THE CREATIVE NECESSITY DEFENSE, FREE SPEECH, AND CALIFORNIA SEXUAL HARASSMENT LAW

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I. INTRODUCTION

The California Supreme Court decided in *Lyle v. Warner Bros. Television Productions*[1] that Amaani Lyle's sexual harassment case should not have survived Warner Bros.' summary judgment motion because Lyle failed to establish facts upon which a rational trier of fact could discern the requisite severe or pervasive sexually objectionable work environment.[2] Lyle worked as a comedy writers' assistant on the television show called *Friends*.[3] Lyle was hired knowing that the show involved sexual themes and that the writers told sexual jokes and engaged in discussions about sex.[4] Specifically, the court noted that the male writers often talked about their sexual preferences in the writers' room, the break room, and the hallway.[5] Additionally, in the presence of

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1. (*Lyle II*), 132 P.3d 211 (Cal. 2006).

2. The California Supreme Court affirmed the Los Angeles County Superior Court's summary judgment as it pertained to the sexual harassment action; the Court remanded on the issues of racial harassment and attorney fees. *Id.* at 231. Justice Baxter wrote for the majority with Chief Justice George, Justices Kennard, Werdegar, Chin, Moreno and Corrigan concurring. *Id*. Justice Chin wrote a separate concurring opinion which included a discussion of the First Amendment issues. *Id.*

3. *Lyle II*, 132 P.3d at 215. The *Friends* sitcom was produced by Warner Bros. and had aired on NBC since its debut in 1994. Elizabeth Kolbert, *A Sitcom is Born: Only Time Will Tell*, N.Y. TIMES, May 23, 1994, at C11. The series was about six close-knit young friends living in New York City. *Id.* The show has been nominated for an Emmy Award sixty-three times; the cast won a Screen Actors Guild Award in 1996. *See* Academy of Television Arts & Sciences, http://www.emmys.org/awards/awardsearch.php (search for "Friends") (last visited Sept. 17, 2007); Screen Actors Guild Awards, http://www.sagawards.org/2_Awards_Recip.htm.

4. *Lyle II*, 132 P.3d at 215, 217, 225-26.

5. *Id.* at 217-18.

Lyle, the male writers talked about their own sexual experiences, drew sexual pictures which were available to Lyle, and talked about what they would like to do to the female members of the cast.[6] Most of this sexually coarse and vulgar language occurred in the writers' room.[7] The writers' room was the base for putting together the script for the weekly sitcom.[8] While Lyle found the writers' room sessions to be pervasively offensive, Lyle's presence at those sessions was in fact required as part of Lyle's job description.[9]

After four months of employment, Lyle filed a complaint under the California Fair Employment and Housing Act (FEHA)[10] alleging that the two male writers, Adam Chase and Gregory Malins, along with executive producer Andrew Reich, created a hostile work environment based on sex.[11] Warner Bros. argued that Lyle had failed to prove the essential elements of a hostile work environment,[12] and that even if such an environment were present, Warner Bros. could establish the defense of creative necessity.[13] The California Supreme Court agreed with Warner Bros. that Lyle had failed to prove a prima facie case allowing the Court to avoid a substantive discussion of the creative necessity defense.[14]

This article considers the California Supreme Court's decision in light of other federal case opinions on similar issues. The article first will discuss sexual harassment law under Title VII and California law. Second, the article discusses the *Lyle* decision at the California Court of Appeal and the California Supreme Court. Third, the article will discuss the creative necessity defense as Warner Bros. attempted to use it. Fourth, the article will examine the First Amendment assertions of Warner Bros. as discussed in the concurring opinion. Fifth, the article concludes with a proposal to adopt a business necessity type of defense for employers involved in the production of creative materials.

6. *Id.* at 217, 218 n.2.
7. *Id.* at 218.
8. *Id.* at 225-26.
9. *Id.* at 217.
10. CAL. GOV'T CODE §§ 12940(a), (j)(1) (West 2006).
11. *Lyle II*, 132 P.3d at 215-16.
12. *See id.* at 215, 225.
13. *See id.* at 225. The defense of creative necessity had not been considered by the California Supreme Court prior to the *Lyle* case. *See* Lyle v. Warner Bros. Television Prods. (*Lyle I*), 12 Cal. Rptr. 3d 511, 518 (Ct. App. 2004), *overruled by Lyle II*, 132 P.3d 211. In fact, the defense does not officially exist in the context of sexual harassment law. *Id.*
14. *Lyle II*, 132 P.3d at 231.

II. SEXUAL HARASSMENT UNDER TITLE VII & THE CALIFORNIA FAIR EMPLOYMENT PRACTICES ACT

Sexual harassment is prohibited under Title VII of the Civil Rights Act of 1964.[15] Although Title VII does not specially prohibit sexual harassment, the Supreme Court has declared sexual harassment to be a form of sex discrimination.[16] Title VII states the following:

> 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.[17]

Sexual harassment must affect an individual's terms, conditions or privileges of employment to fall within the purview of Title VII.[18] Plaintiffs who succeed in proving their case of sexual harassment are entitled to compensatory and punitive damages along with injunctive relief, back pay, and attorney fees.[19]

The California Government Code uses the broad language of Title VII and has an additional section that specifically prohibits harassment based on sex, stating:

> It shall be an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract.[20]

The California statute prohibits harassment based upon twelve protected classes.[21] California courts have interpreted the state law in

15. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

16. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

17. 42 U.S.C. § 2000e-2(a) (2000).

18. *See id.*

19. CAL. GOV'T CODE § 12970(a)(3), (c), (d) (West 2000), Horsford v. Bd. of Trs. of Cal. State Univ., 33 Cal. Rptr. 3d 644, 670 (Ct. App. 2005) (citing CAL. GOV'T CODE § 12965(b) (West 2004)).

20. CAL. GOV'T CODE § 12940(j)(1) (West 2006).

21. CAL. GOV'T CODE § 12940(a) (West 2006).

accord with Title VII whenever possible.[22] Federal and California courts have considered sexual harassment to be of two types: quid pro quo and hostile work environment.[23] The Equal Employment Opportunity Commission (EEOC) has promulgated guidelines on Sexual Harassment which state that quid pro quo occurs when, "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," or when, "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[24]

A. Federal Case Law

In the seminal case of *Meritor Savings Bank, FSB v. Vinson*,[25] the Supreme Court noted that the protection against sex discrimination was added just prior to the passage of the act, making the legislative history quite minimal.[26] The Supreme Court relied heavily on the EEOC guidelines in setting the standard for future sexual harassment litigation.[27] The Court established the benchmark for a sexual harassment case as being "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"[28]

The plaintiff in *Meritor*, Michelle Vinson, was discharged from her job as an assistant branch manager at Meritor Savings Bank after she took an extended leave of absence "due to the level of harassment and the unprofessional atmosphere" in the branch office.[29] Michelle claimed her supervisor subjected her to over forty "episodes of undesired and traumatic sexual intercourse" over a period of twenty months.[30] Her story was verified by other female employees who testified that they

22. *See* Miller v. Dep't of Corr., 115 P.3d 77, 88 (Cal. 2005).

23. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986).

24. *See* Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985).

25. 477 U.S. 57 (1986).

