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*721 SEXUAL HARASSMENT LAWS: A CONSIDERATION OF THE IMPOSITION ON OREGON FREE SPEECH INTERESTS

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Sexual harassment has become an increasingly important issue in Oregon and across America over the past twenty years. Before 1975, sexual harassment [FN1] did not even exist as a legal concept. [FN2] An injured individual was relegated to alleging a traditional common law tort against the tortfeaser. [FN3] Today, courts have expanded the laws providing a cause of action for sexual harassment in ways unimaginable twenty to thirty years ago. [FN4]

***722** While sexual harassment has implications outside of the workplace, [FN5] the primary focus of sexual harassment litigation remains in the work environment. In the work environment context, it is hard to imagine opposition to aggressively combating any form of sexual harassment. For example, many cases involving sexual harassment involve offensive physical touching, [FN6] or threats to fire or not promote an employee if she does not consent to her supervisor's advances. [FN7] An employer is required to take prompt action to remedy or prevent such occurrences. [FN8] Where the employer fails to take remedial action, allowing an injured plaintiff to recover for her injuries is certainly appropriate.

The goals of eliminating prejudice and biases in our society are, in general, furthered by sexual harassment laws. As such, the constitutionality of sexual harassment laws are rarely questioned. However, the issue that may be, but is rarely, raised, is the extent to which aggressive stances on all forms of sexual harassment in the workplace infringe on an employer's and employee's respective freedom of expression rights, whether under the United States Constitution's First Amendment [FN9] or analogous provisions in state constitutions. The Oregon Constitution, for example, expresses its own important goals of personal freedoms, including the right to "free expression of opinion . . . [and] the right to speak, write, or print freely on any subject whatever." [FN10]

***723** Possible conflicts exist between constitutional rights of free expression and statutory rights to a workplace free of sexual harassment. Sexual harassment laws require that an employer take preventive action to ensure a workplace free of abusive or offensive conduct. In the case of harassing conduct based on speech, broad proscriptions on offensive language and expressive conduct may encompass workplace speech that may be protected by the speaker's right of expression. [FN11] Employers are given little guidance as to where to draw the line between harassing speech and protected speech. In general, such a determination is based on whether specific conduct rises to the level of "severe or pervasive" as to alter the workingconditions of the employee. [FN12] This amorphous concept may tend to create situations where employers do not know where the statutory line is to be drawn between permitted and prohibited expression. In such cases, employers will typically err on the side of caution and broad proscriptions on remarks, images, and conduct may result. [FN13]

This Comment will address how federal and state sexual harassment laws operate in light of the freedoms of expression embodied within the Oregon Constitution. First, the Comment examines the relevant federal and state sexual harassment laws that provide the backdrop for potential conflict with Oregon free expression interests. Second, the Comment addresses what rights regarding speech and conduct the laws prohibiting hostile environment sexual harassment implicate. Third, the Comment details how the sexual harassment laws in Oregon may violate Oregon constitutional mandates. Finally, the Comment identifies ***724** how future free expression challenges to the sexual harassment laws might be resolved.

I Background Law

A. Federal Sexual Harassment Law

Title VII of the Civil Rights Act of 1964 ("Title VII") is the primary tool for most employees seeking redress for sexual harassment in the workplace. [FN14] Title VII prohibits employers from discriminating against a person because of race, color, religion, sex, or national origin. [FN15] Prohibited discrimination may include termination, refusal to hire, or any other practice which alters a person's "compensation, terms, conditions or privileges of employment." [FN16] Courts have recognized that the prohibition of discrimination in "conditions or terms" of employment requires a workplace free from all forms of harassment. [FN17]

Congress created the Equal Employment Opportunity Commission ("EEOC") to implement the provisions of Title VII. [FN18] In this capacity, the EEOC developed guidelines defining the conduct that constitutes sexual harassment under Title VII. [FN19] Courts ***725** dealing with sexual harassment cases have been influenced by the EEOC's guidelines, but these regulations are not binding on courts. [FN20] Nevertheless, courts give deference to the guidelines because they "constitute a body of experience and informed judgment" that can be useful in deciding sexual harassment cases. [FN21]

In general, and in accord with the EEOC's guidelines, courts have held that workplace conduct violates Title VII if it is "sufficiently severe or pervasive 'to alter the conditions of [the employee's] employment and create an abusive working environment'" because of the worker's sex, race, religion, or national origin. [FN22] Infrequent or isolated insults generally do not create an abusive or hostile work environment, but the abuse need not be so severe as to drive the employee from her job. [FN23]

Specifically, sexual harassment arises when the employee's submission to unwelcome sexual advances is made a term or condition of employment, [FN24] when the employee's submission, or the lack of it, is the basis of employment decisions affecting the employee, [FN25] or when harassment by a supervisor, co-worker, or customer [FN26] creates a hostile environment. [FN27]

***726** Where the theory of recovery for sexual harassment rests on the denial by a supervisor of a tangible (economic) job benefit, such as promotion, to a subordinate employee due to the employee's rejection of sexual advances, the courts characterize the harassment as "quid pro quo." Where the action of a supervisor does not result in loss of a tangible benefit, but still has the effect of altering the employee's work environment, courts characterize the harassment as "hostile environment."

Expression is at the heart of both forms of harassment, since the demands for sexual favors involved in quid pro quo harassment, as well as conduct that creates a hostile environment, generally take the form of expression. However, tension between free speech interests and sexual harassment only arises from the hostile environment branch of harassment. [FN28]

The categorization of sexual harassment as either quid pro quo or hostile environment has provided the courts a workable framework to address the liability of employers under such claims. [FN29] Courts created both of these theories before the EEOC issued its guidelines, and even though the guidelines did not use ***727** the terms or the distinction, courts continue to rely on them. [FN30] Nevertheless, despite this analytical framework, how broadly "sexual harassment" is to be defined is by no means a settled issue and courts, including the Supreme Court, continue to further define the conduct which is actionable under Title VII. [FN31]

In light of the expansive and yet-undetermined coverage of Title VII, employers have been quick to institute broad anti-harassment policies in order to avoid future lawsuits. In Burlington Industries v. Ellerth, [FN32] the Court made it clear that an employer's failure to institute written policies regarding sexual harassment may very well preclude the employer from asserting a viable defense to a claim of hostile environment sexual harassment. [FN33]

In Burlington, the Court described the test for employer liability under a claim of sexual harassment as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the

plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. [FN34]

The incentive for employers to institute sexual harassment policies after Burlington is obvious-failure to provide "preventative or corrective opportunities" to employees is an invitation for courts to rule for future plaintiffs on summary judgment. On the other hand, proof that an employee unreasonably failed to use established complaint procedures will normally suffice to satisfy the employer's burden under the second element of the affirmative ***728** defense. [FN35] Thus, simply from a business perspective, it is beneficial for an employer to set out a policy on sexual harassment. Additionally, several courts have granted summary judgment to employers as a result of their prompt remedial action, despite the existence of a hostile environment. [FN36]

In Faragher v. City of Boca Raton, [FN37] the companion case to Burlington, the Supreme Court had occasion to apply the current test for hostile environment. In Faragher, a female lifeguard sued her employer (the City) claiming that her two immediate supervisors had created a "sexually hostile atmosphere" at work by repeatedly subjecting her and other female lifeguards to "'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms." [FN38] The Supreme Court held that in a situation such as Faragher's, an employer is vicariously liable for actionable discrimination caused by a supervisor, subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff. [FN39] Because Faragher did not suffer from any tangible employment action, the City would generally be entitled to raise its affirmative defenses to liability. The City did have a sexual harassment policy in place. However, in this case, the Court found that the defense was unavailable to the City as a result of its failure to disseminate its sexual harassment policy or to monitor the activities of its supervisors. [FN40] The Court held that given these failures, the City could not, as a matter of law, demonstrate the first prong of the affirmative defense: reasonable care in preventing the harassment. [FN41] Consequently, the Court found the City vicariously liable. [FN42]

***729** Federal sexual harassment law has thus far developed with little attention to First Amendment concerns. Despite the Supreme Court's pronouncements in Faragher and Burlington, the central question in any hostile environment sexual harassment case remains whether the harassment has risen to the level of creating an abusive or hostile environment. By its nature, this standard is imprecise and allows for latitude in application.

