NOTE

FIRST AMENDMENT DEFENSE TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT: DOES DISCRIMINATORY CONDUCT DESERVE CONSTITUTIONAL PROTECTION?

I. INTRODUCTION

Sexual harassment, a form of sexual discrimination prohibited by Title VII of The Civil Rights Act of 1964,1 is a prevalent problem in the workplace. Certain kinds of conduct and speech create a "hostile environment," a form of sexual harassment which interferes with the victims' ability to perform effectively in their jobs.2 Occasionally, individuals accused of hostile environment sexual harassment use the First Amendment right to freedom of speech to refute the claim, arguing that the speech complained of is protected by the First Amendment.3 Those who claim that such speech is constitutionally protected allege that the anti-discrimination law "plainly implicates First Amendment values."4

Sexual harassment has been shown to be a debilitating type of

2. See Jan Salisbury et al., Counseling Victims of Sexual Harassment, 23 PSYCHOTHERAPY 316, 316 (1986).
3. The plaintiff in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), alleged hostile environment sexual harassment, based on the prominent posting of pictures of nude women throughout the workplace and the constant barrage of insulting and derogatory comments she received from male co-workers. When the plaintiff, Ms. Robinson, complained about this behavior to one of her supervisors, he dismissed her complaint, informing her that the men had "constitutional rights." Id. at 1515.
4. Jules B. Gerard, The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment, 68 NOTRE DAME L. REV. 1003, 1003 (1993) (arguing that the Civil Rights Act of 1964 is an unconstitutional statute, as it disregards the First Amendment Right to free speech by prohibiting content-based speech in the workplace); see Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481 (1991). Browne suggests that prohibited speech according to the definition of hostile environment sexual harassment is "a content-based—even viewpoint-based—restriction of expression that is inconsistent with . . . [F]irst [A]mendment jurisprudence," id. at 481, which will have a "chilling effect on expression." Id. at 501.
discrimination which can severely and adversely affect the victim as well as the work environment within which the harassment occurs. Allowing perpetrators to refute such claims and to escape liability for sexual harassment by using the First Amendment will evade the purpose of prohibiting sexual harassment through the Civil Rights Act of 1964, as well as harm both employers and victims of sexual harassment.

This Note contends that in light of the effects sexual harassment has on victims and on the workplace, it will be clear that preventing sexual harassment, a form of sex discrimination in the workplace, is a compelling governmental interest, and thus outweighs, the First Amendment right to freedom of speech in this limited situation. Part II of this Note explains different forms of sexual harassment prohibited by Title VII and gives examples of what types of conduct are typically considered hostile environment sexual harassment. Part III traces the history of Title VII, emphasizing that its legislative intent was to eradicate discrimination in the workplace of historically oppressed groups. Part IV gives an analysis of the First Amendment right to freedom of speech. Part V discusses how the First Amendment could be used to allege that the conduct or speech complained of is constitutionally protected. This part also discusses several federal cases wherein the First Amendment was used to strike down statutes prohibiting bias-motivated speech, and notes that Title VII can be distinguished from these statutes. Part VI outlines the devastating physical, emotional and economic effects that sexual harassment has on its victims, as well as the dangers inherent in allowing sexual harassment to go un-checked. Part VII discusses Robinson v. Jacksonville Shipyards Inc., a case illustration of hostile environment sexual harassment in the workplace involving conduct and speech alleged to be constitutionally protected. Finally, Part VIII discusses why prohibiting speech and conduct which contributes to the creation of a hostile working environment is not a violation of the First Amendment. It proposes, rather, that Title VII is drafted narrowly to serve the compelling governmental purpose of preventing workplace discrimination against historically discriminated against groups.

II. THE DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is a form of discrimination prohibited by federal law. Title VII of The Civil Rights Act of 1964 § 2000e-2 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The Civil Rights Act of 1964 was amended in 1991, shifting the burden of proof to the defendant in some cases, and allowing plaintiffs to collect compensatory and punitive damages.

The Equal Employment Opportunity Commission (“EEOC”) guidelines to Title VII interpret the Act as prohibiting sexual harassment. There are two kinds of sexual harassment which have been actionable under the statute: “quid pro quo” and “hostile environment.”

Quid pro quo sexual harassment occurs when a victim is promised some benefit, such as a promotion or job security, from an employer or supervisor in exchange for a sexual favor. In this situation, the perpetrator uses his or her position of power, and the inequality of power that exists between the perpetrator and victim, to manipulate the victim into carrying out his or her sexual demand. The perpetrator, always a supervisor or employer, uses economic power to force demeaning, unwelcome sexual conduct on the victim. This type of sexual harassment is more conduct-based than speech-based, so it is nearly impossible for perpetrators to claim that their actions are protected by the First Amendment. For this reason, quid pro quo sexual harassment is not addressed in this Note.

Hostile environment sexual harassment is more expansive and

11. 29 C.F.R. § 1604.11(a) (1993).
12. See id.
more subtle than quid pro quo and thus is harder to define and more controversial. No explicit offer or threat is made to the victim.\textsuperscript{13} Since it does not involve a trade of some benefit for sexual conduct, it is less of an abuse of power than quid pro quo, and consequently, people who are not in a position of power over the victim may be sexual harassers as well.\textsuperscript{14}

Hostile environment sexual harassment occurs when either an employer or an employee says or does something of a sexual nature which "unreasonably interferes with an individual's work performance or creat[es] an intimidating, hostile or offensive working environment."\textsuperscript{15} According to this definition of sexual harassment, in order to be actionable under Title VII, "it must be sufficiently severe or pervasive . . . as to alter the conditions of employment and create an abusive working environment."\textsuperscript{16} Hostile environment sexual harassment has been defined by the EEOC to include either verbal conduct, physical conduct, or physical conduct which serves to express something.\textsuperscript{17}