26. *Meritor* is the first Supreme Court case to recognize the existence of a hostile or abusive work environment. *Id.* at 73. In *Meritor*, the Supreme Court noted that there was sparse legislative history on the Act as it related to sex discrimination to guide the Court. *Id.* at 63-64. Congress amended the law just prior to its enactment leaving minimal Congressional Record to direct future case law. *Id.*

27. *Id.* at 65-67.

28. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

29. *See* Brief for the Respondent at *3, Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979), 1986 WL 728234.

30. *Id.* at *4.

were similarly abused by the branch manager.[31] Vinson further alleged that the branch manager made repeated demands for sexual favors to which she succumbed in order to keep her job.[32] Consequently, Vinson brought a sexual harassment case under Title VII.[33] However, the District Court denied all relief, ruling that Vinson's sexual relationship with the branch manager was voluntary and had nothing to do with her continued employment.[34]

The Court of Appeals for the District of Columbia reversed and remanded finding that the District Court failed to consider the hostile work environment theory of sexual harassment.[35] The court of appeals also held that the Bank would be strictly liable for the sexual harassment committed by the branch manager despite the lack of knowledge on the part of the bank management.[36]

On appeal, the Supreme Court decided that a voluntary sexual affair with a superior would not summarily preclude a plaintiff from proving a *prima facie* case of sexual harassment provided the advances were unwelcome.[37] The Court states that whether advances are welcome should be considered the case from the victim's perspective.[38] When deciding *Meritor*, the Supreme Court looked back to the Eleventh Circuit's decision in *Henson v. City of Dundee*.[39] In *Henson*, the court upheld the notion that sexual harassment can be actionable under Title VII absent a job detriment if the sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"[40] Thus following the EEOC guidelines, *Henson* divided sexual harassment cases in two types: quid pro quo and hostile work environment.[41] In *Meritor*, the Supreme

31. *See id.* at *5.
32. *See id.* at *2.
33. *See Meritor*, 477 U.S. at 57.
34. *Id.* at 61.
35. *See id.* at 68.
36. *Id* at 63.
37. *See id.* at 68.
38. *Id.*
39. *Id.* at 66-67. (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1977a, 105 Stat. 1072, 1072-74 (codified at 42 U.S.C. § 1981a (2000)), *and* Equal Employment Opportunity Act of 1972, sec. 4, § 706(g), Pub. L. No. 92-261, 86 Stat. 103, 107 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)), *as recognized in* Schonauer v. DCR Entm't, Inc., 905 P.2d 392 (Wash. Ct. App. 1995)). The *Henson* case involved a police dispatcher who claimed to have been harassed by the chief of police. *Henson*, 682 F.2d at 899. The allegation was that the chief propositioned her for sex and made vulgar comments at work. *Id.*
40. *Henson*, 682 F.2d at 904.
41. *Id.* at 910.

Court recognized the concept of a "hostile work environment" claim under Title VII and solidified the "sufficiently pervasive" requirement to sustain a sexual harassment claim.[42]

The Sixth Circuit also took up the issue of the hostile work environment in the 1986 case of *Rabidue v. Osceola Refining Co.*[43] In its decision, the court was consistent with *Meritor* as to the characteristics of a hostile work environment claim, but added four important criteria to the proof necessary to succeed in such a case.[44] The Sixth Circuit stated that triers of fact must decide if a "reasonable person" would consider the workplace hostile and that the victim must actually be offended by the conduct.[45] The court also held that the plaintiff must prove that their psychological well-being was affected and that the conduct occurred with some frequency.[46]

In 1988, the Ninth Circuit decided the case of *Jordan v. Clark*.[47] The court in *Jordan* followed *Meritor*'s "unwelcome" criteria to prove a hostile work environment.[48] The Ninth Circuit relied on the *Henson* language requiring the conduct to have been "sufficiently pervasive" to be within the definition of such an environment.[49] The Ninth Circuit then expanded upon the *Meritor* criteria in the 1991 case of *Ellison v. Brady*.[50] The court mandated that the trier of fact should consider, "the victim's perspective and not stereotyped notions of acceptable behavior,"[51] thereby negating the objective reasonable person standard

42. *Meritor*, 477 U.S. at 66-67, 72.

43. 805 F.2d 611 (6th Cir. 1986). The plaintiff complained that a coworker made vulgar comments directed at her and other male employees displayed nude pictures of women in view of the plaintiff. *Id.* at 615.

44. *Id.* at 619-20.

45. *Id.*

46. *Id.*

47. 847 F.2d 1368 (9th Cir. 1988).

48. *Id.* at 1373 (citing Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 65, 68 (1986)). In *Jordan*, the plaintiff alleged that her supervisor suggested they have sexual relations in order for her to keep her employment and to get a promotion. *Id.* at 1371. The plaintiff refused and filed a complaint, then went on leave without pay. *Id.* When plaintiff returned to work, she was assigned to a lower position. *Id.*

49. *Id.* at 1373 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1977a, 105 Stat. 1072, 1072-74 (codified at 42 U.S.C. § 1981a (2000)), *and* Equal Employment Opportunity Act of 1972, sec. 4, § 706(g), Pub. L. No. 92-261, 86 Stat. 103, 107 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)), *as recognized in* Schonauer v. DCR Entm't, Inc., 905 P.2d 392 (Wash. Ct. App. 1995)).

50. 924 F.2d 872, 878 (9th Cir. 1991). In *Ellison*, the plaintiff alleged she was harassed by a coworker in the form of romantic advances and love letters. *Id.* at 873-74.

51. *Id.* at 878.

as annunciated in *Rabidue*.[52]

In 1993 the Supreme Court once again addressed the definition of hostile work environment in *Harris v. Forklift Systems, Inc*.[53] Teresa Harris was employed by Forklift Systems as a manager until she quit in October 1987.[54] While employed, Harris was subjected to sexually degrading comments and innuendo from the president of the company, Charles Hardy, including the statements: "[y]ou're a woman, what do you know," and "[let's go] to the Holiday Inn to negotiate [your] raise."[55] When Harris confronted Hardy about his degrading comments, he agreed to stop making them.[56] However, a few weeks later Hardy again started to make similar degrading comments.[57] Harris thereafter quit her job, and filed a lawsuit against Forklift Systems for sexual harassment under Title VII.[58]

The district court dismissed Harris' case because it found that she was not psychologically injured by the conduct of the company president, and as such, could not prevail on her claim.[59] The district court applied the "reasonable woman" standard to the case, finding that a reasonable woman would have been offended under the circumstances suffered by the plaintiff.[60] However, the court ultimately held that Harris was not personally so offended by the conduct as to suffer a serious psychological injury, and on appeal the Sixth Circuit affirmed the district court's ruling in an unpublished opinion.[61] The Supreme Court granted the petition for certiorari.[62]

The Supreme Court reversed the lower court's opinion and addressed the issue of what conduct is actionable as abusive under Title VII.[63] Justice O'Connor wrote the majority opinion which held that a plaintiff need not prove that he or she suffered a tangible psychological injury to succeed in a hostile work environment case.[64] The Court noted that *Rabidue v. Osceola Refining Co.* required that a plaintiff suffer

52. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).
53. 510 U.S. 17 (1993).
54. *Id.* at 19.
55. *Id.*
56. *Id.*
57. *Id.*
58. *See id.*
59. *Id.* at 20.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 21-23.
64. *Id.* at 18, 22.