For example, different courts have held similar types of expression to amount to, or not to amount to, a hostile environment. In Robinson v. Jacksonville Shipyards, Inc., [FN43] the court held that pornography posted at the workplace contributed to a hostile work environment. [FN44] However, the Sixth Circuit has recognized that workplace pornography may have only a "de minimis effect" on the work environment. [FN45] Similarly, courts have held similar types of speech to contribute, and not to contribute, to a hostile work environment. [FN46] While many of these differences can be explained by the fact that hostile work environment claims are, by their nature, fact intensive inquiries, the mere existence of imprecise standards requires employers to make delicate policy judgments in advance. The employer is asked to determine whether or not specific misconduct may rise to the level of "severe or pervasive" as to alter the working conditions of an employee. This determination must be made before the misconduct has occurred and before the ramifications of the act can be determined. How are employers to make such a judgment in advance? The answer is that they cannot, and the rational employer wishing to avoid liability will therefore prohibit potentially protected speech and conduct. [FN47]

***730** B. Oregon Sexual Harassment Law

Oregon has enacted analogous statutory [FN48] and regulatory [FN49] schemes to that of Title VII and the EEOC regulations. Oregon courts have recognized the general principles that were the basis of the Faragher and Burlington decisions along with the two methodologies used in analyzing sexual harassment cases. In Mains v. II Morrow, Inc., [FN50] the Oregon Court of Appeals stated:

In "quid pro quo" cases, the employer is liable if it links employment benefits to the acceptance or rejection of sexual favors. The employer is strictly liable if the supervisor uses the employee's acceptance or rejection of sexual favors as a quid pro quo for job benefits . . . . "[In sexually 'hostile environment' cases,] [f]or sexual harassment to be

actionable, it must be sufficiently severe or pervasive enough 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" [FN51]

In general, Oregon courts have followed federal Title VII precedent , [FN52] but, until recently, Oregon courts have had relatively little opportunity to consider the established Title VII framework. [FN53] In the recent decisions of Harris v. Pameco Corp. [FN54] and ***731** Cantua v. Creager [FN55] the Oregon Court of Appeals had occasion to address new questions presented under Oregon's sexual harassment laws. In Harris, the court considered for the first time the issue of whether same-sex sexual harassment is prohibited by ORS 659.030. [FN56] The Supreme Court had ruled on same question under Title VII in the 1998 case of Onacale v. Sundowner Offshore Services, Inc. [FN57] The court in Harris, in finding the Supreme Court's ruling "instructive" in interpreting ORS 659.030, came to the same conclusion as the Court in Onacale, holding that "[t]here is nothing in the language of ORS 659.030(1)(b) that bars a claim of discrimination because the sexual harassment is aimed at a person of the same gender." [FN58]

Similarly, in Cantua, [FN59] the Oregon Court of Appeals addressed for the first time whether a plaintiff can make out a sexual harassment hostile work environment claim based solely on having viewed incidents involving other women. Citing relevant Supreme Court precedent, the court "decline[d] to hold that plaintiff's claim had no basis in fact and was not reasonable simply because she based her hostile-work-environment action on having observed incidents of harassment involving other women." [FN60]

Just as the Supreme Court continues to define the boundaries of hostile environment sexual harassment laws, so too do the Oregon appellate courts. Thus, for the same reasons that Title VII compels analysis of its application in light of free speech interests, so too does Oregon's analogous statute and case law.

C. Freedom of Expression under the Oregon Constitution

Article I, section 8 of the Oregon Constitution forbids lawmakers from "restraining the free expression of opinion, or ***732** restricting the right to speak, write, or print freely on any subject whatever." [FN61] The prohibition on such restrictions is meant to "foreclose[ ] the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication." [FN62]

In State v. Robertson, [FN63] the Oregon Supreme Court established Oregon's basic framework for determining whether a law unconstitutionally regulates protected expression or communication. [FN64] First, the Robertson court [FN65] recognized a distinction between laws that focus on the content of speech or writing and laws that focus on proscribing the pursuit or accomplishment of forbidden results. [FN66] A law of the former type is per se invalid, with limited exceptions, as an unconstitutional restriction on freedom of expression. [FN67] Such a law regulates "speech per se" and does not limit liability under the statute to speech that has the effect of causing a proscribed harm. For example, a statute prohibiting making lewd and offensive remarks in the workplace would be classified as one restricting speech per se because it is directed at particular words, not harms. Such a law would violate Article I, section 8, unless the restraint on speech fell within "some historical exception" that the constitutional guarantee was not intended to reach.

Where the law possibly implicates speech as an element of the offense, the courts must determine whether a historical exception exists that justifies prohibiting speech. Such an inquiry looks to whether an exception to the free speech guarantees was "well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." [FN68] Under the "historical exception" analysis, a law that is directed to the substance of any opinion or subject of communication is unconstitutional unless the law existed at the time of the First Amendment (1791) and at the time of the Oregon Constitution (1859), and was not ***733** eliminated by either. Examples of such laws include: "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." [FN69] If the law regulates speech per se and does not fit into a historical exception, the law is unconstitutional. [FN70]

Second, where laws do not focus on speech per se, but instead focus on proscribing the pursuit or accomplishment of a forbidden result, Robertson recognizes that such laws can be further divided into two categories. [FN71] The

first category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. [FN72] The second kind of law also focuses on forbidden effects, but does not refer to expression at all. [FN73]

The law challenged in Robertson was of the former type. [FN74] In Robertson, the defendant challenged a coercion statute which made it a crime to "compel or induce another person to engage in conduct from which he has the legal right to abstain by causing him to fear the disclosure of discreditable assertions about some person." [FN75] In striking down the statute, the court stated that a law prohibiting speech-caused harm is constitutional unless incurably overbroad. [FN76] A law is overbroad it if potentially restricts speech or conduct protected by free expression guarantees, thereby effectively banning privileged speech along with unprivileged speech. [FN77] In such cases, the courts will attempt to construe ***734** the statute narrowly to bring the scope of its restrictions within constitutional boundaries. If the law cannot be sufficiently narrowed, it violates Article I, section 8 because it delegates legislative powers to the judge and jury in violation of ex post facto laws and invites the "standardless and unequal application" of the law. [FN78] In Robertson, the coercion statute held to be overbroad could not be saved simply by a narrow construction of the statute's prohibition on speech. [FN79]

An example of a "speech-caused-harm" statute in the context of workplace sexual harassment would be a statute prohibiting the creation of a sexually hostile work environment by making lewd and offensive remarks. Such a statute would be a speech-caused harm statute because the legislature is prohibiting the harm instead of the words themselves. Arguably, the statute could be considered overbroad if, in restricting the harm, it also prohibits expression of particular viewpoints, such as mere hostility to a particular sex. [FN80]

A third kind of law that has the potential of limiting freedoms of expression, those referred to as "harm per se" statutes, are laws which forbid specific effects without referring to expression at all. [FN81] For example, a law that makes it unlawful to create a sexually hostile work environment would be directed at specific effects of defendant's actions-- sexual harassment--without addressing the form of the harassment, speech or otherwise. [FN82] These laws will generally be upheld unless the defendant can successfully assert that, apart from a vagueness claim, "the statute could not constitutionally be applied to his particular words or other expression . . . ." [FN83] The courts will not recognize an argument that such a statute is per se invalid under Article I, section 8 "without the support of legislative or other background showing that suppression of expression itself was the intended or expected object of the law." [FN84]

***735** II Speech as Harassment

A. Identifying Speech That Creates a Hostile Environment

The courts have set out no general rule as to what words or what kinds of speech can create a hostile environment. [FN85] In general, the activities supporting a claim for sexual harassment fall on a continuum "somewhere between forcible rape and the mere utterance of an epithet." [FN86] A law prohibiting quid pro quo sexual harassment punishes speech, but no one would deny that such statutory restrictions are permissible. Such a restriction is not based on the speaker's message per se, but rather on the underlying coercive conduct. As such, prohibiting such conduct does not raise significant freedom of expression concerns. However, much of the speech involved in hostile environment cases may consist of sexually explicit comments, [FN87] sexual propositions, [FN88] vulgar personal insults, [FN89] pornography in the workplace, [FN90] and demeaning references such as "honey," "dear," "baby," and "momma." [FN91] These types of speech are regulated under the sexual harassment laws even if no corresponding coercive conduct ***736** or physical invasion occurs. [FN92]

In sexual harassment cases, the courts have not recognized a categorically protected form of speech, politically oriented or otherwise, which is alleged to be the basis for creating a hostile environment. [FN93] The only recognized limitation on liability is the requirement that the employee establishes the conduct complained of was sufficiently "severe or pervasive" to alter her working conditions. [FN94] For example, in Faragher v. City of Boca Raton, [FN95] Faragher was subjected to lewd and offensive remarks, which she argued created a hostile environment. [FN96] The Court, in upholding the district court's finding that Faragher's work environment was sufficiently hostile, noted that Title VII does not ***737** prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." [FN97] Furthermore, mere

teasing, offhand comments, and isolated incidents will not amount to discriminatory changes in conditions of employment. [FN98] The Supreme Court continued: "Properly applied, [standards for judging hostility under Title VII] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" [FN99]

Thus, both Title VII and ORS 659.030 define what speech will constitute sexual harassment by looking to the resulting repercussions of the speech, rather than categorizing the content of the speech itself. [FN100] The Faragher Court stated that sporadic abusive language and the like would generally not rise to the level of "severe or pervasive," but such a result is not because sporadic abusive language receives some protection different than that of lewd and offensive remarks. [FN101] Rather, it is simply assumed that such remarks will not constitute "severe or pervasive" harassment as to offend the reasonable victim. [FN102] In the language of ***738** Oregon's constitutional jurisprudence, Title VII and ORS 659.030 appear to fall within the category of "speech-caused harm" statutes. [FN103] The statutes are not violated by mere speech; the speech must create some type of harm. And the courts will only recognize "harm" when the speech is sufficiently severe and pervasive.