Some examples of verbal conduct which may constitute hostile environment sexual harassment include: sexual jokes; degrading and perverse comments based on gender; sexually suggestive innuendos;\textsuperscript{18} sexual remarks about clothing;\textsuperscript{19} propositions for sexual relations;\textsuperscript{20} repeated sexual demands;\textsuperscript{21} sexual graffiti painted on workplace walls;\textsuperscript{22} and the prominent posting of explicit pictures of nude women in submissive, degrading and suggestive poses throughout the workplace.\textsuperscript{23}

Physical conduct which has been determined to contribute to a hostile working environment includes: a male employee asking a female employee to get money out of the front pocket of his pants,\textsuperscript{24} a male employee throwing objects on the ground and asking women

\begin{itemize}
\item \textsuperscript{13} See id. at 65.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Cobb v. Anheuser Busch, Inc., 793 F. Supp. 1457, 1491 (E.D. Mo. 1990).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} 29 C.F.R. § 1604.11 (1993).
\item \textsuperscript{19} Harris, 114 S. Ct. at 369.
\item \textsuperscript{20} Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Robinson, 760 F. Supp. at 1495.
\item \textsuperscript{23} Id. at 1494-98.
\item \textsuperscript{24} Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993).
\end{itemize}
to bend over and pick them up,\textsuperscript{25} unwanted fondling,\textsuperscript{26} following a female employee into the women's restroom,\textsuperscript{27} a male employer exposing himself to a female employee,\textsuperscript{28} and forcible rape.\textsuperscript{29}

Such conduct is prohibited by Title VII when it is sufficiently severe as to create a hostile working environment.\textsuperscript{30} Because each individual has a different concept of what is offensive and hostile, the standard is measured both objectively and subjectively.\textsuperscript{31} It is measured objectively by determining whether a reasonable person would find the environment hostile or abusive,\textsuperscript{32} and subjectively by determining whether the victim's perception of the environment is that it is abusive.\textsuperscript{33}

III. HISTORY OF TITLE VII

Certain groups within our population have been historically and systematically discriminated against, effectively denying them the ability to achieve equality in the workforce as well as in the world.\textsuperscript{34} The national policy of discrimination and oppression of blacks and women did not begin to change until 1865,\textsuperscript{35} and as can be seen

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 73.
\item \textsuperscript{31} See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} See WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT 1-6 (1981). Although both men and women are victims of sexual harassment, this Note focuses on the detrimental effects of sexual harassment on women, because men are usually in positions of power over women in the workforce and because women are most often the victims of sexual harassment. See ANJA ANGELICA CHAN, WOMEN AND SEXUAL HARASSMENT xiii (1994).
\item \textsuperscript{35} In 1865, with the Thirteenth Amendment to the U.S. Constitution, slavery and involuntary servitude were abolished. U.S. CONST. amend. XIII; see Robert A. Blake, Jr., A Step Toward a Color Blind Society: Shaw v. Reno, 29 WAKE FOREST L. REV. 937, 946 (1994). Blacks and those who were slaves were not given the right to vote until the Fifteenth Amendment to the U.S. Constitution was ratified in 1870. The Fifteenth Amendment guaranteed all citizens the right to vote regardless of "race, color, or previous condition of servitude." U.S. CONST. amend. XV. Women were not given the right to vote until the ratification of the Nineteenth Amendment in 1920, which provides that the right of U.S. citizens "to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. Finally, it was not until the passage of the Civil Rights Act of 1964 that discrimination based on race, color, religion, sex, or national origin was explicitly prohibited. 42 U.S.C. §2000e-2 (1988).
\end{itemize}
through current legislation, has not yet been fully corrected.\textsuperscript{36} Congress took the first step in opening the doors to equal employment opportunities for these oppressed groups by prohibiting the discrimination of such groups through the enactment of the Civil Rights Act of 1964.\textsuperscript{37}

Title VII of the Civil Rights Act of 1964 was intended to ban discrimination through deterrent measures of forbidding discrimination on the basis of race, color, religion, sex and national origin, and by providing relief to victims of such discrimination.\textsuperscript{38} According to the Supreme Court, the Act was enacted by Congress to achieve equality of employment opportunities and remove barriers that operated in the past to limit opportunities for minority employees.\textsuperscript{39} Congress intended to achieve this goal through two measures: 1) by explicitly prohibiting discrimination in the workplace because of race, color, religion, sex, or national origin; and 2) by making victims of such discrimination whole through injunctive and monetary relief.\textsuperscript{40} Through these measures, Title VII aims to eliminate disparate treatment of historically oppressed individuals and groups, as well as to eradicate employment systems which treat these groups and individuals disparately.\textsuperscript{41}

Although Title VII has always prohibited discriminating in the workplace because of sex, the ban on sex-based discrimination was added to Title VII only one day before the House passed the Act.\textsuperscript{42} Consequently, there were no legislative hearings on the issue of gender discrimination, and thus, no legislative history to aid the courts in

\textsuperscript{36} Congress found that the Civil Rights Act of 1964 was not accomplishing its goal of obliterating discrimination in the workforce, so it amended the statute in 1972 and in 1991. The 1964 Act only allowed the courts to award victims of sexual harassment reinstatement, injunctions, backpay, and attorney's fees. \textit{See} 42 U.S.C. § 2000e-5(g)(1), (k) (Supp. V 1993). In 1972, The EEOC broadened the court's power to award equitable remedies and extended coverage to public employers. In 1991, the Act was amended to award plaintiffs compensatory and punitive damages. \textit{Id.} These recent amendments to the Act will allow the courts to use the Act's remedial provisions to further deter discriminatory conduct and to make victims whole.

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 430, 431.
\textsuperscript{40} \textit{Id.} at 424.
\textsuperscript{41} \textit{Id.}

HOSTILE ENVIRONMENT SEXUAL HARASSMENT

interpreting Title VII cases brought on such grounds. Since there is no legislative history on the issue, the courts have been slow in recognizing that sexual harassment is actionable under Title VII.

