SEXUAL HARASSMENT AND THE FIRST AMENDMENT

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Recent sexual harassment cases wending their way through the judicial system raise and highlight potential conflicts between the current judicial assumptions about what constitutes “hostile environment” harassment and the current judicial assumptions about the constitutional protection of speech.1 As Kingsley R. Browne puts it, “[i]n contrast with the immediate rejection of regulation of campus speech and pornography that was deemed to convey a ‘wrongheaded’ view about women, regulation of offensive speech in the workplace has been proceeding apace virtually without comment for well over a decade.”2 However, several recent cases are forcing judges and juries to grapple with the potential conflict between Title VII and the First Amendment.

Robinson v. Jacksonville Shipyards, Inc.,4 is one such case. While authorities agree it represents a conflict between Title VII and the First Amendment, there is disagreement regarding Robinson’s importance to the Title VII and First Amendment issues. This Article discusses that conflict. Part I details the decisions in the two sexual harassment cases, Meritor Savings Bank v. Vinson6 and Harris v. Forklift Systems, Inc.,7 that have been decided by the Supreme Court. Part II describes four recent sexual harassment cases. The cases this article addresses in addition to the Robinson8 case are Johnson v. County of Los Angeles Fire Department,9 Bowman v. Heller,10 and Cohen v. San Bernardino Valley College.11 Part III focuses on the First Amendment implications of these cases. Part IV traces the failings in current sexual harassment law to the courts’ reliance on the Equal Employment Opportunity Commission (“EEOC”) Guidelines12 and their derivatives,13 and examines a new standard advocated by Feminists for Free Expression (“FFE”).14 This Article endorses the development of a new definition of sexual harassment that critically examines the EEOC Guidelines in the light of First Amendment issues.

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1. Protected speech is now widely defined to include expressive actions. See generally Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that a regulation prohibiting school children from wearing armbands to exhibit their disapproval of Vietnam hostilities was an unconstitutional denial of students’ rights of expression of opinion); Texas v. Johnson, 491 U.S. 397 (1989) (holding that the act of burning the American flag during a protest rally was expressive conduct within the protection of the First Amendment).


5. The Robinson case is apparently the first reported decision to impose liability for sexual harassment based entirely on the pervasive presence of sexually oriented magazines, pin-up pictures—such as Playboy foldouts and tool-company calendars—and “sexually demeaning remarks and jokes” by male coworkers; the plaintiff complained of neither physical assaults nor sexual propositions. Browne, supra note 2, at 495. “The court also examined, albeit superficially, the argument that the First Amendment imposes limits on the kind of activity that can be the subject of sexual harassment claims.” Id. at 495 n.91. But see Amy Horton, Comment, Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII, 46 U. MIAMI L. REV. 403, 418 n.38 (1991) (“For perhaps the first time in a sexual harassment case, a court addresses First Amendment issues at length.”)


14. FFE is an organization started in 1992 by diverse feminist women who share a commitment both to gender equality and to preserving the individual’s right and responsibility to read, view, and produce expressive materials of her or his own choice, free from government interference “for our own good.” It is active in a variety of litigation, lobbying, and educational efforts to forestall censorship, predominantly including those issues which arise from antidiscrimination-law inspired workspeech regulations.
Amendment considerations, using the FFE standard as a starting point for discussion.

I. THE SUPREME COURT'S SEXUAL HARASSMENT STANDARD

A number of cases of sexual harassment are moving through the system. In some of them, sexual expression seems to be defined as being per se harassing.

What can we expect the Supreme Court to decide if any of these cases reach that august body? Despite the large number of lower court decisions, so far, the Court has only heard two cases dealing with sexual harassment, the aforementioned Meritor and Harris decisions.

A. Meritor Savings Bank v. Vinson

Mechelle Vinson was hired by Sidney Taylor, vice president of a bank and manager of one of its branch offices. She worked at that branch for four years, moving from teller-trainee to assistant branch manager before she was fired on November 1, 1978, for excessive use of sick leave. She then brought suit for sexual harassment against both Taylor and the bank, claiming that, as soon as her probationary period as a trainee was over, Taylor successfully made demands for sexual favors, to which she acquiesced in fear of losing her job. She also claimed that he fondled her in public, exposed himself to her, and forcibly raped her. Taylor denied all charges, and the District Court for the Middle District of Tennessee found that if Vinson and Taylor had a sexual relationship, it was entered into voluntarily and Vinson was, therefore, not a victim of harassment. Further, the court held that, since the bank had a policy against sexual harassment and there were no prior complaints lodged against Taylor, "the bank was without notice and cannot be held liable for the alleged actions of Taylor." The D.C. Circuit reversed and remanded, supporting its action with reference to the EEOC Guidelines on sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. The Guidelines prohibit "[h]arassment on the basis of sex" and state that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" constitute sexual harassment under any one of three conditions: when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," when employment decisions are made on the basis of "submission to or rejection of such conduct," or when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The first two conditions are generally referred to as "quid pro quo" sexual harassment. It is the third condition, the "hostile working environment," that has been increasingly hard for the courts to define. Despite Vinson's allegations, Meritor was considered to be a hostile environment case.

The Court of Appeals also held "that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." In a unanimous opinion written by Chief Justice Rehnquist, the Supreme Court affirmed the Court of Appeals decision. However, there was disagreement over the issue of employer liability. The Court of Appeals held that the employer was always liable, while the Supreme Court held that liability should be decided on a case-by-case basis. A concurring opinion by Justice Marshall, signed by three other justices, urged some limitation on employer liability, but also argued for the "same rules we apply in all other Title VII cases . . . sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense." Although this was decided as a "hostile environment" case, no speech issues surfaced in the discussion of the facts. This was not so in the next sexual harassment case to be heard by the Court.

