons-Harris* (United States Supreme Court) (a lawsuit challenging the Cleveland school-voucher program); *United States v. United Foods, Inc.* (United States Supreme Court) (a lawsuit challenging a federal statute requiring mushroom growers to finance generic advertisements promoting mushrooms); *Gerawan Farming, Inc. v. Veneman* (California Supreme Court) (a lawsuit challenging a California program compelling fruit growers to finance generic advertising promoting fruit); and *Butler v. Alabama Judicial Inquiry Commission* (11th Circuit) (a lawsuit challenging state restrictions on campaign speech by candidates for state judicial office). Of particular interest to the Center in this case is the constitutional protection of the right of free speech of both employees and employers, rights that the Center believes are substantially impaired by broad liability for hostile workplace environments.

STATEMENT OF FACTS

Amicus curiae adopts by reference the Statement of Facts of Defendant-Appellants.

SUMMARY OF ARGUMENT

The Defendant-Appellants (hereinafter "Defendants") in this case were held liable under Section 103(i)(iii) of the Elliott-Larsen Civil Rights Act in large part for the expression in crude terms of unflattering opinions about Plaintiff-Appellee (hereinafter "Plaintiff") in particular and women in general, despite the fact that opinions, even unflattering ones, are fully protected by both the federal and state constitutions. Because equally vulgar but flattering language would not have established liability, it is plain that Defendants have been subjected to liability for the substance of what they said rather than its form. No existing doctrine under which speech may receive reduced First Amendment protection is applicable. Moreover, even if only part of the speech for which liability was imposed was protected by the First Amendment, the judgment is still invalid. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Thus, Section 103(i)(iii) is unconstitutional as applied.

Section 103(i)(iii) is also unconstitutional on its face. The statute – which renders unlawful "verbal . . . conduct or communication of a sexual nature [that] has the purpose or effect of . . . creating an intimidating, hostile, or offensive employment . . . environment" – is unconstitutionally vague. It does not provide employers and employees adequate notice of what speech is permitted and what is forbidden, and it gives juries unbridled discretion to penalize speech with which they disagree.

The statute is also unconstitutionally overbroad. The combination of the vagueness of the statutory standard, the "totality of the circumstances test," and respondeat superior liability imposes a broad obligation on employers to censor speech that someone might deem sexually offensive. When litigation comes, the employer must defend against an aggregation of speech, each individual

component of which might not establish liability. Thus, employers must censor speech long before it reaches the severity or pervasiveness required to hold the employer liable. Because the question of employer liability turns on the vigor with which it enforces its harassment policy, lawyers routinely advise their clients that they must not tolerate *any* language or conduct that might be deemed harassment. The "zero tolerance" policies adopted by many employers are a predictable result of this statutory regime, but "zero tolerance" for speech is anathema to the First Amendment.

It cannot be stressed too strongly that the constitutional question in this case is not whether *some* of the complained-of speech in this case could be proscribed by an *appropriately tailored statute*. Rather, it is whether *all* of the speech can be proscribed by an *inappopriately tailored* statute.

ARGUMENT

I. THE STATEMENTS THAT SUPPORTED THE "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT CLAIM ARE PROTECTED SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS

The speech that formed the basis of Plaintiff's sexual harassment claim is speech that is fully protected by the First Amendment to the United States Constitution and Article I, Section 5, of the Michigan Constitution.[1] Moreover, as Part I(B) of this brief will demonstrate, imposition of liability based even in part upon the expression of personal and social opinions violates the viewpoint-

[1] The Michigan Supreme Court has tended to view the free speech guarantees of the First Amendment and Article I, Section 5, as being coextensive. *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 207-208, 378 N.W. 2d 337, 345 (1985); *Book Tower Garage, Inc. v. UAW Local No. 415*, 295 Mich 580, 587, 295 N.W. 320 (1940). Consequently, the discussion will focus largely on First Amendment case laws. Also, because Section 103(i)(iii) is fashioned after the EEOC Guidelines on Sexual Harassment, 29 C.F.R. §1604.11(a), federal, as well as state, harassment cases will be discussed.

neutrality required by the First Amendment. Part I(C) will show that workplace-speech regulation does not fit within any doctrine under which speech is entitled to reduced protection, and Part I(D) will demonstrate that the limited case law suggesting that existing harassment law is not inconsistent with the First Amendment is poorly reasoned, if reasoned at all.

A. IMPOSING LIABILITY FOR THE EXPRESSION OF OFFENSIVE OPINIONS VIOLATES THE FREE SPEECH GUARANTEES OF THE STATE AND FEDERAL CONSTITUTIONS

1. DEFENDANTS WERE HELD LIABLE BECAUSE OF THE VIEWPOINT EXPRESSED BY THE CHALLENGED SPEECH

If there can be said to be a core principle of First Amendment doctrine, it is that the government may not impose sanctions against the expression of particular views because of the viewpoint expressed. As the Supreme Court stated in *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 828-29 (1995), "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" and "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." This central principle of First Amendment jurisprudence is violated in this case by imposition of liability based on the individual defendants' concededly vulgar speech and their employer's allegedly inadequate steps to censor that speech.[2]

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[2] The academic literature is replete with articles demonstrating the incompatibility of harassment law and First Amendment principles. *See, e.g.,* David E. Bernstein, *Antidiscrimination Laws and the First Amendment,* 66 MO. L. REV. 83 (2001); Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech,* 27 OHIO N. U. L. REV. 563 (2001); Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree,* 47 RUTGERS L. REV. 579 (1995); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment,* 52 OHIO ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment,* 68 NOTRE DAME L. REV. 1003 (1993); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law*

Under the First Amendment, there is "no such thing as a false idea," *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339 (1974), but what is the basis for liability in this case if not the expression of ideas that the jury found offensive? Many of the statements complained of by the Plaintiff convey one of the following ideas or opinions (albeit in vulgar terms): (1) that the Plaintiff is incompetent; (2) that some of the women in the department were difficult to work with; (3) that the Plaintiff and some other female employees would be happier if they had men in their lives; or (4) that women "cry sexual harassment" because of premenstrual syndrome. Is it the vulgar language or the idea expressed that forms the basis for liability? It seems clear that it is the latter.[3]

It is plain that statements in non-vulgar language expressing the opposite of the above opinions would not subject the defendants to liability. No liability would even arguably attach to statements that the Plaintiff is competent, that women in the department were a joy to work with, that the female employees did not need men in their lives to make them happy, or that women complain of sexual harassment for valid reasons. What about vulgar statements to the same effect? Suppose that one of the defendants had said about the Plaintiff "Don't be messing with that b----, man; she really knows her s---" or "I really like working with her a--, because she's as smart as f---ing Einstein." On the assumption that the Elliott-Larsen Act, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is not a "clean language act," *Katz v. Dole*, 709 F.2d 251, 256 (4th

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Restrict?, 85 GEO. L.J. 627 (1997); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791 (1992). For a more extensive listing of the relevant literature, see Browne, *Zero Tolerance for the First Amendment*, at 575-76, n.77.

[3] Plaintiff also asserts that she was faced with threats of physical violence. Plaintiff's Brief at 1-2 [hereinafter "P. Br."]. The short answer to that contention is that the liability finding does not depend on the jury's acceptance of that assertion, and the hostile-environment standard does not require a showing of threats.

Cir. 1983), one can only conclude that these hypothetical statements – which are no less vulgar than the statements that formed the basis of liability in this case – would not justify a finding of liability.

That leaves us, then, with the substance, rather than the form, of the statements. These statements embody opinions that the Plaintiff, and apparently the jury, found offensive. The fact that statements may be offensive or sexist, however, is not a basis for withdrawing them from the protective ambit of the First Amendment. As the Supreme Court observed in reviewing a Georgia abusive-language statute, the statute was invalid because it would impose liability for "harsh insulting language," and would make it unlawful "merely to speak words offensive to some who hear them." *Gooding v. Wilson*, 405 U.S. 518, 525, 527 (1972). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 548 (1980) (stating that the "offensive character of an idea" to a recipient can never "justify an attempt to censor its expression"). Thus, the central requirement of the First Amendment – that the government not prohibit the expression of certain ideas – is violated by harassment law.

2. THE JUDGMENT AGAINST THE DEFENDANTS IS INVALID IF IT RESTS EVEN IN PART ON PROTECTED SPEECH

Even if the court were to conclude that some of the challenged statements lie outside the realm of First Amendment protection, the First Amendment would still be violated in this case. Under prevailing doctrine, if *any* of the speech that contributed to the finding of liability is protected, the judgment is invalid. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court reviewed a judgment against the NAACP that was based upon a boycott of white-owned businesses. Because some black citizens had complied with the boycott out of fear of physical violence, the state court had ruled that the entire boycott was unlawful and that the organizers were liable. The

Supreme Court reversed, holding that because the judgment *might* have been based upon protected speech as well as unprotected conduct, the judgment was invalid. The "ambiguous" findings of the state court, the Court said, were "inadequate to assure the 'precision of regulation' demanded by [the First Amendment]." *Id.* at 921. *See also Street v. New York*, 394 U.S. 576, 589-90 (1969) (where defendant was charged with burning a flag and speaking contemptuously about it, conviction was overturned because even if burning a flag is not protected activity, there was a "possibility" that the conviction was based either on words alone or on a combination of the conduct and the words).

