NOTE

Making Friends: Sexual Harassment in the Workplace, Free Speech, and *Lyle v. Warner Bros.*

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INTRODUCTION

Imagine the following situation. A large entertainment corporation employs a female assistant whose job duties include helping a group of writers for a popular television show during daily meetings.[1] The group engages in creative sessions to produce the television show's script, which often contains sexually mature themes.[2] During these meetings, the show's writers and producers consistently make derogatory comments about women and openly share stories of sexual fantasies and past sexual experiences.[3] The male writers make masturbatory hand gestures and draw crude figures of female genitalia.[4] The assistant feels extremely uncomfortable even though her employers do not direct any sexual language or lewd gestures toward her.[5] The female employee files a complaint with the Department of Fair and Employment Housing claiming sexual harassment.[6] The writers and editors assert that their sexually explicit conduct is necessary to generate ideas for future television shows.[7] In addition, the television show's employers argue that any hindrance to creative expression stifles the free flow of communication and violates fundamental free speech rights.[8]

The California Supreme Court examined these facts in *Lyle v. Warner Bros. Television Productions*.[9] Shortly after hiring her, Warner Brothers terminated Amaani Lyle, a writing assistant for the television show *Friends*, for allegedly poor job performance.[10] Lyle filed a complaint with the California Department of Fair Employment and Housing, claiming sexual harassment during her tenure of employment with Warner Brothers.[11]

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[1] This hypothetical utilizes facts from the case at issue in this Note, *Lyle v. Warner Bros. Television Productions*. *See generally* 132 P.3d 211 (Cal. 2006) (regarding employee's sexual harassment suit against television studio and supervising employees for hostile speech in workplace).

[2] *See* discussion *infra* Part II.A.

[3] *See* discussion *infra* Part II.A.

[4] *See* discussion *infra* Part II.A.

[5] *See* discussion *infra* Part II.A.

[6] *See* discussion *infra* Part II.A-B.

[7] *See* discussion *infra* Part II.A.

[8] *See* discussion *infra* Part II.A.

[9] *See* discussion *infra* Part II.A-B.

[10] *See* discussion *infra* Part II.A.

[11] *See* discussion *infra* Part II.A.

Lyle's case presented the California Supreme Court with questions of first impression.[12] These questions sought to resolve the tension between sexual harassment law and free speech rights within the creative work context.[13] Respondent Warner Brothers argued that in some creative workplaces, the exploration of potentially offensive material is essential to the final product.[14] Upon granting certiorari, the California Supreme Court set forth two issues for oral argument.[15] The first question was whether sexually coarse and vulgar language constitutes harassment within the meaning of the Fair Employment and Housing Act ("FEHA").[16] The second subject of controversy was whether liability for sexually harassing speech infringes upon free speech rights.[17] These questions are especially relevant in the creative employment context where exploring potentially offensive material is essential to the final work product.[18] Properly adjudicating the issues mentioned above would have mitigated the tension between sexual harassment law and free speech rights in the creative workplace.[19] The court's holding, however, only addressed the initial issue of whether sexually coarse and vulgar speech constituted harassment under FEHA.[20] Instead of directly answering the question whether speech restrictions in the workplace violate the First Amendment, the majority holding completely skirted the issue.[21] The court's omission is problematic because it perpetuates the conflict between competing

[12] *See* Respondents' Petition for Review at 2, Lyle v. Warner Bros. Television Prods., 132 P.3d 211 (Cal. 2006) (No. S125171) (filing on behalf of defendant Warner Brothers and stating that petition presents issues of first impression for California Supreme Court); Cal. Appellate Courts, Case Info. Sys., Case Summary for *Lyle v. Warner Bros. Television Prods.*, http://appellatecases.courtinfo.ca.gov (follow "Search"; then enter case number "S125171"; then follow "Search by Case Number") (last visited Apr. 15, 2007) (displaying legal issues, current status of *Lyle* case, and Register of Actions).

[13] *See* Cal. Appellate Courts, *supra* note 12 (stating limited issues California Supreme Court heard during oral argument).

[14] Respondents' Petition for Review, *supra* note 12, at 16.

[15] *See id.*

[16] Cal. Appellate Courts, *supra* note 12.

[17] *Id.*

[18] *See* discussion *infra* Part III.A-C.

[19] *See* discussion *infra* Part III.A-C.

[20] *See* Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 231 (Cal. 2006) (stating that court had no occasion to determine whether liability for harassing speech might infringe upon First Amendment rights).

[21] *See id.*

constitutional interests, inevitably leading to further speculation in the courts.[22]

This Note argues that the California Supreme Court should have addressed whether liability for sexually harassing language violates free speech rights.[23] In addressing this issue, the court should have held that liability for sexually harassing speech does not infringe upon First Amendment freedoms.[24] Part I of this Note explains the current status of sexual harassment law at both the federal and state level.[25] Part I also explores the critical decisions impacting free expression in the workplace.[26] Part II discusses the facts, procedural background, and holding of the California Supreme Court decision in *Lyle*.[27] Part III argues that the right of employees to work in a harassment-free environment overrides free speech protection.[28] This right should not be challenged even in circumstances in which creative expression is critical to the final work product.[29]

I. BACKGROUND

Sexual harassment laws are an amalgam of statutory law and case law interpreting the statutes.[30] Title VII of the Civil Rights Act of 1964

[22] *See* discussion *infra* Part III.A-C.

[23] *See* discussion *infra* Part III.A-C.

[24] *See* discussion *infra* Part III.A-C.

[25] *See* discussion *infra* Part I.A-D.

[26] *See* discussion *infra* Part I.C.

[27] *See* discussion *infra* Part II.A-B.

[28] *See* discussion *infra* Part III.A-C.

[29] *See* discussion *infra* Part III.A-C.

[30] *See* Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (2005) (codifying federal anti-discrimination policies); CAL. GOV'T CODE §§ 12900-12996 (West 2004) (codifying California's anti-discrimination policies). *See generally* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (exemplifying federal case under Title VII whereby context is critical factor to determine existence of sexual harassment); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (illustrating federal case under Title VII rejecting severe psychological impact as necessary requirement to prove sexual harassment); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (demonstrating federal case under Title VII explaining five elements necessary to prove hostile environment); Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846 (Cal. 1999) (exemplifying case under FEHA where court discussed free speech limitations in workplace); Brown v. Superior Court, 691 P.2d 272 (Cal. 1984) (illustrating case under FEHA holding that state policy to protect workers from discrimination is fundamental); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842 (Ct. App. 1989) (exemplifying case under FEHA explaining standard of proof for hostile environment sexual harassment claim).

governs sexual harassment claims at the federal level.[31] FEHA governs sexual harassment claims at the California state level.[32] Succeeding cases clarify the breadth of both statutory measures.[33]

A. Title VII of the Civil Rights Act of 1964

In July 1964, Title VII passed in both houses of Congress with strong bipartisan support.[34] Title VII emerged following years of social turmoil and the Civil Rights Movement.[35] Title VII aims to prohibit employers from discriminating based on an individual's status in a protected group.[36] Minority status based on race, color, religion, sex, or national origin warrants protection under the statute.[37] Moreover, Title VII deters employers from classifying employees in a manner that deprives employees of employment opportunities based on their membership in traditionally disenfranchised groups.[38] The passage of

[31] *See* 42 U.S.C. § 2000e-2 (codifying specific discriminatory acts prohibited by law); *see also* Equal Employment Opportunity Commission (EEOC), Title VII of the Civil Rights Act, http://www.eeoc.gov/policy/vii.html (last visited Apr. 1, 2007) (displaying most Title VII code sections).

[32] *See* Beyda v. City of Los Angeles, 76 Cal. Rptr. 2d 547, 549-50 (Ct. App. 1998) (discussing relationship between Title VII and FEHA).

[33] *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 897 (9th Cir. 1994) (demonstrating that in case where supervisor made distasteful remarks about woman's breasts, evidence of misogynistic, demeaning, and offensive words or conduct in workplace is factor in proving environmental sexual harassment); Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (establishing that FEHA, like Title VII, is not fault-based tort scheme). Thus, sexual harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim. *See Ellison*, 924 F.2d at 880. There are five essential elements to establish a claim for sexual harassment. *See Fisher*, 262 Cal. Rptr. at 851. One of these elements requires the harassment complained of to be based on sex. *Id.* Another element requires the harassment at issue to be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Id.*

[34] EEOC, First Principles — Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination (June 22, 2004), *available at* http://www.eeoc.gov/abouteeoc/40th/panel/firstprinciples.html [hereinafter EEOC, First Principles] (detailing history of Civil Rights Act from panel presentation at EEOC sponsored event celebrating 40th anniversary of Title VII).

[35] *Id.* (explaining historical context of Title VII legislation).

[36] *See* Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1) (explaining prohibited discriminatory conduct). This standard applies to both employees and applicants. *Id.; see also* EEOC, First Principles, *supra* note 34 (discussing aims of Title VII legislation).