psychological injury in order to recover, while *Ellison v. Brady* did not.[65] Justice O'Connor took a middle-of-the-road approach on the issue of psychological injury,[66] and at the same time reaffirmed the reasonable person standard when determining if the environment is hostile or abusive.[67] Justice O'Connor further required that the plaintiff prove that they were subjectively in an abusive work environment.[68] If the plaintiff does not perceive the environment as abusive, then their employment has not been altered.[69]

The Court listed several factors to consider when making the determination of whether a hostile work environment exists.[70] The trier of fact should consider: "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."[71] In his concurring opinion, Justice Scalia considered the majority's "abusive or hostile" test untenable.[72] He believed that the question presented by *Harris* was not whether the employee's work had actually suffered, but rather "whether working conditions ha[d] been discriminatorily altered."[73] Justice Ginsburg also concurred, generally approving of Justice O'Connor's opinion.[74]

Since *Harris*, the Supreme Court has decided two similar cases: *Faragher v. City of Boca Raton*[75] and *Burlington Industries, Inc. v. Ellerth*.[76] Both cases, which were argued on the same day, addressed the issue of vicarious liability for the employer.[77] Justice Kennedy writing for the majority in *Ellerth* held that the distinction between the concepts of quid pro quo and hostile work environment were not critical to determining employer liability.[78] Both *Ellerth* and *Faragher* declared

65. *Id.* at 20. *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (requiring psychological injury to establish liability under Title VII), *abrogated by* Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993), *with* Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991) (omitting any requirement of psychological injury under the statute).

66. *See Harris*, 510 U.S. at 22-23.

67. *Id.*

68. *Id.* at 22 (citing Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

69. *Id.* at 21-22.

70. *Id.* at 23.

71. *Id.*

72. *Id.* at 24 (Scalia, J., concurring).

73. *Id.* at 25.

74. *Id.* at 25-26 (Ginsburg, J., concurring).

75. 524 U.S. 775 (1998).

76. 524 U.S. 742 (1998).

77. *Id.* at 742, 754; *Faragher*, 524 U.S. at 775, 780.

78. *Ellerth*, 524 U.S. at 752-54.

that employers are vicariously liable for sexual harassment of their employees when: (1) the sexual harassment is committed by the immediate supervisor of the victim; and (2) the conduct resulted in a tangible employment action against the complaining employee.[79] The employer may be held liable for the injury to the victim of the harassment even though the employer may have had no knowledge of the harassment.[80] The Court imposed a strict liability standard when a supervisor is at fault for a tangible employment action.[81]

The Court defined the concept of tangible employment action as a "significant change in employment status."[82] Such changes include firing the employee, failing to promote the employee, or changing the employee's benefits.[83] The tangible employment action could also consist of rewarding employees who submit to sexual harassment or demoting employees who refuse to submit to harassment.[84]

In *Burlington Industries* and *Faragher*, the Supreme Court held that an employer is not strictly liable for all sexual harassment that occurs in the workplace by carving out an affirmative defense for the employer when no tangible employment action has occurred.[85] If the employer can prove by a preponderance of the evidence that: "(a) 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise," the employer is allowed to assert the defense.[86]

B. California Case Law

The California Fair Employment Practices Act (FEPA)[87] was enacted in 1959 and then re-codified in 1980 to create the Fair Employment and Housing Act (FEHA).[88] The Act declared that freedom from job discrimination based upon the protected classes is a

79. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

80. *Faragher*, 524 U.S. at 790 (citing Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 70-71 (1986)).

81. *See id.* at 790, 808; *Ellerth*, 524 U.S. at 762-63, 765.

82. *Ellerth*, 524 U.S. at 761.

83. *Id.*

84. *See id.*

85. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08

86. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

87. CAL. GOV'T CODE § 12900 (West 2005).

88. *Id.*

civil right.[89] Furthermore, the Act declares that discrimination is against public policy and is an unlawful employment practice.[90] The Fair Employment and Housing Act states as follows:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtainand hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.[91]

The Act created both the Fair Employment and Housing Commission, which performs adjudicatory and rulemaking functions, and the Department of Fair Employment and Housing, which investigates and attempts to conciliate claims of discrimination and harassment.[92] The prima facie elements of a hostile work environment, as established by the California courts, are: "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior."[93]

The California courts have held that employers are strictly liable for sexual harassment committed by a supervisor, whether it is a quid pro quo or hostile work environment situation, even if no tangible employment action occurred.[94] The California Supreme Court has taken the lead of the United States Supreme Court by mandating that an employee claiming harassment based upon a hostile work environment demonstrate that the conduct complained of was severe enough or sufficiently pervasive so to alter the conditions of employment and

89. *See id.*

90. *Id.* §§ 12900, 12920.

91. *Id.* § 12920.

92. *Id.* §§ 12900, 12930, 12935.

93. Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 851 (Ct. App. 1989) (citing Priest v. Rotary, 634 F. Supp. 571, 582 (N.D. Cal. 1986)); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982), *superseded by statute*, 42 U.S.C. § 1981, 2000e-5(g) (West 2007) and 42 U.S.C. §1981a (West 2007), *as recognized in* Schonauer v. DCR Entm't, Inc., 905 P.2d 392 (Wash. Ct. App. 1995)). For an in-depth explanation of the respondeat superior element of a hostile work environment claim, see Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457, 466-67 (Ct. App. 1994).

94. State Dep't of Health Servs. v. Superior Court, 113 Cal. Rptr. 2d 878, 889-91 (Ct. App. 2001), *rev'd*, 79 P.3d 556 (Cal. 2003).

create a work environment that qualifies as hostile or abusive to employees.[95] In determining if the environment is hostile or abusive the California courts have applied the *Henson* criteria and considered the frequency and severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with an employee's work performance.[96] The objective severity of the harassment is determined from the perspective of a reasonable person in the plaintiff's position in light of all the circumstances.[97] The courts evaluate whether the conduct in question constitutes sexual harassment by considering the totality of the circumstances to which the plaintiff was subjected.[98]

In 2005, the California Supreme Court decided *Miller v. Department of Corrections*.[99] The case involved Edna Miller, a former employee of the Department of Corrections who filed a sexual harassment claim against the Department after sixteen years of employment there.[100] Miller claimed that the Warden of the prison demonstrated widespread sexual favoritism, thereby creating a hostile work environment.[101] The Warden was simultaneously involved in sexual relationships with three female correctional officers at the prison.[102] The trial court granted the defendant summary judgment[103] and the California Court of Appeal affirmed,[104] holding that a supervisor who grants favorable employment opportunities to an employee with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, non-favored employees.[105]

The California Supreme Court reversed and remanded,[106] holding that an employee can establish an actionable claim of sexual harassment under FEHA "by demonstrating that widespread sexual favoritism is severe or pervasive enough to alter his or her working conditions and

95. *E.g.*, Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 851 (following the standard for evaluating hostile work environment claims established by the United States Supreme Court in Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993)).

96. *See Aguilar*, 980 P.2d at 851 (applying *Harris*, 510 U.S. at 23).

97. *See Harris*, 510 U.S. at 23.

98. *See id.* at 21-22.

99. 115 P.3d 77 (Cal. 2005).

100. *Id.* at 81, 84.

101. *Id.* at 80.

102. *Id.* at 81.

103. *Id.* at 80.