In this case, it cannot be doubted that at least some of the speech that the Plaintiff complained of is not subject to governmental sanction. The Plaintiff introduced evidence of a wide variety of statements that she found offensive. These statements were expressions of opinion about the Plaintiff individually, other female employees, and women in general. If there is a realistic possibility that the jury found against the defendants *even in part* because it disapproved of the sexist world-view of the individual defendants and their employer's alleged tolerance of expressions of that world-view, then the judgment is invalid under *Claiborne Hardware*.

Plaintiff's brief has the analysis precisely backwards. After discussing the threats alleged by Plaintiff, it asserts that "[c]ertainly these *and the myriad other statements*, conduct, and threats were sufficient for a reasonable jury to find that they created" a hostile-environment. P. Br. at 36 (emphasis added). Under *Claiborne Hardware*, however, if those "myriad other statements" included protected speech, the judgment is constitutionally infirm, even if the jury might also have believed Plaintiff's testimony that threats were made against her.

B. NO SUPREME COURT DOCTRINE UNDER WHICH SPEECH REGULATION RECEIVES RELAXED SCRUTINY DEPRIVES THE CHALLENGED SPEECH OF FIRST AMENDMENT PROTECTION

The question whether the individual defendants' speech is "protected" by the First Amendment rests on the assumption that there is some speech that is "protected" and some speech that is "unprotected." As demonstrated in the prior section, much of the speech at issue in this case must fall within what has been described as the "protected" category. Although this dichotomy between protected and unprotected speech is sometimes useful for discussion, it tends to mask a fundamental facet of First Amendment doctrine: the First Amendment does not "protect speech" so much as it "prohibits regulation." That is, there is no speech that is always permitted under the First Amendment, as even such "core" speech as an endorsement of a political candidate can be prohibited in a courtroom or a hospital intensive-care unit. Similarly, even speech that is often characterized as "unprotected," such as fighting words, cannot be regulated through viewpoint-based legislation. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Thus, the critical question is whether Section 103(i)(iii) satisfies the requirements laid down by the Supreme Court for statutes regulating speech.[4]

The Supreme Court has developed a series of doctrines under which speech regulation may be subject to a more relaxed review than the strict scrutiny required by the "compelling interest" test, which requires that speech regulation not only further a compelling interest but also be the least-

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[4] Plaintiff devotes much space, P. Br. at 17-24, to arguing that this case involves a balancing of First Amendment and Fourteenth Amendment rights. However, the Fourteenth Amendment is not relevant to this case. It governs only *state* action, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974), while the Elliott-Larsen Act applies to both governmental and private actors. Moreover, the Fourteenth Amendment prohibits only intentional discrimination, *Washington v. Davis*, 426 U.S. 229, 239-41 (1976), while a violation of Section 103(i)(iii) can be established without a showing of intent to discriminate on the part of the speaker and with a showing of mere negligence on the part of the employer.

restrictive method of achieving that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). A few lower courts and some commentators have suggested that harassment regulation falls within one or more of these more easily satisfied rules. Without modification, however, none of these doctrines can justify the breadth of speech restrictions imposed by existing harassment law, as even some supporters of hostile-environment law acknowledge. *See generally* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1.

Before turning to those doctrines, however, it may be worthwhile emphasizing the obvious: Section 103(i)(iii) is, very plainly on its face, a regulation of speech. It provides:

> Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other *verbal* or physical conduct *or communication* of a sexual nature [when] . . . (iii) The conduct *or communication* has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

MCL 37.2103(i), MSA 3.548(103)(i) (emphasis added). Thus, a key target of the statute is "verbal . . . conduct or communication." The question before this Court is whether this statute satisfies the rigorous standards that the Supreme Court has erected to protect free speech. The answer is quite clearly "no."

It should be noted that the Plaintiff's brief defends a hypothetical statute, rather than the one actually at issue in this case. She suggests that Section 103(i)(iii) is not a content-based regulation of speech at all because it merely prohibits "selectively targeting" victims because of their sex. P. Br. at 26, 42. However, a number of the statements about which the Plaintiff complained were not

"targeted" at her at all; instead, she overheard them.[5] More fundamentally, however, whether the plaintiff is a selectively targeted "victim" depends on the content of what was said. If a man tells a co-worker – because of her sex – that he fully supports all of the goals of the feminist movement, there is no sexual harassment even though he selected the recipient of his statements on the basis of her sex. Why not? Because she is not a "victim" of the selectively targeted statements. On the other hand, if he tells her – again because of her sex – that he thinks that women should be barefoot and pregnant and stay out of the workplace, he has made a statement that will at least "count" toward establishing a hostile environment. Why? Because analysis of the *content*, indeed the *viewpoint*, of the speech may establish her status as a victim. Thus, it is not the *targeting* of the speech toward the recipient that violates the law; it is the targeting of speech *with a certain content* that violates it.

The content of the speech can establish not only the fact that the recipient is a victim but also that the speech was motivated by the recipient's sex. A number of courts have held, for example, that the sexual content of the expression demonstrates that the motivation was "because of sex."[6]

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[5] Michigan cases have allowed findings of a hostile environment to be based in part on statements that are not directed at the plaintiff. *Smoyer v. Department of Corrections*, Mich. App., No. 223043 (unpublished) (but upholding summary disposition for employer on ground that plaintiff could not establish respondeat superior liability); *Danca v. K-Mart Corp.*, Mich. App., No. 208738 (unpublished) (upholding jury finding of a hostile environment because the "jury reasonably could have concluded that plaintiff had awareness of at least some, offensive, gender-related comments," but overturning jury verdict because of absence of respondeat superior liability).

[6] *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course"); *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 454 (1993) ("When the harassing conduct is sexual or sexist in nature, the but-for [sex] element will automatically be satisfied . . . [so that] when a plaintiff alleges that she has been subjected to . . . comments about the lesser abilities, capacities, or the 'proper role' of members of her sex, she has established that the harassment occurred because of her sex").

Thus, rather than being irrelevant to a sexual harassment claim, the content of the speech is often outcome-determinative.

1. THE CHALLENGED SPEECH IS NOT REGULABLE UNDER EITHER THE "FIGHTING WORDS" OR OBSCENITY DOCTRINES

Although any regulation of speech may raise First Amendment issues, the Supreme Court has recognized categories of speech that are largely unprotected by the First Amendment. "Fighting words" and "obscenity," for example, are entitled to little First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Miller v. California*, 413 U.S. 15 (1973). Nonetheless, viewpoint-based restrictions of either violate the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a municipal ordinance that distinguished between fighting words that arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" and all other fighting words); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (striking down a city anti-pornography ordinance because it established a viewpoint-based distinction between prohibited and permitted pornography).

Neither the fighting words doctrine nor the obscenity doctrine can justify the finding of liability in this case. There is neither an assertion nor a finding that any of the speech at issue in this case falls within one of those categories, and in any event it is quite clear that little, if any, of it does. Moreover, the selectivity of the fighting words that are prohibited by the statute tends to undercut an argument that the purpose of the regulation is to preserve the peace, and the standard for assessing a hostile-environment does not make the likelihood of a breach of the peace relevant. No doubt, the speech was offensive, but speech does not lose its First Amendment protection merely by virtue of

being offensive. *See Cohen v. California*, 403 U.S. 15 (1971) (overturning a conviction for displaying a jacket bearing the statement "F--- the Draft").

2. THE "LABOR SPEECH" DOCTRINE IS INAPPLICABLE BECAUSE IT RESTS ON A "TRANSACTIONAL" RATIONALE

A doctrine that is sometimes invoked to justify workplace-speech regulation is the "labor speech" doctrine, which was recognized by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Court upheld a bargaining order against an employer based upon its prediction during a representation campaign that selection of the union might lead to a closing of the employer's plant. The Court viewed this speech as "a threat of retaliation based on misrepresentation and coercion," but it was careful to note that employers are "free to communicate . . . [their] general views about unionism or . . . a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618.

The Court's rationale in *Gissel* does not support hostile-environment harassment law. The basis for the *Gissel* decision was a transactional one: the Court viewed the employer's speech as the equivalent of "if you vote in the union, I will close down the plant." Although a transactional rationale applies to quid pro quo harassment – so that the First Amendment would not protect the statement "sleep with me or you are fired" – it does not extend to hostile-environment harassment. Expressing negative views about women is analogous to expressing negative views about unions, which the *Gissel* Court said the employer was free to do. Moreover, the inequality-of-power rationale of *Gissel* is not applicable to claims, as in this case, that one co-worker was offended by another co-worker.