B. How Sexual Harassment Laws Suppress Protected Expression

Courts have construed the language of Title VII to require affirmative steps be taken by the employer to prevent employment discrimination. [FN104] Title VII and ORS 659.030 are both written in broad, inclusive terms: The task of identifying, punishing and remedying conduct labeled as "severe or pervasive" is left in the hands of the employer. If the employer fails in this obligation, it will be held, essentially, strictly liable for sexual harassment. [FN105]

As such, harassment laws have the potential to suppress speech by threatening employers with liability if they do not punish employees who say offensive things in the workplace. This indirect restriction on speech is just as effective as a direct restriction would be. Companies, fearing liability, implement policies prohibiting particular conduct and speech and provide for disciplinary measures. Employees, fearing discipline, avoid expressing the proscribed speech. The employees are as deterred by potential discipline as they would be by the threat of a lawsuit directed at them. [FN106]

The problem employers face when implementing such policies is determining when the conduct to be regulated or prohibited is sufficiently "severe and pervasive." As noted above, such a determination depends wholly on the effect of the speech, not the ***739** speech itself. [FN107]

An employer could make the determination that allowing, for example, gender- related jokes in the workplace has the potential of creating a hostile environment, and thus, potential liability on the employer's part. [FN108] Implementing a policy restricting any gender-related jokes eliminates, or at least greatly reduces, the employer's potential future liability. The recent Burlington Industries v. Ellerth decision validates such a decision, stating that having established preventative measures in place will buttress any defense to an employee's hostile environment claim. [FN109] Additionally, the harassment laws and the courts say nothing about categories of protected speech; they only refer to conduct that has the potential for creating a hostile environment. Thus, a prudent employer might implement a gender-related jokes policy because the employer in such a situation has nothing to lose [FN110] and everything to gain (i.e., increasingly limited liability). However, as Faragher recognized, gender-related jokes, in general, will not rise to the level of "severe or pervasive" harassment. [FN111] Thus, gender-related jokes, along with other "potential" forms of harassment, may very well be protected expression that a prudent employer is nevertheless encouraged to prohibit.

The current state of sexual harassment law creates a potential tension between what the laws and the courts have told employers to do to protect themselves from liability and a speaker's rights to "free expression of opinion . . . on any subject whatever." [FN112] So far, this tension is one-sided in favor of regulation because neither the sexual harassment laws nor the courts have yet recognized constitutional limits on an employer's ability ***740** to restrict speech. [FN113] Thus, at present, potential exposure to liability will prevail over employers' concerns for employees' rights to express themselves, because employers derive no benefits from their employees' offensive speech, but may bear liability for it. Broad restrictions on sex- based speech and conduct are therefore encouraged.

However, it seems possible to develop and apply principles for regulating sexually harassing workplace expression that are faithful to both free speech and equality rights. If the choice is ultimately to be left in the hands of the employer, clearer lines must be established by the courts. Absent such guidance, equality concerns will continue to trump the important constitutional right of free speech. However, this need not be the case. Valid restrictions on harassing conduct do not need to be sacrificed to ensure that employers treat their employees with due respect.

III Implications

A. Jurisdictional Matters

While Title VII has played a large part in Oregon's sexual harassment jurisprudence and ORS 659.030 is modeled after the federal legislation, [FN114] as a jurisdictional matter, Article I, section 8 of the Oregon Constitution is not implicated in federal litigation. Courts have developed the well-established rule that it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the federal courts. [FN115] Where a "well plead complaint" implicates a federal law, such as Title VII, the federal courts will have subject matter jurisdiction over that complaint. [FN116] In such a case, the Supremacy Clause of the U.S. Constitution provides that if federal law conflicts with state law, federal law prevails. [FN117] Additionally, the Supreme Court has explained that:

***741** In the absence of explicit statutory language signaling an intent to pre-empt [state law], we infer such intent where . . . the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. [FN118]

For example, in Garnett v. Renton School District, [FN119] students at a public school wished to form a religious club, but the school district denied their request, citing its view that religious meetings on school grounds would violate the Washington Constitution's establishment clause. [FN120] The students argued that a federal law, the Equal Access Act, [FN121] preempted the state constitutional mandate and the Ninth Circuit Court of Appeals agreed. [FN122] The court acknowledged that state constitutions can be more protective than the U.S. Constitution; however, states cannot abridge rights granted by federal law. [FN123] In the case of the Equal Access Act, any state constitutional provisions limiting the scope of the federal law necessarily had to give way to the rights established in the federal legislation.

In Title VII cases, the statute could be challenged on First Amendment grounds under the U.S. Constitution, [FN124] but any additional***742** protections provided by Article I, section 8 of the Oregon Constitution would not provide a basis for challenge to Title VII's proscriptions. As a result, while Title VII provides the general principles that are the basis of ORS 659.030, an analysis of the sexual harassment law's ramifications on Oregon constitutional liberties is limited to claims brought under Oregon law in Oregon courts.

B. State Action

The second preliminary issue that must be addressed is the requirement of state action. Article I, section 8 prohibits lawmakers from restraining free expression or restricting the rights of free speech. [FN125] Article I, section 8 "is a prohibition on the legislative branch. It prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject." [FN126] Absent a showing of state action, there can be no violation of Article I, section 8. [FN127]

An anti-harassment policy that a private employer creates on its own would raise no freedom of expression difficulties. [FN128] However, the fact that an employer has a right to do something to its employees does not mean that the government may force the employer to do it. For example, an employer may prohibit its employees from burning flags on company time and on company property, but clearly the government cannot require employers to do so. [FN129]

When private employers restrict their employees' speech to comply with government mandates, including Title VII and EEOC regulations, the employer is in effect acting as a government agent. Government-instigated speech restrictions are subject to First Amendment and Article I, section 8 constraints even in the private sector. [FN130] It is the federal or state law that is the ***743** basis for liability and recovery. As such, any civil liability must comport with free expression standards. [FN131]

Likewise, although litigation under ORS 659.030 is between two private parties, there is clearly state action in such litigation. Whether an employer's workplace policies are implemented because of a fear of future liability or mandated by the court, the state action analysis remains the same. The government simply cannot avoid Article I, section 8 scrutiny by using the threat of legal liability to coerce a private party into implementing the speech restrictions on its behalf.

C. Analysis of Sexual Harassment Laws under Robertson

State v. Robertson [FN132] establishes the basic framework for determining whether a law violates Article I, section 8 of the Oregon Constitution. [FN133] Analysis under the Robertson framework focuses on the lawmaking function insofar as it seeks to guide lawmakers in their decisions to enact laws affecting expression. With limited exceptions, lawmakers must enact laws that, by their terms, focus on the harmful effects of expression, and not just on the expression itself. [FN134] Because the legislature's purpose behind the law is paramount in this analysis, that purpose, as evidenced by the statute and rules themselves, must control the inquiry. [FN135]

The statute in question, ORS 659.030, establishes an employer's liability for unlawfully discriminating against an employee on the basis of sex with regard to terms, conditions, or privileges of employment. [FN136] The relevant Bureau of Labor & ***744** Industry (BOLI) regulations further establish that, in regard to hostile environment sexual harassment, the employer is liable if it knew or should have known of any conduct amounting to harassment. [FN137]

1. Speech Per Se

Having established that sexual harassment laws do indeed implicate speech , [FN138] determining the propriety of ORS 659.030 and the BOLI regulations requires first examining whether Oregon's statute can be characterized as legislation focusing on the content of speech, or the mere effects of such speech. [FN139]

ORS 659.030 is written in broad terms. To begin with, the statute's prohibition on "discrimination" is potentially extremely far reaching. As noted before, "discrimination," as interpreted by the courts, is intended to encompass all conduct that is "sufficiently severe or pervasive" so as to create a hostile environment. [FN140] Additionally, such conduct is not limited to non-speech conduct. Therefore, including "discrimination" in ORS 659.030 could arguably be construed as a proscription on "speech per se."