104. *Id.*

105. Mackey v. Dep't of Corr., 130 Cal. Rptr. 2d 57, 67-68 (Ct. App. 2003), *rev'd sub nom.* Miller v. Dep't of Corr., 115 P.3d 77 (Cal. 2005).

106. *Miller*, 115 P.3d at 97-98.

create a hostile work environment."[107] The court cited the 1990 EEOC policy statement, in which the EEOC stated:

> [A]lthough isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demanding message that managers view female employees as 'sexual playthings' or that 'the way for women to get ahead in the workplace is by engaging in sexual conduct.'[108]

The Policy Statement covers three types of favoritism: isolated favoritism, favoritism when sexual favors are coerced, and widespread favoritism of consensual partners.[109] According to the EEOC Policy Statement:

> If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive work environment.'"[110]

The California Supreme Court concluded that the evidence proffered by the plaintiffs in *Miller* established a prima facie case of sexual harassment under a hostile work environment theory.[111] The court reiterated that the critical inquiry in these cases was whether the conduct in question conveyed a message that was demeaning to employees on the basis of their sex.[112] Further, the court noted that, in

107. *Id.* at 90.

108. *Id.* at 88.

109. *See* OFFICE OF LEGAL COUNSEL, EEOC, NO. N-915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990) *reprinted in* 2 EEOC COMPL. MAN. (CCH) § 615, ¶ 3113, *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html.

110. *Id.* (citing Meritor Savs. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

111. *Miller*, 115 P.3d at 90.

112. *Id.*; s*ee also* CAL. CODE REGS. tit. 2, § 7286.7(b) (2007) (outlining employer affirmative defenses in the event of the establishment of a prima facie discrimination case).

order to establish a claim, it is not necessary for the coercive sexual conduct to be directed at the plaintiff, or for the harassing behavior to be motivated by sexual desire.[113]

The California courts have also recognized the business necessity defense in employment discrimination cases.[114] The California Code of Regulations has defined the defense as follows:

> Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve.[115]

The California Code of Regulations would consider a practice impermissible if "an alternative practice . . . would accomplish the business purpose equally well with a lesser discriminatory impact."[116] The California courts have followed these regulations by mandating that an overriding compelling business purpose exist and be effectively carried out by the practice, leaving no available acceptable alternatives that have a less discriminatory impact.[117]

However, the California courts have limited the application of the business necessity defense to disparate impact cases.[118] They have generally followed the lead of the federal courts when interpreting California antidiscrimination law recognizing that the anti-discriminatory objectives and overriding public policy are identical and should be used as interpretive where appropriate, but they have also

113. *Miller*, 115 P.3d at 92-93 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

114. *See, e.g.*, Johnson Controls, Inc. v. FEHC, 267 Cal. Rptr. 158, 170 (Ct. App. 1990). In *Johnson Controls* the California Court of Appeal held that the Commission did not err by refusing to follow the business necessity defense as interpreted under Title VII. *See id.* at 170, 178. The Court ruled that the business necessity defense only applies to charges of unlawful employment discrimination in connection with facially neutral practices that have a demonstrably disproportionate and adverse impact on members of a protected class. *Id.* at 171, 173.

115. CAL. CODE REGS. tit. 2, § 7286.7(b) (2007).

116. *Id.*

117. *See* Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1987); *see also* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (discussing Supreme Court cases that outline the application of the business necessity defense).

118. *See*, e.g., West v. Bechtel Corp., 117 Cal. Rptr. 2d 647, 660-61 (Ct. App. 2002) (refusing to apply the business necessity defense in a disparate treatment case).

acknowledged that a court may decline to follow federal precedent.[119]

III. *LYLE V. WARNER BROTHERS*

Amaani Lyle was a comedy writers' assistant who worked on the television production show *Friends*.[120] Lyle was hired in June of 1999 by Gregory Malins and Adam Chase, executive producers and writers of the show.[121] While interviewing for the position, Lyle was told that the show dealt with sexual themes and that accordingly, the writers discussed sex and told sexual jokes.[122] Before she was hired, the plaintiff specified that this type of behavior did not make her uncomfortable.[123] Lyle was hired for the position.[124]

Lyle attended writers' meetings to take notes for the writers while they considered ideas for upcoming scripts for the show.[125] Lyle complained that two executive producers and one supervising producer continuously made crude sex-related jokes that disparaged women.[126] During the meetings, the writers had explicit discussions about sex: they recounted their own experiences, made sexually crude gestures, drew sexually explicit pictures, and spoke demeaningly about female members of the cast.[127] Lyle was required not only to attend these writers' meetings, but to take meticulous notes of what transpired.[128] The barrage of gender-denigrating conduct occurred not only in the writers' room but also in common areas such as hallways and the breakroom.[129] The evidence showed that such conduct occurred nearly everyday the plaintiff was employed at Warner Bros.[130]

Four months after she was hired, Lyle was fired for poor job performance.[131] She filed an action against three of the male writers and Warner Bros. under the California Fair Employment and Housing Act,

119. San Francisco v. FEHC, 236 Cal. Rptr. 716, 721, 726 (Ct. App. 1987).
120. *Lyle II*, 132 P.3d 211, 215 (Cal. 2006).
121. *Id.* at 217.
122. *Id*. at 215, 217, 225-26.
123. *Id*.
124. *Id*.
125. *Lyle I*, 12 Cal. Rptr. 3d 511, 512-13, 518 (Ct. App. 2004), *rev'd*, 132 P.3d 211 (Cal. 2006).
126. *Lyle II*, 132 P.3d at 215-16, 217.
127. *Id*. at 217-18.
128. *See Id*. at 217; *Lyle I*, 12 Cal. Rptr. 3d at 512-13, 518.
129. *Lyle II*, 132 P.3d at 217, 229.
130. *Id*. at 217-18.
131. *Id.* 132 P.3d at 215.

alleging sexual harassment.[132] The Superior Court granted the defendant's summary judgment on the sexual harassment claim.[133] The court of appeal reversed, in part, the trial court's decision, holding that there were triable issues of fact as to whether the plaintiff suffered sexual harassment.[134]

Warner Bros.' argument before the California Supreme Court was threefold: (1) the harassment complained of was not based on sex; (2) the harassment was not sufficiently pervasive so as to alter the conditions of employment; and (3) the defendant can assert the affirmative defense of creative necessity.[135] The first two go to the essence of a hostile work environment case and, if both are accepted by the court, the case should not survive summary judgment.[136]

A. Creative Necessity

Warner Bros. argued that even if the writers' conduct was vulgar, crude, and disparaging to women, the writers were in the process of creating a script, which necessitated such behavior.[137] They explained, "[b]ecause '*Friends*' deals with sexual matters, intimate body parts and risqué humor, the writers of the show are required to have frank sexual discussions and tell colorful jokes and stories . . . as part of the creative process of developing story lines, dialogue, gags and jokes for each episode."[138]

The court of appeal accepted Warner Bros.' assertion of a creative necessity defense.[139] The court reasoned that the creative necessity defense goes to the single factor of "context," and that the defendants would have to prove that "[the] conduct was indeed necessary to the performance of their jobs."[140] The harassment "must be viewed in the context in which it took place to determine whether the defendants' actions created an objectively hostile work environment."[141] In other

132. *Id*. at 215-16.

133. *Id*. at 216.

134. *Lyle I*, 12 Cal. Rptr. 3d at 514.