3. WORKPLACE SPEECH IS NOT REGULABLE UNDER THE CAPTIVE-AUDIENCE DOCTRINE

Somewhat related to the labor-speech doctrine is that of the "captive audience." The District Court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), held, with little discussion, that regulation of speech under Title VII was justified on the ground that employees constitute a "captive audience."

The captive-audience doctrine does not extend so far as to justify sexual-harassment law. First, most captive-audience cases have emphasized the sanctity and uniqueness of the home. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970). In *Rowan*, for example, the Court upheld a statute permitting persons having received advertisements for "sexually provocative" materials to request the Post Office to require mailers to stop future mailings to the addressee. The Court stated: "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738.[7]

The Supreme Court has never upheld a viewpoint-based restriction under a captive-audience rationale. As Laurence Tribe has noted, "The concept of a 'captive audience' is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a

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[7] Plaintiff's reliance, P. Br. at 29, on the case of *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), to support her captive-audience argument is inapt. In *Lehman*, the Court upheld a city ordinance against political advertising on *city-owned* buses, holding that it was justified by the city's interest, *as a proprietor*, in avoiding concerns about favoritism and in protecting riders from "the blare of political propaganda." *Id.* at 304. It is inconceivable that the Court would have upheld an advertising ban on *private* buses to protect citizens from the "blare of political propaganda," which would plainly be an illegitimate governmental interest. Plaintiff's argument implies that a prohibition in the private workplace of political speech, as well as harassing speech, would be as appropriate as the limitation in *Lehman*, demonstrating just how unprotective of speech the Plaintiff's position is.

regulation is not content-neutral." Laurence Tribe, *American Constitutional Law* §§ 12-19, at 950 n.24 (1988). Moreover, if people are captives for First Amendment purposes in their workplaces as well as in their homes, the "limited exception" to ordinary First Amendment principles becomes the rule, rather than the exception, as the two locales in which individuals are most likely to engage in discussion of social issues would both be extended less than full First Amendment protection.

Finally, unlike the laws involved in the Court's captive-audience precedents, harassment law attempts to insulate one captive from the speech of another captive, for typically the harassing co-worker is no less captive than his target. Had the statute at issue in *Rowan* purported to allow *any* member of the household to bar entry of sexually provocative materials to the entire household, the result would likely have been different. *See Rowan*, 397 U.S. at 741 (Brennan, J., concurring). An analogous situation is presented by a law such as Section 103(i)(iii) that allows one worker to exercise a similar veto over the expression of sexist or sexual remarks or possession of sexually suggestive materials in the workplace by all other co-workers.

4. SECTION 103(i)(iii) IS NOT A VALID "TIME, PLACE, OR MANNER" REGULATION

In some circumstances, regulation of the "time, place, or manner" of speech may be permissible. The District Court in *Jacksonville Shipyards* held that hostile-environment law is a valid time, place, or manner restriction, reasoning that it regulates offensive speech in only one "place" – the workplace. In order for speech regulation to be justified under this doctrine, however, the law must be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication of the information. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding city's sound-amplification guidelines for park concerts). Hostile-environment harassment law cannot satisfy any of these requirements. It is, as

we have seen, most assuredly not content neutral; a law reaching everything from sexist language to forcible rape can hardly be called narrowly tailored; and a law prohibiting speech during the entire time that someone is in the workplace does not leave open ample alternative channels for communication.[8]

It is important to note that the fact that the harassment inquiry focuses primarily on the effect of the speech on the target does not render it content neutral. The Supreme Court has made clear that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Nonetheless, the listeners' reaction is central to a harassment claim under Section 103(i)(iii). *Radtke v. Everett*, 442 Mich. 368, 501 N.W.2d 155 (1993).

Although the government may take limited steps to protect unwilling listeners, harassment law goes far beyond anything the Supreme Court has approved. In *Hill v. Colorado*, 530 U.S. 703 (2000), for example, the Court was faced with a challenge to a state law that was adopted primarily to protect patients and employees of abortion clinics. It prohibited, within 100 feet of a health-care facility's entrance, the "knowing approach" within eight feet of another person, without the person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with" that person. *Id.* at 707. The Court upheld the statute as a

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[8] Plaintiff's argument, P. Br. at 23, that the workplace is not a traditional public forum, like streets and parks, and is therefore not accorded as much First Amendment protection reflects a misunderstanding of the public-forum cases. Those cases deal with the government's power to regulate speech *on public property*, that is, property in which the government has a *proprietary* interest. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). Plaintiff's argument implies that the less a venue resembles a public forum, the greater the government's power to regulate speech. Citizens, under this view, have greater liberty to speak freely on the street than in their homes, plainly a principle that the Supreme Court has not, and would not, endorse.

valid time, place, or manner restriction, emphasizing that the statute made no distinction between viewpoints or subject matters. Whether the "education" was pro-abortion or anti-abortion, or whether it focused on abortion, global warming, or mandolin playing, it was covered by the statute. Moreover, the eight-foot zone allowed the speaker to communicate even with an unwilling listener at a "normal conversational distance," and the "knowing" requirement protected speakers who thought they were complying with the law. *Id.* at 726-27.

None of the features that saved the Colorado statute are found in Section 103(i)(iii). Section 103(i)(iii) distinguishes between speech that causes offense on the basis of sex and speech that causes offense on the basis of some other personal characteristic. It distinguishes between speech that is critical of women and speech that is laudatory. It prohibits not simply getting too close to an unwilling listener; it prohibits offensive communication within earshot of an unwilling listener, no matter how many willing listeners might also be present.

5. SECTION 103(i)(iii) IS NOT SAVED BY THE "SECONDARY EFFECTS" DOCTRINE

Speech can sometimes be regulated, even on the basis of content, when the regulation is directed not at speech itself but rather at its "secondary effects." The leading case is *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which upheld a zoning ordinance prohibiting adult theaters from locating near homes, churches, and schools. The Court held that the ordinance was permissible because it was aimed at the "secondary effects" of adult theaters – crime, lowered property values, and disintegration of neighborhoods. According to the Court, the ordinance was not designed to suppress offensive speech and therefore was not to be subjected to the rigorous review it would otherwise face.

Although one might argue that the psychological, physical, and emotional harms that the legislature was intending to prevent by Section 103(i)(iii) are secondary effects of the sort that may justify the regulation, the Supreme Court has emphasized that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). *See also United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 811-12 (2000) (concern for the effect of the subject matter on listeners is "the essence of content-based regulation"). The Third Circuit in *Saxe v. State College Area School District*, 240 F.3d 200, 209 (3d Cir. 2001), rejected the defendant's argument that its harassment policy could be justified under *Renton*, pointing out that the harassment policy (like Section 103(i)(iii)) focuses on the effect of speech on its listeners. It is precisely the listeners' reactions that are of concern in harassment cases – either women's reactions to hostile speech that is said to impair their ability to function in the workplace or co-workers' reactions to the speech that may lead them to view women as primarily sexual creatures rather than co-workers of equal status.

C. EXISTING CASE LAW ON FREE SPEECH AND SEXUAL HARASSMENT DOES NOT VALIDATE HOSTILE-ENVIRONMENT HARASSMENT LAW

As shown above, no category of speech regulation heretofore recognized by the Supreme Court exists that would justify hostile-environment harassment law. There is dictum in the Supreme Court's opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), however, that arguably supports the constitutionality of some hostile-environment regulation, and there are a few lower-court holdings that hostile-environment harassment regulation is not inconsistent with the First Amendment. However, the *R.A.V.* dictum does not save Section 103(i)(iii), and the reasoning of the lower-court cases is both erroneous and incomplete.

1. THE SUPREME COURT'S DICTUM IN *R.A.V.* DOES NOT SAVE SECTION 103(i)(iii)

In *R.A.V.*, the Court held unconstitutional a city ordinance defining as disorderly conduct the display of a symbol, such as a burning cross or 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." *Id.* at 379. The Minnesota Supreme Court, in upholding the ordinance, had interpreted it to ban only "fighting words." Accepting the state court's construction, the *R.A.V.* majority nonetheless held that the ordinance was unconstitutional, reasoning that a regulation of fighting words that is viewpoint-based is impermissible even though "fighting words" traditionally had been thought to be beyond constitutional protection. The five-justice majority explained that when it had previously described categories of expression such as obscenity and fighting words as being outside the bounds of constitutional protection, it had simply meant that this expression could be regulated because of its "*constitutionally proscribable content*." *Id.* at 383 (emphasis in original). That does not mean, the Court stated, that these categories of expression are subject to "content discrimination unrelated to their distinctively proscribable content." *Id.* at 384. The four justices who did not join the majority opinion also viewed the ordinance as unconstitutional, because they rejected as unsupportable the state court's construction limiting the ordinance to fighting words.

