

ACTIONS AS WORDS, WORDS AS ACTIONS: SEXUAL HARASSMENT LAW, THE FIRST AMENDMENT AND VERBAL ACTS

JOHN F. WIRENIUS*

I. INTRODUCTION

For nearly two decades, a debate has smoldered over the perceived tension between the law of sexual harassment and the First Amendment's guarantee of freedom of speech. As the protection against sexual harassment in the workplace spread beyond overt discrimination in discrete employment decisions and *quid pro quo* sexual harassment to include the less readily quantified "hostile work environment," free speech advocates became less sanguine about the compatibility between the protections against workplace discrimination and the First Amendment, especially its proscription of viewpoint discrimination.

This previously almost purely academic controversy is likely to take on practical and doctrinal significance with the retirement of Justice Sandra Day O'Connor, and the recent appointment of Justice Samuel Alito to the Supreme Court. Justice Alito authored, as a federal appeals court judge, an opinion striking as unconstitutionally overbroad a college anti-discrimination policy that purported to bar only speech proscribed under federal and anti-discrimination laws; he wrote that "we have found no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection," and referred to "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."¹ Plainly, Justice Alito is not one to flinch from an analysis of hostile work environment doctrine in the light of the First Amendment—an analysis that the Court has avoided to date. How the doctrine will fare in such an examination is unclear.

Beginning with the Supreme Court's ratification of the hostile work environment doctrine as consistent with the statutory mandate of the *Civil Rights Act of 1964* in *Meritor Savings Bank, FSB v. Vinson*,² a cottage industry of scholarly comment sprang into being. Since then, advocates of gender

* J.D. Columbia Univ. 1990; B.A. Fordham 1987. Deputy General Counsel, NYC Office of Collective Bargaining. The Author would like to express his thanks to the Hon. Jed S. Rakoff, for productive discussions on the topic of the First Amendment, and to acknowledge valuable feedback received from Mitchell Rubinstein and Catherine Isobe on a previous draft. Finally, the Author notes that any errors are his own, as are the views expressed in this Article, and neither should be attributable to those colleagues or to the Office of Collective Bargaining.

1. *Saxe v. St. College Area Sch. Dist.*, 240 F.3d 200, 209-10 (3d Cir. 2001).

2. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986). *Meritor* involved a sexual harassment claim under Title VII of the *Civil Rights Act of 1964* (42 U.S.C. § 2000-e); however, hostile work environment claims or hostile learning environment claims may also be brought under other sections of the *Civil Rights Act*, such as Title IX (20 U.S.C. § 1681), barring discrimination in education, or under 42 U.S.C. § 1983, on the theory that a state actor has intentionally deprived an individual of federal statutory or constitutional rights. In every context, the definition of hostile work/learning environment is the same. See *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (Title IX); *Hayut v. SUNY*, 352 F.3d 733, 744-45, 750 (2d Cir. 2003) (§ 1983 and Title IX; citing cases).

While many of these cases involve sexual harassment, hostile work environment claims may be raised by members of any protected class. See e.g. *Meritor*, 477 U.S. at 65-66 (noting that early regulations and lower court decisions applying hostile work environment theory of recovery involved claims of racial or national-origin discrimination, and that early regulations applying the concept to sexual harassment "appropriately drew from, and were fully consistent with, the existing case law"); *Torres v. Pisano*, 116 F.3d 625, 631-32 (2d Cir. 1997), cert. denied, 522 U.S. 997 (1997) (race and national origin claims involving hostile work environment claims judged by same standard as sexual harassment hostile work environment claims).

equality in the workplace and advocates of the First Amendment have clashed over the legitimacy of the hostile work environment cause of action under the First Amendment.

In the ensuing welter of attacks on hostile work environment doctrine, a series of rationales have been proffered to justify a civil cause of action which penalizes speech based on its poisonous effects in the work environment. These rationales range from the elegant—analagizing workers to “captive audiences”—to the overtly political—declaring the goal of workplace equality so important that it should outweigh the constitutional imperatives of protecting free speech.

In the end, these arguments either turn upon artificially tortured logic, or they allow for an impermissible subjectivity in judicial decisions regarding the legal status of speech. Neither avenue is healthy for the future of constitutional governance. While Richard Posner’s call for pragmatic judicial decisions even where no legal doctrine supports (let alone compels) such decisions is refreshingly candid,³ it underlines the extent to which the judiciary is constituting itself as an infallible, unelected power elite reminiscent of Plato’s Guardians—a fear expressed by the great conservative jurist Learned Hand nearly fifty years ago.⁴

In fact, the arguments for protecting against a hostile work environment need neither be so tortured, nor overtly political. The limits of the hostile work environment standard evince respect for the essence of the First Amendment’s guarantee of free speech, if not complete harmony with contemporary free speech doctrine. One need not categorize speech as “high” or “low” value (thus introducing the moral and social values of the decider as a “filter”), nor need one balance the social utility of protecting the right of free speech against that of protecting the right to be free of a discriminatory hostile work environment. Rather, recourse to first principles demonstrates that conduct which creates a hostile work environment fits largely within the parameters of what the Supreme Court has long recognized as a “verbal act,” an act performed through speech and thus remains outside the boundaries of First Amendment protection, not based upon governmental disapproval of the speech in question but because those words spoken in the particular factual context have the effect of an act, not of a communication.⁵

One reason for the tension between these two doctrines is that the judge-created criteria for hostile work environment liability partake of the nature of a variable standard, while First Amendment jurisprudence generally applies a rule, to use the terms employed by H.L.A. Hart.⁶ The distinction between rules and standards is not often marked in conversation, or even in legal practice. Indeed, many legal scholars have, on occasion, conflated the two. Hart’s categories are helpful in exploring the tension between these two legal imperatives. More importantly, the reconciliation of the two imperatives is advanced by recognizing the limits of Hart’s categories and the extent to which they blur at the fringes.

In exploring the compatibility of the hostile work environment standard with the First Amendment, both the First Amendment’s core and the often-neglected doctrine of the verbal act need to be examined. So too the limitations of hostile work environment doctrine must be fully understood, especially its threshold requirement limiting applicability to harassing speech that is “severe or pervasive enough to create an objectively hostile or abusive work environment.”⁷ This requirement, “that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of . . . employment were thereby altered,”⁸ bears a striking resemblance to the kind of inquiry that has been employed by the courts, especially the Supreme Court, in delineating the distinction between speech,

3. See generally Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard U. Press 2003).

4. Learned Hand, *The Bill of Rights* 73 (7th prtg., Harvard U. Press 1977).

5. See generally John F. Wirenius, *First Amendment, First Principles: Verbal Acts and Freedom of Speech* (2d ed., Holmes & Meier 2004) [hereinafter *First Amendment, First Principles*].

6. H.L.A. Hart, *The Concept of Law* 128-30 (Oxford Press 1961).

7. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

8. *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002); see generally *Sprague v. Adventures, Inc.*, 121 Fed. Appx. 813 (10th Cir. 2005); *Valentine v. City of Chicago*, 452 F.3d 670, 681 (7th Cir. 2006) (describing requirement that environment be “objectively hostile”).

which is protected, and a verbal act, which may be regulated.

This is not to assert that the courts have deliberately tailored the contours of the hostile work environment claim to respect the parameters of free speech. The congruence between the case law establishing the scope of the hostile work environment doctrine and the verbal act concept is not perfect. However, it is sufficiently close to justify retention of this cause of action as consistent with the mandates of the First Amendment.