135. *Lyle II*, 132 P.3d at 220; *Lyle I*, 12 Cal. Rptr. 3d at 514, 518.

136. *See Lyle II*, 132 P.3d at 229 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)).

137. *Lyle I*, 12 Cal. Rptr. 3d at 520.

138. *Id.* at 518.

139. *Id.*

140. *Id.*

141. *Id*. at 519 (citing *Oncale*, 523 U.S. at 81-82; Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 852 (Ct. App. 1989)).

words, the nature of the work and possibly even the nature of the workplace are factors in a sexual harassment claim.[142] The court of appeal considered the "[d]efendants' 'creative necessity' argument . . . analogous to the 'business necessity' defense recognized in disparate impact cases . . . ."[143] Under the business necessity defense, the employer must prove that there is a compelling, overriding, and legitimate business purpose, that the contested practice effectively carries out this purpose, and that there are no acceptable alternative policies or practices which would better accomplish the business purpose, or accomplish it equally well, with a lesser differential impact.[144]

The court of appeal noted that the defense was limited, but that "[w]ithin such limits . . . [the] defendants may be able to convince a jury [that] the artistic process for producing episodes of '*Friends*' necessitates conduct which might be unacceptable in other contexts."[145]

The California Supreme Court reversed and remanded the California Court of Appeal decision with directions to affirm the summary judgment for the defendants on the issue of sexual harassment.[146] The California Supreme Court stated that the elements the plaintiff must prove under a hostile work environment sexual harassment claim were that "she was subjected to sexual advances, conduct, or comments that were: (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment."[147]

The California high court considered the case under a disparate treatment theory.[148] The court explained that the essence of a harassment claim is the sex-based disparate treatment of an employee, not sexual or vulgar exchanges.[149] The California high court stated: "a hostile work environment sexual harassment claim is not established

142. *Id*. at 519 n.67 (citing *Oncale*, 523 U.S. at 81-82).

143. *Id*. at 520 (citing CAL. CODE REGS. tit. 2, § 7286.7(b) (2007)). The court of appeal accepted Warner Bros.' argument that, as in disparate impact cases, where a business necessity defense is allowed, in the production of television programs, a creative necessity defense would be appropriate. *See id.* at 518-20.

144. *Id*. at 520 (citing San Francisco v. Fair Employment & Hous. Comm'n, 236 Cal. Rptr. 716, 724 (Ct. App. 1987), *abrogated on other grounds by* Richards v. CH2M Hill, Inc., 29 P.3d 175 (Cal. 2001)).

145. *Id.*

146. *Lyle II*, 132 P.3d 211, 231 (Cal. 2006).

147. *Id*. at 220 (citing *Oncale*, 523 U.S. at 81; Meritor Savs. Bank v. Vinson, 477 U.S. 57, 67-68 (1986)).

148. *See id*. at 221, 226.

149. *Id*. at 221.

where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender–related language toward a plaintiff or toward women in general."[150]

After reviewing both federal and state case law on the issue, the court considered the plaintiff's factual showing.[151] The California Supreme Court concluded that the offensive conduct of the writers had not been aimed at the plaintiff.[152] As a result, the plaintiff was obligated to prove "specific facts from which a reasonable trier of fact could find the conduct 'permeated' her direct workplace environment and was 'pervasive and destructive.'"[153] The plaintiff was also required to prove that the conduct was motivated by or because of her sex.[154]

The California high court considered the creative necessity defense, acknowledging that the show *Friends* "featured young sexually active adults and sexual humor geared primarily toward adults."[155] The court called it a "creative workplace focused on generating scripts . . . featuring sexual themes . . . ."[156] The court relied upon the Fourth Circuit's decision in *Ocheltree v. Scollon Productions*,[157] a case in which the plaintiff brought a Title VII action for hostile work environment.[158] Lisa Ocheltree was employed as a shoe maker at Scollon Production for eighteen months.[159] She was the only female working with eleven other men in the shop.[160] During her first year, some of her male co-workers began to participate in crude sexual talk and antics with increased frequency.[161] Ocheltree complained about the offensive behavior to her supervisor but the misconduct only worsened.[162] The California Supreme Court considered *Ocheltree* to be a case of the defendants directing their degrading behavior toward the plaintiff.[163] The court

150. *Id*. at 222 (citing Brown v. Henderson, 257 F.3d 246, 250, 256 (2d Cir. 2001); Moore v. Grove N. Am., Inc., 927 F. Supp. 824, 830 (M.D. Pa. 1996)).

151. *Id*. at 216-30.

152. *Id*. at 215, 225.

153. *Id*. at 227 (quoting Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 853 (Ct. App. 1989)).

154. *Id*. at 220 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)).

155. *Id.* at 225.

156. *Id.*

157. 335 F.3d 325 (4th Cir. 2003).

158. *Id*. at 327, 330.

159. *Id*. at 328.

160. *Id.*

161. *Id*. at 328-29.

162. *Id*. at 328.

163. *See id*. at 332-33 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80

concluded that "[a] reasonable jury could find that . . . the men behaved as they did to make [the plaintiff] uncomfortable and self-conscious as the only woman in the workplace."[164] In *Lyle* though, the California high court came to a different conclusion, reasoning that there was nothing in the evidence of that case to "suggest the defendants engaged in this particular behavior to make plaintiff uncomfortable or self-conscious, or to intimidate, ridicule, or insult her as was the case in *Ocheltree*."[165]

The court considered the creative necessity defense as part of the "totality of the circumstance" requirement.[166] The court stated that the sexual antics and sexual discussions were not aimed at the plaintiff or any other female employee, and as such were non-directed conduct.[167] The court considered the physical gesturing, discussion of personal sexual experiences, and other sexual conduct not unreasonable from a creative standpoint.[168]

The court's opinion clarified the definition of the hostile work environment under the California Fair Employment and Housing Act. The California Supreme Court, in overturning the court of appeal, described and rigidly applied the plaintiff's burden when proving a hostile work environment sexual harassment case.[169] Warner Bros. argued that in the business of producing television programs, "creativity" and the resulting coarse language, was essential.[170] Warner Bros. asserted that as long as other employees were treated equally and not intentionally discriminated against, creativity should have no limits.[171]

B. Totality of the Circumstances

1. The "Just Like One of the Guys" Defense

The California high court refused to establish a creative necessity

(1998)).

164. *Id*. at 332.

165. *Lyle II*, 132 P.3d 211, 226 (Cal. 2006).

166. *See id*. at 228-29.

167. *Id.* at 225.

168. *Id.*

169. *Id*. at 229-30 (laying out the criterion of a hostile work environment claim that would survive summary judgment and explaining why Lyle's case did not meet this standard).

170. *Lyle I*, 12 Cal. Rptr. 3d 511, 512 (Ct. App. 2004), *rev'd*, 132 P.3d 211 (Cal. 2006).