The holding of *R.A.V.* provides strong support for the view that viewpoint-based restrictions on workplace speech are impermissible. In *R.A.V.*, after all, the Court struck down viewpoint-based restrictions on "fighting words" – speech that had long been thought outside First Amendment protection – while much speech involved in harassment cases is clearly within the sphere of First Amendment protection. Indeed, some of the speech involved in harassment cases – such as

expression of negative views about the participation of women in the workforce – seems like sociopolitical speech that is at the core of First Amendment protection. *See, e.g., Carey v. Brown*, 447 U.S. 455, 467 (1980) (expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values").

Notwithstanding its holding that would appear to call much, if not all, harassment regulation into question, the *R.A.V.* majority in dictum denied that its analysis would have that effect. The Court stated:

> 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 proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. See [*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)] at 571 (plurality opinion); *id.*, at 577 (SCALIA, J., concurring in judgment); *id.*, at 582 (SOUTER, J., concurring in judgment); *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 425-432 (1990); [*United States v. O'Brien*, 391 U.S. 367 (1968)] at 376-377. *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*, 42 U.S.C § 2000e-2; 29 CFR § 1604.11 (1991). *See also* 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

505 U.S. at 389-90 (emphasis added).

One might first question whether the *R.A.V.* dictum is an accurate description of federal harassment law. In his concurring opinion, Justice White took the majority to task for its description, stating that "the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working environment, which reaches beyond any 'incidental' effect on speech." 505 U.S. at 410 (White, J., concurring in the judgment).

Even assuming that the Court's description of federal harassment law is accurate, the cases cited by the Court in support of its suggestion that harassment law may not violate the First Amendment suggest the limits of the proposition that the Court was offering. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991), the plurality opinion cited by the *R.A.V.* majority expressed the view that Indiana's public-nudity law could constitutionally be applied to nude dancing because the law was aimed at public nudity and not at expression. The Court stated:

> It can be argued, of course, that almost limitless types of conduct – including appearing in the nude in public – are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech'whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376.

Similarly, in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425-432 (1990), the Court held that when a group of lawyers boycotted cases involving indigent defendants they were not insulated from the antitrust laws merely because the boycott had an expressive component – a protest against the perceived inadequacy of their compensation. Finally, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court rejected the contention that a provision of the Universal Military Training and Service Act that prohibited knowing destruction of a draft card could not constitutionally be applied to an individual who burned his draft card as part of an anti-war protest. The Court held that because the Government's interest was "unrelated to the suppression of free expression" and the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," application of the statute to the defendant's protest activity was permissible under the First Amendment. *Id.* at 377.

The cited cases stand for the proposition that the fact that unlawful conduct happens to have an expressive component does not immunize it from governmental sanction; they do not stand for the proposition that the government may regulate expression simply by including expression within the definition of the offense. For example, "treason" is defined by federal law as follows:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2381 (2002). As the Court's *R.A.V.* dictum noted, the fact that revelation of national secrets to an enemy may be accomplished by speech does not insulate the traitor from prosecution, nor, of course, would the fact that the traitor acted for the specific purpose of protesting national policy. Nonetheless, the First Amendment would prohibit the government from *defining* treason to include public statements critical of war policy even if it could be shown that the enemy was pleased by the internal dissent. It is no defense for the government to assert that the statute also prohibits a wide variety of nonexpressive conduct. This same reasoning applies in the harassment context. The government may have as much power to prohibit sex discrimination as it does to prohibit treason, but the First Amendment places the same kind of restrictions on the government's ability to define sex discrimination to include "offensive" speech as it does on its ability to define treason to include "disloyal" speech.

It is important to think carefully about what the Supreme Court meant by "swept up incidentally." One might be tempted to say, for example, that the Elliott-Larsen Act has very broad sweep – prohibiting as it does discrimination in employment, housing, and public accommodations on the basis of religion, race, color, national origin, age, sex, height, weight, and marital status– and

therefore the effect of Section 103(i)(iii)'s speech restriction pales into insignificance in comparison to the Act's other effects. That is not, however, what "swept up incidentally" means. The question is how much speech is prohibited by the challenged provision in light of the plainly legitimate sweep *of that same provision*. Thus, when the Supreme Court analyzed the constitutionality of Section 505 of the Telecommunications Act of 1996, which required cable television operators either to fully scramble the signal of sexually oriented programs or limit their transmission to the late-night period, it based its decision on the effect of that particular section, not on a comparison of Section 505 to the entire sweep of the 1996 Act. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Similarly, when the Court entertained a challenge to Section 462(b)(3) of the Universal Military Training and Service Act of 1948 in *O'Brien*, which prohibited knowing destruction of a draft card, it examined the effect of that specific provision by itself, not by reference to the overwhelmingly non-expressive aims of the entire statute.

Even if the *R.A.V.* dictum is to be taken at face value, it would not save most harassment law. The *R.A.V.* majority spoke of "a particular content-based subcategory of *a proscribable class of speech*" that might be swept up incidentally by a statute regulating conduct. 505 U.S. at 389 (emphasis added). At most, this language would allow incidental content-based regulation of types of speech, such as obscenity or fighting words, that are *already* proscribable. Section 103(i)(iii) is not limited to proscribable classes of speech, however, and little if any of the speech at issue in this case falls within such a category.

Moreover, even if the *R.A.V.* dictum could save federal harassment law, it could not save Section 103(i)(iii). Under federal law, sexual harassment is prohibited by section 703(a) of Title VII, which is a general prohibition of sex discrimination in employment. 42 U.S.C. § 2000e-2(a)(1). The

EEOC Guidelines, which provide the operative definition of sexual harassment, do not have the force of law. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986). In Michigan, in contrast, a specific statutory provision defines sexual harassment. It can hardly be argued that the term "*verbal* or physical conduct or *communication*" is directed at conduct primarily and only incidentally at speech. Instead, it is explicitly directed at speech as much as it is at conduct.

Finally, even if *R.A.V.* meant that some harassing speech could be proscribed under appropriately tailored standards, the statute would still be subject to examination under the vagueness and overbreadth doctrines, discussed in Parts II and III. Thus, Section 103(i)(iii) would still be unconstitutional.

2. LOWER COURT CASE LAW UPHOLDING REGULATION OF WORKPLACE SPEECH IS BOTH ERRONEOUS AND INCOMPLETE

A few courts have acknowledged the serious First Amendment issues raised by hostile-environment harassment regulation in the workplace. *See DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) (finding that the complained-of harassment was not sufficiently severe to constitute actionable harassment, but noting that "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"); *Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. 1994) (acknowledging the tension between the First Amendment and harassment law, but declining to resolve it because of an inadequate record and lack of full briefing). Even more lower courts, however, have rejected the First Amendment argument, but they have done so without substantial analysis.

The first case to deal with the issue was *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). In the space of approximately two pages out of a 54-page opinion, the court addressed the First Amendment argument and rejected it on six independent grounds: (1) the defendant was not expressing *itself* through speech of employees; (2) expression is not protected because it is "discriminatory conduct"; (3) regulation is merely a time, place, or manner restriction; (4) employees are a "captive audience"; (5) sexual equality is a compelling interest and the regulation is narrowly tailored; and (6) workplace speech of private employees may be regulated by analogy to workplace speech of public employees.

None of the *Jacksonville Shipyards* rationales will withstand scrutiny. This brief has already demonstrated why the captive-audience and "time, place, or manner" arguments must be rejected. The suggestion that the First Amendment defense cannot be raised by the employer because the speech of the employees was not the speech of the employer is simply bizarre. According to that reasoning, a law holding parents liable for the speech of their children could not be challenged on First Amendment grounds by parents in an enforcement action. Moreover, because the law requires affirmative steps by employers to stifle the speech of their employees, the First Amendment interests of employers themselves are implicated. The Supreme Court's holding in *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), that the state may not "constitutionally require an individual to participate in the dissemination of an ideological message" presumably extends as well to a requirement that an individual participate in the *censorship* of such a message. In any event, in this case, the First Amendment rights of individual defendants are implicated.

The court's bland pronouncement that harassing speech is not speech at all, but rather conduct, could validate almost any regulation of expression. Burning a flag seems far more like

conduct than expression of unflattering opinions does, yet it is protected by the First Amendment from a statute that would prohibit it when it is done to express a message of disrespect. *Texas v. Johnson*, 491 U.S. 397 (1989). Even if the "conduct not speech" argument validly applied to federal law, a statute that specifically targets "conduct or communication," as Section 103(i)(iii) does, can hardly be said to reach only conduct.