16 Meritor, 477 U.S. at 59.
17 Id. at 60.
18 Id. at 64 (quoting Vinson v. Taylor, 23 Fair. Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980)).
19 Id.
B. *Harris v. Forklift Systems, Inc.*

Teresa Harris worked as the rental manager at an equipment rental company, Forklift Systems, Inc., from April 1985 to October 1987. Harris accused Forklift’s president, Charles Hardy, of sexual harassment. According to Harris, Hardy publicly made her the target of sexual innuendos, insulted her because of her gender, and asked her to perform humiliating tasks, such as picking up objects he threw down in front of her and getting coins out of his front pants pocket. Harris confronted Hardy in August 1987. Hardy claimed to be joking and apologized to keep her on the job. Some time later, Hardy asked Harris, in the presence of others, if she had made a particular deal with a customer by promising him sex. At that point, Harris quit her job.

Harris sued for sexual harassment, and the United States District Court for the Middle District of Tennessee found it to be a “close case,” but followed Sixth Circuit precedent in finding that only abuse strong enough to cause psychological damage could be said to create an “abusive environment.” Since Harris had not suffered “severe psychological injury,” she could not prevail even though Hardy’s comments “would offend the reasonable woman.” The Sixth Circuit Court of Appeals affirmed in a short, unpublished decision. The case was argued before the Supreme Court on October 13, 1993, and decided less than a month later, on November 9, 1993. The Court’s quick decision in *Harris* caused court watchers to speculate that the Court was sending the message that harassment is a serious issue. The opinion, written by Justice O’Connor, was again unanimous, with concurring opinions by Justices Scalia and Ginsberg.

The Court reaffirmed the standard of *Meritor* that Title VII is violated by discriminatory behavior that creates a “hostile or abusive” environment. The “reasonable woman” standard that surfaced in several cases, including *Robinson* was discarded for a “reasonable person” standard. One of the issues raised in *Meritor* was whether Congress intended an economic harm be present in order to sustain a charge of sexual discrimination, and, therefore, of sexual harassment. The *Meritor* court decided otherwise. *Harris* now has made it clear that severe psychological harm also need not be present, by saying that although “Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being. . . . the statute is not limited to such conduct.” O’Connor’s opinion explicitly stated that the relevant standard “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . . Title VII comes into play before the harassing conduct leads to a nervous breakdown.”

The Court also took a step toward a more exact definition of sexual harassment by listing circumstances that must be examined in order to find that a work environment is hostile or abusive. The decision says:

> whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work.

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51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
59 Harris, 114 S. Ct. at 370 (quoting Harris v. Forklift Sys., Inc., 61 Fair Empl. Prac. Cas. (BNA) at 245 (M.D. Tenn. 1991)).
60 Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992).
61 See, e.g., Barbara Presley Noble, *Little Discord on Har-
Helpful as this step is, it leaves the standard by which to differentiate protected speech from discriminatory harassment unexplained. Does an “offensive utterance” amount to discrimination, or is it to be distinguished from “physically threatening or humiliating” behavior because, unlike them, it is protected by the First Amendment?

One such standard was suggested in an amicus brief submitted in Harris by FFE.80 The FFE argues, in its brief, that both the “psychological harm” test of the lower court in Harris and the “offensiveness” test adopted by other courts81 were unduly subjective, as well as overbroad and vague. FFE proposed the following: “Title VII liability should be imposed only for a pattern or practice of speech or conduct targeting a specific employee or employees, which a reasonable person would experience as harassment, and which has demonstrably hindered the employee in his or her job performance.”82

Justice Scalia’s concurring opinion expresses concern about the lack of clarity both in the statute and in the idea of an “abusive” or “hostile” work environment.83 He applauds the listing of factors that “contribute to abusiveness,” and particularly calls attention to “whether the conduct unreasonably interferes with an employee’s work performance,” which Justice Scalia argues “would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation on whether the discriminatory conduct has interfered with an employee’s work performance.”

Further, the court adopted a “totality of the circumstances”84 analysis of a hostile environment because that behavior is prominent in society at large, the case conflicts with the established law in this Circuit.85 Instead, the court adopted a “reasonable woman” standard,86 holding that speech is unlawful if “a reasonable woman . . . would perceive that an abusive working environment has been created.”87

Neither of these decisions gives guidance as to how the Court will address the First Amendment conflicts surfacing in the cases under consideration in this article.

II. RECENT SEXUAL HARASSMENT CASES

A. Robinson v. Jacksonville Shipyards, Inc.

Lois Robinson was a welder employed at the Jacksonville Shipyards from 1977 to 1988, one of a small number of females working there as skilled craftworkers.88 Robinson brought suit for sexual harassment after years of battling to get explicitly sexual pictures of women taken down from the walls of offices and common areas, and to have workers reprimanded for lewd or “demeaning” remarks.89 Most of the evidence considered by the court was of a general atmosphere of raunchy pictures and remarks rather than of an intention to target Robinson specifically, although there was other evidence of incidents directed at her.90 Refusing to adopt the viewpoint of a previous case arising from Florida, Rabidue v. Osceola Refining Co.91 the Florida District Court in Robinson stated, “[t]o the extent that Rabidue holds that some forms of abusive, anti-female behavior must be tolerated in the work environment because that behavior is prominent in society at large, the case conflicts with the established law in this Circuit.”92 Instead, the court adopted a “reasonable woman” standard,93 holding that speech is unlawful if “a reasonable woman . . . would perceive that an abusive working environment has been created.”94 Further, the court adopted a “totality of the circumstances”95 analysis of a hostile environment, finding that the impact of multiple incidents may accumulate in such a way that “the environ-