[37] *See* § 2000e-2(a)(1) (listing categories warranting protection under statute).

[38] *See* § 2000e-2(a)(2) (defining unlawful employment practices); *see also* EEOC,

Title VII established the Equal Employment Opportunity Commission ("EEOC"), which oversees the enforcement of Title VII.[39]

Subsequent case law established two paradigms to definitively prove a Title VII violation: disparate treatment and disparate impact.[40] Disparate treatment is the practice of intentionally treating persons differently based on their race, sex, national origin, age, or disability.[41] In order to succeed on a disparate treatment claim, the plaintiff must

First Principles, *supra* note 34 (discussing objectives of Title VII legislation).

[39] *See* § 2000e-4 (2005) (establishing EEOC); *see also* EEOC, First Principles, *supra* note 34 (discussing creation of EEOC as agency overseeing Title VII enforcement).

[40] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (discussing claim of disparate treatment based on race). Under *McDonnell*, proving a disparate treatment claim requires a three-step process. *Id.* First, a plaintiff making a sexual harassment claim must present facts which show an employer made adverse employment decision based on gender. *See id.* at 802. Second, the defendant must produce credible evidence of a nondiscriminatory reason for its adverse employment decision. *See id.* at 803. Third, the plaintiff must then prove that the defendant's reason is simply a pretext for a discriminatory motive. *See id.* at 804; Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971) (discussing disparate impact claims). In a disparate impact case, a plaintiff must present statistical evidence to show an employment practice disqualified a higher percentage of minority employees than non-minority employees. *Id.* at 431-32. A defendant then presents evidence to show that their employment practice is a business necessity. *Id.* The plaintiff must then show that defendant's reason is simply pretextual and that the employer can achieve its business goals via nondiscriminatory means. *Id.* at 435. Federal standards are applicable to determine if facially neutral selection criteria has a discriminatory impact on a protected group. *See* City of San Francisco v. Fair Employment & Hous. Comm'n, 236 Cal. Rptr. 716, 721-22 (Ct. App. 1987) (discussing Title VII authority as appropriate means to interpret FEHA).

[41] *See* BLACK'S LAW DICTIONARY 504 (8th ed. 2004) (defining "disparate treatment" as: "The practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability. To succeed on a disparate-treatment claim, the plaintiff must prove that the defendant acted with discriminatory intent or motive."); *see also* THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 59-87 (2001) (giving general overview of disparate treatment law); GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 56 (2001) ("Claims brought on behalf of a group of employees come in two varieties: claims of intentional discrimination and claims of discriminatory impact."). Constitutional law only recognizes claims of disparate treatment, not disparate impact. RUTHERGLEN, *supra*, at 56. However, these two kinds of claims resemble one another, in the statistical evidence that the plaintiff must present in order to establish liability. *Id.* While class claims of disparate treatment emphasize the a negative conception of equality as colorblindness, class claims of disparate impact emphasize the goal of eliminating the effects of past discrimination. *Id.*

prove that the defendant acted with discriminatory intent.[42] Disparate impact refers to the adverse effects of a facially neutral practice that discriminates against persons based on their race, sex, national origin, age, or disability.[43] Regardless of the type of violation, Title VII requires reviewing courts to apply a de novo standard of review.[44] This means the court will not defer to the EEOC's prior findings when deciding a disparate impact or disparate treatment case.[45]

Prior to Title VII's enactment, women possessed limited power to combat gender discrimination in the workplace.[46] The burgeoning women's movement of the 1960s encouraged women to pursue equality in the courts by utilizing Title VII.[47] In 1965, one year after Title VII's enactment, a third of all claims filed with the EEOC were sex discrimination claims.[48] In addition to helping women find new job opportunities, Title VII became a vehicle for women to pursue redress for harassment in the workplace.[49] Although Title VII

[42] *See* BLACK'S LAW DICTIONARY, *supra* note 41, at 504 (discussing disparate impact); *see also* HAGGARD, *supra* note 41, at 59-87 (giving general overview of disparate treatment law); RUTHERGLEN, *supra* note 41, at 56 (discussing disparate treatment law).

[43] Disparate impact cases are most common and relevant in employment practice cases. *See* BLACK'S LAW DICTIONARY, *supra* note 41, at 504 (defining "disparate impact" as: "The adverse effect of a facially neutral practice . . . that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant in a disparate-impact claim."); *see also* HAGGARD, *supra* note 41, at 89-107 (giving overview of disparate impact law); RUTHERGLEN, *supra* note 41, at 56 (discussing disparate impact law).

[44] *See* EEOC, First Principles, *supra* note 34 (discussing standard of review for Title VII suits).

[45] *See id.*

[46] *See id.*

[47] *See generally* Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (holding that company that denied switchman's job to female applicant failed to meet burden of proving that gender was bona fide occupational qualification); Rosenfeld v. S. Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968) (invalidating legislation that limited women to jobs that did not require heavy lifting, enabling women to seek employment previously unavailable to them).

[48] EEOC, Expanding the Reach — Making Title VII Work for Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimination (June 23, 2004), *available at* http://www.eeoc.gov/abouteeoc/40th/panel/expanding.html (explaining history of Title VII as it pertains to women).

[49] *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (explaining that congressional intent behind Title VII was not limited to economic or tangible discrimination, but targeted entire spectrum of disparate treatment between men and women in workplace). In evaluating a sexual harassment claim, the court must

provides women with a federal remedy for harassment, California offers women even further protection against harassment under its state laws.[50]

B. The Fair Employment and Housing Act

The Department of Fair Employment and Housing ("DFEH") enforces California's comprehensive employment and housing anti-discrimination laws.[51] The DFEH's statutory mandate protects the people of California from discrimination and authorizes the agency to enforce FEHA.[52] FEHA asserts that it is the public policy goal of the state to safeguard people's employment rights.[53] California workers

examine the totality of the circumstances. *Id.* *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that claim of hostile environment sexual harassment is form of sex discrimination actionable under Title VII employment discrimination statute); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993) (holding that plaintiffs demonstrated pattern and practice of discrimination based on gender and that plaintiffs prevailed on hostile work environment sexual harassment theory).

[50] Title VII and FEHA both broadly prohibit employers from discriminating against employees on the basis of protected characteristics, but they are slightly different. *See* Joanna Grossman, *Sexual Harassment: The California Supreme Court Holds That Damages Cannot Include "Avoidable Consequences" of a Victim's Failure to Properly Complain*, FINDLAW, Dec. 2, 2003, http://writ.news.findlaw.com/grossman/20031202.html (discussing differences between FEHA and Title VII that make California laws more protective of individuals filing sexual harassment suits). Title VII does not explicitly mention sexual harassment, whereas FEHA specifically defines sexual harassment of an employee as an unlawful employment practice. *Id.* Additionally, FEHA places an affirmative duty on employers to take necessary precautions to prevent discrimination and harassment. *Id.* As such, FEHA mandates employers to distribute informational materials to employees about sexual harassment laws and the company's policies and procedures regarding workplace harassment. *Id.*

[51] *See* CAL. GOV'T CODE § 12900 (West 2005); *see also* Letter from Assemb. Tom Torlakson to Dotson Wilson (Aug. 31, 2000), *in* ASSEMB. DAILY J., 1999-2000 Reg. Sess., at 9081 ("[FEHA] establishes a comprehensive scheme designed to eliminate discriminatory practices in employment. . . . The act further makes it unlawful for any employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."); Cal. Dep't of Fair Employment and Hous., About DFEH, http://www.dfeh.ca.gov/about.asp (last visited Apr. 1, 2006) [hereinafter About DFEH] (explaining history and purpose of DFEH).

[52] The DFEH is responsible for investigating, conciliating, and seeking redress for discrimination claims. *See* CAL. GOV'T CODE § 12900 (establishing two administrative bodies, DFEH and Fair Employment and Housing Commission to enforce and implement FEHA); *see also* About DFEH, *supra* note 51.

[53] *See* CAL. GOV'T CODE § 12920 (West 2005) (declaring public policy of state to protect and safeguard right and opportunity of all persons to seek, obtain, and hold

can pursue employment opportunities without fear of discrimination based on their status in a protected group.[54] Under FEHA, gender qualifies as a protected group, thus prohibiting gender discrimination.[55]

FEHA prohibits sexual harassment in the employment context because it is a form of gender discrimination.[56] Under FEHA, employers must take all reasonable steps to prevent workplace harassment.[57] FEHA explicitly states that the harassment of an employee is unlawful if the employer knew or should have known of the conduct.[58] Furthermore, if an employer fails to take immediate and appropriate corrective action, liability falls upon the employer.[59]

Once an employee files a harassment claim with the DFEH, the DFEH assesses the claim's merits.[60] After evaluating the claim, the DFEH may either issue a right-to-sue letter or initiate a lawsuit on

employment without discrimination). Discrimination on account of one's membership in a protected class is illegal under FEHA. *Id.* California recognizes that discriminatory employment practices promote domestic strife, preventing the state from maximizing its capacity to develop and advance. *Id.* This substantially and adversely affects the interest of employees, employers, and the public in general. *Id.*

[54] *See id.* § 12921(a) (West 2005) (declaring that opportunity to seek, obtain and hold employment without discrimination based upon status in protected group is civil right).