The *Jacksonville Shipyard* court's assertion that the compelling interest test was satisfied is unsupportable. In order to satisfy this test the restriction must not only further a compelling interest, it must also be narrowly tailored, so that it restricts no more speech than absolutely necessary. If a "less restrictive alternative" exists, it must be used instead. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). As demonstrated in the "time, place, or manner" discussion, hostile-environment regulation cannot satisfy even the less-stringent narrow-tailoring requirement of that doctrine, let alone the more stringent "least restrictive alternative" analysis of the compelling-interest test. *See Ward v. Rock Against Racism*, 491 U.S. at 797 (noting that the time, place, and manner doctrine does not incorporate a least-restrictive alternative analysis). Moreover, the Court has stated that "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, *even where no less restrictive alternative exists*." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 813 (emphasis added).[9]

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[9] Plaintiff asserts, P. Br. at 13-15, that the harms identified by the legislature when it outlawed sexual harassment demonstrate the state's compelling interest in regulating speech under Section 103(i)(iii). However, the legislature's findings were aimed at sexual harassment in general – including quid pro quo harassment and hostile-environment harassment whether or not created by speech. Demonstration of a compelling interest in regulating employee speech would require, *at a minimum*, that specific harms relating to pure-speech-based harassment be identified.

Finally, the analogy to public employers was wholly misplaced. Public employers, *in their capacity as employers*, have general authority to regulate the speech of their employees unless the employee is speaking on a matter of public concern, in which case the employee's interest in self-expression and the employer's legitimate employment interests are balanced. *Connick v. Myers*, 461 U.S. 138 (1983). As the Supreme Court has noted, "the government as employer . . . has far broader powers than does the government as sovereign," because its "interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 671, 675 (1994). Thus, despite Plaintiff's assertion to the contrary, P. Br. at 18, the fact that the government may regulate speech in its capacity as employer provides no support for a conclusion that it can do so in its capacity as regulator.[10]

It is important to emphasize that the difference between the government's power as an employer and its power as a regulator means that a declaration that Section 103(i)(iii) is unconstitutional would not prevent public employers from establishing their own harassment policies. By the same token, that difference also means that it would be wrong to apply the public-employment cases to this case and hold that if the challenged speech was not on a matter of public concern it is unprotected. This case involves a plaintiff who is invoking the power of the government *as regulator* to *impose liability* based upon speech; it does not involve a government employer *as employer* seeking to regulate its own workforce.

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[10] For this same reason, Plaintiff's reliance on arguments in support of university rules against classroom epithets, *see* Henry W. Saad, *The Case for Prohibitions of Racial Epithets in the University Classroom*, 37 WAYNE L. REV. 1351 (1991), is misplaced. A university's interest in what goes on in its classrooms is a proprietary one, akin to the public employer's interest in regulating its own workplace.

Despite the skeletal nature of the analysis provided by the *Jacksonville Shipyards* court, other courts have invoked *Jacksonville Shipyards* as a basis for rejecting the First Amendment argument. The Tenth Circuit, for example, rejected the First Amendment defense, largely without analysis, stating that it "agree[s] with the reasoning of" the *Jacksonville Shipyards* court. *Baty v. Willamette Indus., Inc*., 172 F.3d 1232, 1247 (10th Cir. 1999). Similarly, the District Court for the District of Columbia rejected the defense in a footnote, also citing *Jacksonville Shipyards*. *Berman v. Washington Times Corp*., 1994 U.S. Dist. LEXIS 16476 (D.D.C. 1994). Significantly, neither of these cases indicated which of the six justifications of *Jacksonville Shipyards* it agreed with.

A few cases have rejected the First Amendment argument on other grounds. A federal court in Minnesota rejected the argument in a footnote, citing *R.A.V. Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993). As discussed previously, however, *R.A.V.* does not justify rejection of the First Amendment defense in most circumstances. The New Jersey Superior Court rejected the argument on the ground that the harassment involved in the case was not "solely verbal." *Woods-Pirozzi v. Nabisco Foods*, 675 A.2d 684 (N.J. Super. 1996). However, again as previously discussed, the First Amendment question is not whether *all* of the speech involved was protected, but rather whether *any* of it was. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Finally, the Supreme Court of California considered and rejected a First Amendment defense in *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 980 P.2d 846 (1999), *cert. denied*, 529 U.S. 1138 (2000). The procedural posture of that case was somewhat unusual, however. The employer challenged an injunction against racial epithets following a finding of liability for racial harassment, but it did not challenge the liability finding itself. Therefore, it was arguing that even though the speech could be punished after the fact, the injunction constituted an impermissible "prior restraint."

It is hardly surprising that the court declined to invalidate an injunction against speech that was conceded to be both regulable under the First Amendment and unlawful under discrimination laws. The United States Supreme Court denied certiorari in *Aguilar*, although Justice Thomas dissented from the denial, stating that "[a]ttaching liability to the utterance of words in the workplace is likely invalid for the simple reason that this speech is fully protected speech." 529 U.S. at 1140 (Thomas, J., dissenting).

None of the cases rejecting the First Amendment argument have provided anything approaching a reasoned explanation for why a law that prohibits the expression of speech that creates sexual or racial offense is not an invalid viewpoint-based restriction on speech. Even more to the point, however, is the fact that not a single one of these cases even *addressed* the central problems with harassment regulation, which are its vagueness and overbreadth, which will be discussed below.

II. SECTION 103(i)(iii) IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO GIVE SPEAKERS ADEQUATE NOTICE OF WHAT SPEECH IS PROHIBITED AND BECAUSE IT ALLOWS JURIES TO IMPOSE LIABILITY BASED UPON THEIR DISAGREEMENT WITH THE IDEAS EXPRESSED.

Even if one were to conclude that hostile-environment harassment regulation could potentially be justified under one or another previously recognized doctrine, existing harassment regulation would still be constitutionally infirm. Not only must speech regulations be a *kind* of regulation that is permissible under the constitution, their *form* must also be appropriate. That is, statutes regulating speech must give sufficient notice of what speech is prohibited (in other words, they must not be unconstitutionally vague) and, as will be shown in Part III, they must be sufficiently tailored that they not reach substantially beyond the boundaries of properly regulated speech (in other words, they must not be unconstitutionally overbroad).

A. THE LANGUAGE OF SECTION 103(i)(iii) IS INHERENTLY VAGUE

A central principle of First Amendment doctrine is that any law regulating speech must give reasonable notice of what is prohibited. The vagueness doctrine rests on two rationales. First, a vague law creates a "chilling effect," so that individuals will stifle not only their expression of appropriately prohibited speech but also their expression of protected speech that comes anywhere close to the line because of their inability to perceive with confidence where the line is. *NAACP v. Button*, 371 U.S. 415, 433 (1963). A vague law thus restricts too much speech, because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks and citation omitted). Second, the indeterminacy of a vague law allows a jury "to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). Both rationales are implicated by Section 103(i)(iii).

The legal standard governing harassment liability provides little guidance about what speech is actionable. The phrase "communication [that] has the purpose or effect of . . . creating an intimidating, hostile, or offensive . . . environment" provides speakers extraordinarily little guidance about when they must hold their tongues. The language is hardly self-explanatory, and the definition has not been substantially narrowed through judicial interpretation. Moreover, it is not clear that there is any plausible interpretation of the language that would render it constitutionally permissible. The Michigan Supreme Court has noted that the language of Section 103(i)(iii) "strongly parallels" the EEOC Guidelines on Sexual Harassment, which define harassment as "verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an

individual's work performance or creating an intimidating, hostile, or offensive work environment." *Radtke v. Everett*, 442 Mich. 368, 382, 501 N.W.2d 155, 162 (1993); 29 C.F.R. §1604.11(a). The vagueness of the EEOC's standard led Justice Scalia to observe in his concurrence in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 24 (1993), that the law lets "virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." While such an unclear standard may be acceptable in some contexts – *Harris* did not involve a First Amendment challenge – when it comes to regulation of speech, "precision of regulation is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (citation and internal quotation marks omitted).

Also contributing to the vagueness of Section 103(i)(iii) is the fact that it contains no intent requirement, forbidding as it does speech that has *either* the purpose *or* effect of creating a hostile environment. In upholding the Colorado abortion-protest statute in *Hill v. Colorado*, 530 U.S. at 732, the Supreme Court emphasized that the notice concern was ameliorated by the fact that the statute applied only to those who "knowingly" approached another.

B. THE VAGUENESS OF SECTION 103(i)(iii) IS AGGRAVATED BY THE TOTALITY OF THE CIRCUMSTANCES TEST

The fact that the existence of a hostile environment is determined under a "totality of the circumstances" test compounds the vagueness of Section 103(i)(iii). *Radtke*, 442 Mich. at 387, 501 N.W.2d at 164. While it makes sense as a matter of statutory interpretation to employ such an inquiry – after all, what is an "environment" other than a "totality of the circumstances" – it deprives employees of notice concerning what speech they may engage in and employers of notice of what speech they must stifle.