IV. THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

The First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”

Under the First Amendment, most regulation of speech is subject to strict scrutiny and thus held unconstitutional, unless the speech falls within an established exception. The underlying purpose of the First Amendment is to encourage the free exchange of ideas, and government, therefore, should be denied the ability to censor speech. Although the First Amendment only explicitly protects speech, the courts have interpreted it to apply to certain types of expressive conduct as well. Conduct which is intended to convey a specific message, and which is very likely to be understood by those

43. See Twomey, supra note 42, at 20.
44. In Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977), one of the first cases wherein plaintiffs brought a Title VII claim based on sexual harassment, the court dismissed plaintiff’s claim holding that no discrimination occurred since the sexual advances upon which the claim was based were unrelated to work and represented the supervisor’s attempt to satisfy his personal urges. Id. at 163. The earliest federal case to recognize that sexual advances made by a male supervisor to a female employee constituted sexual discrimination in violation of Title VII was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev’d in part and vacated in part, 587 F.2d 1240 (D.C. Cir. 1978). Hostile environment sexual harassment was not recognized as an actionable claim under Title VII until 1981, in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), and it was not until 1986, in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), that the Supreme Court held that sexual harassment based on a hostile work environment was conduct prohibited by Title VII.
45. U.S. CONST. amend. I.
48. Id. (holding that burning a cross in a black family’s front yard is communicative conduct protected by the First Amendment); see also Texas v. Johnson, 491 U.S. 397 (1989) (holding that burning the American flag was sufficiently communicative to be protected by the First Amendment because the political message was intentional as well as explicitly clear).
who witness it, is sufficiently communicative to be protected by the First Amendment.\textsuperscript{49}

When there is a question regarding whether a statute violates the First Amendment, the statute may be justified by demonstrating that its purpose serves a compelling governmental interest.\textsuperscript{50} The policy underlying the statute must be weighed against the importance of the First Amendment in determining whether the statute violates the perpetrator's right to free speech.\textsuperscript{51} If use of the First Amendment to bar such a statute would not undermine the goals underlying the enactment of the statute regulating the speech, the First Amendment right to freedom of speech will outweigh the purpose of the statute, and the statute will be deemed unconstitutional.\textsuperscript{52}

V. THE FIRST AMENDMENT IN HOSTILE ENVIRONMENT SEXUAL HARASSMENT CASES

Since most hostile environment sexual harassment cases involve some sort of speech, whether oral or gestural, perpetrators may try to establish that the First Amendment guarantees them the right to use such speech without punishment. They will argue that they are not liable for sexual harassment when they use this type of speech, since prohibition of such conduct under The Civil Rights Act of 1964 is unconstitutional.\textsuperscript{53} Although the First Amendment defense to sexual harassment has rarely been used,\textsuperscript{54} current case law indicates that the First Amendment is being used to challenge other anti-discrimination laws,\textsuperscript{55} and thus, may be used to refute sexual harassment claims in the future.

In \textit{R.A.V. v. City of St. Paul},\textsuperscript{56} a bias-motivated disorderly conduct ordinance was challenged on grounds that it was violative of the First Amendment.\textsuperscript{57} The petitioner allegedly burned a cross on a

\begin{itemize}
\item \textsuperscript{49} \textit{R.A.V.}, 112 S. Ct. at 2548; \textit{Johnson}, 491 U.S. at 404.
\item \textsuperscript{50} \textit{R.A.V.}, 112 S. Ct. at 2549.
\item \textsuperscript{51} \textit{Johnson}, 491 U.S. at 403-04.
\item \textsuperscript{52} Id. at 406.
\item \textsuperscript{53} See Gerard, supra note 4, at 1004; see also Browne, supra note 4, at 481.
\item \textsuperscript{54} See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). Though defendants in Robinson did not obviously bring a First Amendment defense, they mentioned that they did not respond to Ms. Robinson's complaints because they believed the employees had constitutional rights to behave in the manner in which they did. Id. at 1515.
\item \textsuperscript{56} 112 S. Ct. 2538 (1992).
\item \textsuperscript{57} Id.
\end{itemize}
black family's lawn, after which he was charged with violating an ordinance prohibiting the display of a symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Supreme Court held the ordinance to be facially invalid under the First Amendment, because it unconstitutionally prohibited speech on the basis of content. The Court further held that the speech content regulation was not justified on the ground that the ordinance was "narrowly tailored to serve a compelling state interest" in ensuring the basic human rights of groups historically discriminated against because an ordinance not limited to those specific topics would have the same beneficial effect.

In finding the city ordinance unconstitutional, the Supreme Court, in *R.A.V.*, was concerned with the general danger of censorship. The ordinance is a fairly broad prohibition on free speech, as there are not any limitations as to who is prohibited from using such speech. It is also broad in that it restricts the expressive conduct on all public as well as private property. The Court therefore held the ordinance unconstitutional because it was not a narrowly tailored means of accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

The First Amendment was also used to refute an anti-hate speech policy at the University of Michigan. The court in *Doe v. University of Michigan*, held the university's anti-discrimination policy unconstitutional as it "had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."

This Note contends that Title VII of The Civil Rights Act of 1964 can be distinguished from these other anti-discrimination rules, and, thus, is not unconstitutional. Title VII, as it is interpreted to prohibit workplace sexual harassment, cannot be deemed unconsti-

58. *Id.* at 2541 (citation omitted).
59. *Id.* at 2547.
60. *Id.* at 2549-50.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 2546.
67. *Id.*
68. *Id.* at 863.
tional on these grounds. Title VII attempts to accomplish its purpose of ensuring equal employment opportunities\(^{69}\) regardless of race, color, religion, sex, or national origin,\(^{70}\) by prohibiting only certain people from carrying out a narrow class of conduct in a very limited number of settings.\(^{71}\) It only prohibits employers and certain employees from engaging in discriminatory conduct in the workplace.\(^{72}\)

VI. THE EFFECTS OF SEXUAL HARASSMENT

It is estimated that at least forty-nine percent to eighty-one percent of working women experience some sort of sexual discrimination on the job.\(^{73}\) This unfair treatment of women may cause severe psychiatric injury to the victims of sexual harassment.\(^{74}\) Hostile work environment sexual harassment can have devastating effects on the victims of the harassment, as well as on the workplace within which the conduct is occurring.\(^{75}\) Sexual harassment is different than other forms of sexual discrimination in that it has a direct impact on economic and career status, as well as on emotional, psychological and physical well-being.\(^{76}\)