[55] *Id.*

[56] *See id.* § 12940(j)(1) (West 2005) (applying FEHA to employers, labor organizations, employment agencies, apprenticeship training programs, and any other training program leading to employment); *see also* Cal. Dep't of Fair Employment & Hous., Sexual Harassment: The Facts About Sexual Harassment (2004), *available at* http://www.dfeh.ca.gov/Publications/DFEH%20185.pdf [hereinafter DFEH, Sexual Harassment Guide] ("[FEHA] defines sexual harassment as harassment based on sex or of a sexual nature [or] gender harassment . . . . The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser.").

[57] *See* DFEH, Sexual Harassment Guide, *supra* note 56 ("If harassment does occur, [an employer must] take effective action to stop any further harassment and to correct any effects of the harassment.").

[58] § 12940(j)(1) ("Harassment of an employee . . . by an employee . . . shall be unlawful if the entity, or its agents and supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.").

[59] *Id.*; *see* DFEH, Sexual Harassment Guide, *supra* note 56 ("[T]he law requires employers to take all reasonable steps to prevent harassment from occurring. If an employer has failed to take such preventive measures, that employer can be held liable for the harassment.").

[60] *See* DFEH, Sexual Harassment Guide, *supra* note 56 ("If DFEH finds sufficient evidence to establish discrimination occurred and settlement efforts fail, the Department may file a formal accusation.").

behalf of the injured party.[61] Upon receipt of a right-to-sue letter from the DFEH, the employee may initiate a private suit.[62] Private lawsuits filed by sexually harassed employees have shaped and defined FEHA's requirements.[63]

C. Case Law Elaborating on FEHA and Title VII's Statutory Language Regarding Sexual Harassment Law

According to case law, sexual harassment claims exist in two distinct forms.[64] The first type is "quid pro quo" harassment.[65] This occurs when an employer or an employer's agent coerces an employee into unwelcome sexual acts to obtain an employment benefit or avoid an employment disadvantage.[66] The second type of harassment is "hostile environment" harassment.[67] This occurs when an employee

[61] *Id.* ("The [DFEH's] accusation will lead to either a public hearing before the . . . Commission or a lawsuit filed by DFEH on behalf of the complaining party.").

[62] *Id.* ("Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.").

[63] *See, e.g.*, Beyda v. City of Los Angeles, 76 Cal. Rptr. 2d 547, 550 (Ct. App. 1998) (discussing environmental sexual harassment and how workplace verbal abuse constitutes employment discrimination); Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116, 118 (Ct. App. 1993) (discussing standards for quid pro quo harassment); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 851 (Ct. App. 1989) (discussing requirements for prima facie claim of hostile environment sexual harassment).

[64] *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987) (discussing types of sexual harassment); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (stating elements of quid pro quo harassment); *Fisher*, 262 Cal. Rptr. at 850 ("Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment."); *see also* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 410 (1996) (discussing both quid pro quo and hostile environment harassment).

[65] *See Henson*, 682 F.2d at 909. *Henson* held that a plaintiff must demonstrate certain elements for a quid pro quo sexual harassment cause of action. *Id.* First, the employee must be a part of a protected class. *Id.* Second, the sexual advances or requests were unwelcome. *Id.* Third, the underlying motivation for the harassment was gender. *Id.* Fourth, submission to unwelcome advances was a condition of receiving a job benefit. *Id.*

[66] *See* Epstein, *supra* note 64, at 410 (contending quid pro quo harassment is equivalent to extortion or blackmail and is not subject to First Amendment Protection).

[67] *See Beyda*, 76 Cal. Rptr. 2d at 550 (holding that verbal harassment at work constitutes employment discrimination for hostile environment sexual harassment);

endures severe or pervasive discriminatory conduct that alters employment conditions and creates an abusive working environment.[68]

FEHA and Title VII's anti-discriminatory objectives and public policy purposes are similar.[69] FEHA, passed by the California legislature in 1959, preceded Title VII.[70] Title VII cases are, however, relevant to interpreting FEHA.[71] The leading federal cases setting the standard for evaluating harassment claims under Title VII are *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems, Inc.*[72] *Meritor* and *Harris* both explain and elaborate upon the legal standards for a "hostile environment" harassment claim.[73]

In *Meritor*, the U.S. Supreme Court held that sexual harassment, if sufficiently severe or pervasive, constitutes employment discrimination on the basis of sex.[74] In *Meritor*, the plaintiff, a female bank employee, brought a sexual harassment suit against the bank and

Fisher, 262 Cal. Rptr. at 851 (listing requirements for environmental sexual harassment claim).

[68] *See Fisher*, 262 Cal. Rptr. at 852 ("Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances."); *see also* Epstein, *supra* note 64, at 410-11 (stating that quid pro quo and hostile environment harassment may occur in single case and that both maintain identical standards of proof).

[69] *See Beyda*, 76 Cal. Rptr. at 550 ("Although the wording of title VII differs in some particulars from the wording of FEHA, the antidiscriminatory objectives and overriding public policy purposes of the two acts are identical." (citing County of Alameda v. Fair Employment & Hous. Comm'n, 200 Cal. Rptr. 381, 383 (Ct. App. 1984))).

[70] *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 851 (Cal. 1999) ("Verbal harassment in the workplace also may constitute employment discrimination under title VII of the Civil Rights Act of 1964, the federal counterpart of the FEHA.").

[71] *See Beyda*, 76 Cal. Rptr. 2d at 550 ("[I]n an area of emerging law, such as employment discrimination, it is appropriate to consider federal cases interpreting title VII." (quoting Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116, 119 n.5 (Ct. App. 1993))).

[72] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); *see Aguilar*, 980 P.2d at 851 (citing to both *Meritor* and *Harris* in discussion of hostile environment harassment law).

[73] *See Aguilar*, 980 P.2d at 851.

[74] Meritor, 477 U.S. at 67 ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality . . . . [A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (citing Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982))).

her supervisor.[75] She alleged that her supervisor repeatedly demanded sexual favors, fondled her in front of coworkers, and forcibly raped her on multiple occasions.[76]

The plaintiff employee filed a suit in federal court for sexual harassment in violation of Title VII,[77] requesting injunctive relief, compensatory and punitive damages, and attorney's fees.[78] The District Court for the District of Columbia denied relief, reasoning that any sexual relationship between the employee and her supervisor was voluntary.[79] Further, the district court concluded that the bank was unaware of any harassing conduct and was not liable for the supervisor's actions.[80]

The Court of Appeals for the District of Columbia reversed the lower court's decision.[81] The appellate court held that the district court erred by not considering hostile environment sexual harassment.[82] The appellate court further concluded that if the employee's toleration of sexual harassment was a condition of her employment, then voluntary sexual activity was immaterial.[83] The appellate court further held that the bank was absolutely liable for the actions of the supervisor as an agent of the bank.[84] The bank appealed to the U.S. Supreme Court, which granted certiorari.[85]

The Supreme Court held that voluntary sexual activity is not a defense to sexual harassment, but evidence of provocative dress and speech may be relevant in determining whether sexual advances were

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[75] *Id.* at 60.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 61. The *Meritor* district court found that if an employee and supervisor engaged in sexual acts during employment, then the relationship was voluntary. *Id.* The district court reasoned that sexual acts had no relation to continued employment or advancement opportunities. *Id.*

[80] *Id.* at 62. The *Meritor* district court noted that neither the employee nor any of her coworkers filed a complaint about the supervisor. *Id.* Thus, the district court ruled that the bank was without notice and not liable for the supervisor's conduct. *Id.*

[81] *Id.* at 57.

[82] *Id.* at 62 ("Title VII may be predicated on . . . harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.").

[83] *Id.* The appellate court noted that evidence of the employee's provocative dress and sharing of personal fantasies had no place in litigation. *Id.* at 68-69.

[84] *Id.* at 62 ("[T]he Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known.").

[85] *Id.* at 63.

unwelcome.[86] The Court emphasized that a jury must look at the totality of the circumstances to conclude whether sexual harassment existed.[87] The critical factor to examine is whether the employee's conduct indicated that sexual advances were unwelcome.[88] On the issue of employer liability, the Supreme Court provided no specific criteria.[89] The Court held, however, that even if grievance procedures existed and employees failed to invoke them, their existence alone would not insulate employers from liability.[90]

Most importantly, the Supreme Court held that "hostile environment" sexual harassment is actionable under Title VII.[91] A plaintiff must demonstrate that the harassment is sufficiently severe or pervasive to alter employment conditions, thereby creating an abusive working environment.[92] As such, *Meritor* is significant because it clarified the standard of liability for sexual harassment in the workplace.[93]

The Supreme Court later reaffirmed its *Meritor* ruling in *Harris v. Forklift Systems, Inc.*[94] In *Harris*, a former employee filed a Title VII action claiming that the conduct of the company president created a hostile working environment.[95] The plaintiff, Harris, alleged that throughout her employment Forklift's president often insulted her

[86] *Id.* at 69 (reasoning that evidence of sexually provocative speech and dress is admissible, demonstrating possibility that sexual advances were welcome).

