COMMENTS

"DON'T YOU SAY THAT!": INJUNCTIONS AGAINST SPEECH FOUND TO VIOLATE TITLE VII ARE NOT PRIOR RESTRAINTS

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INTRODUCTION

"[T]he right to free speech is not absolute."1 With these words, the California Supreme Court held that an injunction posing a "content-neutral restriction upon expression"2 found to violate California’s Fair Employment and Housing Act (FEHA)3 does not violate the First Amendment.4 The California Supreme Court’s four-to-three decision marks the first time that a reviewing court has found that an injunction against racial epithets in the workplace does not constitute a prior restraint.5 The Aguilar decision also stretches the boundaries of a debate about free speech and workplace rights that has been building since the 1980s. Many scholars have discussed the First Amendment implications of imposing civil liability for speech that

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1 B.A., Colorado College, 1997; J.D. Candidate, 2001, University of Pennsylvania Law School. I am grateful to my parents, Mary Kay and David Randall of Fort Collins, Colorado, for their continuing encouragement and support. Thanks to Professor Alan Lerner for his thoughtful reading and critique of this Comment. Special thanks to my Grandma and Grandpa Randall, who gave me a room to write in while I was visiting in December 1999 and July 2000.

2 Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal. 4th 121, 134 (Cal. 1999) (citing Near v. Minnesota, 283 U.S. 697, 708 (1931) (noting that “[t]he liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse”).


4 Aguilar, 21 Cal. 4th at 145. See also U.S. CONST. amend. I (“Congress shall make no law... abridging the freedom of speech...”).

5 Prior cases dealing with injunctions against continuing speech or conduct in Title VII cases either found the injunctions were a prior restraint, or did not address the issue of prior restraint. See McLaughlin v. New York, 784 F. Supp. 961, 978 (N.D.N.Y. 1992) (refusing to enjoin the continuing blacklisting of the plaintiff on the grounds that the proposed injunction would constitute an unlawful prior restraint); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534-35 (M.D. Fla. 1991) (issuing an injunction against a continuing course of conduct found to constitute sexual harassment on the grounds that “[t]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”) (citation omitted).
The Aguilar decision takes the debate one step further by assuming that the First Amendment permits the imposition of civil liability for speech found to violate anti-discrimination statutes like the FEHA, and then finding that the First Amendment also permits a court to issue an injunction against the continuation of that specific speech pattern. This Comment analyzes the Aguilar decision, applies it to Title VII employment discrimination cases, and argues that an injunction against speech found to violate Title VII of the 1964 Civil Rights Act is not a prior restraint. Part One reviews the doctrine of prior restraints. Part Two analyzes the Aguilar decision. Part Three discusses the elements of a "hostile work environment" under Title VII, and analyzes the constitutionality of anti-discrimination statutes that encompass speech. Finally, Part Four argues that an injunction against speech found to violate Title VII is not a prior restraint if the injunction meets the three-factor test articulated by the Aguilar court.

I. THE DOCTRINE OF PRIOR RESTRAINTS

The doctrine of prior restraint developed as a limitation of form, not of substance, permitting subsequent punishment for certain forms of expression while prohibiting the prior restraint of the same expression. Thomas Emerson has identified the following policy.

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7 See Aguilar, 21 Cal. 4th at 136 (noting that the United State Supreme Court's decision in R.A.V. v. St. Paul, 509 U.S. 377, 389 (1992), leaves "little room for doubt" that "the First Amendment permits the imposition of civil liability for pure speech that violates the FEHA").

8 Near v. Minnesota, 283 U.S. 697, 708-11 (1931) (noting that the Supreme Court views
reasons for the general presumption against prior restraints: prior restraints allow greater governmental scrutiny and approval of expression than subsequent punishment; prior restraints suppress communication because it occurs before the speech; they increase the likelihood of an adverse decision because the burden is on the defendant, not the plaintiff; they lack the procedural protections of a jury trial; they allow less opportunity for public appraisal, leading to a greater possibility of abuse of political power; and they give the defendant greater warning, but at the cost of free expression.