Emotional and psychological injuries which may arise due to sexual harassment include increased anger, fear, depression, anxiety, irritability, loss of self esteem, vulnerability, shame, guilt, loss of sexual interest, feelings of humiliation and alienation, a sense of helplessness, severe emotional distress, and Post Traumatic Stress Disorder.\(^{77}\) Sexual harassment may also result in physical injuries,

\(^{71}\) Id.
\(^{72}\) Id.
\(^{73}\) Ben Bursten, *Psychiatric Injury in the Women's Workplace*, 13 BULL. AM. ACAD. PSYCHIATRY L. 399 (1985); see Chan, supra note 34, at 3 (citing Charles Safran, *What Men Do to on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 217-23) (publishing the results of a survey wherein 88% of working women who responded maintained that they had been personally harassed, and 90% verified that sexual harassment was a problem at their jobs).
\(^{74}\) Id. at 400.
\(^{75}\) Id.
\(^{76}\) See Gutek & Koss, supra note 5, at 28-32.
\(^{77}\) Id. at 32-45. In a general study of victims of sexual harassment conducted by Gutek and Koss, they found that between “21 and 82% of women indicated that their emotional or physical condition worsened as a result of [sexual] harassment.” Id. at 33. In a smaller sample of ninety-two women who had been sexually harassed, virtually all women “reported debilitating stress reactions affecting work performance and attitudes, psychological health and physical health.” Id.
including, "gastrointestinal disturbances, jaw tightness and teeth grinding, nervousness, binge-eating, headaches, inability to sleep, tiredness, nausea, loss of appetite, and crying spells." Additional physical injuries include irritability, loss of concentration, dizzy spells, terminal insomnia, fainting spells, back problems, muscle spasms, and hypertension.

These physical, psychological, and emotional effects usually interfere with the victims performance at work, thus resulting in economic injury as well. For example, victims of sexual harassment are likely to feel humiliated and ashamed from the harassing behavior, leading them to constantly attempt to avoid the situation within which they are being harassed. They will do this by avoiding the harasser, leaving work early, calling in sick, or simply not coming in to work at all. The psychological and emotional effects will lead to a decrease in morale, which in turn results in diminished work performance. Sexual harassment, therefore, induces life changes for the victims, including, loss of job, loss of income, job movement, and a disrupted work history.

In addition to causing psychological, emotional, and economic harm, sexual harassment adversely affects the environment within which the victim works. Businesses bear the costs of sick leave, absenteeism, inefficient work, medical and turnover costs. Turnover costs for a company are outrageous since many women are fired for inefficiency due to sexual harassment, and at least ten percent of women have quit a job because of sexual harassment. When sexual harassment occurs and the victim decides to endure it rather than employ one of her other options, relationships in the work environment may become strained and tense. Not only do victims tend to avoid the harassers, but if the sexual harassment has an incredibly

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78. *Id.*
80. *Id.* at 403.
81. *Id.* at 405.
82. *Id.*
83. *Id.* at 403.
85. *See id.*
86. *Id.* at 35-36. Gutek and Koss cite an assessment conducted by the U.S. Merit Systems Protection Board in 1981, reporting on the magnitude of sexual harassment in the federal workforce, wherein the Board sought to determine the actual costs of sexual harassment in the workplace. Among the factors considered were cost of absenteeism, medical costs, and turnover attributable to sexual harassment.
negative effect on the victim, she will often try to avoid male co-
workers in general. Another common response that women have to
sexual harassment is that they attempt to retaliate by hitting or insult-
ing the harasser, which will also lead to strained relations within the
workplace.

Victims of sexual harassment are often economically and emo-
tionally dependent on the aggressor, the aggressor either being an
employer, supervisor or a co-worker. The abuse is humiliating but
the victims often need their jobs, and therefore, they often keep the
abuse a secret. As the victim’s harassment continues there will be
one of three possible results. The victim will remain in her job and
endure the continual abuse and later be fired for the decline in work
performance, the victim will quit, or the victim will bring a Title
VII suit against the perpetrator.

If perpetrators are allowed to allege that their speech, which is
creating the hostile work environment, is protected by the First
Amendment, victims will lose their third option: they will no longer
be able to bring a Title VII suit against the perpetrator. That leaves
two options for the sexual harassment victim. She can either endure
the sexual harassment and deal with the psychological and emotional
injuries which result, or she can quit her job.

The sexual harassment will result in victims either being passed
over for promotions, quitting their jobs because they cannot deal with
the abuse, or being fired for their incompetence. Since most vic-
tims of sexual harassment are women, allowing sexual harassment to
continue will, at best, act as a barrier to women’s economic and
employment advancement, keeping women from obtaining prestigious
positions, and at worst, keep women out of the workforce all-togeth-

87. Id. at 38.
88. Id.
89. Id. at 30.
90. Id. at 31.
91. See id.
92. Although a sexual harassment victim may take legal action in other ways, such as
pressing criminal charges, bringing workers compensation claims and tort claims, these actions
are often more difficult to prove than a Title VII case, and the victim will face the same
obstacles with these actions as she would face in bringing a Title VII claim. Title VII is a
preferred legal action, as it is a sexual harassment victim’s only civil rights remedy, and
because it is the only remedy wherein the victim can make a claim based on economic inju-
ry as the harm. See Bursten, supra note 73, at 400.
93. See Hemming, supra note 5, at 69-70.
Allowing the utilization of the First Amendment to prevent women from alleging that hostile work environments exist will also cause businesses as we know them today to deteriorate. Unless society is willing to keep women out of the workforce altogether, the business world cannot coexist successfully with the presence of hostile work environment sexual harassment, as it cannot survive all of the devastating effects that sexual harassment will have on it. After investigating the effects of sexual harassment on the individual and the organization, psychologists Barbara A. Gutek and Mary P. Koss suggest that "an understanding of the true costs of sexual harassment borne by organizations and their employees, as well as the more visible costs of dealing with charges of harassment, investigations, and lawsuits, may encourage organizations to provide a more supportive environment for female employees who encounter harassment." 95