The First Amendment vagueness standard is meant to ensure that speakers (or those who are responsible for the speech of speakers, such as employers) know *in advance* what can be said and what cannot. Under the totality of the circumstances standard, however, whether a given statement is actionable turns not just on the nature of the particular statement but also on all other statements that a plaintiff might rely upon in subsequent litigation. Thus, an employer cannot know whether a given expression is ultimately going to contribute to a finding of liability without knowing what else has already been said and will be said in the future by both the particular speaker and all other co-workers. Thus, rather than providing *prospective* notice about what can be said, the analysis under the statute is wholly *retrospective.*

C. THE VAGUENESS OF THE HARASSMENT STANDARD IS NOT MITIGATED BY THE "REASONABLE PERSON" TEST

One might suppose that the objective "reasonable person" standard would lend some content to the hostile-environment test, but it does not. As Justice Scalia noted in his concurrence in *Harris v. Forklift Systems*, 510 U.S. at 24, the meaning of the terms "abusive" and "hostile" is not at all clarified by "adding the adverb 'objectively' or by appealing to a 'reasonable person['s]' notion of what the vague word means."

The reason that the concept of "reasonableness" provides far less notice to defendants than it does, say, in negligence cases is that it plays a very different role in harassment cases. When the Michigan Supreme Court adopted the "reasonable person" standard in preference to the "reasonable woman" standard in *Radtke*, it quoted Prosser's exposition:

> The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and

> careful person, who is always up to standard. . . . [H]e is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.

442 Mich. at 390, 501 N.W.2d at 166 (quoting Prosser & Keeton, *Torts* (5th ed.), § 32, at 175). As Oliver Wendell Holmes put it, "[t]he ideal average prudent man . . . is a constant, and his conduct under given circumstances is theoretically always the same." Oliver W. Holmes, *The Common Law* 110 (1881). Thus, in a negligence case, we look at the defendant's conduct and decide whether or not *the* "prudent and careful person" would have behaved in such a way; if not, we label the defendant negligent. "Reasonableness" in this context is a measure of community consensus.

The "reasonable person" test has a much different meaning in harassment cases. It does not ask whether a reasonable person would have acted as the *defendant* did; in fact, hostile-environment rules are largely indifferent to the accused harasser's state of mind. Rather, the question is whether *a* "reasonable person" (not *the* "reasonable person") *might* have (not "*would* have") perceived the environment the way that the plaintiff did. That is, a decision that the "reasonable person" test is satisfied does not mean that *all* reasonable people would have found the environment to be a hostile one. Rather, courts recognize that there is a broad variety of opinions about whether an environment is a hostile one. For example, the New Jersey Supreme Court stated, in describing the operation of the "reasonable woman" standard that it adopted (although the point holds under a "reasonable person" standard, as well):

> We emphasize that only claims based on the idiosyncratic response of a hypersensitive plaintiff to conduct that is not objectively harassing would be barred by the reasonable woman standard. The category of reasonable women is diverse and includes both sensitive and tough people. A woman is not unreasonable merely because she falls toward the more sensitive side of the broad spectrum of reasonableness.

Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 458 (N.J. 1993). *See also Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (upholding a hostile environment claim, stating that "[w]e cannot say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive"). The Michigan Supreme Court in *Radtke* expressed a similar rationale, when it adopted an objective standard in order to avoid "imposing upon employers liability for behavior that, for idiosyncratic reasons, is offensive to an employee." 442 Mich. at 387, 501 N.W. 2d at 164.

The "reasonable person" standard in harassment law is not, as in tort law, a reflection of community consensus. If, for example, four-fifths of all people would not find an environment to be a hostile one, the reasonable-person test would still be satisfied, since it is hard to label the reaction of twenty percent of humanity "idiosyncratic" or "hypersensitive." Liability would be imposed even if we do not think that the plaintiff responded, in Justice Holmes's words, as the "ideal average prudent" person. Therefore, despite the fact that courts express unwillingness to have the determination hinge on the subjective response of the plaintiff, that is exactly what happens unless the plaintiff's reaction is so extreme as to be "hypersensitive" or "idiosyncratic."

The indeterminacy of the hostile-environment standard is related to the second flaw in the statute – its overbreadth – because it requires suppression of a substantial amount of speech that the government has no business regulating.

III. SECTION 103(i)(iii) IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT REACHES SUBSTANTIALLY MORE SPEECH THAN THE CONSTITUTION PERMITS

Under prevailing doctrine, a litigant challenging an overbroad restriction on speech is not required to demonstrate that his own speech could not be regulated by an appropriately tailored statute. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Thus, were this Court were to find that

the speech in this case is not protected – and therefore might be legitimately regulated by a properly tailored statute – the judgment is still invalid if the statute's overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Hostile-environment law has been used to reach a very broad range of expression, including: (1) sexual jokes and pictures, *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); (2) sexist comments, *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); (3) obscene language and gestures on a picket line, *Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. 1994); (4) failure to squelch false rumors that an employee was having an affair with her supervisor, *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994); and (5) sexual propositions, *Burns v. McGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993). Indeed, the Ninth Circuit has suggested that even "[w]ell-intentioned compliments" can form the basis of a harassment action. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

The overbreadth of Section 103(i)(iii) comes not only from its specific language, but also from the operation of other features of hostile-environment regulation – the totality-of-the-circumstances test and the doctrine of respondeat superior.

A. THE LANGUAGE OF SECTION 103(i)(iii) IS OVERBROAD ON ITS FACE

The statutory language is not only vague, it is facially overbroad. It covers "verbal . . . communication . . . of a sexual nature [when] . . . [s]uch . . . communication has the . . . effect of . . . creating an . . . offensive . . . environment." A number of courts have found public-sector harassment policies similar to Section 103(i)(iii) to be facially overbroad. In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), for example, the plaintiff basketball coach had

been discharged for using the word "nigger" in motivational sessions with his players. Although his use of the word was not intended to offend the players, the university maintained that he had violated its discriminatory harassment policy. That policy defined racial and ethnic harassment as follows:

> any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through. . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.

Id. at 1182. The United States District Court for the Eastern District of Michigan held that the policy was unconstitutional, and the Sixth Circuit affirmed.

The Court of Appeals reasoned that the harassment policy was both vague and overbroad. The policy did not provide fair notice of what speech was prohibited, and on its face reached a substantial amount of constitutionally protected speech. The policy allowed the university to prohibit the speech, regardless of its political value, on the basis of subjective judgments about what speech was "negative" or "offensive." *Id.* at 1184.

The Third Circuit has similarly found a public school district's harassment policy to be facially overbroad. *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001). The policy provided, in part:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.

Id. at 202. The policy also stated that harassment "can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above." *Id.* at 202-03.

The Third Circuit rejected the District Court's assertion that "[h]arassment has never been considered to be protected activity under the First Amendment," stating that "[t]here is no categorical 'harassment exception' to the First Amendment." *Id.* at 204. No one, the court stated, "would suggest that a school could constitutionally ban 'any unwelcome verbal . . . conduct which offends . . . an individual because of' some enumerated personal characteristics." *Id.* at 215. Moreover, the court observed, the overbreadth of the policy was magnified by the definition of harassment as conduct having either the purpose *or* effect of creating a hostile environment (just as Section 103(i)(iii) does). Therefore, notwithstanding the latitude that schools have to regulate the speech of students, the policy had a far broader reach than the Constitution would allow.

In *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), the university's student harassment policy fared no better. The court held that a university may not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people," and it found the policy overbroad both on its face and as applied. *Id.* at 863. A number of other courts have struck down university harassment policies. *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991).

The policies struck down in the cases discussed above are very similar to both the language of Section 103(i)(iii) and the harassment policies adopted by many public- and private-sector employers pursuant to the demands of harassment law. Thus, even without consideration of the other attributes of harassment regulation that enhance the sweep of the statute, Section 103(i)(iii) is facially overbroad.

B. THE TOTALITY OF THE CIRCUMSTANCES STANDARD AND THE DOCTRINE OF RESPONDEAT SUPERIOR COMBINE WITH THE VAGUENESS OF THE STATUTORY LANGUAGE TO MAGNIFY THE STATUTE'S OVERBREADTH

The facial vagueness and overbreadth of section 103(i)(iii) are apparent. The true extent of speech regulation required by the statute (and its federal counterpart) is perhaps less obvious. The vagueness of the statutory language combines with the totality-of-the-circumstances test and third-party liability of employers to impose a massive obligation on employers to censor their employees' speech.

No regulation of speech can specify with absolute precision what is permitted and what is prohibited, other than an itemized list of words that cannot be said in any context. There is virtually always some "grey area" and therefore some potential for a "chilling effect." When an individual's speech is directly punishable, the individual is subjected to countervailing pressures that tend to minimize the extent to which protected speech is stifled. The individual's desire to avoid punishment pushes him away from the line, but his desire for self-expression pushes him back toward it. That is, the speaker may think to himself, "I know I might get in trouble for this, but I just have to say it." Even under a totality-of-the-circumstances standard, as long as he is responsible for only his own speech, he can make some judgment about whether everything that he has said, and will probably say in the future, constitutes actionable harassment.