For the purposes of this analysis, prior restraints may be divided into two broad categories. The first encompasses licensing systems in which a particular form or method of expression is permitted only after certain procedures are followed. Licensing cases involve "permit or license requirements designed to determine the alleged obscenity of books, plays or films, or to regulate access to public forums." The second broad category, which will be the focus of this paper, encompasses judicial injunctions against "specific aspects of a particular kind of communication," or injunctions preventing "all communication entirely." Aguilar and other cases involving injunctions issued against speech found to violate anti-discrimination statutes like the FEHA and Title VII fall into this category.

prior restraint cases with "regard to substance, and not to mere matters of form" and "distinguishing between prior suppression and subsequent punishment"); Thomas I. Emerson, The Doctrine of Prior Restraint, 20 LAW & CONTEMP. PROBS. 648, 648 (1955) (noting that "the issue is not whether the government may impose a particular restriction of substance in an area of public expression . . . but whether it may do so by a particular method . . . In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint"); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal, he must take the consequences of his temerity.

But see Paul A. Freund, The Supreme Court and Civil Liberties, 4 VAND. L. REV. 533, 544 (1951) (arguing that there is an "artificiality of an absolute distinction between prior restraint and subsequent punishment"); John Calvin Jeffries, Jr., Rethinking Prior Restraint, 92 YALE L.J. 409, 419 (1983) ("The doctrine [of prior restraint] is fundamentally unintelligible. It purports to assess the constitutionality of government action by distinguishing prior restraint from subsequent punishment, but provides no coherent basis for making that categorization.").

9 Emerson, supra note 8, at 656-658.

10 See id. at 655-56 (describing statutory prior restraints that "where the government limitation . . . undertakes to prevent future publication or other communication without advance approval of an executive official" and "legislative restraints which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act").


12 Emerson, supra note 8, at 656.
The general presumption against prior restraints was established in Near v. Minnesota. In Near, after a newspaper printed allegations that law enforcement officials were not doing their jobs, a state court issued a permanent injunction against the future publication of the paper. The court issued the injunction under a Minnesota law providing that any person who published or circulated "malicious, scandalous and defamatory" newspapers or periodicals was guilty of a nuisance, and that "all persons guilty of such nuisance may be enjoined...." The Near court found that the statute constituted an invalid prior restraint because its purpose and effect was to permit authorities to enjoin the publication of allegations of "official dereliction" without requiring the officials to prove the "falsity of the charges," "suppress[ing] the offending newspaper" and "put[ting] the publisher under an effective censorship." As Near involved issues of media censorship, the decision emphasized the importance of preserving the "liberty of the press," noting that "the constitutional guaranty of the liberty of the press gives [the press] immunity from previous restraints." Writing for the majority, Chief Justice Hughes noted that the prohibition against prior restraints applies in all but "exceptional cases," like the obstruction of military recruiting or publication of "the sailing dates of transports or the number and location of troops."

Near marked the first time the Supreme Court "employed the doctrine [of prior restraint] to strike down a legislative act," and "the first time [the Supreme Court] vigorously and effectively enunciated the doctrine of prior restraint." In the seventy years since the decision, Near has become associated with a "sort of syllogism" about injunctions and prior restraints:

Prior restraint of speech is presumptively unconstitutional, even where the speech in question is not otherwise protected.

An injunction is a prior restraint.

Therefore, an injunction against speech is presumptively unconstitutional, even where the speech enjoined is not otherwise protected.

15. 283 U.S. 697 (1931).
14. Id. at 704 ("There is no question but that the articles made serious accusations against the public officials named and others in connection with the prevalence of crimes and the failure to expose and punish them.").
16. Id. at 702 (quoting MINN STAT. §§ 10123-1 – 10123-3 (1927)).
17. Id. at 713.
18. Id. at 709.
19. Id. at 711.
20. Id. at 712.
21. Id. at 719.
22. Emerson, supra note 8, at 654.
23. Jeffries, Jr., supra note 8, at 417.
In recent years, the *Near* syllogism has been criticized by scholars arguing that "a rule of special hostility to administrative preclearance [or licensing] is fully justified, but a rule of special hostility to injunctive relief is not." Subsequent Supreme Court decisions support these arguments, suggesting that the *Near* injunction was unconstitutional because it was overly broad, and not because injunctions themselves are per se unlawful prior restraints.