171. *Id*. at 518-20 (citations omitted).

defense on par with a business necessity defense.[172] Instead, the court gave deference to the "we treated her just like one of the guys" defense in its application of the totality of the circumstance criteria.[173] In other words, the court recognized that though Lyle may have been more sensitive to the working environment on *Friends*, by treating her the same as her male counterparts, Warner Bros. had avoided a workplace where men and women were treated disparately, or where Lyle could be said to have been specifically targeted "because of [her] sex."[174] The defendants argued that they acted the way they did out of a sense of "equality," therefore dismissing any allegation of a discriminatory intent.[175]

The court analyzed the *Lyle* facts under disparate treatment theory.[176] It scoured the record for evidence of the defendants' intent that showed a discriminatory motivation.[177] The record suggested that the writers' room atmosphere could be compared to some blue-collar workplaces that by their very nature have been known to be inundated with vulgar and crude behavior.[178] The defendants argued that Amaani Lyle, despite being an African American female, was treated "just like one of the guys."[179] As the men at the workplace were treated in a vulgar and crude way, to treat the women any differently would theoretically be discriminatory. The flaw with this logic is that the "just like one of the guys" defense promotes workplaces that are hostile to both women and men. This follows from the fact that the conduct could be severe enough or sufficiently pervasive so as to alter the conditions of employment for both sexes, however still not meet the "because of sex" requirement because of a lack of disparate treatment; therefore, it would fall outside the purview of FEHA.[180]

The court recognized that the conduct of the defendants was certainly tinged with "sexual content" and "sexual connotations."[181] However, the court of appeal refused to accept the "just like one of the

172. *See Lyle II*, 132 P.3d at 229 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Reno v. Baird, 957 P.2d 1333, 1336 (Cal. 1998)).

173. *See id*. at 225-26.

174. *Id*. (citing *Oncale*, 523 U.S. at 80; Accardi v. Superior Court, 21 Cal. Rptr. 2d 292, 295-96 (Ct. App. 1993)).

175. *Lyle II*, 132 P.3d at 226.

176. *Id.* at 221.

177. *See id.* at 226-29.

178. *Id.* at 227.

179. *Lyle I*, 12 Cal. Rptr. 3d. 511, 515 (App. Ct. 2004), *rev'd*, 132 P.3d 211 (Cal. 2006).

180. *See Lyle II*, 132 P.3d at 220-21.

181. *Id.* at 220, 226.

guys" defense stating that, "FEHA, like Title VII, is not a fault based tort scheme, unlawful sexual harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim."[182] The California Supreme Court, unlike the court of appeal, placed the emphasis on the motive or intent of the defendants.[183] The California high court rigidly applied the "because of sex" requirement as if a hostile work environment is inconsequential if equally imposed on both sexes.[184] By doing this, the California Supreme Court implicitly validated the "just like one of the guys" defense, failing to consider the potential that a work environment could be abusive to female employees but not male employees where the conduct of the defendants is the same.

One of the critical aspects of the *Harris* case was the requirement that the workplace be both objectively and subjectively hostile toward a victim's gender.[185] The subjective aspect of the standard allows for varying perspectives of acceptable behavior. As applied to the *Lyle* case, the sexually coarse and vulgar language and conduct that occurred in the writers' room at Warner Bros. could be considered hostile under the objective test, yet the same is not true under the subjective test, where male employees may perceive the conduct differently than female counterparts. The reasonable person standard, coupled with the subjective test, provides a balance between making any offensive conduct actionable and requiring the victim to prove psychological injury. The standard allows for different perceptions of the same behavior, but opens the door to an actionable claim if a reasonable person would consider the environment hostile or abusive toward their gender.[186]

2. The "We Didn't Really Mean It Defense"

The "we didn't really mean it" defense suggests that the defendants were so caught up in the workplace atmosphere that they did not intentionally act in a hostile way against the plaintiff's gender.[187] This defense implies that the motives of the defendants are innocent and that a hostile work environment was created by mere inadvertence.

182. *Lyle I*, 12 Cal. Rptr. 3d at 515.
183. *See Lyle II*, 132 P.3d at 225-30.
184. *See Id.* at 220.
185. Harris v. Forklift Sys., Inc., 510 U.S. 17, 17, 21-22.
186. *Id.* at 21.
187. *Lyle II*, 132 P.3d at 226.

The defendants in *Lyle* argued that the nature of both Lyle's position and the workplace were sexually charged.[188] The writers asserted that in order to set the mood for writing the scripts, vulgar language and sexually crude behavior were appropriate.[189] In this sense, the writers were just doing their job of creating scripts for episodes of *Friends*. In *Oncale*, the United States Supreme Court held that sexual harassment must be viewed in the context in which it took place in order to determine whether the defendants' actions created an objectively hostile work environment.[190] The nature of the work and the nature of the workplace may be factors in determining a claim of sexual harassment.[191]

Warner Bros. argued that the sexually explicit conversations in the writers' room were consistent with the nature of Lyle's job as an assistant writer.[192] The essence of the writer's job was to produce scripts that were appealing to a twenty-something audience about sexually active friends.[193] The California Supreme Court cited the Second Circuit case of *Brown v. Henderson*[194] for the proposition that use of crude or inappropriate language in front of employees or drawing a vulgar picture without directing the degrading activity at the plaintiff or at women in general fails as a claim under Title VII.[195] The plaintiff in *Brown* was not able to prove that the conduct was aimed at her or that the defendants intended to create a hostile work environment based upon her gender.[196]

The court of appeal considered the creative necessity defense to have merit as a factor to determine context.[197] The court of appeal found the defense to be similar to that of the "business necessity" defense recognized in disparate impact cases.[198] The business necessity defense requires the business purpose to be sufficiently compelling to override any discriminatory impact.[199] Moreover, "the challenged practice must effectively carry out the business purpose it is alleged to serve; and there

188. *Id.* at 217-18, 226.
189. *Id.* at 233.
190. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998).
191. *Id.*
192. *Lyle II*, 132 P.3d at 217-18, 226.
193. *Id.* at 215.
194. 257 F.3d 246 (2d Cir. 2001).
195. *Lyle II*, 132 P.3d at 222 (citing *Brown*, 257 F.3d at 250, 256).
196. *Brown*, 257 F.3d at 256.
197. *Lyle I*, 12 Cal. Rptr. 3d. 511, 518 (Ct. App. 2004) *rev'd*, 132 P.3d 211 (Cal. 2006).
198. *Id.* at 520.
199. *Id.* (citing San Francisco v. Fair Employment & Hous. Comm'n., 236 Cal. Rptr. 716, 724 (Ct. App. 1987)).

must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced . . . ."[200] The defendants in *Lyle* argued that the business purpose was to generate ideas for jokes, dialogue and story ideas which contain sexual humor.[201]

The court of appeal would have allowed the defendants to establish that their conduct was within the scope of necessary job performance, and not merely done out of bigotry or other personal motives.[202] The court opened the door for applying disparate impact theory in a sexual harassment case, something which generally had not been done.[203]

The California Supreme Court stuck to the prima facie elements in conducting a disparate treatment analysis.[204] Disparate impact sexual harassment would effectively remove the "because of sex" requirement; however, the disparate impact case applied to sexual harassment could be labeled an attempt to promulgate a civility code for the workplace. The California Supreme Court stated that "[w]e simply recognize that, like Title VII, the FEHA is 'not a civility code and is not designed to rid the workplace of vulgarity.'"[205]

Allowing sexual harassment cases to proceed on disparate impact theory opens the door to assertions that the law is attempting to act as a human resource department. Taking the "because of sex" criteria out of the plaintiff's burden of proof effectively allows a sexual harassment claim without direct or inferred evidence of a discriminatory motive.[206] The unintended hostile environment would have a discriminatory impact but no discriminatory conduct.[207]

IV. BUSINESS NECESSITY TO CREATIVE NECESSITY

The creative necessity defense is a derivative of the business

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.*

204. *See Lyle II*, 132 P.3d 211, 220-21 (Cal. 2006).