[87] *Id.* (emphasizing EEOC guidelines, which direct jury to look at nature of sexual advances and context in which alleged incidents occurred).

[88] *Id.* at 68.

[89] *Id.* at 72 ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance.").

[90] *Id.* at 72-73.

[91] *Id.* at 57 ("A claim of hostile environment sexual harassment is a form of sex discrimination that is actionable under Title VII.").

[92] *Id.* at 67.

[93] *Id.*

[94] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (affirming *Meritor* standard as appropriate: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview."). The Supreme Court outlined both subjective and objective requirements to prevail on a Title VII hostile environment claim. *Id.* If a victim does not subjectively perceive an abusive environment, then the conduct at issue does not alter the victim's employment conditions. *Id.* Thus, there is no Title VII action. *Id.*

[95] *Id.* at 18-19 (equating "abusive work environment" with "hostile work environment").

because of her gender, making lewd comments and requesting sexual favors.[96] The District Court for the Middle District of Tennessee held that although the alleged conduct was offensive to Harris, the conduct did not amount to an abusive environment.[97] The district court reasoned that the conduct had to be so severe that it affected Harris's work performance.[98] The Court of Appeals for the Sixth Circuit affirmed the district court decision.[99] Harris appealed the case to the U.S. Supreme Court.[100]

The Supreme Court granted certiorari to resolve whether a showing of severe psychological injury is essential to an abusive work environment claim.[101] The Supreme Court determined the issue, rejecting the requirement that harassment must impact a victim's psychological well-being or lead to injury.[102] The Court further held that whether a hostile work environment exists depends upon the entirety of the situation.[103] The Supreme Court created a non-exhaustive list of factors for courts to consider when establishing whether a hostile work environment exists.[104] Those factors include: the frequency, severity, and nature of the harassing conduct, and whether the harassment constituted an unreasonable interference with an employee's work performance.[105] In *Harris*, the Supreme Court

[96] *Id.* at 19 (discussing company president's reference to Harris as "dumb ass woman," sexual innuendos made about Harris, and instances where employer requested female employees fish out coins from front pockets).

[97] *Id.* at 20.

[98] *Id.* The district court concluded that Forklift's president did not offend Harris to the point of injury thereby creating an abusive or intimidating environment. *Id.* The district court's focus on Harris's psychological effects followed Sixth Circuit precedent. *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (requiring major psychological impact), *with* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (rejecting psychological impact requirement).

[102] *Harris*, 510 U.S. at 22 (stating discriminatorily abusive work environment is actionable under Title VII even when job performance remains constant because it affects overall worker productivity).

[103] *Id.* at 23.

[104] *Id.* (emphasizing that psychological harm is relevant factor but not requirement).

[105] *Id.* at 21 ("[W]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of victim's employment and create an abusive working environment, Title VII is violated.").

reaffirmed the requirement that plaintiffs adequately demonstrate severe and pervasive conduct on the part of their harassers.[106] Although plaintiffs maintain the burden of demonstrating harassing behavior, the Supreme Court rejected a tangible psychological injury requirement.[107]

In California, the leading FEHA sexual harassment case based on a hostile environment claim is *Fisher v. San Pedro Peninsula Hospital*.[108] Similar to *Meritor* and *Harris*, the *Fisher* court held that hostile environment harassment must be sufficiently pervasive.[109] Further, the harassment must alter the conditions of employment and create an abusive work environment.[110] In *Fisher*, a nurse and her husband filed suit against the hospital where they worked.[111] They alleged that the supervising physician verbally and physically harassed the nurse and her colleagues in an overtly sexual manner.[112] The trial court sustained the defendant's demurrers without leave to amend and dismissed all actions.[113]

A California appellate court reversed and remanded, granting plaintiffs an opportunity to amend the complaint to adequately plead a FEHA hostile environment sexual harassment claim.[114] In its decision, the court explained the legal standards associated with a hostile environment sexual harassment claim.[115] The appellate court held that the plaintiff must belong to a protected group and the harassment must be unwelcome and based on the plaintiff's gender.[116] The court stated that in determining whether the harassment is sufficiently pervasive to create a hostile working environment, it must take into account the totality of the circumstances.[117] When evaluating a sexual

[106] *Id.*

[107] *Id.* at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment . . . can and often will detract from employees' job performance . . . .").

[108] 262 Cal. Rptr. 842, 845 (Ct. App. 1989) (holding plaintiff did not sufficiently plead cause of action for environmental sexual harassment under FEHA).

[109] *Id.* at 852.

[110] *Id.*

[111] *Id.* at 846.

[112] *Id.*

[113] *Id.* at 848.

[114] *Id.* at 861.

[115] *Id.* at 851-55.

[116] *Id.* at 851 (adopting requirements for prima facie claim of environmental sexual harassment based on prior federal court holdings).

[117] *Id.* at 852.

harassment claim, a reasonable employee is one of the same sex as the complainant.[118] A jury must assess whether a reasonable employee of the same sex as the plaintiff would take offense to the conduct at issue.[119]

Meritor, *Harris*, and *Fisher* demonstrate that verbal harassment in the employment context creates a hostile environment, punishable by law.[120] These cases further establish that employers may limit speech rights in the workplace.[121]

D. A Limited Right to Free Speech

The First Amendment guarantees citizens the right to free speech.[122] The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."[123] This right to free speech extends to the states via the Fourteenth Amendment's Due Process Clause.[124] Although written in broad terms, the First Amendment's guarantees are not absolute.[125]

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[118] *Id.* at 852 n.7.

[119] *Id.* at 852 ("The plaintiff must prove that the defendant's conduct interfered with a reasonable employee's work performance . . . and that she was actually offended.").

[120] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19, 22 (1993) (concluding that employer's series of unwanted verbal insults and sexual innuendos were actionable under abusive work environment claim); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (defining "sexual harassment" to include unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of sexual nature); *Fisher*, 262 Cal. Rptr. at 846 (discussing verbal sexual insults endured by plaintiff as actionable under FEHA).

[121] Due to potential employer liability for sexual harassment perpetrated by an employer or its agent, employers are likely to restrict speech to avoid vicarious liability. *See generally Harris*, 510 U.S. at 22 (recognizing employer liability for verbal epithets directed at female employee); *Meritor*, 477 U.S. at 70-73 (acknowledging employer liability for sexually harassing speech and acknowledging employer's responsibility to implement policies deterring harassment and grievance procedures for victims); *Fisher*, 262 Cal. Rptr. at 858 (recognizing employer hospital's liability if plaintiff could adequately prove supervising physician committed sexual harassment).

[122] U.S. CONST. amend. I.

[123] *Id.*

[124] *See* Stromberg v. California, 283 U.S. 359, 368 (1931) (asserting Due Process Clause incorporates free speech rights); Gitlow v. New York, 268 U.S. 652, 666 (1925) (asserting that fundamental right to free speech extends to states via Fourteenth Amendment's Due Process Clause); Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 853-59 (Cal. 1999) (discussing relationship between free speech rights and Due Process Clause).

[125] *See* Near v. Minnesota, 283 U.S. 697, 708 (1931) (noting state power to punish

Most courts and scholars generally recognize that speech falls into different categories, garnering varying degrees of legal protection.[126] The First Amendment affords the highest level of protection to certain categories of speech, while allowing government regulation over other types of expression.[127] Political speech possesses the highest level of protection under the First Amendment.[128] Other types of speech, such as obscene language, have little or no protection because the expression does not advance First Amendment interests.[129] Similarly, sexually harassing speech is subject to government restrictions because it fails to promote free speech aims and undermines the value of gender equality.[130] *Lyle v. Warner Bros. Television Productions* gave the California Supreme Court an opportunity to determine whether sexually harassing speech restrictions universally apply to all workplaces.

II. *LYLE V. WARNER BROS. TELEVISION PRODUCTIONS*

In *Lyle*, plaintiff Amaani Lyle filed a sexual harassment suit, asserting her employers at Warner Brothers violated FEHA.[131] Her allegations rested on the accepted notion that harassment based upon

free speech abuses); *Stromberg*, 283 U.S. at 368 (noting that Due Process Clause grants free speech rights subject to state's power to punish abuse); Whitney v. California, 274 U.S. 357, 371 (1927) (asserting that free speech right is not entitlement to speech without responsibility).