VII. A CASE ILLUSTRATION: ROBINSON v. JACKSONVILLE SHIPYARDS, INC.

In 1991, a federal district court in Florida refused to allow defendants to justify their actions constituting hostile environment sexual harassment on First Amendment freedom of expression grounds. 96 In Robinson v. Jacksonville Shipyards, Inc., 97 the plaintiff, Lois Robinson brought suit against her employer, alleging that Jacksonville Shipyards, Inc. ("JSI") created and encouraged a hostile work environment 98 which violated her civil rights under Title VII of the Civil Rights Act of 1964. 99 This case is significant because it indicates that maintaining a work environment free from sexual harassment and any consequences it might cause is a compelling state interest which overrides the First Amendment. 100 The facts of Robinson provide a good illustration of how Title VII and the First Amendment clash, and why, in the case of sexual harassment, Title VII should prevail.

Lois Robinson was employed as a welder at JSI from 1977 to 1988. 101 JSI is a corporation that is engaged in the business of ship
repair. Women form less than five percent of the skilled craft workers at JSI, and in 1986 only six of 852 skilled craft workers at JSI were women. Lois Robinson was not the only woman who felt that JSI's work environment was hostile. There were at least two other women that testified that they felt they were victims of hostile environment sexual harassment at JSI. Each of the three women, Leslie Albert, Lawanna Gail Banks, and Lois Robinson testified that she was sexually harassed at JSI. Even to an outsider, JSI would appear to be a work environment which would be hostile to women. Not only has JSI never had a woman supervisor, but JSI's employees describe JSI as "a boys club" and "more or less a man's world."

Explicit pictures of nude women, partially nude women, women in sexually submissive and suggestive poses, as well as pictures of various female body parts were prominently and frequently displayed in almost all public work areas at JSI. The display of these pic-
tures was common and encouraged in the workplace, as JSI officials were often responsible for their distribution.\textsuperscript{108} Even the supervisors displayed such pictures in their offices.\textsuperscript{109} On the other hand JSI has never distributed nor tolerated the distribution of calendars with pictures of nude or partially nude men.\textsuperscript{110}

These pictures were not the only elements of the hostile work environment which Ms. Robinson had to endure each day she worked at JSI. She was also consistently subjected to verbal sexual abuse by her co-workers in the form of sexual jokes,\textsuperscript{111} degrading and perverse comments directed at her,\textsuperscript{112} as well as comments generally

\begin{itemize}
\item \textbf{a)} a picture of a nude black woman, pubic area exposed to reveal her labia;
\item \textbf{b)} a drawing on the workplace wall depicting a frontal view of a nude female torso with the words “USDA choice” written on it;
\item \textbf{c)} a picture of a woman’s pubic area with a meat spatula pressed on it;
\item \textbf{d)} a picture of a nude woman with a shaved pubic area;
\item \textbf{e)} a picture of a nude corseted woman with her breasts and buttocks area exposed;
\item \textbf{f)} a picture of a nude woman with long blonde hair wearing high heels and holding a whip;
\item \textbf{g)} calendars posted in the pipe shop, including a picture in which a nude woman was bending over with her buttocks and genitals exposed to view;
\item \textbf{h)} a picture of two nude women engaged in lesbian sex;
\item \textbf{i)} a picture of a woman wearing black tights, the top pulled down to expose her breasts;
\item \textbf{j)} a picture of a nude woman in an outdoor setting playing with a piece of cloth between her legs;
\item \textbf{k)} a drawing on a heater control box of a nude woman with fluid coming from her genital area;
\item \textbf{l)} a dart board with a drawing of a woman’s breast with her nipple as the bull’s eye;
\item \textbf{m)} various other degrading pornographic magazines, posters and calendars of nude women in sexually submissive and suggestive poses. \textit{Id.} at 1495-98.
\item \textbf{108.} \textit{Id.} at 1493. Some of the calendars displayed are advertising calendars, delivered to JSI by vendors with whom it does business. JSI officials distribute and post these calendars with the full knowledge and approval from JSI management. The employees are free to post these advertising calendars throughout the workplace, wherever they choose. \textit{Id.}
\item \textbf{109.} \textit{Id.} Arnold McIlwain, President of JSI, had been aware of the pictures showing nude women posted in the workplace for years, yet he refused to issue a policy prohibiting the display of such pictures. Lawrence Brown, the Vice President of JSI and John Stewart, the Industrial Relations Manager of JSI, have both seen the nude pictures of women in the workplace, and have concluded that there is nothing wrong with posting such pictures in the workplace. Elmer L. Ahlwardt, the Vice President of one of JSI’s shipyards, and Ellis Lovett, the shipfitter’s foreman, both had the advertising calendars and nude pinups in their offices. Coordinates, members of management, who are responsible for ensuring that government contracts are performed to the satisfaction of the federal government, have had pornographic magazines in the desks of their trailers. \textit{Id.}
\item \textbf{110.} \textit{Id.} at 1494. One of the welding foremen admitted that it was accepted at the shipyards for the vendors to supply calendars of nude women, but said he had never known a vendor to distribute pictures of nude men, and would think the “son of a bitch” was “queer” if a vendor had distributed calendars of nude men. \textit{Id.}
\item \textbf{111.} \textit{Id.} at 1498.
\item \textbf{112.} \textit{Id.} Robinson’s co-workers made many comments of a sexual nature to her while at JSI. Examples of such remarks directed at her include the following: “Hey pussycat, come here and give me a whiff,” “The more you lick it, the harder it gets,” “I’d like to get in bed with that,” “I’d like to have some of that,” “Black women taste like sardines,” “It doesn’t hurt women to have sex right after childbirth,” “You rate about an 8 or a 9 on a scale
degrading to women. Frequently when Robinson returned to her work station, she would find fresh graffiti there, including abusive words and phrases such as, "lick me you whore dog bitch," "eat me," "pussy," and "cunt." Robinson did not complain about the degrading comments and pictures at the beginning of her employment at JSI because she feared not only retaliation, but also that her complaints would not be well received. Her suspicions about how her supervisors would react to her complaints concerning the harassment were correct. When Robinson finally did make complaints to her supervisors about the lewd pictures, her requests to remove them were either ignored, or the pictures were temporarily removed, just to be later replaced with new ones. As her co-workers found out about her complaints, the harassment got worse for her and the other female employees. When Robinson decided to make a formal complaint, one of her supervisors, Owens, told her that she chose the JSI work environment and that the men had "constitutional rights." Owens continued, stating that the shipyard was "a man's world" and that such pictures were a "natural thing" there. He further contended that the rules against vulgar and abusive language did not apply to the "cussing" commonly heard in the shipyard. He reiterated his statement to another supervisor that he would grieve any rule banning the pictures as an infringement on the freedom of expression of the male shipyard workers.