205. *Id.* at 231 (citing Sheffield v. L.A. County Dep't of Soc. Servs., 134 Cal. Rptr. 2d 492, 498 (Ct. App. 2003)).

206. Robert A. Kearney, *The Coming Rise of Disparate Impact Theory*, 110 PENN ST. L. REV. 69, 80, 88-89 (2005).

207. *Id.* at 73. Professor Robert A. Kearney argues that the unintended hostile work environment is injurious to members of a protected class and unlawful. *Id.* at 87-88. He proposes a "standard of deliberate indifference" applied to disparate impact sexual harassment cases. *Id.* The standard would only hold an employer liable if it was aware of the environment and willfully indifferent to it. *Id.*

necessity defense.[208] The business necessity defense has gone through an evolution over the last three decades. In *Griggs v. Duke Power Co.*,[209] the Supreme Court announced that a business necessity was the touchstone of a disparate impact case.[210] *Griggs* came six years after the initial enactment of Title VII and declared that neutral employment practices can have disparate impacts on members of a protected class.[211] The business necessity defense originally required that the employer prove that the challenged practice was a demonstrably reasonable measure of job performance.[212] Years later the Supreme Court would frame the business necessity defense as having two components.[213] The two-part test was that the defendant must prove that a quality was essential to effective job performance and that the employer's practice directly measured the applicant's possession of that quality.[214]

In *Watson v. Fort Worth Bank & Trust*,[215] the Supreme Court recognized that subjective employment practices could create a disparate impact cause of action.[216] The Court went on to limit the reach of the business necessity defense and increase the plaintiff's burden of proof.[217] The Court mandated that the plaintiff identify the specific practice that caused the disparate impact and allowed the defendant to overcome the plaintiff's case by showing that the challenged practice was based upon legitimate business reasons.[218]

The rationale in *Watson* led to the Supreme Court's decision in *Wards Cove Packing Co. v. Antonio*.[219] *Wards Cove* significantly departed from *Griggs*, enhancing the plaintiff's burden.[220] The Court required the plaintiff to demonstrate the disparity through proof of the relevant labor market, showing that the specific employment practice actually caused the disparity.[221] The defendant's case was reduced to the burden of production, leaving the burden of persuasion with the

208. *Id.* at 88.
209. 401 U.S. 424 (1971).
210. *Id.* at 431.
211. *Id.* at 426, 430.
212. *Id.* at 431-32.
213. Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977).
214. *Id.*
215. 487 U.S. 977 (1988).
216. *Id.* at 978.
217. *Id.* at 994.
218. *Id.* at 997-98.
219. 490 U.S. 642 (1989).
220. *Id.* at 659-60.
221. *Id.* at 657.

plaintiff.[222] In proving the business necessity, the defendant need only prove that the practice served a legitimate employment goal.[223] Congress then enacted the Civil Rights Act of 1991, which restored the allocation of burdens that existed prior to *Wards Cove*.[224] The defendant's burden was restored to one of persuasion and required an employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[225]

Since the enactment of the Civil Rights Act of 1991, the courts have crafted a two-part test concerning business necessity.[226] Once a plaintiff makes out a prima facie case, the defendant must show that their challenged practice is "demonstrably necessary to meeting a goal of a sort that, as a matter of law, qualifies as an important business goal for Title VII purposes."[227] In *Lyle*, Warner Bros. argued that they had a creative necessity defense, which they claimed was a reformulated version of business necessity.[228] The facts presented by Warner Bros. showed an absence of any intent on the part of the writers, thus appearing as a disparate impact case which would have allowed for the business necessity defense used as far back as *Griggs*.[229] One scholar has argued, "[i]t is time to extend the necessity defense to harassment claims because, in some instances, the employer may have a legitimate need to be harassing."[230]

Other writers have argued that the creative necessity defense should not be applied to hostile work environment cases.[231] One of the most

222. *Id.* at 659.

223. *Id.* at 659-60.

224. *See* 42 U.S.C. § 2000e-2(k) (1991); s*ee also* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 320-21 (1998) (providing a historical perspective on the business necessity defense and its impact on the courts).

225. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991).

226. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117-18 (11th Cir. 1993).

227. *See id.* at 1117. The plaintiffs were African American firefighters that challenged the "clean shaven" policy of the City of Atlanta Fire Department. *Id.* at 1113. Plaintiffs argued that the policy had a disparate impact on members of a protected class. *Id.* The City argued that the policy was necessary for safety reasons, as firefighters were sometimes required to wear breathing equipment while on the job. *Id.*

228. *Lyle I*, 12 Cal. Rptr. 3d 511, 520 (Ct. App. 2004).

229. *Id.*

230. Eric S. Tilton, *Business Necessity and Hostile Work Environment: An Evolutionary Step Forward for Title VII*, 34 HOFSTRA L. REV. 229, 261 (2005).

231. Sarah Pahnke Reisert, *Let's Talk About Sex Baby: Lyle v. Warner Brothers Television Productions and the California Court of Appeal's Creative Necessity Defense to Hostile Work Environment Sexual Harassment*, 15 AM. U.J. GENDER SOC. POL'Y & L 111, 125 (2006). Reisert argues that allowing the creative necessity defense to be applied to hostile work environment cases

persuasive justifications for limiting the defense focuses on the lack of precedent extending the business necessity defense to disparate treatment cases. Under the Supreme Court's disparate treatment framework, business necessity was not considered viable.[232] Business necessity was premised upon a facially neutral environment, which was not conceived in sexual harassment cases.[233] In addition, it is argued that the installation of a creative necessity defense disregards legislative policy aimed at providing equal opportunities for both women and minorities.[234] This argument states that if workplaces are allowed to be sexually crude and vulgar, the vast majority of women will refuse employment at those workplaces.[235] Designing a workplace that creates an environment that keeps women out is not facially neutral. Accordingly, the analogy from business necessity to creative necessity is unworkable.

V. THE FREE SPEECH ARGUMENT

The California Supreme Court majority opinion in *Lyle* did not discuss the free speech argument, although Justice Chin considered it extensively in his concurring opinion.[236] Justice Chin opened with a declaration that the case "has very little to do with sexual harassment and very much to do with core First Amendment free speech rights."[237] His concurring opinion stated that the writers were engaged in the creative process of producing entertainment and that the defendants were fully protected by free speech guarantees just as news commentary would be protected by the First Amendment.[238]

Justice Chin noted that not all sexually harassing speech is protected by the First Amendment;[239] however, he stated that because the product of Warner Bros. was the expression itself free speech rights

has some severe implications. For example, Reisert asserts that not only would the California Court be outside the theoretical framework for disparate treatment cases and case precedent if the creative necessity defense is to be applied to hostile work environment cases, but that the defense has the potential to entrench sexism in the television industry. *Id.* at 142-43. Reisert noted, "Hollywood remains fraught with sexism and the Court of Appeal's creative necessity defense will entrench the 'boys club' atmosphere of television writing." *Id.* at 142.