80 See generally Andrews v. City of Phila., 895 F.2d 1469 (3rd Cir. 1990); Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)).
81 FFE Harris Brief, supra note 50, at 31.
82 Harris, 114 S. Ct. at 371 (Scalia, J., concurring).
83 Id.
84 Id. at 372 (Ginsberg, J., concurring).
85 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1493 (M.D. Fla. 1991). In 1986, the Shipyard employed 546 men in that category, but only six women. Id.
86 Id. at 1494.
87 Id. at 1494.
89 805 F.2d 611 (6th Cir. 1986), cert. denied, 461 U.S. 1041 (1987) (holding that the offensive conduct must occur with some frequency in order to be actionable).
90 Browne, supra note 2, at 494 n.82. “The court rejected the suggestion of Rabidue that sexually oriented pictures and comments standing alone cannot form the basis for Title VII liability, stating that excluding some forms of offensive conduct as a matter of law is not consistent with the factually oriented approach required by Title VII.” Id. at 495.
91 See supra notes 11, 12 and accompanying text.
93 Id. at 1523.
ment viewed as a whole may satisfy the legal definition of an abusive working environment although no single episode crosses the Title VII threshold.64

Because of this analysis, the court decided that, despite First Amendment arguments to the contrary, the employer was liable for sexual harassment by repeatedly refusing to take down sexually explicit pictures posted in common work areas.65 The court also went so far as to find that, since the speech at issue was “discriminatory conduct in the form of a hostile work environment,”66 it constituted “[p]otentially expressive activities that produce special harms distinct from their communicative impact,” and, therefore, “the speech at issue is indistinguishable from the speech that comprises a crime such as threats of violence or blackmail . . . .”67

Finally, the Robinson court required that not only must sexual pictures be banned henceforth from Jacksonville Shipyards, but employees must not be in possession of “sexually suggestive” reading material at work.68 Additionally, the court defined the “sexual pictures” broadly, as depicting a person (male or female) “who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.”69

B. Johnson v. County of Los Angeles Fire Department

In the Johnson v. County of Los Angeles Fire Department case, veteran firefighter Captain Steven W. Johnson challenged part of the new sexual harassment policy of the Los Angeles County Fire Department.70 The shifts that firefighters work often require them to spend several days and nights in the firehouse, living in dormitories and being on call twenty-four hours a day.71 Captain Johnson had been a firefighter for twenty-seven years, and sometimes worked as many as three twenty-four hour shifts in succession.72 Because it was his habit to read Playboy magazine while on call, Captain Johnson sued the Los Angeles County Fire Department for violating his First Amendment rights when the new sexual harassment policy went into effect.73

In a narrow decision, Federal District Court Judge Stephen Wilson defended Johnson’s right to “quiet possession, reading and sharing of Playboy magazine.”74 Judge Wilson added that “[t]he policy poses a particularly severe restriction on plaintiff’s First Amendment rights.”75

This decision caused public friction in the ranks of the National Organization for Women (“NOW”). The president of the Los Angeles chapter of NOW immediately criticized the decision by saying, “[t]his judge has ruled that men have more rights in the workplace than women . . . This is astounding and shocking.”76 In contrast, a spokeswoman for the San Fernando Valley-Northeast Los Angeles chapter called it “absolutely consistent with the state NOW policy,” and was backed by NOW’s California state coordinator.77

C. Bowman v. Heller

The Bowman v. Heller78 case represents one of the more controversial sexual harassment decisions.

64 Id. at 1524.
65 Id. at 1531.
66 Id. at 1535.
67 Id.
68 Id. at 1542. Usually, “at work” means the period of time when employees are being paid to perform productive tasks, not including lunch breaks. In re Peyton Packing Company, Inc. and Amalgamated Meat Cutters and Butcher Workmen of N.A., A.F. of L., Local #606, Case No. C-2466 - Decided May 18, 1943, Decision and Order, 49 N.L.R.B. 828, 843 (1943)
69 Id.
70 The specific provisions were as follows:
The following types of sexual material are prohibited in all work locations, including dormitories, rest rooms and lockers . . . sexually-oriented magazines, particularly those containing nude pictures, such as Playboy, Penthouse and Playgirl . . . .
71 Levendosky, supra note 70.
72 Johnson, 865 F. Supp. at 1434; see also Levendosky, supra note 70.
73 Johnson, 865 F. Supp. at 1434.
74 Id. The court also took into account testimony about Playboy’s content. Levendosky, supra note 70.
75 Johnson, 865 F. Supp. at 1438; see also Federal Judge Overturns Playboy Ban at Firehouses, ORLANDO SENTINEL, June 10, 1994, at A8.
77 Michael Fleeman, Playboy Ruling Doesn’t Faze All NOW Leaders Judge Says Firefighter Can Read It, and Some Feminists Say ‘So What?’ SACRAMENTO Bee, June 11, 1994, at B5.
78 651 N.E.2d 369 (Mass. 1995).
Bowman addresses a head-on collision between the protection of political speech and a targeted sexual affront in the workplace. Sylvia Smith Bowman, a social worker supervisor and union activist in the Massachusetts Department of Public Welfare, was running for president of Local 509 of the Service Employees International Union in the fall of 1987. David Heller, twenty-six years younger than Bowman, was a regular staff member in the same office, and was active in the same election campaign. Heller was a staunch supporter of Bowman’s opponent, incumbent union president Fred Trusten.

Heller took Bowman’s photographs and mailed them to workers in her office. He then made “five or six” photocopies of the collages and gave them to five of the workers in the office. Heller and a co-worker testified that Heller asked the recipients not to distribute them or to show them to Bowman, but one of the five gave copies to Bowman’s campaign manager, who then told Bowman about the photocopies.

Bowman delayed looking at the photocopies until after the election was over. Bowman then complained to her supervisor and filed a complaint with the Department of Public Welfare, which suspended Heller for five days without pay for “sexually harassing” Bowman. She also distributed flyers about the incident at a NOW public event, and in January 1988, consulted a therapist. In February 1988, a complaint was filed with the Union Trial Board, which found that Heller had “committed conduct unbecoming a union member,” and, as a result, Heller issued a public, written apology to the union and to Bowman in February 1989.