of 10," etc. Robinson also recounted one welder telling her he wished her skirt would blow over her head so he could look, while another co-worker told her he wished her shirt was tighter because he thought it would be sexier. Co-workers referred to her as "honey," "dear," "baby," "sugar," "sugar-booger," and "momma" instead of calling her by her name. 

113. Id. One of Robinson's co-workers, with whom she was assigned to work on a project, expressed his displeasure at having to work with Robinson, by making comments such as "women are only fit company for something that howls," and "there's nothing worse than having to work around women." 

114. Id. at 1499.
115. Id. at 1511.
116. Id. at 1513.

117. Id. Robinson was ridiculed by her male co-workers for making a big deal out of the situation. The male employees started bringing in hard core pornography and leaving it either in Robinson's work station, or somewhere else where Robinson was likely to view it. Some of the men put up a "Men Only" sign on a trailer where they had hung up some of the pornographic pictures. Id. at 1514.

118. Id. at 1515.
119. Id. at 1516.
120. Id.
121. Id.
Dr. Susan Fiske, an expert in psychology, appeared as an expert witness for Ms. Robinson to testify as to the effects of sexual harassment on women, and more specifically as to the effects JSI's hostile work environment can have on Robinson as well as the other female employees. Dr. Fiske explained that allowing women to be sexually harassed creates an environment where women are seen as sex objects rather than as good employees. She explained that these would result in a significant proportion of the male population in the workforce to view and interact with female co-workers as if they were sex objects, rather than equals.

Dr. Fiske also noted that "when sex comes into the workplace, women are profoundly affected ... in their job performance and in their ability to do their jobs without being bothered by it." According to Dr. Fiske, the effects include emotional upset, reduced job satisfaction, women being deterred from seeking jobs or promotions, and an increase in women quitting jobs, getting transferred, or being fired.

Ms. K.C. Wagner also testified as an expert witness for the plaintiff regarding common responses and coping tactics women employ after being sexually harassed. Ms. Wagner testified that women who have been sexually harassed cope with the situation in several ways, including avoiding the workplace and the harasser by taking sick leave or being absent. Victims of sexual harassment

122. Id. at 1501. The court accepted Dr. Susan Fiske as an expert witness based on her credentials. She holds a full professorship in the psychology department at the University of Massachusetts at Amherst, she is a member of the American Psychological Association and the Society for Experimental Social Psychology, she has performed research for the National Science Foundation and the National Institute of Mental Health, and she has published 40 articles in the top journals in her field. Id. at 1502.

123. Id. at 1503.
124. Id.
125. Id. at 1505.
126. Id. at 1504.
127. Id. at 1505. Ms. Wagner is a self-employed consultant in the area of issues regarding women and the work environment, with particular emphasis on the prevention of sexual harassment in the workplace. She worked for the Working Women's Institute, an organization devoted to the study and remedy of sexual harassment in the workplace, for seven years, where she held positions as counseling director, and program director before being named executive director. She has a master's degree in social work, and has been an instructor for sexual harassment courses. Id.

128. Id. at 1506. According to Ms. Wagner other coping strategies include, denying the impact of the event, blocking it out, telling the harasser to stop, engaging in joking or other banter in the language of the workplace in order to defuse the situation, and threatening to make or actually making an informal complaint. Id.
suffer stress effects as a result of sexual harassment, including work performance stress, which includes distraction from tasks, dread of work, and the inability to work.\textsuperscript{129} Victims also may suffer emotional stress which includes anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment.\textsuperscript{130} Physical stress is also a result of sexual harassment, which includes sleeping problems, headaches, weight changes, as well as other physical ailments.\textsuperscript{131} Ms. Wagner concludes that “sexual harassment has a cumulative, eroding effect on the victim’s well-being.”\textsuperscript{132}

Despite JSI arguing that the male employees had a constitutional right to verbally abuse Ms. Robinson and to post explicit pictures of nude women all over the shipyard, the court found that JSI violated Title VII through the maintenance of a sexually hostile work environment and thereby discriminated against Ms. Robinson because of her sex.\textsuperscript{133} JSI refused to acknowledge that it sought to express itself through the pictures or the verbal harassment, so no First Amendment concern officially arose. Nonetheless, the court discussed whether such conduct, had it meant to be expressive, would be protected by the First Amendment right to freedom of speech.\textsuperscript{134} The court found Ms. Robinson’s right to work in an environment free from debilitating discrimination more compelling than the male employees’ First Amendment right to freedom of speech in the work environment.\textsuperscript{135}

VIII. \textbf{EFFECTS OF PLACING FIRST AMENDMENT LIMITS ON HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS}

Those who allege that Title VII of the Civil Rights Act of 1964 implicates the First Amendment right to freedom of speech claim that the speech and other behavior used to create a hostile work environment is protected speech, thus, those using such speech can not be held liable for sexual harassment.\textsuperscript{136} One commentator, Jules B. Gerard, has voiced his concern that Title VII, by prohibiting hostile environment sexual harassment in the workplace, is denying such

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 1506.
  \item \textsuperscript{130} \textit{Id.} at 1507.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.} at 1486.
  \item \textsuperscript{134} \textit{Id.} at 1535.
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{See Gerard, supra note 4}, at 1004.
\end{itemize}
perpetrators their First Amendment right to freedom of speech. Gerard explains that he is specifically concerned that “[m]any of the incidents that were used to support claims of hostile environment appear to involve varieties of speech that the Court . . . has specifically held to be protected by the Constitution.” He is also concerned that banning such behavior in the workplace is speech content regulation, and “[i]f government could regulate speech because of its content, officials could outlaw all speech on whatever topics they chose and could suppress information they would rather conceal or points of view with which they disagree.” The court in Robinson acknowledges these issues, and in weighing all of the factors determines that Lois Robinson’s right to work in an environment free from sexual discrimination in the form of sexual harassment overrides the perpetrators’ First Amendment right to freedom of speech in this situation.