As Robertson identifies, not all laws that regulate "speech per se" are necessarily invalid. [FN141] There may be a recognized historical exception that allows valid governmental restraint. [FN142] However, in the context of ORS 659.030, a court would never be required to identify a historical exception to freedom of speech in the workplace for a number of reasons.

First, the potential defense that a certain kind of speech falls within a "historical exception" presupposes that a plaintiff has asserted a valid hostile environment harassment claim. Ascertaining validity requires characterizing the defendant's conduct ***745** as sufficiently "severe or pervasive" to alter the conditions of the plaintiff's employment. [FN143] In such an instance, the defendant-employer is faced with defending the claim by (1) asserting the conduct complained of does not rise to the level of "severe or pervasive," or (2) claiming that the employer did indeed exercise reasonable care to prevent and correct the harassing behavior and the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. [FN144] In either case, the employer is not asserting a facial challenge to the statute itself. The employer cannot reasonably assert, for example, that the sexual harassment law's proscription on "discrimination" regulates speech per se (a determination

that would require the court to examine the aforementioned historical exceptions) because the plaintiff's claim is based on specific discriminatory harm to her. [FN145] It is the nature of the harm, not the underlying sexual misconduct, that is the focus of ORS 659.030. In comparison, the "speech per se" statutes are aimed at regulating speech in the abstract, not the harm that may be caused by that speech, which itself may or may not be regulated by another law.

For example, in State v. Henry [FN146] the defendant challenged the constitutional validity of a statute that made it a crime to disseminate obscene material or possess obscene material with the intent ***746** to disseminate it. [FN147] The Oregon Supreme Court held that the obscenity statute violated Article I, section 8 and the statutory restrictions could not be justified by a historical exception to its free speech provision. [FN148] The statute unconstitutionally regulated speech in the abstract by creating a "uniform vision on how human sexuality should be regarded or portrayed," but, as the Henry court points out, invalidating the obscenity statute does not preclude regulation of obscene materials in the interests of unwilling viewers, captive audiences and minors. [FN149]

In the case of sexual harassment claims, an assertion that specific speech is protected under Article I, section 8 would require characterizing "discrimination" as abstract speech. But the sexual harassment laws do not attempt to proscribe merely abstract speech; the speech must have an effect on another individual and that effect must be "severe or pervasive." It is the effect of such speech that ORS 659.030 regulates. [FN150]

Second, an employee wishing to challenge the facial validity of a law prohibiting "discrimination ," may assert that the statute, as applied by his employer, is overbroad. For example, an employee who wishes to place a "boudoir photography" [FN151] of his wife or girlfriend on his desk at work, may be prevented from doing so by workplace policy. The courts, however, would not recognize a challenge to the employer's policy brought by the disgruntled employee on free speech grounds. Even assuming state action is present, [FN152] and that the policy is in furtherance of the sexual harassment laws, ORS 659.030, while broad in its ***747** scope, is limited to addressing grievances brought by employees based on employer discrimination on the basis of race, color, religion, sex, or national origin. [FN153] The statute, while a limitation on some forms of speech, does not appear to be susceptible to a facial challenge by a third party. Such workplace policies would, presumably, be left to "freedom of contract."

In summary, while ORS 659.030 may arguably be read to regulate speech on its face by prohibiting "discrimination," the application of the prohibition requires focusing on the effects of offensive speech, not merely speech in the abstract. As such, a facial challenge to the statute as a regulation of "speech per se," while conceivable, would probably be dismissed by the courts in light of the harm suffered by the plaintiff. Where the effects of the speech are the essential inquiry, the law cannot literally be called a "speech per se" statute.

2. Speech-Caused Harm

The second kind of laws that have the potential of limiting freedoms of expression are those referred to as "speech-caused harm" statutes. [FN154] Such statutes focus on specific forbidden effects without explicitly prohibiting expression. [FN155] Whether sexual harassment laws may be included within this second category depends upon whether the prohibition on discrimination in the workplace "expressly prohibits expression" in order to achieve the statute's policy of eliminating sexual harassment in the workplace. According to the argument that a prohibition on discrimination (i.e., the harm caused by a discriminatory act) is tantamount to a prohibition on speech itself, it follows that the statute's terms expressly prohibit expression. Therefore, sexual harassment laws fall within the second category and must be analyzed for overbreadth. [FN156]

In analyzing an Article I, section 8 challenge to a statute that regulates harm caused by speech, the issue the courts address is whether the challenged statute is overbroad. [FN157] An overbreadth and narrowing analysis is a constitutional inquiry that asks if constitutionally permissible activity is swept into the statute as written. ***748** If so, the inquiry becomes whether a judicially imposed narrowing construction can remove most of the constitutionally protected activity from the statute so as to leave its focus upon legitimately proscribed activity. [FN158]

The present inquiry focuses on whether a prohibition on discrimination that may tend to encompass protected speech is unconstitutionally overbroad. It seems decisive to point out that if speech does not rise to the level of

"discrimination," it is not prohibited by the statute. Any analysis under the statute itself leads to the inescapable conclusion that the statutory prohibitions are sufficiently narrow as to avoid encompassing protected conduct. "Protected conduct" in this instance encompasses all conduct that is not sufficiently severe as to create a hostile environment. [FN159] Therefore, it seems implausible that a court would find ORS 659.030 on its face to be overbroad, let alone attempt to construe the statute more narrowly than it already is.

The question this Comment attempts to raise, if not answer, is whether the secondary effects of the sexual harassment statutes lend credence to the argument that ORS 659.030 is overbroad in its effect. Recall, for example, the hypothetical employer who instituted a ban on gender-related jokes out of a fear of potential liability under sexual harassment law. Neither the sexual harassment laws nor court interpretations of the laws are so broad as to place restrictions on all offensive speech, including gender-related jokes. Courts have acknowledged that whatever potential "harms" such jokes and related speech may cause are relatively minor and will generally not constitute "severe or pervasive" conduct. [FN160] Nevertheless, the secondary effect of the statute may be to limit such innocuous speech because of the potential for any harm that may be the basis for liability.

In City of Portland v. Tidyman, [FN161] the Oregon Supreme Court dealt with the "secondary effects" argument in the context of a city ordinance restricting the location of adult businesses. At issue ***749** was a city ordinance that required adult businesses to locate at least 500 feet away from any residential zone or any public or private school. The City attempted to justify its restriction on freedom of expression by finding that "adult bookstores and theaters [are] inherently incompatible with residential zones 'because these businesses adversely affect the quality and stability of nearby residential and commercial areas,' [and] that the 'clustering' of adult businesses 'tended to create or accelerate blighted conditions . . . .'" [FN162] The court dispensed with the findings as "vague and conclusory," explaining that "[i]t is the operative text of the legislation, not prefatory findings, that people must obey and that administrators and judges enforce." [FN163] The court found that by omitting the supposed adverse effects as an element in the regulatory standard, the Portland ordinance appeared to attempt to regulate the characteristics of "adult" materials rather than secondary characteristics and anticipated effects of the store in violation of Article I, section 8. [FN164]

"[C]ases under Article I, section 8 , preclude using apprehension of unproven [secondary] effects as a cover for suppression of undesired expression, because they require regulation to address the effects rather than the expression as such." [FN165] In contrast, the Portland ordinance at issue in Tidyman restricted the marketing of "adult" materials, not only the effects of this marketing. [FN166] "[W]hen the terms of such a restriction include the specified harm from particular forms of expression, application of the ordinance necessarily requires showing the reality of the threatening effect at the place and time . . . ." [FN167]

In the context of the secondary effects under ORS 659.030, the goal of the law is not to reach speech per se in a roundabout way as in Tidyman, but rather to effectuate the legislation's policy of reducing sexual harassment in the workplace. This goal is effectuated by employers creating anti-harassment workplace policies. Such policies are not "prefatory findings," but rather the basis for achieving the goals of reducing workplace harassment.