Finally, on June 6, 1990, Bowman filed a lawsuit against not only Heller but the Commissioner of the Department of Public Welfare and some of its supervisory and management personnel. A settlement agreement was reached with all the defendants except Heller, and the cases against them were dismissed on December 18, 1991.

Bowman originally charged Heller with intentional and reckless infliction of emotional distress as well as defamation, for having violated the Massachusetts Civil Rights Act (“MCRA”) by depriving her of her right “to run for the presidency of her union local.” In 1992, after consulting a new therapist who diagnosed her as suffering from Post-Traumatic Stress Disorder, Bowman moved to amend her original complaint, alleging that Heller violated another provision of the MCRA by “depriving her of her right to be free from sexual harassment.” The motion was granted on July 7, 1992, and a year later, on July 9, 1993, Judge Flannery of the Suffolk County Superior Court awarded her damages, holding that Heller sexually harassed Bowman, attempted to deprive her of her right to run for office, and tortiously caused her emotional distress.

In order to show that a violation of the MCRA has occurred, it is necessary to prove “threat, intimidation, or coercion.” On June 13, 1995, the Supreme Judicial Court of Massachusetts affirmed the “judgment based on the tort claim of intentional or reckless infliction of emotional distress,” but vacated the judgment “to the extent that it is based on any violation of the MCRA.” The trial judge “credited the defendant’s claim that . . . it was not his intent to sway votes or to induce people not to vote for [the plaintiff].” This enabled the judge to find that Heller’s intent was the infliction of emotional distress, and so to rule for Bowman despite finding that she was a limited-purpose public figure because of her participation in the union election. Presumably, had the union election been part of the issue, Bowman, as a public figure, would have lost her case.
The Supreme Judicial Court's decision disagreed with this part of the trial judge's ruling, and held that she was neither a public figure nor a limited public figure. Judge Nolan, in his dissent, which was joined by Judge Lynch, argued that "the plaintiff became a limited public figure when she voluntarily thrust herself into the election campaign," and that "the caricatures at issue addressed the plaintiff's campaign for the presidency, despite their horrid content." Therefore, said the dissent, the actual malice standard should apply, and since Bowman hadn't shown that the caricatures contained a false statement of fact, she should not prevail. The Supreme Judicial Court, which transferred the case from the appellate court on its own motion, did not perpetuate the "reasonable woman" standard in its decision.

D. Cohen v. San Bernardino Valley College

In Cohen v. San Bernardino Valley College, the issues are slightly different because this is a case that deals with sexual harassment in an educational environment rather than in the work place. Dean Cohen is a tenured professor who has been teaching English and Film Studies at San Bernardino Valley College ("SBVC") for twenty-seven years. He assigns and discusses controversial subjects. In February of 1992, in a remedial English class, Cohen began a classroom discussion of pornography. He told his students that he has written for the magazines Hustler and Playboy, and he asked his students to write essays that defined pornography. One of his students, Anita Murillo, stopped attending the class after Cohen refused to give her an alternative assignment to the paper on pornography, and failed the course. She subsequently complained of sexual harassment to the head of the English Department, and ultimately filed a formal grievance against Cohen in May of 1993.

After a series of hearings within the college system, rulings against Cohen, and appeals, the San Bernardino Community College Board of Trustees found that Cohen sexually harassed Murillo and issued a four-part order requiring Cohen to 1) provide students and the department chair with an advance syllabus that dealt not only with the content of his classes but with his teaching style, purpose, and method; 2) attend a sexual harassment seminar; 3) be formally evaluated according to the collective bargaining agreement; and 4) "become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn."

Cohen filed suit on February 18, 1994, charging that this order violated his free speech rights. On April 14, 1995, a district court judge disagreed. The court applied the standard set forth in Connick v. Myers, that government agencies do not have "wide latitude" to regulate employee speech that is "on a matter of public concern." Such speech may only be regulated if balanced against "the interest of the State as an employer in promoting the efficiency of the public services it performed through its employees." The court reasoned that, although Cohen's discussion of pornography was "on matters of public concern," the college's interest in educating and in preventing the creation of a "hostile, sexually discriminatory environment" outweighed Cohen's First Amendment interests, as the discipline required was "narrowly tailored" and the college's sexual harassment policy was neither vague nor overbroad.

The SBVC sexual harassment policy in question forbids "unwelcome sexual advances, requests for

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101 Id. at 375.
102 Id. at 376 (Nolan J., dissenting).
103 Id.
104 See Hustler Magazine v. Falwell, 485 U.S. 46 (1988). In Falwell, the Court held that recovery for a public figure required showing that a publication contains a false statement of fact which was made with "actual malice" - either knowing that the statement was false or with reckless disregard as to whether or not it was false. Id. "In other words, the Court required public officials or public figures who claim intentional infliction of emotional distress to satisfy the same heavy burden of proof it imposes upon such individuals who bring defamation claims." Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 516-17 (1990).
105 Bowman, 651 N.E.2d at 380.
107 Cannibalism is one topic that is cited in the decision. Id.
108 Id.
109 Id.
110 Id.
111 Id. at 1411.
112 Id.
113 Id. at 1407.
116 Id.
117 Id. at 1415 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).
118 Id.
III. THE FIRST AMENDMENT IMPLICATIONS

The First Amendment implications of these cases warrant a closer look.

The district court judge summarized his understanding of the issues in Robinson's complaint as follows: "Her claim centers around the presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women."

This characterization raises an important First Amendment issue. Can workers in an "old boys" environment dislike women, look on them as sex objects, even not want to work with them? Or is the expression of such attitudes and ideas in itself to be considered harassing? Current First Amendment law in other areas holds that "the First Amendment prohibits regulation of racist and sexist speech on the basis of the viewpoint expressed." Since this language is derived from the EEOC Guidelines that have become the standard reference for defining sexual harassment, perhaps it is not surprising that the court did not criticize this definition.