[126] Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 506 (1995) (asserting that there are two tiers of speech, one tier protected by First Amendment, other tier not protected). *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (providing sources that discuss numerous limitations on First Amendment rights); First Amendment Ctr., Speech: Arts and First Amendment, http://www.fac.org/speech/arts/Index.aspx (last visited Mar. 2, 2007) (discussing legal issues involving art and freedom of expression).

[127] *See* Sangree, *supra* note 126, at 506 (asserting that speech advocating government change or challenging state authority is clearly within boundary of protected speech).

[128] *See id.* ("There is general consensus that 'political speech' is at the core of speech protected by the First Amendment . . . .").

[129] *See id.* at 507 ("There is general recognition between scholars and courts that certain categories of speech deserve only low-level, if any, constitutional protection.").

[130] *See id.* at 532, 534-35 (arguing that regulation of harassing speech is constitutional because it targets gender inequity in employment and does not significantly further free speech interests).

[131] Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 513 (Ct. App. 2004) (discussing Warner Brothers' alleged FEHA violations).

gender is a form of employment discrimination.[132] When analyzing a FEHA sexual harassment claim, a plaintiff such as Lyle would present evidence of harassment and a court would determine if the evidence is sufficient to show a pervasive pattern of harassment.[133] This pattern of harassment constitutes a hostile work environment.[134] Although the regulation of sexually harassing speech is commonplace, it is unclear if speech restraints still apply when sexually explicit discourse is a business necessity.[135] The *Lyle* case speaks to this controversial issue.

A. Facts and Procedure

When Lyle, an African American woman, learned that the producers of the television show *Friends* sought a new writers' assistant, she applied for the position.[136] Two executive producers and two writers for the show, including Adam Chase and Gregory Malins, interviewed Lyle.[137] Lyle's interviewers clearly conveyed that one of her job duties involved taking copious and detailed notes of the writers' discussions about the show.[138] Lyle understood that her rapid word processing skills were critical to successful job performance.[139] Lyle assured the writers that she met their qualifications, stating she could type eighty

[132] *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 851 (Cal. 1999) (discussing verbal harassment as violation of FEHA). *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (holding that sexual harassment is form of employment discrimination actionable under Title VII); Beyda v. City of Los Angeles, 76 Cal. Rptr. 2d 547, 550 (Ct. App. 1998) (stating FEHA is state counterpart to Title VII and that employment discrimination occurs when employee experiences sexual harassment).

[133] *See, e.g.*, *Aguilar*, 980 P.2d at 851 (discussing that harassment must be severe or pervasive enough to create objectively hostile or abusive work environment); *Beyda*, 76 Cal. Rptr. 2d at 549-50 (discussing pervasive pattern of harassment standard); Fisher v. San Pedro Hosp., 262 Cal. Rptr. 842, 852 (Ct. App. 1989) (discussing plaintiff's burden of pleading facts sufficient to show pervasive pattern of harassment).

[134] *Aguilar*, 980 P.2d at 851.

[135] *See* Respondents' Petition for Review, *supra* note 12, at 2; *see also Beyda*, 76 Cal. Rptr. 2d at 550 (explaining Title VII is federal counterpart of FEHA, promoting same social goals of outlawing employment discrimination on basis of gender). *See generally* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (holding that prior speech restraints are acceptable form of relief); *Aguilar*, 980 P.2d at 848 (exemplifying California state court holding that prior speech restraints are acceptable form of relief).

[136] *Lyle*, 12 Cal. Rptr. 3d at 512.

[137] *Id.*

[138] *Id.* at 513.

[139] *Id.*

words per minute on her job application.[140]

Warner Brothers hired Lyle in June 1999 without testing her transcribing skills.[141] Lyle worked directly under Chase and Malins, but occasionally worked for Andrew Reich, a supervising producer.[142] The writers terminated Lyle from her position four months after hiring her.[143]

Upon her firing, Lyle filed a complaint with the DFEH claiming termination based on her race and gender.[144] Lyle also alleged retaliation for complaining about the lack of African American actors on the television show.[145] Lyle later amended her FEHA complaint to include claims of racial and sexual harassment and wrongful termination in violation of public policy.[146] After obtaining a right-to-sue notice from the DFEH, Lyle brought suit against Warner Brothers, NBC Studios, and the show's producers and writers.[147]

The defendant writers maintained that they terminated Lyle for legitimate, nondiscriminatory reasons, specifically, poor job performance.[148] The defendants further contended that Lyle could not type fast enough to keep track of the writers' dialogue.[149] Thus, she lost important material for the show.[150] Lyle, however, argued that her complaints about the lack of African Americans on the television show contributed to her elimination.[151] Furthermore, Lyle argued that her supervisors subjected her to racially and sexually harassing comments during daily writers meetings.[152]

Lyle's deposition testimony detailed Chase, Malins, and Reich's harassing conduct.[153] As an example, Lyle described Malins's coloring book, which he left open for others to see, depicting cheerleaders with

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 516.

their legs spread apart.[154] Chase and Malins made numerous lewd comments about the supposed infertility of an actress on the show.[155] Malins openly shared his fantasy of having an episode where one of the male actors walks in while a female actress showers and rapes her.[156] Reich frequently made masturbatory hand gestures in the writers' room.[157] He made the same hand gestures while sitting at his desk or walking around the studio, making noises as if pleasuring himself.[158] Evidence of the writers' behavior while in the studio and office became the cornerstone of Lyle's sexual harassment claims based on a hostile work environment.[159]

The defendants filed a motion for summary judgment, which the Superior Court of Los Angeles County granted.[160] The trial court ruled that NBC and the *Friends* production company were not Lyle's employers and relieved them of any liability.[161] The trial court also held that Lyle could not factually establish causes of action for wrongful termination and retaliation as to any defendant.[162] Thus, the court entered a judgment in favor of defendants, which included attorney fees amounting to over $400,000.[163] The trial court reasoned that the FEHA causes of action were frivolous and without foundation.[164]

Lyle filed a timely appeal with the California Court of Appeal for the Second District.[165] The appellate court affirmed the trial court's decision dismissing Lyle's claims for termination based on race, gender, and retaliation.[166] The court, however, found that triable issues of fact existed as to Lyle's causes of action for sexual

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[154] *Id.* (noting that Malins would sit in writers' room drawing breasts and vaginas onto cheerleaders in coloring book and leave book open for others to view).

[155] *Id.* (describing writers' conversations in which writers discussed female actor's fertility problems, referring to "dried branches in her vagina" and her "dried up pussy").

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 517.

[160] *Id.* at 513.

[161] *Id.* at 513-14.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* (vacating attorneys' fees award, ruling that court must recalculate award to reflect partial judgment reversal).

harassment.[167]

B. Holding and Rationale

The appellate court remanded the case to the trial court to resolve two key issues.[168] One question was whether Lyle suffered harassment based on gender.[169] The other determination was whether the writers' conduct was sufficiently severe and pervasive to create a hostile working environment.[170] The appellate court based its holding on a review of the evidence presented at trial.[171]

The appellate court held that Lyle presented enough evidence at trial to meet the standards for a sexual harassment cause of action.[172] The court utilized the requirements articulated in *Fisher*.[173] Under *Fisher*, when a victim personally witnesses harassing conduct within her immediate work environment, a cause of action arises.[174] Upon review of Lyle's deposition, the appellate court found that her supervisors' deluge of denigrating remarks about women could constitute harassment.[175] The court reasoned a reasonable employee in Lyle's position could construe the defendants' alleged conduct as creating a hostile working environment for women.[176]

The appellate court again turned to the *Fisher* holding to elaborate on the factors considered when making a sexually hostile working environment claim.[177] The *Fisher* court held that the totality of the circumstances determines if conduct meets the criteria for a hostile working environment.[178] According to *Fisher*, courts should examine the nature, frequency, and context of the harassing conduct to determine if a hostile work environment exists.[179] The appellate court

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[167] *Id.*

[168] *Id.*

[169] *Id.* (holding that triable issues of fact exist as to whether Lyle suffered harassment based on sex).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 515-16.

[174] *Id.* at 515.

[175] *Id.*

[176] *Id.* at 516.

[177] *Id.*

[178] *Id.*

[179] *Id.* (citing Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 852 (Ct. App. 1989)) ("The factors that can be considered . . . are: 1) the nature of the

applied the factors in *Fisher* and held that sufficient evidence existed from which a reasonable jury could find that the *Friends* writers' room was a hostile working environment.[180] The court pointed to the crude and misogynistic nature of the writers' conduct and the frequency of their behavior.[181] The court also noted that Lyle had no choice but to work in the writers' room where her supervisors made lewd gestures and remarks.[182]

The defense argued that the writers' conduct was a part of their work and that Lyle had an obligation to attend their meetings.[183] The appellate court acknowledged the validity of the defendants' "creative necessity" argument.[184] The court pointed to the holding in *Reno v. Baird*, which defined "harassment" as conduct that is unnecessary to the employer's business or performance.[185] This was especially relevant to the *Lyle* defendants because they claimed the harassing conduct was critical to their work.[186] Even though the court acknowledged the importance of the "creative necessity" defense, the court refused to completely absolve the defendants of liability.