As such, the secondary effects of anti-harassment policies ***750** promulgated by private employers should be viewed as effectuating the sexual harassment laws, and therefore subject to the same overbreadth analysis as the legislation. In that context, it is easy to imagine an employer's anti- harassment policy that potentially restricts conduct protected by Article I, section 8. [FN168] And, unlike a defendant's challenge to a "speech per se" statute, a constitutional challenge to an employer's broad anti-harassment policy may in fact be cognizable in Oregon courts.

This is so because of the nature of the Robertson analysis itself. A speech per se statutory analysis looks to whether speech in the abstract may be regulated. And in the context of sexual harassment laws, speech itself is not regulated, only the effects of such speech that create a hostile environment. [FN169] In contrast, a speech-caused harm statute prohibits a particular harm instead of the words themselves, but the effect of the prohibition is susceptible to a challenge that the prohibition is unconstitutionally overbroad. It is hard to tell exactly how this differentiation would play out in practice, because employers' over-suppression of speech generally does not end up in court.

Nevertheless, it is plausible that such a restriction might be litigated. Return to the example of the employer who

chooses to prohibit gender-related jokes. An employee who feels his free expression interests have been compromised may choose to take up the issue with his supervisor. If the supervisor is intent on maintaining the policy, the employee could challenge the rule as overbroad under the Robertson analysis without a required showing that the law itself is facially invalid.

In such a case, the courts will attempt to construe the statute narrowly to bring the scope of its restrictions within constitutional boundaries. If the law cannot be sufficiently narrowed, it violates Article I, section 8. [FN170] In the case of an employee who challenges an employment policy as overbroad, the "overbreadth and narrowing" analysis would dictate a predictable outcome. A court would presumably construe ORS 659.030 as restricting speech that causes a hostile environment and, in the process, strike down an employment policy that had the effect of unconstitutionally restricting protected activity. [FN171]

***751** In the end, it is safe to say that ORS 659.030 is not, on its face, unconstitutionally overbroad. Any specific occurrence of restriction on protected speech through a workplace sexual anti-harassment policy could be rectified by narrowing the scope of conduct an employer may legitimately prohibit. The concern that remains rests on the presumption that few employees, if any, would choose to challenge an employment policy in this fashion. [FN172]

3. Harm Per Se

A law addresses harm per se when it focuses on forbidden effects without referring to expression at all. [FN173] ORS 659.030 prohibits discrimination, but does not define how broadly "discrimination" is to be interpreted. As noted before, courts have interpreted the term "discrimination" to include speech-caused harms. [FN174] Even if one denies prohibition on discrimination is equivalent to prohibition on expression, sexual harassment laws still fall within this third category. A reference to expression is not required in the law, only a focus on the forbidden effect--sexual harassment in the workplace. Therefore, such laws may be analyzed "as applied" to the particular speech at issue, similar to the analysis under speech-caused harm statutes. [FN175]

Conclusion

Sexual harassment laws as applied by individual employers raise the issue of what free speech rights an employee retains in the work environment. The laws themselves do not appear to prohibit any speech more than necessary to achieve their stated purpose of ensuring a hostile free environment. Under the constitutional analysis set out by State v. Robertson, the laws appear to validly constrain individual expression because the laws are based on a determination that the conduct complained of had the effect of seriously altering the victim's conditions of employment.

Rather than attempting to balance competing rights, the Oregon Constitution examines a law on its face to determine the validity ***752** of the constraints. In the context of workplace sexual harassment, such restraints appear not only valid, but a necessary condition of employment. The laws operate to provide a level playing field for all employees and ensure a workplace free of bigotry and oppression.

However, when employers implement specific prohibitions on workplace conduct, concerns are raised regarding the effect of such policies on constitutionally protected speech. While some employers will initiate employment policies to effectuate the policies of the sexual harassment laws, others do so merely out of fear of liability. At least one drawback to such a system is the authority employers are given to establish their own oppressive rules. Many of these workplace rules may include strict regulations on speech and expression - not for the benefit of diversity and happiness in the workplace, but rather out of an acknowledgment of the liability associated with not doing so.

This Comment has focused on the inherent tension between the employees' rights to not be burdened by strict anti-harassment policies and the employers' attempts to live up to the duties placed on them by recent Supreme Court decisions. Of course, the victim should not be forgotten in all of this. But, as this Comment attempts to identify, valid restrictions on harassing conduct do not need to be sacrificed to ensure that employers treat their employees with due respect. Continued efforts by the courts to define what conduct is or is not actionable as a form of hostile

environment sexual harassment will effectuate the free speech rights of employees. The Supreme Court's decision in R.A.V. v. City of St. Paul [FN176] started down this line, pronouncing the general rule that proscribable classes of content-based speech may be regulated by statute. [FN177] A line of Supreme Court sexual harassment cases culminating in Burlington Industries v. Ellerth [FN178] and Faragher v. City of Boca Raton [FN179] provide some guidance to employers regarding how to ascertain whether specific conduct fell within a "proscribable class of content-based speech," and the necessary care an employer should exercise in addressing claims of sexual harassment. However, until a less amorphous statutory test for actionable conduct is articulated by the courts or legislatures, ***753** employee constitutional rights to speak on any given matter are seemingly exercised at the whim of the employer.

[FNa1]. Third year student, University of Oregon School of Law; Managing Editor, Oregon Law Review, 2000-01.

[FN1]. The Equal Employment Opportunity Commission ("EEOC"), the agency in charge of enforcing federal sexual harassment laws, defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual; or

(3) 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.

29 C.F.R. ß 1604.11 (1999). Of course, the EEOC guidelines are defined in terms of workplace harassment only. For a broader definition, see Catherine A. MacKinnon, Sexual Harassment of Working Women 1 (1979) ("Sexual harassment, most broadly defined, refers to unwanted imposition of sexual requirements in the context of a relationship of unequal power.").

[FN2]. MacKinnon, supra note 1, at 27.

[FN3]. See, e.g., Ponton v. Scarfone, 468 So. 2d 1009 (Fla. Dist. Ct. App. 1985). Sexual harassment laws provide two particular advantages over a tort theory. First, because they specifically recognize sexual harassment as a cause of action, they remove from the discretion of the judge issues about the validity and sufficiency of the injury as well as the amount of "outrageousness" necessary for a successful claim. Second, sexual harassment claims can benefit from the law's broad definition of "employer," thus eliminating some agency problems of tort law. Christopher Barton, Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank, FSB v. Vinson and the Law of Sexual Harassment, 67 B.U. L. Rev. 445, 464-65 (1987).

[FN4]. See, e.g. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (holding same-sex sexual harassment prohibited); Harris v. Pameco Corp., 170 Or. App. 164, 180-81, 12 P.3d 524, 534-35 (2000) (same); see also Louis P. DiLorenzo & Laura H. Harshbarger, Employer Liability for Supervisor Harassment After Ellerth and Faragher, 6 Duke J. Gender L. & Pol'y 3 (1999) (noting that the amount of development in Title VII case law can be attributed to the relative lack of guidance from the Supreme Court in this area).

[FN5]. See, e.g., Title IX of the Education Amendment of 1972, 20 U.S.C. ß 1681(a) (1994) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...."); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 315 (10th Cir. 1987) (extending traditional statutory prohibitions on sexual harassment to Title IX suit); Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980) (same).

[FN6]. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[FN7]. See, e.g., Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989).

[FN8]. Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

[FN9]. For a good discussion of sexual harassment laws under the U.S. Constitution's Free Speech Clause, see Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791 (1992); see also Jeffery Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000) (discussing effects of heightened surveillance, including the monitoring of e-mail, in efforts to combat hostile environment sexual harassment).

[FN10]. Or. Const. art. I, ß 8.

[FN11]. See, e.g., Los Angeles County Fire Department General Operations Manual, ch. 4, Subj. 20, at 3 (July 15, 1992), quoted in Nadine Strossen, The Kenneth M. Piper Lecture: The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump, 71 Chi.-Kent L. Rev. 701, 723 (1995) (citing sexual harassment policy that banned "all... material... of a clear sexual connotation" from the entire workplace, including dormitories, restrooms, and lockers). But cf. Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986), aff'g 771 F.2d 323 (7th Cir. 1985) (holding that the First Amendment was violated by anti-pornography law aimed at graphic sexually explicit subordination of women through pictures).

[FN12]. Burlington, 524 U.S. at 765.