However, the judge's summary omits important facts. It is not necessary to conclude that what was at issue in Robinson was only a general atmosphere of pictures and remarks. The district court's Findings of Fact include a number of specific incidents that indicate harassment targeted at her. A male co-worker handed her a "pornographic magazine." Another male co-worker waved around a picture of a nude woman with long blond hair holding a whip in "an enclosed area where Robinson and approximately six men were working. Robinson testified she felt particularly targeted by this action because she has long blonde hair and works with a welding tool known as a whip." Men left a picture of a nude woman on the tool box where she returned her tools, and laughed at her when she saw it and "appeared upset." She quoted a number of sexual comments made in her presence, many directed at her. Sexual graffiti directed at her was written on the wall in her work area and where she hung her jacket.

Another woman, Gail Banks, testified to a number of specifically harassing incidents she had experienced, including "having a shipfitter leaderman... hold a chipping hammer handle, which was whittled to resemble a penis, near her face while he told her to open her mouth." Banks also testified about two occasions when she saw men posting pictures for Robinson to encounter. This does not exhaust the list of incidents that indicate repeated harassment directed at a specific woman, but the judge instead chose to concentrate his decision and his remarks on the general atmosphere at the shipyard and on testimony from an expert witness as to the ways in which stereotyping women (for example, as sex objects) discriminates against them. But reading the factual information in the decision leaves this reader with the conclusion that, at least after she began complaining about the posting of sexual pictures, Lois Robinson was sexually harassed by her co-workers, through remarks and graffiti aimed at her, and being shown sexually explicit material and having such material intentionally posted where she could not avoid seeing it.

Also, a case might be made for the collusion of management in some of this harassment. Management did not just refuse to interfere with the posting of sexual images; it sanctioned the distribution of calendars featuring naked breasts and buttocks and sometimes female genitalia. These calendars "have been delivered for years to JSI by vendors with whom it does business. JSI officials then distribute the advertising calendars among JSI employees with

119 Id. at 1421.
120 Id.
121 See 29 C.F.R. § 1604.11(a) (1995).
122 Robinson, 760 F. Supp. at 1490.
125 Id. at 1495.
126 Id. at 1496.
127 Id. at 1497.
128 "[Robinson] recalled one occasion on which a welder told her he wished her shirt would blow over her head so he could look." Id. at 1498.
129 Id. at 1499.
130 Id. at 1500.
131 Id. at 1501.
132 The pictures ranged in various degrees of explicitness from swimsuited models to depictions of group sex. Id. at 1495.
133 See id. at 1493; see also Dennis Cauchon, Harassment, Free Speech Collide in Florida: National and State ACLU Offices Square Off, USA TODAY, Nov. 20, 1991, at 9A.
the full knowledge and approval of JSI management. JSI employees are free to post these advertising calendars in the workplace.\footnote{Robinson, 760 F. Supp. at 1493; see also Cauchon, supra note 133.}

The judge chose the wrong evidence on which to base his decision, and the remedial measures that he mandated to correct the atmosphere he deplored were consequently impermissibly overbroad.

Much was made in the popular press of the fact that American Civil Liberties Union ("ACLU") activists in Florida and at national headquarters in New York had some disagreements while jointly drafting and filing an amicus brief in the Robinson case.\footnote{Brief for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc. and American Civil Liberties Union, Inc., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) [hereinafter ACLU Brief].} In a 1992 law review article, the national president of the ACLU, Nadine Strossen, discussed the fact that this brief did not support the entire argument of either the plaintiff or the defendant, but found both free speech issues and equality issues compelling.\footnote{Strossen, supra note 58, at 772 n.56.} The Strossen article, for example, called attention to the fact that the shipyard "has itself historically banned all public displays of expressive activity except sexual materials," and suggested that the court might "require the employer, if it permits the posting of sexual materials, also to permit the posting of other materials — materials critical of such sexual expression, as well as other political, religious or social messages, which are currently banned in the Jacksonville Shipyards workplace."\footnote{Id. at 772-73.}

The ACLU brief argued that the alleged conduct "consisted entirely of obnoxious and offensive speech or other expressive activity"\footnote{ACLU Brief, supra note 135 at 5.} and that the court erred in finding such activity to be harassing merely because it was found to be offensive, without inquiring into what comments were specifically directed at Robinson, and "whether Robinson suffered definable consequences that demonstrably hindered or completely prevented her from continuing to function as an employee."\footnote{Strossen, supra note 58, at 772 n.56.} The brief also pointed out that "three of the district court's remedial orders were overbroad and therefore violative of First Amendment protections."\footnote{Id. at 773.}

An issue raised in both the Johnson and Cohen cases is the speech of public employees. The Connick standard discussed previously was applied in both cases. Browne raises the question of whether NLRB \textit{v. Gissel Packing Co.} has led courts erroneously to assume that there is "a general government right to regulate speech in the workplace."\footnote{Browne, supra note 2, at 514.} In fact, since the First Amendment only curtails state action, the question of the right of private employers to limit the behavior (including expressive behavior) of employees on the job rarely comes up in the courts except obliquely, as a duty that employers have to prevent discrimination, including harassment.\footnote{See, e.g., Burger King Corp. \textit{v. NLRB}, 725 F.2d 1053 (1984) (holding that a fast food chain could lawfully ban the wearing of union buttons by employees who had regular contact with the public to maintain a clean, professional image).} However, the right of the government to limit the speech of its own employees is circumscribed by the First Amendment while that of a private employer is not. But any speech rights claimed by government employees must be balanced against the interest it has in performing public services efficiently. As the court in \textit{Cohen} puts it, "[t]he government as employer has far broader powers to restrict its employees' speech than does the government as sovereign."\footnote{Id. at 1415.}