There are several reasons why Title VII, as it is interpreted to prohibit hostile environment sexual harassment, is not violative of the First Amendment. First of all, as the court in Robinson points out, employers have a legal right to prohibit certain types of conduct, including speech and the posting of sexually explicit pictures within the workplace, even if that conduct is expressive, because a “workplace is for working.” Secondly, the pictures and verbal harassment are not protected by the First Amendment because they act as discriminatory conduct in the form of hostile work environment sexual harassment. The court in Robinson compares the conduct that took place at JSI to criminal speech, such as threats of violence and blackmail and deems it indistinguishable. Such conduct is undoubtedly conduct which the state has authority to punish.

137. Id.
138. Id.
139. Id. at 1007.
141. Id. at 1535 (citing May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1110 (7th Cir. 1986)) (holding that an employer may lawfully withhold its consent for employees to engage in expressive activities).
142. Id. (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984), which holds that expressive conduct which produces special harms, such as sexual discrimination, is not entitled to constitutional protection).
143. Id. (citing Rankin v. McPherson, 483 U.S. 378, 386-87 (1987)) (threat to kill the President is not protected by First Amendment); United States v. Shoulberg, 895 F.2d 882, 886 (2d Cir. 1990) (threats to intimidate witnesses are not protected by the First Amendment).
In response to Mr. Gerard's concern that banning speech which constitutes sexual harassment is content regulation of speech, the court in Robinson provides that the regulation of discriminatory speech in the workplace constitutes a "time, place and manner regulation of speech," rather than a content regulation of speech.\textsuperscript{144} A time, place and manner regulation of speech is subject to a lower level of scrutiny than content regulation.\textsuperscript{145} In order to uphold such a regulation of speech, one must prove that there is a legitimate governmental interest for regulating the speech, content neutrality, and a tailoring of the means to accomplish the interest.\textsuperscript{146} The court stresses that eliminating workplace discrimination surpasses the level of merely being a legitimate governmental interest, rather this goal rises to the level of a compelling governmental interest.\textsuperscript{147}

This Note contends that the First Amendment right to freedom of speech must also be weighed against the underlying purpose of the Civil Rights Act of 1964. This analysis will reveal that use of the First Amendment to protect sexual harassment perpetrators will have such a negative impact on the victims of sexual harassment and the workforce in general, that limiting the speech prohibited by the Act is justified. When these two effects are weighed, preventing such negative impacts outweighs the First Amendment right to use this type of speech in the specific situations prohibited by the Act.

When there is a question as to whether a statute which regulates speech is violative of the First Amendment, courts apply strict scrutiny.\textsuperscript{148} If the purpose of the statute serves a compelling governmental interest, and it is drafted narrowly as to serve that interest, the statute will be allowed to regulate the speech contained therein.\textsuperscript{149} In applying strict scrutiny to Title VII, as it is interpreted to prohibit speech which sexually harasses by creating a hostile work environ-

\textsuperscript{144} Robinson, 760 F. Supp. at 1535.
\textsuperscript{145} Id. (citing Marcy Strauss, Sextist Speech in the Workplace, 25 HARV. C.R.-C.L. L. REV. 1, 46 (1990)) ("[B]anning sexist speech in the workplace does not censor such speech everywhere and for all time.").
\textsuperscript{147} See Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (holding that elimination of discrimination against women is a compelling governmental interest); see also Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (holding that a compelling governmental interest lies in removing barriers to economic advancement and political and social integration that have historically plagued women).
\textsuperscript{149} R.A.V., 112 S. Ct. at 2549.
In determining whether the statute serves a compelling governmental interest, the policy underlying it must be examined. Title VII was enacted to remedy the rampant discrimination that was occurring against minorities in the workplace. It was enacted to ensure that, despite the history of discrimination that existed against these groups, they would finally be guaranteed equal employment opportunities. One way of ensuring this was by prohibiting certain discriminatory speech which would create a hostile environment in the workplace.

It has been proven that use of such speech to create a hostile working environment has devastating psychological, emotional, physical and economic effects on the victim who has been sexually harassed, which has the result of stripping that victim of the equal employment opportunities she is guaranteed by Title VII of the Civil Rights Act of 1964.

In weighing the First Amendment right to freedom of speech against the policy underlying Title VII, these effects must be considered. When these effects of sexual harassment are examined, one concludes that their mere existence denies victims their equal employment opportunities. Thus, use of the First Amendment to bar such a statute would seriously undermine the goals underlying its enactment. Therefore, the statute outweighs the First Amendment right to freedom of speech in this instance, and will not be deemed unconstitutional if it is also found to be a narrowly tailored means of accomplishing the compelling governmental interest. After close analysis, the court in Robinson determined that even if we treated speech alleged to contribute to a hostile work environment as fully protected speech, and the court must balance the governmental interest in cleansing the workplace of impediments to the equality of

151. See R.A.V., 112 S. Ct. at 2550.
152. See Johnson, 491 U.S. at 407.
154. Id.
156. For further discussion on this issue, see supra part VI.
women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest.\(^6\)

Title VII is drafted narrowly to serve the compelling governmental purpose of preventing discrimination in the workplace, so as to ensure equal employment opportunities for certain groups which have been historically discriminated against.\(^6\) Title VII attempts to serve this purpose by prohibiting certain people, such as employers and employees, from engaging in specific discriminatory conduct, only in the workplace.\(^6\) The people who are regulated, the conduct which is prohibited, and the places in which it is prohibited, are clearly and narrowly defined by Title VII, which provides:

a) It shall be an unlawful employment practice for an employer—
   1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.\(^6\)