[FN13]. See, e.g., Tunis v. Corning Glass Works, 747 F. Supp. 951, 954 (S.D.N.Y. 1990), aff'd without opinion, 930 F.2d 910 (2d Cir. 1991) (noting that company's antipornography policy led to the removal of a single pornographic postcard on the inside cover of an employee's tool box); see also Rosen, supra note 9, at 22 ("[R]ecent scandals in Washington and the workplace have taught us that the effort to provide legal remedies for relatively minor invasions of privacy may inadvertently lead to privacy violations greater than those the law seeks to redress.").

[FN14]. 42 U.S.C. ß 2000e-2(a)-(h) (1994) [hereinafter Title VII].

[FN15]. Title VII, in relevant part, states:
> It shall be an unlawful employment practice for an employer 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.

Id. ß (a)(1).

[FN16]. Id. Title VII, in relevant part, states:
> It shall be an unlawful employment practice for an employer 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.

Id. ß (a)(2).

[FN17]. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

[FN18]. See 42 U.S.C. ß 2000e-5(a).

[FN19]. Sexual harassment, as defined by the EEOC, encompasses:
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... when:
(1) submission of such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual; or
(3) 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.
29 C.F.R. ß 1604.11 (1999).

[FN20]. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

[FN21]. Id. (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976)).

[FN22]. Id. at 67 (quoting Henson, 682 F.2d at 904).

[FN23]. See Harris v. Forklift Sys. Inc., 510 U.S. 17, 20-24 (1993). The Court in Harris acknowledged the impreciseness of this test, and emphasized the necessary fact-bound nature of the determination in any particular case:
[W]hether 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 performance.
Id. at 23.

[FN24]. 29 C.F.R. ß 1604.11(a)(1).

[FN25]. 29 C.F.R. ß 1604.11(a)(2).

[FN26]. Employers are generally held liable for the actions of their employees under relevant principles of state agency law. See Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998). Relevant agency laws set out the circumstances under which a principal can be held vicariously liable for the acts of its agents. Compare G.L. v. Kaiser Found. Hosps., Inc., 306 Or. 54, 61-62, 757 P.2d 1347, 1350 (1988) (stating that for principal to be liable, agent must perform act within time and space limits authorized by employment, be motivated by a purpose to serve the employer, and be acting in a way the employee was hired to act or perform) (citing Chesterman v. Barmon, 305 Or. 439, 442, 305 P.2d 439 (1988)), with Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991) (holding principal may be held liable for actions of its agents if public policy considerations are furthered by holding principal liable).

In the case of customer-created hostile environments, courts generally do not base liability on principles of agency in regard to the actions of the customer, but rather on the employer's duty to take prompt, remedial action where the employer or its agents knew or should have known of the harassment. See Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (holding employer liable when its employee was sexually harassed by employer's patron and employer either ratified or acquiesced in the harassment by not taking immediate and/or corrective action); Henson, 682 F.2d at 910 (recognizing that non-employee strangers may create sexually hostile working environment); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981).

[FN27]. 29 C.F.R. ß 1604.11(a)(3).

[FN28]. See Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech 78-79 (1995):
Sexual harassment takes two discrete forms, only one of which generates serious First Amendment questions. One form is called quid pro quo harassment; it typically involves conditioning someone's employment position on her sexual involvement.... [T]his kind of threat alters the situation of the listener. It presents her with a new and potentially disturbing choice-- whether to engage in unwelcome sexual relations or lose her job. Such situation-altering utterances are not the sort of speech that warrants protection under a guarantee of free speech.
Id.

[FN29]. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67-68 (1986). But see Burlington, 524 U.S. at 751 (dispensing with quid pro quo/hostile environment dichotomy in so much as it determines strict liability on part of employer).

[FN30]. MacKinnon, supra note 1, at 32-47.

[FN31]. See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (stating that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

[FN32]. 524 U.S. 742.

[FN33]. Id. at 765.

[FN34]. Id. (emphasis added).

[FN35]. Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995).

[FN36]. See, e.g., Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) (upholding summary judgment because of company's prompt response to plaintiff's complaints); Toliver v. Sequoyah Fuels Corp., 931 F.2d 900 (10th Cir. 1991) (similar); Giordano v. William Paterson College, 804 F. Supp. 637 (D.N.J. 1992) (similar).

[FN37]. 524 U.S. 775 (1998).

[FN38]. Id. at 780.

[FN39]. Id. at 807 (citing Burlington, 524 U.S. at 765).

[FN40]. Id. at 808.

[FN41]. Id.; see also Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977, 979 (S.D. Fla. 1989) (holding city liable for hostile environment sexual harassment where, although the city instituted a policy against sexual harassment, the policy was insignificant and no meaningful steps were taken to disseminate it or instruct employees regarding its purpose, terms, and objectives).

[FN42]. Faragher, 524 U.S. at 810.

[FN43]. 760 F. Supp. 1486 (M.D. Fla. 1991).

[FN44]. Id. at 1524-25.

[FN45]. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986).

[FN46]. Compare Thompson v. Campbell, 845 F. Supp. 665, 673-74 (D. Minn. 1994) (finding hostile environment did not result from defendant's comments "on the size and appearance of the breasts and buttocks of women in the... office") with Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993) (finding hostile environment where employees used language "referring to women generally in terms of their body parts").

[FN47]. See Strossen, supra note 11, at 714 (noting the potential problem employers face in addressing workplace anti-harassment policies, as identified by Justice Ruth Bader Ginsburg during oral arguments in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).

[FN48]. Or. Rev. Stat. ß 659.030(1)(b) (1999) provides in relevant part: "[I]t is an unlawful employment practice: [f]or an employer, because of an individual's... sex... to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

[FN49]. Or. Admin. R. 839-007-0500 (1999).

[FN50]. 128 Or. App. 625, 877 P.2d 88 (1994).

[FN51]. Id. at 634-35, 877 P.2d at 93 (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))).

[FN52]. See, e.g., id.; Harris v. Pameco Corp., 170 Or. App. 164, 12 P.3d 524 (2000); Cantua v. Creager, 169 Or. App. 81, 7 P.3d 693 (2000); Fred Meyer, Inc. v. Bureau of Labor & Indus., 152 Or. App. 302, 954 P.2d 804 (1998).

[FN53]. In contrast to litigation under Title VII, in which federal courts hear numerous sexual harassment cases, Oregon courts have only addressed a handful of sexual harassment claims under ORS 659.030. Fred Meyer and A.L.P. Inc. v. Bureau of Labor & Indus., 161 Or. App. 417, 984 P.2d 883 (1999), were the first substantive sexual harassment decisions under ORS 659.030 by Oregon appellate courts since Ballinger v. Klamath Pac. Corp., 135 Or. App. 438, 898 P.2d 232 (1995). Nevertheless, with the recent cases of Cantua, 169 Or. App. 81, 7 P.3d 693 and Harris, 170 Or. App. 164, 12 P.3d 524, Oregon courts continue to define the parameters of ORS 659.030.

In large part, the relative lack of claims brought in Oregon state courts may be attributed to differing remedial schemes set out by the respective laws. Title VII remedies may include compensatory damages, 42 U.S.C. ß 2000e-5(g)(1), while remedies under Oregon's sexual harassment statute are limited to injunctive relief and possible back pay. Or. Rev. Stat. ß 659.121. Thus, plaintiffs and practitioners choose to work within the more favorable federal scheme. Interview with Jacquelyn Romm, Walters Romm Chanti & Dickens P.C., in Eugene, Or. (Oct. 22, 1999).

Additionally, certain plaintiffs may be relegated to bringing a sexual harassment case under ORS 659.030 due to the fact that their employer does not fall within Title VII's parameters. Title VII limits its coverage to employers who employ 15 or more employees, 42 U.S.C. ß 2000e(b), while the analogous Oregon statute contains no numerical limitations. See Or. Rev. Stat. ß 659.010(6).

[FN54]. 170 Or. App. 164, 12 P.3d 524.

[FN55]. 169 Or. App. 81, 7 P.3d 693.

[FN56]. Harris, 170 Or. App. at 179, 12 P.3d at 533.

[FN57]. 523 U.S. 75 (1998).

[FN58]. Harris, 170 Or. App. at 181, 12 P.3d at 535.

[FN59]. 169 Or. App. at 81, 7 P.3d at 693.

[FN60]. Id. at 99, 7 P.3d at 704.

[FN61]. Or. Const. art I, ß 8.

[FN62]. State v. Robertson, 293 Or. 402, 412, 649 P.2d 569, 576 (1982).

[FN63]. Id.

[FN64]. Id. at 416-17, 649 P.2d at 579.