Nevertheless, if the speech in question is "a matter of public concern," then the government "must show that the speech 'substantially interfered' with government duties," in order to prevail.\footnote{Connick \textit{v. Myers}, 461 U.S. 138, 149-50 (1983).} By this test, \textit{Playboy} magazine was held in \textit{Johnson} to discuss matters of public concern, and so was "Cohen's curricular focus on sexual topics such as pornography."\footnote{Id. at 1415 (quoting Connick \textit{v. Myers}, 461 U.S. 138, 149-50 (1983)).} But some matters of public concern are more equal than others. Johnson's "quiet possession" of \textit{Playboy} was held to be his right, while Cohen's choice of topics and his "teaching style" was held to disrupt the educational process. Based on "testimony from the complaining student and from other students in the class, Cohen's sexually sugges-

\begin{thebibliography}{9}
\item Robinson, 760 F. Supp. at 1493; see also Cauchon, supra note 133.
\item Brief for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc. and American Civil Liberties Union, Inc., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) [hereinafter ACLU Brief].
\item Strossen, supra note 58, at 772 n.56.
\item Id.
\item ACLU Brief, supra note 135 at 5.
\item Strossen, supra note 58, at 772-73.
\item Id. at 773. The ACLU's brief continues: First, the Order bans possession, reading and privately displaying "sexually suggestive" materials. Second, it prohibits jokes and other comments "in the presence" of any employee who objects. Third, it bans the public display of "sexually suggestive" materials without regard to whether they are directed at any employee. These provisions amount to a prior restraint on otherwise lawful speech, and are unconstitutionally overbroad.
\item ACLU Brief, supra note 135, at 6.
\item 395 U.S. 575 (1969).
\item Browne, supra note 2, at 514.
\item See, e.g., Burger King Corp. \textit{v. NLRB}, 725 F.2d 1053 (1984) (holding that a fast food chain could lawfully ban the wearing of union buttons by employees who had regular contact with the public to maintain a clean, professional image).
\item Id. at 1415 (quoting Connick \textit{v. Myers}, 461 U.S. 138, 149-50 (1983)).
\item Id. at 1415-16.
\end{thebibliography}
tive remarks, use of vulgarities and obscenities, and the topics for discussion prevented them from learning."\(^\text{147}\)

The Cohen case raises a lot of questions, perhaps because it was a bench trial based on a stipulated record and written briefs. There are no examples given in the record of the aforementioned "sexually suggestive remarks." Furthermore, there are no details regarding the vulgarities and obscenities used in the case. Failure to detail this information is questionable, considering the fact that the court partially based its decision on these remarks and singled them out as a separate category of speech not of public concern. Did the teacher swear at his students, read aloud literature that contained vulgar words, assign such material? Was it germane to the subject matter under discussion, or specifically directed at students? And if so directed, was there an intent to harass or discriminate?

The conclusion of the decision leans heavily on the issue of teaching style: Cohen is to detail this style in his syllabus and "submit to a formal evaluation of his teaching methods," because the College "has shown that its educational mission has been disrupted for some students by Cohen's teaching style."\(^\text{148}\) Although it is not necessarily irrelevant for a college to wish to evaluate teaching style, surely the time to do this is when annual evaluations of nontenured faculty are reported; certainly evaluating teaching style when a tenure decision is made would be belated. But after twenty years? Why is the issue of tenure never raised, even in an amicus brief submitted by the American Association of University Professors? Similarly, in the court's discussion of the "Academic Freedom Doctrine," most of the cases cited have to do with high school teachers.\(^\text{149}\) An exception to this is Lovelace v. Southeastern Massachusetts University.\(^\text{150}\) In the discussion, the court refers twice to the fact that Lovelace was nontenured, ending with the quotation, "[t]he First Amendment does not require that each nontenured professor be made a sovereign unto himself."\(^\text{151}\) Is the word "nontenured" important here?

Why was an issue that was not raised by the student complaining of sexual harassment not only included in the stipulated record but featured in the court's ruling? "Cohen discussed subjects such as . . . consensual sex with children."\(^\text{152}\) A footnote then tells the reader that this was not discussed in English 015, the only class in which the issue of sexual harassment was raised.\(^\text{153}\) But later, two written evaluations by his colleagues are quoted by the court, both of which discuss his assigning a paper on consensual sex with children.\(^\text{154}\)

If the issue on which Cohen was disciplined was sexual harassment, the stipulated facts are murky. There is one fleeting reference to a personal remark by Cohen to his complainant: "Professor Cohen then told her that if she met him in a bar he would help her get a better grade."\(^\text{155}\) That's all. Otherwise, his choice of subject matter, which the court says is a topic of public concern, his "vulgarities and obscenities" and his "style" seem to have led to his disciplining. These questions and the facts as presented make it seem as if "sexual harassment" may have been used as a catch-all concept to discipline an unusual tenured teacher whose methods are not like everyone else's.

In Bowman, due to the wording of the MCRA, sexual harassment is no longer the issue. In her suit, Bowman claimed intentional and reckless infliction of emotional distress. She also made two claims based on any violation of the MCRA.\(^\text{156}\) The trial judge ruled for Bowman on all counts and awarded her $35,000 in damages, an amount the trial judge said any one of the claims deserved.\(^\text{157}\) However, the MCRA states that, in order to bring suit, interference with one of the rights defined in the Act must be by "threat, intimidation, or coercion."\(^\text{158}\) Since Supreme Judicial Court Judge Abrams did not consider distribution of two photocopies fit that definition, he, therefore, vacated the trial court judgment "to the extent it is based on any violation of the MCRA."\(^\text{159}\) So Bowman is left with her damages, but now the damages are only "based on the tort claim of intentional or reckless infliction of emotional distress . . ."\(^\text{160}\)

\(^{147}\) Id. at 1418.

\(^{148}\) Id. at 1421.


\(^{150}\) 793 F.2d 419 (lst Cir. 1986).

\(^{151}\) Cohen, 883 F. Supp. at 1413-14 (quoting Lovelace, 793 F.2d at 424).

\(^{152}\) Id. at 1410.