C. Defendants' Appeal to the California Supreme Court

The defendants appealed to the California Supreme Court.[187] In their appeal, the writers claimed that any liability for sexual harassment violated their free speech rights and adversely affected their work.[188] The California Supreme Court granted certiorari and

unwelcome sexual acts or works . . . ; 2) the frequency of the offensive encounters; 3) the total number of days over which the offensive conduct occurs; and 4) the context in which the conduct occurred.").

[180] *Id.* at 517.

[181] *Id.* ("The evidence in the record shows [the writers] constantly engaged in discussions about anal and oral sex . . . discussed their sexual exploits both real and fantasized . . . made and displayed crude drawings of women's [private parts], pretended to masturbate . . . . This conduct occurred nearly every working day of the four months Lyle spent on the show.").

[182] *Id.* at 518 ("Lyle was a captive audience. She had to be in the writers' room where most of the offensive conduct took place . . . .").

[183] *Id.*

[184] *Id.*

[185] *Id.* at 520 (defining "harassment" as conduct outside scope of necessary job performance and unnecessary to manage business or perform supervisory employee's job (citing Reno v. Baird, 957 P.2d 1333, 1336 (Cal. 1998))).

[186] *Id.*

[187] *Id.*

[188] Respondents' Petition for Review, *supra* note 12, at 15.

heard limited oral arguments on two issues.[189]

The first issue was whether the use of sexually coarse and vulgar language in the workplace constitutes harassment based on sex within the meaning of the FEHA.[190] The second issue was whether the imposition of liability under FEHA for sexually harassing speech infringes upon defendants' free speech rights.[191] The *Lyle* outcome was significant because defendants sought to construct an exception to sexual harassment laws for certain employers.[192] A ruling that favored the writers would place free speech concerns above antidiscrimination objectives in the employment context.[193]

Instead of addressing whether harassing speech constitutes a free speech violation, the California Supreme Court holding only addressed the issue of whether sexually course and vulgar language was sexual harassment.[194] In its holding, the court reasoned that a hostile environment claim under FEHA is not established when a coworker simply engages in crude or inappropriate conduct in front of employees.[195] The individual engaging in the harassment must direct his or her behavior toward a plaintiff or toward women in general.[196] Annoying or merely offensive comments are not actionable.[197] Furthermore, a plaintiff who was not personally subjected to offensive behavior bears an even higher burden of proof than a claimant who

[189] *See* Cal. Appellate Courts, *supra* note 12 (explaining limited issues for oral argument).

[190] *Id.*

[191] *Id.*

[192] *See* Respondents' Petition for Review, *supra* note 12, at 27 ("The First Amendment rights of employers and employees in communicative workplaces must be preserved.").

[193] *Compare id.* at 19 (arguing that First Amendment concerns are paramount in creative workplace context), *with* Amicus Brief of the California Employment Lawyers Association in Support of Plaintiff/Appellant at 4, Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511 (Ct. App. 2004) (No. S125171), *available at* 2005 WL 847602 (arguing discrimination laws do not regulate speech and that regulating discriminatory working conditions supersede speech concerns).

[194] Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 231 (Cal. 2006). Note that Justice Chin wrote a concurring opinion asserting that to uphold sexual harassment laws in the creative workplace context would violate the First Amendment rights of the writers and producers in *Lyle*. *Id.* at 295-96 (Chin, J., concurring). Justice Chin's opinion is not discussed in this Note.

[195] *Id.* at 222.

[196] *Id.*

[197] *Id.* at 223.

suffered direct harassment.[198] As such, the court held that Lyle failed to establish that the *Friends* writing studio was a hostile work environment.[199] In making its decision the court looked at several factors.[200] First, the defendants had forewarned Lyle about the sexual nature of the show, thus Lyle suffered no job detriment.[201] Second, the writers did not direct any sexual comments toward her.[202] Lastly, the court reasoned that in light of the studio's creative environment, the conduct at issue was not severe or pervasive enough to constitute harassment.[203] In light of this conclusion the court felt that it had no occasion to determine whether liability for such language might infringe on defendants' free speech rights under the First Amendment or the state constitution.[204]

III. ANALYSIS

In deciding *Lyle*, the California Supreme Court should have addressed the issue of free speech rights in the workplace.[205] In doing so, the court should have held that workplace speech restrictions do not violate First Amendment rights.[206] Furthermore, workplace speech restrictions should not vary depending upon the nature of a defendant's work product.[207]

First, due to the unique nature of the employee-employer relationship, all employers must face potential liability under either Title VII or FEHA.[208] Second, protecting workers from sexual harassment is a compelling state interest.[209] Sexually harassing speech should diminish free speech protection in the workplace since free

198 *Id.* at 224.
199 *Id.* at 225-28.
200 *Id.*
201 *Id.*
202 *Id.* at 227.
203 *Id.* at 225-26.
204 *Id.* at 231.
205 *See* discussion *infra* Part III.A-C.
206 *See* discussion *infra* Part III.B.
207 *See* discussion *infra* Part III.A.
208 *See* discussion *infra* Part III.A.
209 *See* discussion *infra* Part III.B; *see also* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 714 (1997) (arguing that robust protection of free speech undermines workplace equality).

speech rights are not absolute.[210] Moreover, harassing speech does not further First Amendment interests and violates the Fourteenth Amendment.[211] Third, equal protection rights outweigh speech rights in the workplace context because the pursuit of equality better serves society's democratic and economic goals.[212]

A. Due to the Unique Nature of the Employment Relationship, All Employers Must Face Potential Liability Under Title VII or FEHA

It is generally understood that most adult Americans spend much of their time at work.[213] The extensive amount of time spent working presents special employment issues, which may allow for certain speech restrictions.[214] The unique nature of the employment relationship and an employer's inherent coercive power justify halting offensive speech in the workplace.[215] Even the *Lyle* appellate court noted Lyle's captivity to the offending messages perpetrated by her bosses.[216] Thus, exercising greater speech restrictions is acceptable when employees cannot avoid hearing unwelcome remarks.[217]

Going beyond the court's captive audience analysis, another factor to consider is the interpersonal dynamic that exists between supervisors and subordinates.[218] Assuming the harasser is in a supervisory role, the disparity in power between the harasser and the

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[210] *See* discussion *infra* Part III.B.

[211] *See* discussion *infra* Part III.B.

[212] *See* discussion *infra* Part III.C.

[213] *See* Sangree, *supra* note 126, at 559 (asserting that Americans spend majority of time at work); *see also* Joan Williams & Ariane Hegewisch, *All Work and No Play Is the U.S. Way*, L.A. TIMES, Aug. 30, 2004, at B9 (asserting that Americans with families work more hours than workers in other industrialized nations, except South Korea).

[214] *See* Estlund, *supra* note 209, at 694-95 (arguing that constraints on free expression should have greater scope in workplace because workplace is important satellite forum for public discourse). Reasonable civility constraints on an employee's freedom of expression are necessary to reinforce norms of tolerance which bind work communities. *Id.*

[215] *See id.* at 716 (discussing coercive power involved in employment relationship).

[216] *See* Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 519 (Ct. App. 2004).

[217] *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 12-13 (1990).

[218] *See* Epstein, *supra* note 64, at 429 (arguing that sexual harassment claim standards under Title VII are extremely stringent and leave some legitimate victims unprotected by law).

victim exacerbates the employee's captivity.[219] Employees realize that taking a stand may adversely affect their employment status.[220] There is an economic dependence on the part of subordinate employees, making them hesitant to confront their harassers.[221]

As it pertains to the instant case, Lyle's supervisors forced her to listen to and observe offensive language and gestures in both the writers' room and office common areas.[222] An offended party, like Lyle, cannot physically escape hearing derogatory messages.[223] The male-dominated social hierarchy replicates itself in the workforce, placing pressures on female employees in subordinate positions.[224] As such, the regulation of expression in the workplace is necessary to combat discriminatory behavior.[225] Without workplace speech regulations, much harassing speech would go unchecked due to the economic coercion present in the employer-employee dynamic.[226]

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[219] *See id.*

[220] *See id.*

[221] *See id.* at 431-32 (citing NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)) (illustrating law's power to restrain speech in order to protect workers' rights despite employer's coercive power).

[222] *See* Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 519 (Ct. App. 2004).

[223] *See* Epstein, *supra* note 64, at 424 (discussing captive audience theory that appellate court used in *Lyle*).

[224] *See id.* at 429-31 (discussing interpersonal context of workplace affecting victims' abilities to challenge their harassers); *see also* Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person,"* 58 OHIO ST. L.J. 1217, 1227-29 (1997) (discussing how employee may consent to exchange of provocative ideas as element of job performance, thereby invalidating Title VII protections). Lower level employees typically do not choose to engage in provocative type of speech. *See* Calleros, *supra*, at 1229. One should not assume an employee consents to participate through the acceptance of their position. *Id.*

[225] *See* Estlund, *supra* note 209, at 699 ("Harassment harms individual women and minorities, and it undermines the statutory goal of workplace equality. These harms are serious and are of obvious and central relevance to the constitutionality of any speech restrictions imposed . . . .").