232. *Id.* at 128-29.
233. *Id.* at 119-21.
234. *Id.* at 124.
235. *Id.* at 142-43.
236. *Lyle II*, 132 P.3d 211, 231-35 (Cal. 2006).
237. *Id.* at 231.
238. *Id.* at 231-32.
239. *Id.* at 232.

were paramount.[240] Accordingly, Justice Chin said he would treat sexually harassing speech that occurred at a rental car business or a car repair shop very differently than speech that was directly related to the final product of the organization.[241]

Regarding causes of action brought against individuals in the creative process, Justice Chin stated: "[l]awsuits like this one, directed at restricting the creative process in a workplace *whose very business is speech related*, present a clear and present danger to fundamental free speech rights."[242]

The concurrence explained that group writing "requires an atmosphere of complete trust."[243] The writers must feel comfortable that they will not be sued for things they say during a creative session.[244] Justice Chin quoted from the amicus curiae brief of the Writer's Guild of America to bolster the significance of "trust" among employees working in the creative process.[245] The creative process, as Justice Chin asserted, must be "unfettered."[246]

The concurring opinion also considered whether or not the harassing speech was necessary to performing the job at hand.[247] Justice Chin argued that speech may not be prohibited because it concerns subjects offending to an employee's sensibilities.[248] Courts may not delve into whether the challenged speech was necessary for creative purposes.[249] Justice Chin championed the test proposed by the California Newspaper Publishers Association's amicus curiae brief for sexual harassment cases involving the creative process:

> [w]here, as here, an employer's product is protected by the First Amendment—whether it be a television program, a newspaper, a book, or any other similar work—the challenged speech should not be actionable if the court finds that the speech arose in the context of the creative and/or editorial process, and it was not directed at or about the plaintiff.[250]

240. *Id.*
241. *Id.* at 232-33.
242. *Id.* at 232.
243. *Id.* at 233.
244. *See id.*
245. *Id.* at 234.
246. *Id.* at 233.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 234.

The test, as Justice Chin discussed, appears to balance competing interests.[251] The difficulty with the test as proposed goes to the scope of the defense. It appears that an employer directly or indirectly producing protected materials could assert the defense. Most employers producing a product or providing a service would argue that significant creativity goes into the initial idea stage, design, manufacture and distribution. For example, consider the design, manufacture and marketing of Barbie and Ken dolls. Would the designers of the clothes for Barbie have the latitude to be vulgar and crude in the workplace? Or consider the writers of the script for a children's animation about a father and son clown fish making sexually crude gestures and remarks during a writing session.

The notion that offensive speech in the workplace should go "unfettered" when some level of creativity is involved is in opposition to the purpose underlying sexual harassment law. In *Harris*, the Supreme Court set forth the parameters of a hostile work environment as requiring a level of abuse from the perspective of a reasonable person.[252] Creativity in many instances may necessitate a broad scope of conduct in the workplace. The concurrence fails to mandate a "nexus criteria" between the end product and the offensive behavior.[253] As in the business necessity defense, a measure of connectiveness to the operation of the business should be required.[254] The defense could be formulated to require a causal connection between the creative end product or service and the offensive conduct. To allow unfettered offensive behavior to occur in all business operations that are associated with a creative end product seems to contradict the purpose of sexual harassment policy. Workplaces are not public forums, and there is no general need for offensive information to be exchanged at a workplace. In some cases, the writing of a script, designing of a movie set, or describing of the mood for a television program may necessitate some level of offensive speech or behavior.[255] However, allowing unbridled crude and vulgar conduct where there is no demonstrable need seems to trample the rights of co-workers to a harassment free workplace.

One scholar believes that completely immunizing creative enterprises from sexual harassment laws would effectively take away the protections of the antidiscrimination laws for millions of employees in

251. *Id.*
252. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
253. *See Lyle II*, 132 P.3d at 225, 233.
254. *See* CAL. CODE REGS. tit. 2, § 7286.7(b) (2007).
255. *Lyle II*, 132 P.3d at 225-26.

the entertainment industry.[256] Professor Robinson argued in his amicus brief to the California Supreme Court that creative necessity as an absolute defense to sexual harassment laws is "unpalatable."[257] In addition, Robinson argued that Warner Bros.' attempt to assert creative freedom as a defense was pretext to justify sexual harassment and was not entitled to First Amendment protection.[258] Robinson further asserted that the case should have been remanded to the trial court to determine if a reasonable nexus existed with the creative process.[259] Considering the facts of the case and some of the crude sexual expressions that pervaded the workplace, it was difficult to discern any connection to the creative end product.

VI. CONCLUSION

The *Lyle* case presented a myriad of issues that both the California Court of Appeal and the California Supreme Court were forced to examine. The California Supreme Court was presented with a set of facts detailing a workplace that was operating in a constant state of varying levels of vulgarity. Throughout her employment with Warner Bros., Lyle worked for two writers and an executive producer that regularly exposed her to crude, sex-related jokes, disparaging remarks about women, sexual gestures, and vulgar drawings.[260]

The California Supreme Court upheld the trial court's summary judgment for the defendants, reversing the court of appeal. As discussed, by applying the disparate treatment theory, the California Supreme Court held that the plaintiff failed to prove that the defendants' conduct was "because of sex" and that it was severe or pervasive enough to constitute a hostile work environment. Notably, the court did not consider the defendants' free speech arguments because the plaintiff failed to make her prima facie case.[261]

Conversely, the California Court of Appeal, approaching the case

256. Russell K. Robinson, *In the Case of* Lyle v. Warner Bros. Television Productions, et al.*: A Brief Amicus Curiae*, 12 UCLA ENT. L. REV. 169, 185-87 (2005). Professor Robinson argued that the California Supreme Court should avoid the First Amendment issues and decide the case narrowly. *Id.* at 175. In addition, Professor Robinson argued that the creative freedom assertion by Warner Bros. must be supported by a reasonable nexus to the created product and that allowing gratuitous sexual harassment effectively excludes women from the entertainment field. *Id.* at 182.

257. *Id.* at 170.

258. *Id.* at 170-71, 175.

259. *Id.* at 175, 181-82, 187.

260. *Lyle II*, 132 P.3d at 215.

261. *Id.* at 231.

under disparate impact analysis, held for Lyle. The court of appeal recognized the creative necessity defense and allowed the defendants to provide evidence to support their claim. Although the defendants' conduct was not aimed directly at the plaintiff, the court of appeal considered the "because of sex" requirement satisfied.[262] Hostility permeated throughout the plaintiff's work environment, and as such, met the "because of sex" requirement.[263] The court of appeal found that conduct was severe or pervasive enough to create a hostile work environment.

Under California Law, the business necessity defense has been limited to disparate impact cases. The California Supreme Court, in *Lyle*, did not make any attempt to expand business necessity notions beyond their present reach. The concurring opinion propounded that creative enterprises are entitled to full free speech protections. However, the California Supreme Court refused to recognize a creative necessity defense as deriving from the First Amendment.

In sum, dismissing the case based upon the "because of sex" criteria raises the proof necessary for an employee in the entertainment industry to survive summary judgment to an insurmountable level. In other words, the underlying message of the California Supreme Court is that employees may be as sexually crude as they want to be as long as they direct their behavior equally toward both men and women. As the California high court has reiterated, the harassment law is not a civility code.

262. *Lyle I*, 12 Cal. Rptr. 511, 517 (App. Ct. 2004).
263. *Id.* at 517-18.