\(^{153}\) Id. at 1410 n.2.

\(^{154}\) Id. at 1418-19.

\(^{155}\) Id. at 1410. This invitation was made after Murillo was refused an alternate assignment. Id.

\(^{156}\) The claim was that Heller had violated Bowman's right to run for office and her right to be free of sexual harassment. Bowman v. Heller, 651 N.E.2d 369 (Mass. 1995).

\(^{157}\) Id. at 371-72.

\(^{158}\) MASS. GEN. LAWS ANN. ch. 12, § 11H (West 1995).

\(^{159}\) Bowman, 651 N.E.2d at 372.

\(^{160}\) Id.
Bowman turns on whether the caricatures constitute speech connected to an issue of public controversy. That is, was the union election a public issue, and were the caricatures meant to influence it? Bowman's case was based in part on an alleged controversy. That is, was the union election a public issue, a public debate on free speech connected to an issue of public controversy? 161 Judge Nolan's dissent holds that Judge Nolan's dissent should have been persuasive.

In these three cases, and in the sexual harassment policy that was at issue in Johnson, we see a lack of willingness to confront sexual harassment issues with the viewpoint and content limitations on speech restrictions that are so well understood by courts ruling in other policy areas.

IV. A NEW DEFINITION OF SEXUAL HARASSMENT

The reasoning of the judge in Robinson, of the authors of the sexual harassment policy in Johnson, and of the complainant in Cohen all have something in common—an assumption that explicitly sexual words and images are in themselves harassing to women. This can be traced back to the sexual harassment legal definitions originating in the EEOC 1980 Guidelines. 168 This wording is the model for the MCRA chapter 151B invoked by Bowman, and for the sexual harassment policy adopted by SBVC that was described in Cohen. The Supreme Court adopted the Guidelines in its Meritor decision as its own guide, stating that they, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 170

The wording of these Guidelines has been the source of so much misunderstanding and of so many lower court decisions that contradict the spirit of the First Amendment that it is to be hoped that the next Supreme Court to consider a sexual harassment case will critically examine it and repudiate some implications that have been attributed to it. 171 First, the

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161 Id.
162 Id.
163 Id. at 377. Judge Nolan's dissent should have been persuasive. 170
164 Id. at 13 n.12.
165 627 F.2d 1287 (D.C. Cir. 1988).
166 Id. at 1287 n.1.
167 "[A]n election is the absolute paradigm of a public controversy... this election would have had an effect on each of the 8700 members of Local 509." Bowman v. Heller, 651 N.E.2d 369, 377 (Mass. 1995)(Nolan, J., dissenting).
168 If a union election is a public controversy, a candidate for president is surely central.
169 Judge Abrams' opinion reasoned that "we need not decide if the defendant's cartoons were germane to the plaintiff's participation in the union election." Id. at 375. Judge Nolan raises a number of questions about the vulnerability of professorial speech, and applies a sexual harassment code to punish unspecified "suggestive remarks," vulgarity and obscenity, and "teaching style." 170 And in Bowman, the reasoning of Judge Nolan's dissent should have been persuasive.

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168 If a union election is a public controversy, a candidate for president is surely central.
169 Judge Abrams' opinion reasoned that "we need not decide if the defendant's cartoons were germane to the plaintiff's participation in the union election." Id. at 375. Judge Nolan agrees. "After reviewing the entire record... I am compelled to conclude that the speech in this case addressed... the plaintiff's candidacy for the presidency of Local 509." Id. at 378 (Nolan, J., dissenting).
wording postulates that interfering with an individual’s job performance is not a necessary factor to sustain a charge of harassment — the word “or” makes it an alternative to creating “an intimidating, hostile, or offensive working environment.” A working environment should not be defined as harassing just because it is offensive, the law says that to be harassing, it must be discriminatory. “Verbal conduct of a sexual nature” not directed at anyone in particular may be offensive, but it is not necessarily harassing.

Also, the term “sexual” itself is ambiguous. Does it refer to gender, or to explicit sexuality? In fact, it seems to be either or both. Sexual harassment should be understood to mean harassment because of one’s sex, not exclusively harassment by sex. As stated in the less ambiguous first sentence of the Guidelines, “[h]arassment on the basis of sex is a violation of Section 703 of Title VII.” In deciding Vinson, the Court drew on a line of cases forbidding harassment based on race and religion. The standards for sexual harassment cases should continue to be essentially similar to those for other forms of harassment.

The definition of harassment contains two crucial elements. First, all harassment involves repeated conduct. Second, harassing conduct always has a specific target. The 1986 edition of Webster’s Third New International Dictionary details that “harass” is derived from a medieval French word meaning “to set a dog on,” and gives three sets of synonyms for the word: “1. b: to worry and impede by repeated attacks . . . 2. a: exhaust, fatigue . . . b: . . . annoy continually or chronically.”

Look again at FFE’s suggested standard in the light of this dictionary definition:

Title VII liability should be imposed only for a pattern or practice of speech or conduct targeting a specific employee or employees which a reasonable person would experience as harassment, and which has demonstrably hindered the employee in his or her job performance.

This standard was not only submitted to the Supreme Court in the Harris case, but with slightly different wording was in FFE’s amicus briefs in Johnson and Bowman as well. It is heartening that the concurring opinions in Harris both stressed that interference with an employee’s work performance is crucial in determining harassment, just as it is in the FFE standard for liability.

Two other points that FFE is stressing in its briefs are worth mentioning here. The first is that the thicket of past labor laws intending to protect women, known as “protective labor legislation,” are now generally understood not to have been in women’s interests. According to the FFE Johnson brief,

[Until quite recently, the law commonly provided women workers special “protections” against exploitation, most of which had negative effects on women’s employment opportunities . . . . Contemporary scholars have concluded that labor laws supposedly protecting women resulted in a loss for women in gender-integrated jobs and probably depressed wages for women even in gender-segregated jobs. Although the protectionist premise of these measures and the decisions upholding them is now discredited, the underlying assumptions have been resurrected under a new guise: protection from “sexual harassment.”]