[FN65]. The Robertson decision was authored by Justice Hans Linde. The roots of Justice Linde's constitutional free speech approach can be found in Hans A. Linde, Without "Due Process"-Unconstitutional Law in Oregon, 49 Or. L. Rev. 125 (1970).

[FN66]. Robertson, 293 Or. at 416-17, 649 P.2d at 579.

[FN67]. Id. at 412, 649 P.2d at 576.

[FN68]. Id.

[FN69]. Id.

[FN70]. See discussion infra Part III.C.1.

[FN71]. Robertson, 293 Or. at 417-18, 649 P.2d at 579.

[FN72]. See, e.g., State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984) (upholding a speech-caused harm statute).

[FN73]. See, e.g., State v. Plowman, 314 Or. 157, 838 P.2d 558 (1992) (upholding a harm per se statute).

[FN74]. Robertson, 293 Or. at 417-18, 649 P.2d at 579.

[FN75]. Id. at 404, 649 P.2d at 571 (citing Or. Rev. Stat. ß 163.275(1)(e)).

[FN76]. Id. at 415, 649 P.2d at 578-79. "When the proscribed means include speech or writing... a law written to focus on a forbidden effect... must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" Id. at 417-18, 649 P.2d at 579.

[FN77]. Id. at 410-11, 649 P.2d at 575; see also State v. Blocker, 291 Or. 255, 261, 630 P.2d 824, 827 (1981) ("[A] law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as 'broad' and inclusive as it chooses unless it reaches into constitutionally protected ground."); State v. Spencer, 289 Or. 225, 229, 611 P.2d 1147, 1148 (1980) (holding disorderly conduct statute unconstitutional as written because it did "not require that the words spoken actually cause 'public inconvenience, annoyance or alarm.' The statute makes the speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm was caused or threatened.").

[FN78]. Robertson, 293 Or. at 408, 649 P.2d at 573-74.

[FN79]. Id. at 435-36, 649 P.2d at 589-90.

[FN80]. See discussion infra Part III.C.2.

[FN81]. See State v. Plowman, 314 Or. 157, 838 P.2d 558 (1992). In rejecting a challenge to Oregon's menacing statute, Or. Rev. Stat. ß 166.165, the Plowman court stated: "When the assailant had committed the act with the necessary intent, the assailant has committed the crime [of menacing], whether or not the assailant spoke." Plowman 314 Or. at 167, 838 P.2d at 564.

[FN82]. See discussion infra Part III.C.3.

[FN83]. Robertson, 293 Or. at 417, 649 P.2d at 579.

[FN84]. Id. at 417 n.11, 649 P.2d at 579 n.11.

[FN85]. But see 29 C.F.R. ß 1604.11 (1999), which seems to imply that only "conduct of a sexual nature" can be harassment. Courts have generally rejected this reading. See, e.g., Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."); A.L.P. Inc. v. Bureau of Labor & Indus., 161 Or. App. 417, 422, 984 P.2d 883, 885 (1999) (rejecting defendant's contention that only sexual misconduct is actionable under ORS 659.030).

[FN86]. Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991); see also Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment).

[FN87]. See, e.g., Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); see also Harvey A. Silvergate, An Overdue Outrage Over Speech Codes, The Boston Herald, Apr. 26, 1999, at 29 (discussing suspension of literature professor on the basis of a complaint by a female undergraduate who charged his use of vulgarity during a class lecture created a "hostile learning environment" constituting sexual harassment).

[FN88]. See, e.g., Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997).

[FN89]. See, e.g., Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994); see also Tom Kertscher, Case Could Redefine Sexual Harassment, Milwaukee J. Sentinal, Feb. 7, 2000, at 1D (discussing suit against factory in which EEOC alleged gender-specific verbal insults made by and to heterosexual women constituted hostile environment sexual harassment).

[FN90]. See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1530 (M.D. Fla. 1991).

[FN91]. See, e.g., Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993); Robinson, 760 F. Supp. at 1498.

[FN92]. Note that some courts have argued that harassing speech is somehow itself "conduct" rather than speech, and is thus unprotected by the First Amendment. See Jenson, 824 F. Supp. at 884; Robinson, 760 F. Supp. at 1535 ("[Pornographic] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."). The Jenson court stated:

Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment. That expression is "swept up" in this proscription does not violate First

Amendment principles.
For example, wearing a shirt on a street corner which says "a woman's place is on her back," would not subject the wearer to prosecution if the shirt's only characteristic is to communicate words of "gender intolerance." However, that same shirt, if worn at work, is an act of expression that may be proscribed by Title VII....
Jenson, 824 F. Supp. at 884 n.89 (citations omitted). The respective courts did not explain how words or pictures, which are treated as "speech" outside the workplace, stop being speech when they contribute to a hostile work environment. Cf. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (acknowledging harassing speech is speech). Under R.A.V., "a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech," id. at 389, and thus "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." Id. However, a proscribable class of speech would generally not include words or pictures otherwise treated as protected speech. See Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

[FN93]. See, e.g., Fair v. Guiding Eyes for the Blind, Inc., 742 F. Supp. 151 (S.D.N.Y. 1990) (implying that a male homosexual's discussion of his sexual preference, and of political issues related to homosexuality, with a male employee might constitute sexual harassment); see also Meltebeke v. Bureau of Labor & Indus., 322 Or. 132, 903 P.2d 351 (1995) (stating that religious speech may constitute harassment).

[FN94]. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[FN95]. 524 U.S. 775 (1998).

[FN96]. Id. at 780. Faragher was additionally subjected to uninvited and offensive touching, but because the Court made no distinction between the two acts, this Comment will simply address the lewd and offensive remarks claim for the purposes of this discussion.

[FN97]. Id. at 788 (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998)).

[FN98]. Id.

[FN99]. Id. (quoting B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992)).

[FN100]. This approach is in sharp contrast to the kinds of speech outside of the workplace that have been deemed sexually harassing, but nevertheless entitled to constitutional protection. The Supreme Court repeatedly has affirmed the protected status of expression that is sexual, sexist, insulting, offensive, and biased. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (reversing conviction for burning cross on property of African-American family); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (striking down restrictions on "dial-a-porn" as violating Free Speech Clause because "[s]exual expression which is indecent but not obscene is protected by the First Amendment"); Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986), aff'g 771 F.2d 323 (7th Cir. 1985) (striking down anti- pornography law aimed at graphic sexually explicit subordination of women through pictures as violating First Amendment); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (reversing conviction of woman who said "you god damn mother fucking police" to a police officer); Cohen v. California, 403 U.S. 15 (1971) (reversing defendant's conviction for wearing a jacket that said "Fuck the Draft" in a courthouse).

[FN101]. Faragher, 524 U.S. at 788.

[FN102]. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a "reasonable victim" standard). "[T]he reasonable victim standard... classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment." Id. at 880. Cf. Caroline A. Forell & Donna M. Matthews, A Law of Her Own: The Reasonable Woman as a Measure of Man 70-71 (2000) (discussing need for a "reasonable woman" standard in hostile environment sexual harassment cases). Such a standard has been adopted by some courts. See, e.g., Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884- 85 (D. Minn. 1993).

[FN103]. Oregon courts, however, initially focus any free speech analysis on the statute itself and not the underlying effects. See State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982). The initial inquiry of whether a statute regulates speech per se or merely the effects of speech dictates the rest of the analysis. Arguably, one could challenge Title VII or ORS 659.030 as a facially invalid restriction on speech under the first prong of the Robertson analysis. See discussion infra Part III.C.2.

[FN104]. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

[FN105]. See id. at 765.

[FN106]. Such circumstances are generally referred to as creating a "chilling effect" on otherwise protected speech. Daniel Farber et al., Constitutional Law: Themes for the Constitution's Third Century 700 (2d ed. 1998).

[FN107]. See supra notes 100-03 and accompanying text.

[FN108]. Of course, this determination may be attributable to other relevant factors. Many employers choose to prevent abusive workplace speech as a matter of good business and not with an eye to potential liability. See Marcy Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1, 16 (1990) ("All evidence indicates that sexist speech diminishes effective workplace performance."). But it seems clear that many anti-harassment policies are instituted at least in part because of a fear of liability. See Volokh, supra note 9 (citing numerous sexual harassment policies and strategies aimed at minimizing liability).

[FN109]. See Ellerth, 524 U.S. at 765.

[FN110]. Obviously one downside to far-reaching restrictions on employee behavior would be a negative effect on employee morale and productivity. Such psychological and sociological ramifications are beyond the scope of this Comment.

[FN111]. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[FN112]. Or. Const. art I, ß 8.

[FN113]. But see NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (recognizing that both employees and employers do not shed their free speech rights at the workplace doors).