[226] *See id.*; *see also* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2308 (1999) (discussing economic and social dependence in workplace context); Marion Crain, *Women, Labor Unions, and Hostile Work Environment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 15-17 (1995) (discussing how quid pro quo and hostile environment sexual harassment adversely impact women economically); Lea VanderVelde, *Coercion in At-Will Termination of Employment and Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 496, 498, 508 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing coercive circumstances of at-will employment doctrine).

Those who oppose regulating workplace speech assert that attaching liability for sexually harassing remarks violates an individual's free speech liberties.[227] Arguably, limiting speech in the creative context chills workplace communication and adversely affects businesses dependent upon sexually explicit expression.[228] The inference is that free speech rights should supersede sexual harassment laws for creative processes.[229]

Those who oppose regulating workplace speech emphasize that creative writers deserve heightened protection under the First Amendment because they operate in "communicative workplaces."[230] As it relates to *Lyle*, the writers' ability to openly discuss sexually explicit matters was an inherent part of the creative writing process for *Friends*.[231] Thus, the workplaces of producers and distributors of constitutionally protected materials, like scripts, merit an exception to the hostile work environment prohibition.[232]

Opponents' arguments, however, ultimately fail because FEHA and free speech rights are not wholly inconsistent, even within the creative context.[233] Restrictions on spoken communication in creative

[227] *See* Respondents' Petition for Review, *supra* note 12, at 2 ("[T]he Court of Appeal's ruling that a jury should determine whether the writers' sexual discussions in developing the story lines and scripts for the television show were justified by 'creative necessity' will chill speech in many other workplaces."). *See generally* Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 521 (1991) (arguing that sexual harassment laws restrict protected political speech); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) [hereinafter Volokh, *Freedom of Speech*] (arguing that harassment law unjustifiably restricts free speech and calling for protection of harassing speech); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (arguing that standards for sexual harassment claims are ambiguous and suppress core protected speech).

[228] *See* Respondents' Petition for Review, *supra* note 12, at 2 ("The [o]pinion hangs like [a] sword over the heads of employees in any workplace in which speech, particularly that which might offend others, is an integral part of the 'business' and an indispensable part of the job.").

[229] *See id.* at 1 (arguing that creative workplaces require heightened First Amendment protection).

[230] *See id.*

[231] *Id.* at 2-5.

[232] *See* Richard H. Fallon, *Sexual Harassment, Content Neutrality and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 50 (1994) (advocating for exception to hostile environment discrimination laws for producers or distributors of constitutionally protected materials).

[233] *See* Sangree, *supra* note 126, at 558-59 (arguing that hostile environment law

workplaces are possible.[234] Regulating speech can protect workers' rights without compromising the artistic process.[235] Employers can create narrow, speech-protective, anti-harassment policies that allow employees to freely express themselves until others complain that the comments are unwelcome.[236] Employers should promote workers to engage in creative dialogue, but make certain that employees understand that sexual expression unrelated to the end product is unacceptable.[237] Employers can encourage employees to immediately report incidents of harassment by having victim-friendly grievance procedures.[238] In creative workplaces, employers must stress the importance of context.[239] A professional football coach may smack his players' buttocks as they enter the field, but he cannot engage in the same behavior with his assistant in the back office.[240] As it pertains to *Lyle*, discussions regarding sexual topics were a necessary exercise during writers' meetings.[241] The offensive conduct and language extraneous to the show's development, however, were wholly unnecessary and created an oppressive work environment.[242]

B. FEHA Represents the Interests of the State in Eliminating Workplace Discrimination

Anti-discrimination laws in the workplace represent the interests of

furthers First Amendment interests).

[234] *See* Epstein, *supra* note 64, at 443 (asserting that sexual harassment laws restricting speech are extremely narrow).

[235] *See id.* (discussing free speech zones designated for vigorous debate regarding gender inequity).

[236] *See* Sangree, *supra* note 126, at 502-03 (discussing how employers can avoid liability for sexual harassment based on prompt, remedial action upon notice of sexual harassment).

[237] *See id.* (discussing liability avoidance).

[238] *See id.* (discussing importance of employers creating grievance procedures that do not antagonize victims).

[239] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (discussing importance of context when evaluating sexual harassment claim).

[240] *See generally* Karen T. Meyers, *The Threshold for Hostile Work Environment Harassment*, ORANGE COUNTY L., Mar. 2005, at 30 (discussing issues faced by many California employment lawyers advising companies on sexual harassment liability).

[241] *See* Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 513 (Ct. App. 2004) (discussing Lyle's job requirements).

[242] *See Oncale*, 523 U.S. at 81 (applying social context notion to workplace harassment issues).

the state in eliminating inequality.[243] Under California Government Code section 1290, it is the public policy of the state to preserve employment rights without discrimination on account of gender.[244] The statutory language contained in section 1290 gives the state the power to regulate speech in the workplace and combat discriminatory working conditions.[245] Free speech protection must diminish when it does not further First Amendment interests and runs counter to anti-discrimination policies, violating the Fourteenth Amendment.[246]

The Equal Protection Clause of the Fourteenth Amendment supports the compelling state interest in regulating workplace speech.[247] In *Lyle*, the fierce controversy surrounding the First Amendment ignores the need to balance multiple constitutional interests.[248] The state has an obligation to enforce the tenets of the Fourteenth Amendment, which guarantee citizens the right to equal protection under the law.[249] The state's obligation to enforce the Equal Protection Clause makes it a substantial interest for courts to promote equality.[250] By allowing harassing expression to go unchecked in the workplace, the state fails to uphold the Fourteenth Amendment.[251]

The core of protected First Amendment speech is political speech.[252] Courts recognize that certain types of speech deserve little or no protection under the First Amendment, especially if the speech undermines a substantial state interest.[253] As it pertains to *Lyle*,

[243] *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 856 (Cal. 1999).

[244] *See* CAL. GOV'T CODE § 1290 (West 2004). In private forums the government may reasonably regulate speech. *See Aguilar*, 980 P.2d at 856.

[245] *See* § 1290.

[246] *Aguilar*, 980 P.2d at 856.

[247] Section 5 of the Fourteenth Amendment enables Congress to correct state legislation in conflict with the principles of the Fourteenth Amendment. *See* Katzenbach v. Morgan, 384 U.S. 641, 649 n.8 (1966) (citing CONG. GLOBE, 39th Cong., 1st Sess., 2766, 2768 (1866)).

[248] *See* Epstein, *supra* note 64, at 436-37 (discussing conflict between First and Fourteenth Amendments).

[249] *Id.* at 437.

[250] *Id.*

[251] *Id.*

[252] *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 859 (Cal. 1999) ("In this context, the goal of the First Amendment is to protect expression that engages in some fashion public dialogue . . . communication in which the participants seek to persuade . . . communication which is about changing or maintaining beliefs . . . .").

[253] For example, the state may penalize threats, even those consisting of pure speech. *Id.* Civil wrongs also may consist solely of spoken words, such as slander and

allowing sexually harassing speech in the workplace undermines the substantial state interest in promoting social equality between the sexes.[254] The courts in *Meritor*, *Harris*, and *Fisher* ruled that harassing speech in the employment context deserves no protection.[255] The courts reasoned that harassing expression creates a hostile work environment that is contrary to the egalitarian intentions embodied by Title VII and FEHA.[256] Although the defendants in *Lyle* claimed that harassing speech is relevant to the creative process, neither the First nor Fourteenth Amendments protect such speech.[257]

In defense of employers, one could argue that although FEHA may further equal protection rights, the court should strike down sexual harassment regulations for vagueness.[258] Employers have a right to be free from unconstitutionally vague governmental regulation.[259] Upholding ambiguous laws regarding sexual harassment, such as

intentional infliction of emotional distress. *Id.* A statute, not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. *Id.*; *see* Sangree, *supra* note 126, at 546. *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978) (regarding profanity on radio); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) (regarding pornography); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (regarding fighting words).

[254] *See Aguilar*, 980 P.2d at 866-67 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)) (asserting that acts of discrimination in distribution of publicly available goods and services cause unique evils that government has compelling interest to prevent); Sangree, *supra* note 126, at 540 (arguing that greater speech restrictions are permissible in workplace when restrictions further recognize government interests).

[255] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (holding verbal insults and sexual innuendos are actionable under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986) (holding harassers liable under Title VII for unwelcome verbal contact of sexual nature); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 846 (Ct. App. 1989) (holding verbal sexual insults endured by plaintiff actionable under FEHA).

