Harassment Law Chills Free Speech
By Kingsley R. Browne

The Michigan Court of Appeals recently heard arguments to determine whether Michigan’s sexual harassment law violates the First Amendment. The law fails the constitutional test in a number of respects.

The plaintiff in Burns v. City of Detroit alleged that her co-workers subjected her to a barrage of insulting and vulgar speech. She introduced a litany of statements that she claimed created a hostile work environment. A jury returned a verdict against the city (read taxpayers) in excess of $1 million.

Michigan’s sexual harassment statute prohibits “verbal or physical conduct or communication of a sexual nature” when it has the “purpose or effect” of “creating an intimidating, hostile or offensive” environment. Whether a hostile environment exists is judged under a “totality of the circumstances” standard, and the plaintiff’s perception that the environment was hostile must be reasonable. The employer is liable for the hostile environment if it knew or should have known about it but failed to take adequate remedial steps.

The law, which is directed at speech, fails the rigorous standards that the U.S. Supreme Court has established for governmental regulation of speech.

Not all speech is protected by the First Amendment. Threats of violence and “fighting words” that are likely to breach the peace are both largely unprotected. Some of the speech that Burns complained of arguably fell within these categories, but some of it did not. And the jury was not instructed that it could impose liability based only on constitutionally unprotected speech.

Under Supreme Court precedent, however, a judgment that is based upon a mixture of protected and unprotected speech violates the First Amendment.

Judicial scrutiny is at its highest when the government restricts speech based upon the viewpoint expressed, which is precisely what the harassment law does. Progressive statements about women are fine; Neanderthal statements are not. Statements praising
women as a group raise no issue; statements critical of women do.

As the U.S. Court of Appeals for the 6th Circuit, which covers Michigan, has said, harassment law requires “that an employer take prompt action to prevent ... bigots from expressing their opinions in a way that abuses or offends their co-workers.” This is classic viewpoint regulation, which is almost always impermissible.

Much First Amendment doctrine tries to eliminate “chilling effects” on speech. One of the core requirements is that statutes regulating speech provide reasonably clear notice of what is prohibited, so speakers do not avoid even constitutionally protected speech for fear of being sued. The Michigan statute gives very little notice about what is prohibited.

Sometimes, vagueness can be avoided or at least reduced by including a requirement that the speaker possess a blameworthy mental state. Thus, the Michigan anti-stalking statute was upheld against a vagueness challenge, in part because it required “willful” conduct by the defendant. Although the harassment statute requires that the plaintiff’s reaction to the speech be reasonable to prevail, it does not require that the speaker even be negligent, let alone act willfully.

The vagueness of the harassment statute is made worse by the “totality of the circumstances” standard. A hostile environment can be created by a collection of different speech by different speakers even though no single statement by itself would violate the law.

One cannot know, therefore, whether a hostile environment exists without knowing the entire array of speech that will be challenged. Speakers are supposed to be given an advance warning of what can be said and what cannot, but the hostile environment standard is always assessed after the fact.

The “totality of the circumstances” test is also too broad – it effectively chills or prohibits a substantial amount of constitutionally protected speech along with unprotected speech. According to the Supreme Court, “The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.” Harassment law has taken just the opposite approach, chilling protected speech so some unprotected speech might be prevented.

The result is that even though no individual joke, picture or comment is likely to be judged as harassing, all such jokes, pictures and comments are still suppressed by the Michigan law because they can all be added together and considered harassment. A single statement that women should be “barefoot and pregnant” would not be harassing, but it could be, and often has been, added into the mix of speech that a plaintiff challenges.
Any lawyer representing employers will tell you that the standard advice to employers is “when in doubt, cut it out,” as anyone who has suffered through sexual harassment training at work knows. Zero tolerance may be a good idea under the harassment statute, but it is the kind of good idea that the First Amendment was designed to counter.

This is not to minimize the harms that sometimes may flow from some workplace speech. But the First Amendment places limits on how government may respond to disfavored speech. One of those restraints is that it may not use a blunderbuss to suppress unprotected and protected speech alike. But that is precisely what the government has done with harassment law, which makes it unconstitutional.

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