The calculus changes when a third party is responsible for regulating the speech and is subject to a substantial penalty for under-regulation, and the incentives become far less symmetrical. The employer, unlike the individual himself, derives little satisfaction from the speech at issue, but the employer may be subjected to substantial penalties for failing to restrict the speech. Thus, the

employer may think, "I get no benefit from Joe's speaking his mind about his views about sexual equality, but if I let him talk, I may pay for it later, especially since I must worry not only about Joe's speech but the cumulative total of all other speech that may be complained of later." The employer thus has every reason to restrict speech and little reason to allow it (other than, at the very extreme, to preserve employee morale). As demonstrated in the next section, that is exactly how employers are counseled to fulfill their responsibilities under harassment law, and the section following will examine how employers have responded to that advice.

C. THE VAGUENESS AND OVERBREADTH OF THE LAW HAS LED TO A CONSENSUS AMONG ENFORCEMENT AGENCIES, LAWYERS, AND COURTS THAT EMPLOYERS MUST BE DILIGENT IN CENSORING THE SPEECH OF THEIR EMPLOYEES

Employers are consistently advised by enforcement agencies, lawyers, and courts that they should not tolerate *any* conduct that might be deemed harassing. For example, the Maryland Commission on Human Relations has advised that "[b]ecause the legal boundaries are so poorly marked, the best course of action is to avoid all sexually offensive conduct in the workplace." Jonathan Rauch, *Offices and Gentlemen*, NEW REPUBLIC, June 23, 1997, at 22. Similarly, the attorney who wrote the EEOC guidance on employer liability advised lawyers that harassment policies "should be broadly written" and that employers "must take steps to nip harassment in the bud." Nancy Montwieler, *EEOC Attorney Advises Employers to Establish Clear Anti-Harassment Policies*, DAILY LAB. REP. (BNA) No. 60, at A-3 (March 28, 2000). The EEOC itself has also spoken forcefully about employers' obligations to police their premises to purge them of offensive material. In *Merriex v. Henderson*, EEOC, Appeal No. 01A00583 (May 16, 2000), for example, although the EEOC rejected the complainant's assertion that her complaints about the presence of

"offensive KKK material" on postal property were related to her termination, it went on to warn employers that they must purge their workplaces of offensive materials:

> Although we do not find discrimination in the context of the removal action, the agency is reminded of its obligation to provide a work environment free of discriminatory harassment. The agency is advised to investigate the claim that racist materials are located on its premises, and immediately remove such items if they are in fact found.

It is significant to note that the EEOC did not simply counsel the employer to remove the materials if they were sufficiently severe or pervasive as to constitute a hostile environment; rather, the employer was urged to remove *all* "racist materials."

Law firm newsletters routinely encourage employers to be aggressive in policing their workplaces. One advises employers "to routinely audit the workplace to identify potential problems and remove materials likely to be found offensive prior to receiving complaints from employees." Jack, Lyon & Jones, P.A., *Wal-Mart Ordered to Pay $50 Million as a Warning Against Permitting Sexual Harassment*, ARKANSAS EMPLOYMENT LAW LETTER, November, 1995. Another advises that because "several courts have found a hostile work environment based, at least in part, on the presence in the work place of sexually oriented calendars, pictures and magazines . . . it would make sense for all employers to inspect their work places carefully for pornographic material and to *remove any potentially offensive material* found on walls or otherwise on public display." Lois C. Schlissel, *What is Sexual Harassment? – An Overview*, (on-line newsletter of law firm of Meyer, Suozzi, English & Klein, P.C., http://www.msek.com/disc_980926.html (1998)) (emphasis added). It also advises employers not to "participate even in the slightest way in sexual harassment," as by advising employees to "[g]et a tougher skin" or by laughing at "off-color jokes." The director of an organization that develops sexual harassment programs warns against employer over-reaction as

follows: "If someone makes one off-color joke, apologizes, promises not to do it again *and* goes through sensitivity training, that person should *probably* not be terminated." Margaret Littman, *Keeping out Sexual Harassment Means Acting Before it Happens*, CRAIN'S DETROIT BUSINESS, Sept. 14, 1998 (emphasis added). "Probably"!

The caution advised by lawyers is not unreasonable; indeed, it would be unreasonable for lawyers not to give such advice. Whether an employer is held liable for sexual harassment depends in very large part on what steps it has taken to prevent sexual harassment and to deal with it when it occurs. Employers gain nothing from sensitivity to the expressive interests of employees; indeed, such sensitivity can be an expensive luxury. For example, in a case involving the harassment of a white woman who was romantically involved with, and later married, a black man, the following excerpt from a memorandum from one supervisor to another was used as evidence against the employer:

> Becky, I'm afraid if Sue is entering into this relationship she had better be prepared to get snide remarks from just about anyone and everyone. I don't think inter-marriages are accepted in our society today and although you and I certainly would not say anything, I am not sure we can keep our staff from saying things. I am not sure that we could fire them on the basis of their remarks. You had better check with [the company lawyer] and see if he agrees with what I am saying.

Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 259 (N.D. Ind. 1985). The court found this memo to be "[t]he most convincing evidence of [the employer's] toleration of the harassment" and "ample evidence of an intent to discriminate against [plaintiff] on the basis of her race because it shows that [it] would not act against [her] harassers due to an intolerance for interracial relationships." *Id.* at 259, 275.

The Sixth Circuit has been quite explicit in describing the legal obligation of employers to censor their employees. In a racial harassment case, the court described employers' obligations as follows:

> In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take *prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers*. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (emphasis added). Demonstrating that this description of employers' obligations is not an idiosyncratic response of a single court, this language has been quoted with approval by other appellate courts. *See Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). The message to employers is clear: if they want to avoid liability for harassment, they must be vigorous in the suppression of their employees' speech. The next section shows that employers have heeded this message.

D. EMPLOYERS HAVE RESPONDED PREDICTABLY TO THE LIABILITY REGIME BY ENGAGING IN DRACONIAN CENSORSHIP OF THEIR EMPLOYEES' SPEECH

Employers have taken the advice they are given to heart. Most employers of any size have harassment policies, and most, it seems, enforce them. Although harassment cases continue to be brought, they usually reflect the breakdown of an employer's policy rather than reflecting its absence.

In contending that harassment law does not result in substantial restrictions on speech, defenders of the current system typically point to decided cases and contend that in the cases where

the employer loses the speech is usually egregious or coupled with offensive conduct. That is, indeed, often the case. Focusing on decided cases to estimate the quantity of speech stifled by the law is misguided, however, because it assumes that the principal censorship spawned by the law comes in the form of sanctions in litigation. In fact, most of the censorship is analogous to a prior restraint: it consists of employers' instructions to employees not to speak because of employers' fear of liability, rather than punishment of employers for the speech of their employees after it occurs. This censorship by employers is not simply a side effect of the liability regime; it is its central purpose. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting that "Title VII is designed to encourage the creation of antiharassment policies").

The focus on reported sexual harassment cases to determine the scope of speech regulation is somewhat perverse, because those cases involve at least allegations that the employer is unable or unwilling to do what the law requires. In order to assess the impact of the law, however, one should examine the behavior of employers who do what the law wants them to do – adopt and enforce harassment policies.

In the vast majority of cases, there is no public record of an employer's enforcement of its harassment policies. In most cases, one imagines, employees comply with their employers' policies restricting their speech. If not, the offending employee is often counseled not to do it again, and he complies with the instruction. Because of the limited protection from discharge enjoyed by private-sector non-union employees, there are relatively few legal cases involving application of sexual-harassment policies against them. A number of state courts have specifically held that an employer owes no tort duty toward an accused harasser to conduct a reasonable investigation before discharging him. *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282 (Tex. App. 2000); *Williams v.*

Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996); *Lambert v. Morehouse*, 843 P.2d 1116 (Wash. App. 1993). At least one court has held that no claim is stated even by an assertion that the employer discharged an at-will employee to insulate itself against a claim of sexual harassment by another employee that the employer believed to lack merit. *Mackenzie v. Miller Brewing Co.*, 608 N.W.2d 331 (Wisc. App. 2000).

To find a legal record of enforcement of employer policies, it is necessary to look to public-sector employers whose right to discharge is limited by either the Constitution or civil-service rules or to private-sector employers whose right to discharge is limited by collective-bargaining agreements. These sources reveal that employers are vigorous in their role as censor of their employees.

Public employees often enjoy civil-service protection or constitutional protection resulting from due-process obligations of their employers, and a number of them have run afoul of their employer's harassment policies.

- A machinist foreman was *demoted* for telling a female apprentice that he was from the "old school" and did not believe that women belonged in the shipyards, that the apprentice program was a "joke," and that she should have gotten a "typewriter" job. *Curry v. Department of the Navy*, 13 M.S.P.R. 326 (1982).
- A Postal Service supervisor was *demoted* for addressing a subordinate "on more than one occasion" as "sweet thing." *Dubiel v. United States Postal Service*, 54 M.S.P.R. 428 (1992).