[256] *See Harris*, 510 U.S. at 21-23 (holding verbal insults and sexual innuendos create triable issue of fact as to existence of hostile work environment); *Meritor*, 477 U.S. at 65-66 (regarding hostile environment claim); *Fisher*, 262 Cal. Rptr. at 849-52 (holding that severe and pervasive sexually harassing speech creates hostile work environment).

[257] *See* Epstein, *supra* note 64, at 435-37.

[258] *See* Brief of the Employers Group et al. as Amici Curiae in Support of Defendant Respondent Warner Bros. Television Productions Inc. at 15-16, Lyle v. Warner Bros. Television Prods., 132 P.3d 211 (Cal. 2005) (No. 5125171), *available at* 2005 WL 847603 [hereinafter Brief of the Employers Group et al.] (discussing how vague sexual harassment laws are unconstitutional).

[259] *Id.*

FEHA, could possibly leave the public uncertain as to the type of conduct prohibited by the law.[260] Employers are therefore incapable of adjusting their policies to the meet the law's requirements.[261] A primary complaint is that FEHA does not delineate what falls under sexually harassing speech.[262] Thus, the law's lack of clarity might arguably lead to over-enforcement of speech restrictions as a means of liability avoidance.[263] Limiting speech in the employment context places an undue burden on employers and imposes potentially limitless damages when laws do not clearly define harassing speech.[264]

This argument ultimately fails because the required elements of a hostile environment claim are clear.[265] First, the harassment must be gender-based.[266] Second, the employer must perpetrate or condone the harassment.[267] Third, the harassment must be severe or pervasive.[268] Fourth, the harassment must be unwelcome to its target.[269] Lastly, the harassment must create a subjectively and objectively hostile work environment.[270] These well-defined standards indicate to workers and employers what is and is not acceptable workplace behavior.[271]

The legal criteria required to prove a sexual harassment case are often difficult to meet.[272] Courts are reluctant to enforce hostile

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[260] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999) ("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.").

[261] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (discussing requirement that government articulate aims with clarity so that individuals may conform conduct to comply with law).

[262] *See* Brief of the Employers Group et al., *supra* note 258, at 15-16 (referring to "utter vagueness" of FEHA).

[263] *See* Volokh, *Freedom of Speech*, *supra* note 227, at 1812 ("[L]ike all vague standards, the harassment law standard has a substantial 'chilling effect' . . . .").

[264] *See* Brief of the Employers Group et al., *supra* note 258, at 15-16.

[265] *See* Epstein, *supra* note 64, at 411-15 (explaining hostile environment sexual harassment claim). *But see* Browne, *supra* note 227, at 539-40 (arguing that harassment laws violate First Amendment via censorship of protected speech in workplace).

[266] *See* Epstein, *supra* note 64, at 411.

[267] *See id.* at 412.

[268] *See id.* at 412-13.

[269] *See id.* at 413-14.

[270] *See id.* at 414.

[271] *See id.* at 411-15.

[272] *Id.* at 417; Hollis v. Fleetguard, Inc., 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987) (exemplifying courts tendencies to construe harassment laws narrowly); *see,*

environment harassment claims even when the harassment involves physical touching, demonstrating that courts construe harassment law quite narrowly.[273] In addition, employers are reluctant to overregulate employee speech because it potentially injures worker morale.[274] These factors weigh against the courts and employers over-enforcing FEHA.[275] Thus, the fear of over-enforcement is without basis and supports the view that society needs laws prohibiting sexually harassing speech in the workplace.[276]

C. FEHA Furthers Democratic and Economic Goals by Protecting Employees and Society from Discriminatory Behavior

FEHA affirms the social value of equality between the sexes.[277] Ensuring the fair treatment of women in the workplace optimizes overall worker productivity.[278] Statutes like FEHA and Title VII

e.g., Jones v. Flagship Int'l, 793 F.2d 714, 719-21 (5th Cir. 1986) (demonstrating difficulty of meeting legal standard for hostile environment sexual harassment).

[273] *See* Epstein, *supra* note 64, at 417; *see also* Staton v. Maries County, 868 F.2d 996, 997-98 (8th Cir. 1989) (discussing work harassment involving physical contact); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1410-12 (10th Cir. 1987) (explaining how court did not find workplace harassment despite overtly sexual behavior); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 211-14 (7th Cir. 1986) (describing how court did not find workplace harassment despite overtly sexual speech and physical contact); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1565-66 (M.D. Fla. 1990) (discussing how court did not find workplace harassment despite intrusive physical contact and sexual epithets).

[274] *See* Sangree, *supra* note 126, at 551 ("[E]mployee morale is recognized to directly benefit employers and to be undermined by overly restrictive work environments."); *see also* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech*, 22 HARV. J.L. & PUB. POL'Y 959, 966 (1999) (noting that employers generally seeks to balance concerns of workplace efficiency and employee morale); Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649, 664 (1997) (stating most employers recognize that absolutist policies forbidding certain interactions could have devastating impact on employee morale, hurting bottom line).

[275] *See* Sangree, *supra* note 126, at 552-53.

[276] *See id.* at 553-54 ("[R]ather than a problem of overregulation in the effort to open the workplace to women, the limited effect of Title VII only reflects pervasive underregulation.").

[277] Without discrimination protections, women would remain at a disadvantage in the workplace. *See id.* at 560 ("Speech which effectuates discrimination in employment undermines First Amendment interests by imposing economic coercion which disadvantages women solely on the basis of gender.").

[278] *See* Strauss, *supra* note 217, at 16 ("All evidence indicates that sexist speech diminishes effective workplace performance.").

justifiably infringe upon free speech interests within the employment context because they promote economic efficiency and democratic strength.[279]

Sexually harassing speech is contrary to economic efficiency and democratic strength because it prevents women from fully participating in the workforce.[280] Depriving women of their ability to maximize their contribution negatively impacts society by reducing worker productivity.[281] Harassment creates high stress situations that affect victims' mental and physical health and causes some victims to resign or take leave to avoid the harassment.[282] Sexual harassment damages the work unit because it disrupts working relationships and hurts employee morale, especially if nothing exists to prevent the harassment of a coworker.[283] Eliminating economic disadvantage to women created by male dominance in the workforce is one of FEHA's main purposes.[284] The U.S. Supreme Court clearly recognizes that equality and freedom are preconditions of a free market.[285]

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[279] *See* Sangree, *supra* note 126, at 540 (arguing that workplace speech restrictions are necessary to promote societal goals).

[280] *See* U.S. MERIT SYSTEMS PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 19 (1995), *available at* http://www.mspb.gov/studies/sexhar.pdf (reporting results of national study regarding sexual harassment effects on public employees). In the two years preceding 1980, sexual harassment cost the federal government $189 million. *Id.* at 23. In the two years preceding 1987, sexual harassment cost the federal government $267 million. *Id.* In the two years preceding 1994, the latest study shows that sexual harassment cost the federal government $327 million. *Id.* These figures demonstrate that the cost of sexual harassment remained constant, after accounting for inflation. *Id.* In 1994, a larger number of respondents reported worker productivity decreases due to harassment, although the degree of productivity decrease was less than in prior survey years. *Id.* The federal government takes into account the following cost factors: sick leave due to harassment, job turnover rates, and individual and group productivity decrease due to harassment. *Id.* Although there are no definite figures, survey results show a likelihood that private industry costs are comparable, if not greater, than federal government costs associated with sexual harassment claims. *Id.* at 19.

[281] It is important to note that the Merit Systems Protection Board study does not account for the costs of benefits paid, cost of worker replacement, or administrative costs associated with sexual harassment. *Id.* at 24 ("[The government's] estimate of the cost of sexual harassment is conservative.").

[282] *Id.*

[283] *Id.*

[284] *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (asserting employment discrimination is type of illegal commercial activity).

[285] Sangree, *supra* note 126, at 540 (citing FTC v. Superior Court Trial Lawyers

CONCLUSION

Sexual harassment in any employment context is still sexual harassment. Creative workplaces are no exception. To allow an exemption would mean leaving any potential harassment victims without recourse or due process of law. First, all employers, regardless of the industry, must face potential liability under Title VII and FEHA because of the unique power dynamics between employers and employees. Second, the Fourteenth Amendment's Equal Protection Clause does not allow for disparate treatment based on gender. Allowing verbal harassment to continue violates a victim's constitutional rights. Third, Title VII and FEHA represent the compelling state interest in eliminating discriminatory harassment. Lastly, sexually harassing speech is not protected because it fails to advance compelling social interests, breaks down economic efficiency, and weakens democratic strength.

If courts permit harassing speech and conduct to continue under the guise of free speech protection, lower level employees become vulnerable to inappropriate behavior at the hands of their employers. Returning to our initial hypothetical, a lack of legal protection for employees in the creative workplace would force our young writers' assistant to either endure the harassment or resign her position. Either result is unacceptable, crystallizing why it is imperative for courts to uphold sexual harassment laws in every workplace.

Ass'n, 493 U.S. 411, 427 (1990)) (noting importance of equality and freedom in marketplace).