In addressing decisions that restrict expressive rights in an “apparently growing emphasis on cleansing the workplace of all sexual expression,” FFE indicates a second way in which current decisions may be antithetical to women’s interests:

Undoubtedly, this over-regulation also generates hostility on the part of male workers who conclude that women’s entry into the workplace has occasioned this diminution of their personal freedoms. For these reasons, the anti-sexual assumptions increasingly embedded in hostile work environment cases are not only offensively paternalistic but also probably as counterproductive to the pursuit of equality as they are destructive of free speech rights.

This leads us to the question raised by the facts of the Robinson case. Can we realistically expect that women can enter non-traditional occupations without ever being viewed with skepticism, or even hostility? And do male workers have any right to express such negative views?

When women enter non-traditional fields in which they are a very small minority, they are often faced with co-workers who believe that women do not belong in what has been a traditionally male field.

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See generally id.
Id.
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1031 (3rd ed. 1986).
FFE Harris Brief, supra note 50, at 31.
Heller Appellant’s Brief, supra note 82.
FFE Johnson Brief, supra at 178.
FFE Harris Brief, supra note 50, at 21.
Id.
When male workers torment specific women in order to drive them from the workplace, that behavior, whether verbal or not, is prohibited. But what about the underlying beliefs?

Browne takes the view that, even though offensive, this expression cannot be prohibited.\textsuperscript{164} The justification for prohibiting it is counter to the spirit of the First Amendment. That justification, often explicit, is an assumption that if the law makes it punishable to express a certain opinion, the people expressing it will come to think that the opinion itself is wrong, and they will change their minds. The experience that dictatorships have had in trying to suppress religious and political expression indicates that this assumption is not true. But the assumption is still widely held. And it has a corollary that is, if anything, even more dangerous.

It is but a small step from requiring a person to refrain from expressing beliefs in the hope that he will cease to hold them to requiring a person to express beliefs in the hope that he will begin to hold them. If the state may justify a prohibition on a person's saying "blacks are inferior" by pointing to the effect of the prohibition on a person's beliefs, the state should have equivalent power to require that a person affirm a belief in racial equality on the ground that repeated affirmation will cause the person to come to believe it, and, once having come to believe it, to conform his actions to his newly acquired beliefs. Thus, the state could require as a condition of holding public employment — or attending public school — that an applicant sign an "equality oath" affirming a belief in the equality of the races and sexes.\textsuperscript{165}

In fact, a school district that attempted to enforce a milder rule was stopped by the Supreme Court even though the country was at war at the time and the rule only required a salute to the flag. During World War II, the West Virginia State Board of Education required that all school children start the day by saluting on pain of expulsion if they stood silent. Jehovah's Witnesses felt that such a salute violated the biblical ban on worshiping a graven image and challenged the requirement in the name of the Barnette children who had been expelled. The Supreme Court held that this compulsory flag salute was a violation of the First Amendment.\textsuperscript{166} Justice Jackson wrote in his majority opinion: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\textsuperscript{167}

These words should be remembered by officials trying to decide what opinions about women may or may not be expressed.

V. CONCLUSION

Browne also writes,

Had courts squarely faced the first amendment issue in hostile-environment cases, they could not have employed the EEOC Guidelines as they did without creating a new exception to the first amendment. The standard for hostile-environment harassment cases is strongly viewpoint-based and can be upheld only by a showing of a government interest of the highest order. No currently recognized first amendment doctrine can explain the analysis in these cases.\textsuperscript{168}

In a seemingly contrary opinion, Amy Horton holds that "[a] decision in the Robinson appeal that workplace expression in violation of Title VII nevertheless enjoys First Amendment protection would have significant — and detrimental — implications for the future of sexual harassment law, and for women in male-dominated workplaces."\textsuperscript{169} But this is not a complete analysis of how that case might be decided. The problem with the Robinson decision — apart from the fact that the imposed remedies are overbroad - is that the judge did not separate the issue of protected expression that might be offensive from the issue of targeted harassment when he decided that the totality of speech created such a harassing atmosphere that it had no First Amendment protection. He decided on the basis of that overall workplace atmosphere, rather than by examining the specific harassing incidents.

The courts should continue to develop a new and specific definition of sexual harassment as well as a standard for liability that critically examines the EEOC Guidelines with a willingness to abandon or clarify specific wording. The FFE suggested standard, together with the Supreme Court's emphasis in Harris on both "interference with an employee's work performance"\textsuperscript{170} and the frequency and severity of discriminatory behavior, have already started such a discussion.

The discussion must continue. The cases examined here show a willingness on the part of vari-

\textsuperscript{164} Browne, supra note 2, at 483.
\textsuperscript{165} Id. at 549-50.
\textsuperscript{167} Id. at 642.
\textsuperscript{168} Browne, supra note 2, at 512-13.
\textsuperscript{169} Horton, supra note 5, at 452.
ous authorities to solve potential sexual harassment problems by "cleansing the workplace of all sexual expression." Private employers, university administrators, government agencies, even unions, stand to suffer legally if they allow harassment to exist — they have no parallel reason to be sensitive to First Amendment rights. We must look to the courts to balance the issues.

Unfortunately, they do not always live up to this requirement. The task before those interested both in the advancement of women and in civil liberties is to separate out real harassment from nontargeted expression that may be offensive to some. As FFE's Johnson brief states, "it is ironic that just as women are finally making inroads into such male-exclusive venues as handling a skyscraper construction crane, a hostile corporate takeover attempt, and an Air Force fighter plane, we are being told we cannot handle dirty pictures, and certainly that we would never enjoy them."

191 FFE Harris Brief, supra note 50, at 21.

192 FFE Johnson Brief, supra note 178, at 16.