[FN114]. See discussion supra Part II.B.

[FN115]. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[FN116]. Id. at 153.

[FN117]. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, ß 2.

[FN118]. Northwest Central Pipeline v. Kansas Corp., 489 U.S. 493, 509 (1989) (citations omitted).

[FN119]. 987 F.2d 641 (9th Cir. 1993).

[FN120]. Id. at 643. The Washington Constitution provides in relevant part:
Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.
Wash. Const, art. I, ß 11.

[FN121]. 20 U.S.C. ß ß 4071-4074 (1994). The Act provides:
[I]t shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
Id. ß 4071(a).

[FN122]. Garnett, 987 F.2d at 646.

[FN123]. Id.; see also Northwest Central Pipeline, 489 U.S. at 509; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[FN124]. Specific arguments detailing how Title VII operates to restrict First Amendment free speech rights, while germane to the analysis under Oregon's Constitution and incorporated for those purposes, are beyond the scope of this Comment. See supra note 9.

[FN125]. Or. Const. art I, ß 8.

[FN126]. State v. Spencer, 289 Or. 225, 228, 611 P.2d 1147, 1148 (1980).

[FN127]. See Lloyd Corp. v. Whiffen, 307 Or. 674, 713, 773 P.2d 1294, 1317 (1989) (Carson, J., dissenting).

[FN128]. See Hudgens v. NLRB, 424 U.S. 507 (1976) (stating that the First Amendment applies only to government speech restrictions).

[FN129]. See Texas v. Johnson, 491 U.S. 397 (1989).

[FN130]. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). Skinner held that the Fourth Amendment applies to searches and seizures conducted by a private party which acts as "an instrument or agent of the Government," id. at 614, and noted that such a relationship will be found even if "the Government has not compelled a private party to perform a search." Id. at 615. The Court concluded that the Fourth Amendment did apply to the searches at issue because "the Government did more than adopt a passive position toward" them, and because they were not "primarily the result of private initiative." Id.

[FN131]. See New York Times v. Sullivan, 376 U.S. 254 (1964). In Sullivan, Justice Brennan stated: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards... may be markedly more inhibiting that the fear of prosecution under a criminal statute." Id. at 277.

[FN132]. 293 Or. 402, 649 P.2d 569 (1982).

[FN133]. See discussion supra Part II.C.

[FN134]. Rex Armstrong, Free Speech Fundamentalism: Justice Linde's Lasting Legacy, 70 Or. L. Rev. 855, 877 (1991).

[FN135]. See Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 317 Or. 606, 859 P.2d 1143 (1993).

[FN136]. Or. Rev. Stat. ß 659.030.

[FN137]. Or. Admin. R. 839-007-0500.

[FN138]. See discussion infra Part III.

[FN139]. State v. Robertson, 293 Or. 402, 416-17, 649 P.2d 569, 579 (1982).

[FN140]. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[FN141]. Robertson, 293 Or. at 412, 649 P.2d at 576.

[FN142]. Id.; see also State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984). The court in Garcias was faced with a challenge to Oregon's menacing statute. Having concluded that speech was a possible element of the crime, the court examined the historical analogue to the modern menacing statute, common law assault. The court recognized that no threatening gesture is required in the modern menacing statute in contrast to common law assault. Thus, "[t]he menacing statute extends beyond the traditional limits of assault" and is not "wholly confined within its historical exception." Id. at 696- 97, 679 P.2d at 1358 (quoting Robertson, 293 Or. at 412, 649 P.2d at 576).

[FN143]. Meritor, 477 U.S. at 67.

[FN144]. See Burlington Indust. v. Ellerth, 524 U.S. 742, 765 (1998). Accord Mains v. II Morrow, Inc., 128 Or. App. 625, 877 P.2d 88 (1994).

[FN145]. See, e.g., A.L.P. Inc. v. Bureau of Labor & Indus., 161 Or. App. 417, 984 P.2d 883 (1999). In A.L.P., Theresa Getman filed a complaint with the Bureau of Labor and Industry (BOLI) for, inter alia, discrimination on the basis of sex that created a hostile work environment. Getman worked at a retail smoke shop which also sold "adult toys and gifts." When she began her work at the smoke shop, she did not know that the store sold "adult" items. Id. at 419, 984 P.2d at 884.

Getman's supervisor, Allen Pieper, continuously engaged in ridiculing and tormenting behavior throughout the period of Getman's employment at the smoke shop, including threatening to "bitch slap" her and waiving artificial plastic penises at her. The court of appeals affirmed the BOLI order, which found that Pieper's offensive conduct created a hostile environment. Id.at 422-23, 984 P.2d at 885-86.

Given the personal harassment Getman experienced, Pieper could not have successfully argued that his free expression rights were abridged. See generally Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993). Nor could he assert that "adult items" in the workplace were protected expression. Compare Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1530 (M.D. Fla. 1991) with Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986), aff'g 771 F.2d 323 (7th Cir. 1985). Either argument assumes no injury occurred; Getman, however, was injured by Pieper's conduct, regardless of whether it was constitutionally protected expression.

[FN146]. 302 Or. 510, 732 P.2d 9 (1987).

[FN147]. Former ORS 167.087(1) provided:

A person commits the crime of disseminating obscene materials if the person knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproductions.

Or. Rev. Stat. ß 167.087(1) (1987) (current version at Or. Rev. Stat. ß 167.087 (1999)).

[FN148]. Henry, 302 Or. at 525, 732 P.2d at 17.

[FN149]. Id. at 18. Id., 732 P.2d at 18.

[FN150]. Accord State v. Stoneman, 323 Or. 536, 920 P.2d 535 (1996) (holding statute restricting child pornography not a restriction on speech per se because it implicates harm to children).

[FN151]. "Boudoir photographs" are pictures of a woman, generally a wife or girlfriend, dressed in lingerie, and posed suggestively. Volokh, supra note 9, at 1815 n.104 (citing Ford, "Something Kind of Sexy": Women Choose

Boudoir Poses as Gifts to Men, St. Louis Bus. J., Jan. 28, 1991, ß 1, at 4).

[FN152]. See discussion supra Part III.B.

[FN153]. Or. Rev. Stat. ß 659.030.

[FN154]. State v. Robertson, 293 Or. 402, 417-18, 649 P.2d 569, 579 (1982).

[FN155]. See discussion supra notes 74-80 and accompanying text.

[FN156]. See State v. Plowman, 314 Or. 157, 164, 838 P.2d 558, 563 (1992).

[FN157]. Id.

[FN158]. Robertson, 293 Or. at 410, 649 P.2d at 575. In Robertson, the court summarizes Oregon's overbreadth doctrine: "A claim of 'overbreadth' asserts that the terms of a law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as, for instance, Oregon Constitution, Article I, section 8...." Id.

[FN159]. See supra notes 22-23, 94-99 and accompanying text.

[FN160]. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). But see Harris v. Forklift Sys. Inc, 510 U.S. 17, 20-23 (1993) (recognizing that workplace conditions need not be so severe as to drive the employee from her job).

[FN161]. 306 Or. 174, 759 P.2d 242 (1988).

[FN162]. Id. at 184, 759 P.2d at 247 (quoting Portland. Or., Code ß 33.80.030(9), (10)).

[FN163]. Id. at 185, 759 P.2d at 247.

[FN164]. Id. at 186, 759 P.2d at 248.

[FN165]. Id. at 188, 759 P.2d at 249.

[FN166]. Id.

[FN167]. Id.

[FN168]. See supra notes 11-13 and accompanying text.

[FN169]. See supra notes 22-27 and accompanying text.

[FN170]. State v. Robertson, 293 Or. 402, 435-36, 649 P.2d 569, 589-90 (1982).

[FN171]. See discussion infra Part III.B.

[FN172]. See David B. Ezra, "Get Off Your Butts": The Employer's Right to Regulate Employee Smoking, 60 Tenn. L. Rev. 905, 953 (1993). But see Mary Williams Walsh, The Biggest Company Secret; Workers Challenge Employer Policies on Pay Confidentiality, N.Y. Times, July 28, 2000, at C1.

[FN173]. Robertson, 293 Or. at 416, 649 P.2d at 579.

[FN174]. See discussion infra Part II.A.

[FN175]. Robertson, 293 Or. at 416, 649 P.2d at 579. See discussion supra Part III.C.3.

[FN176]. 505 U.S. 377 (1992).

[FN177]. Id. at 389.

[FN178]. 524 U.S. 742 (1998).

[FN179]. 524 U.S. 775 (1998).

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