- A warehouse foreman was *demoted* for having said approximately ten times during a four-year period "that he believed that women in general were incapable of performing work in the [warehouse] and that he would never hire a woman," even though he had not acted on his attitudes. *Holland v. Department of the Air Force,* 31 F.3d 1118-19 (Fed. Cir. 1994).
- A police officer's name was *removed* from the Sergeant's List because, upon learning that he scored well on the Sergeant's exam, he had e-mailed a friend of his, a civilian woman in the department, "Now that I am on the Sergeant's List will you sleep with me?," even though his friend was not offended. *Olive v. City of Scottsdale*, 969 F. Supp. 564, 567 (D. Ariz. 1996).

Arbitration cases are a fertile source of information about the application of policies, because they often involve discipline less than discharge or even demotion and so pick up many of the more routine applications of policies.

- A computer operator was *discharged* for bringing a copy of *National Lampoon* magazine to work because it contained pictures of scantily clad women. *RMS Technologies, Inc.*, 94 LAB. ARB. (BNA) 297 (1990).
- An employee in Oregon was *suspended* for looking unobtrusively at a copy of *Penthouse* magazine containing pictures of local celebrity Tonya Harding. *American Mail-Well Envelope,* 105 LAB. ARB. (BNA) 1209 (1995).
- A female employee was given a written *reprimand* for wearing a "Hooters Restaurant" t-shirt to work. *Clarion Sintered Metals, Inc*., 110 LAB. ARB. (BNA) 770 (1998).

- An employee was *suspended* for circulating the "Oakland Ebonics Quiz," a document that ridiculed "ebonics" in ways that were deemed racially and sexually offensive, at a time when the subject was much in the news. *Pepsi Cola Co.*, 110 LAB. ARB. (BNA) 803 (1998).
- A correctional officer was *suspended* for distributing, before and after his shift, a newsletter that contained an article entitled *Where Are All the Balls?*, which was written by military analyst David Hackworth and criticized both the "feminization" of the Army and the "emasculation of America." *County of Ramsey*, 114 LAB. ARB. (BNA) 993 (2000).
- An employee was *discharged* after inadvertently not logging off a computer and leaving his e-mailbox open, because a female employee discovered sexual material on the computer. *PPG Industries, Inc.*, 113 LAB. ARB. (BNA) 833 (2000).
- An employee was *discharged* after he was discovered to have thirty-five "inappropriate" e-mails on his computer, most in the form of jokes and cartoons. *Snohomish County Public Utility District No. 1*, 115 LAB. ARB. (BNA) 1 (2001).[11]

The above cases have a few things in common. In each, the employee was disciplined or discharged for violating his employer's harassment policy. In each, the employee was sanctioned for speech that by itself would not have been sufficient to constitute actionable harassment. In most,

[11] For more details of these cases and others, see Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N. U. L. REV. 563 (2001)

there was no intent on the part of the employee to offend anyone, but nonetheless the administrative agency or arbitrator upheld at least some discipline. When the sanction against the employee was reduced or overturned, it was usually on some "due process" ground – such as lack of notice to the employee that his conduct violated the policy or inconsistent application of the policy. The decision-makers repeatedly emphasized the importance of employers' enforcing their harassment policies.

These cases are simply the visible tip of a very large iceberg. They arise only when there is an actual or purported violation of an employer's policy that leaves its tracks in a written decision. The vast majority of employees heed their employers' warnings not to say anything that offends their co-workers, and most employees lack the procedural protections provided by collective-bargaining agreements or civil-service systems. Thus, the most egregious censorship fostered by the hostile-environment regime is not imposition of liability on employers for what is often highly offensive speech by their employees, nor is it even discipline of employees who violate their employers' harassment policies. Rather, it consists of the day-to-day restrictions on the speech of millions of employees who are likely never to be parties to a lawsuit – decent people who must walk on eggshells because their employers have made it clear that their jobs hang in the balance if they say the wrong thing. As the Supreme Court recognized in *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone,' . . . [f]or the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." (Internal quotation marks omitted).

Plaintiff is correct in arguing that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." P. Br. at 42. Where Plaintiff errs, however,

is in asserting that harassment law presents a "simply negligible" danger of such infringement. *Id.* at 43. What Plaintiff fails even to mention is the speech regulation that occurs outside the context of court cases imposing liability on employers. The fact is that *millions* of employees in America are exposed to sanctions from their employers for uttering statements that are deemed sexist, racist, ageist, etc., without regard to whether the speech was motivated by animus, or whether it was severe and pervasive, or whether it would, by itself, create a hostile work environment.

Some argue that when employers discipline employees for "sub-actionable" speech – speech that would not by itself justify a finding of liability – they are simply being "paranoid." *See* Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595, 595 (1995). If employers are going beyond what the law requires, they say, their actions are not attributable to the government; instead, it is simply private action beyond the concern of the First Amendment. However, it is not fair to say that when employers prohibit sub-actionable speech they are over-reacting. Rather, they are doing exactly what they are told by lawyers, administrative agencies, and courts that they must do to avoid liability.

A hypothetical illustrating the pressures acting on an employer is illuminating. Suppose there is some expression that by itself is not actionable but if said five times would be sufficiently egregious to support a finding of liability. When the offending employee says it the first time and the offended employee complains, the employer tells the complaining employee, "That speech is not sufficiently egregious as to constitute harassment; therefore I will not prohibit him from saying it, and you should just 'toughen up.'" When she complains about a second, third, and fourth incident, the employer responds in the same way. Then, it happens a fifth time, taking the case over the threshold of actionability, and the employee sues. By hypothesis, a hostile environment exists, which

means that the employer's liability will turn on whether it can avoid respondeat superior liability, a question that in turn depends on whether it "adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke v. Everett,* 442 Mich. at 396, 501 N.W.2d at168, quoting *Downer v. Detroit Receiving Hosp.,* 191 Mich. App. 232, 234; 477 N.W.2d 146 (1991).

Would respondeat superior liability exist in this case? The plaintiff will assert that she repeatedly complained about the offensive speech and the employer refused to do anything about it. Given its repeated refusal to act on the employee's complaints, the employer would almost certainly lose. Yet upon what would its liability be based if not its prior failure to stifle sub-actionable speech?

The D.C. Circuit recently described the pressures facing employers. The court was reviewing a decision of the National Labor Relations Board that held an employer's policy against abusive and threatening language to be an unfair labor practice because it would prohibit such language in the union-organizing context. The court rejected the Board's conclusion, stating:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law. *Given this legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook. While a single, isolated remark will rarely be sufficient to trigger employer liability, failure to maintain a workplace free of such language can place an employer at significant financial risk nonetheless. Under current law, the only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment.* Indeed, such rules are commonplace. To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22."

Adtranz v. NLRB, 253 F.3d 19, 27 (D.C. Cir. 2001) (emphasis added; citations and internal quotation marks omitted).

When employers adopt "zero tolerance" policies, it is not because they choose voluntarily to go beyond what the law requires; it is because they are seeking to comply with a law that makes any offensive statement another potential brick in the wall of liability. While it is true that even in the absence of a law many employers would adopt policies to prevent their employees from abusing each other, it is doubtful that they would be as extreme as "zero tolerance." In assessing whether employers are adopting policies motivated by fear of liability or just a desire to "do the right thing," it is significant that employers are not getting the advice to adopt these policies from philosophers, psychologists, social workers, ethicists, or theologians; the advice is coming from lawyers.

If the law set forth explicitly what virtually all employment lawyers and judges appear to think it requires, no one would doubt its facial invalidity. Imagine a statute that explicitly prohibited the following expression in the workplace: (1) stating that women do not belong in male-dominated occupations; (2) possessing *National Lampoon* or *Penthouse* magazines; (3) wearing "Hooters Restaurant" t-shirts; (4) ridiculing "ebonics"; and (5) circulating David Hackworth columns critical of women in combat. It is unlikely that a single judge or constitutional scholar could be found who would vouch for the constitutionality of the statute, but such prohibitions are the inevitable effect of the regulatory regime that has developed over the last two decades.

CONCLUSION

Harassment regulation has cast an unmistakable pall of orthodoxy over the contemporary workplace. Liability in this case was imposed for speech that violates that orthodoxy, despite the fact that the speech is subject to full protection of both the state and federal constitutions. Section

103(i)(iii) of the Elliott-Larsen Civil Rights Act, which purports to outlaw deviations from that orthodoxy, is unconstitutional on its face as a content-based regulation of speech that is both vague and overbroad. Consequently, *amicus curiae* Center for Individual Freedom respectfully requests that this Court rule that the judgment below was inconsistent with the free speech guarantees of the federal and state constitutions.

CENTER FOR INDIVIDUAL FREEDOM

By: _____

KINGSLEY R. BROWNE
Pro hac vice
471 W. Palmer Avenue
Detroit, MI 48202
(313) 577-0476

Attorney for *Amicus Curiae*

DATED: _____, 2002