The First Amendment prohibits Congress from making any law which abridges the freedom of speech.\(^6\) However, certain types of speech are not protected by the First Amendment, and thus, Congress may make laws regulating speech in these situations.\(^6\) The Su-

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163. Id.
164. U.S. CONST. amend. I.
165. See Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (holding that the time and manner of solicitation may be regulated without violating the First Amendment); Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974) (holding that libelous speech is not protected by the First Amendment); Miller v. California, 413 U.S. 15 (1973) (holding that obscenity is not protected by the First Amendment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech which may incite riots is not protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" are not protected by the First Amendment).
prime Court has identified five situations wherein such speech may be regulated, including libel, incitement, "fighting words," solicitation and obscenity. Regulation of these exceptions to the First Amendment are allowed, because such regulation serves a governmental interest so compelling, that the policy underlying such regulation outweighs the First Amendment right to freedom of speech. Sexual harassment is not yet included in one of these exceptions. However, as awareness of the prevalence of sexual harassment increases, and as awareness of the devastating injuries which sexual harassment causes increases, the compelling governmental interest in preventing such severe harm will lead the courts to recognize that sexual harassment should be an exception to the types of speech which are protected by the First Amendment. The courts will then be justified in infringing upon First Amendment rights in this limited situation, just as it is justified in infringing on First Amendment rights in these other limited situations.

IX. CONCLUSION

Since sexual harassment is damaging to the individual employee who is being harassed, the organization for which she works, as well as society as a whole, it is in everyone's best interest to limit sexual harassment in the workplace by making it a punishable offense which can be enforced. Allowing perpetrators to use the First Amendment defense, claiming that workplace speech and other expression is protected, to escape liability for their abusive behavior would have detrimental effects. It would be detrimental to Title VII, as it would undermine the purposes in enacting the anti-harassment law; it would be detrimental to all of the victims of hostile environment sexual harassment, as it will be taking away their remedy; and it would be destructive to the workplace, as it will eliminate the possibility of men and women working together.

The current case law in the Supreme Court which uses the First

166. See id.
167. See supra note 165.
168. Catharine A. MacKinnon, Only Words 106, 107 (1993) makes a similar analysis, stating that the notion of equality is a "compelling state interest," and that when it is recognized as such will outweigh First Amendment rights in certain settings. She suggests that the notion of equality has already been recognized as a more compelling interest than one's right to freedom of speech, citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (holding that there is a compelling state interest in eradicating discrimination on the basis of sex, which can outweigh the First Amendment right of association).
Amendment to repeal anti-discrimination laws is frightening.\textsuperscript{169} Although the Supreme Court has not repealed Title VII with similar reasoning, it seems possible that sexual harassment perpetrators may begin to use this reasoning to escape liability for their behavior.

The issue of whether Title VII, as it is interpreted to prohibit hostile environment sexual harassment, is violative of the First Amendment right to freedom of expression, has neither been heard, nor decided by the Supreme Court. The closest we have to such an analysis is Robinson v. Jacksonville Shipyards, Inc.\textsuperscript{170} Though the defendants here did not raise the First Amendment in defense of their behavior, they did mention that they did not respond to Ms. Robinson’s complaints because they believed the male employees had constitutional rights to behave in the ways that they did.\textsuperscript{171} In response to this claim, though not used as a formal defense, the Court performed a First Amendment analysis and concluded that the First Amendment can never be used to allow sexually discriminatory speech and conduct leading to a hostile working environment.\textsuperscript{172}

Though Robinson was decided after the Supreme Court cases which struck down anti-discrimination laws, the court in Robinson did not use such an analysis to strike down Title VII. If this opinion is upheld in the Supreme Court, their failure to address the male employee’s constitutional rights will show that the Court finds these rights less compelling than the underlying purposes of Title VII.

Robinson is a good start in protecting people’s rights to equal employment opportunities, and will hopefully stand up against R.A.V. v. City of St. Paul\textsuperscript{173} and Doe v. University of Michigan,\textsuperscript{174} in the future. There are other sexual harassment cases and legislation emerging which look promising for the future of Title VII as well. For example, in Harris v. Forklift Systems, Inc.,\textsuperscript{175} decided in November of 1993, the Supreme Court retracted the requirement that victims of sexual harassment must suffer psychological damage before they can successfully bring a Title VII suit.\textsuperscript{176} The Court recognized that victims should be able to put a stop to abusive behavior in the

\textsuperscript{169} For discussion of cases involving First Amendment, see supra part V.
\textsuperscript{171} Id. at 1515.
\textsuperscript{172} Id. at 1535.
\textsuperscript{175} 114 S. Ct. 367 (1993).
\textsuperscript{176} Id. at 371.
workplace before they suffer a psychological breakdown. It also demonstrated a heightened awareness of sexual harassment and how injurious it can be. Furthermore, it acknowledged the important policy of ensuring equal employment opportunities which underlies the enactment of Title VII.

Recently, Title VII has been amended to allow victims of sexual harassment to collect punitive and compensatory damages, as well as back pay and attorney’s fees. This also appreciates the vital nature of Title VII’s goals. It makes Title VII more enforceable by inflicting stricter penalties on sexual harassment perpetrators.

Although it appears that use of the First Amendment is becoming a common way to dispute anti-discrimination laws, it also appears that preventing sexual harassment in the workplace is finally beginning to be recognized as a compelling governmental interest. As it is realized that sexual harassment is a prevalent problem, and that it causes severe injuries to employees and organizations, prevention of it will become increasingly necessary. As it becomes more compelling, it will be more difficult for perpetrators to allege that their freedom of expression is being abridged by allowing hostile environment sexual harassment suits.

Aileen V. Kent*

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177. Id. at 370.
178. Id.
179. Id.
* I would like to thank David Susswein and my family for their encouragement and support.