While *Near* established a general presumption against prior restraints, the Supreme Court has "never held that all injunctions are impermissible." In fact, the Court has indicated that injunctions will be upheld if (1) the order is "based on a continuing course of repetitive conduct," (2) the order "is clear and sweeps no more broadly than necessary," and (3) the order does not go into effect before the conduct in question has been found to be illegal. Thus, an injunction is not a prior restraint if the order is comprehensive and concise, and if the order is based on a recurring pattern of behavior that a fact finder has determined to be illegal.

As applied in *Pittsburgh Press*, these factors minimize the harms that the doctrine of prior restraint was developed to address. In *Pittsburgh Press*, the Supreme Court held that an injunction against gender classification in classified ads, issued after the ads were found to violate the city's human relations ordinance, was not an unlawful prior restraint. Unlike the injunction in *Near*, which was issued "upon the mere proof of publication," the injunction in *Pittsburgh Press* was issued only after the Pittsburgh Commission on Human Relations received evidence, heard arguments from the parties, and found that Pittsburgh Press violated a local ordinance. Because the order was issued after the Commission found that Pittsburgh Press' conduct was illegal, the injunction acted more as a subsequent punishment than as a prior restraint. The requirement that the injunction

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24 *Id.* at 433; see also Barnett, *supra* note 11, at 543 (arguing that, in the absence of the collateral bar rule, the presumption that an injunction is an invalid prior restraint is "correspondingly undermined").

25 *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (distinguishing *Near* on the grounds that "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," manifesting "the essence of censorship" (citing *Near*, 283 U.S. at 713)).

26 *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (citing *Lorain Journal Co. v. United States*, 342 U.S. 143, 156 (1951) (holding that "[i]njunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is others").

27 *Pittsburgh Press Co.*, 413 U.S. at 390 (citing *New York Times Co. v. United States*, 403 U.S. 713, 733 (White, J., concurring) (1971) (noting that the injunction in question was overly broad)).

28 *Pittsburgh Press Co.*, 413 U.S. at 390.

29 *Near*, 283 U.S. at 709 (1931).

30 *Pittsburgh Press Co.*, 413 U.S. at 379-80.

31 *But cf. Near*, 283 U.S. at 709 (noting that, "there was no allegation that the matter published was not true," and that "judgement... proceeded upon the mere proof of publication").
tion must be based on a "continuing course of repetitive conduct" distinguishes the injunction in *Pittsburgh Press* from the statute in *Near*, which asked the court to "speculate as to the effect of publication." 39 This "continuing course" requirement also limits government scrutiny and approval of expression to "particular cases which are the subject of complaint," instead of requiring "universal inspection" of any expression that falls under the statute. 40 Under the requirement that an injunction sweep no more broadly than necessary, the *Pittsburgh Press* order enjoins the publication of sex-designated employment advertisements while permitting future publication of ads "with no reference to sex," 41 punishing the violations of the Human Relations Ordinance without suppressing future publication of the newspaper. 42

II. AGUILAR

California's Fair Housing and Employment Act (FEHA) states that it is unlawful

> [f]or an employer ... or any other person, because of race ... [or] national origin ... to harass an employee ... [or] an applicant .... Harassment of an employee ... [or] an applicant ... by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. 43

FEHA's definition of "harassment" includes "[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act." 44

*Aguilar* involved a complaint under the FEHA by seventeen Latino employees of Avis Rent A Car. 45 The employees alleged that John Lawrence, a station manager at Avis, "verbally harassed" the plaintiffs, and that another Avis employee conducted a discriminatory investigation of a missing calculator that was later found, questioning only Latino employees and threatening to call the Immigration and Naturalization Services if the employees did not cooperate. 46 At trial, the jury found that Lawrence "harassed or discriminated against" several of the defendants, and the judge found "a substantial likelihood" that Lawrence would continue to make harassing and discriminatory

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39 *Pittsburgh Press Co.*, 413 U.S. at 390.
40 *Emerson*, supra note 8, at 656.
41 *Pittsburgh Press Co.*, 413 U.S. at 380.
42 Compare *Near*, 283 U.S. at 710-711 (noting that the *Near* statute was not "directed ... simply at the circulation of scandalous and defamatory statements with regard to private citizens," but at the suppression of newspapers and periodicals that print allegations of official corruption).
43 *Cal. Gov't Code* § 12940 (a),(j).
44 2 *Cal. Code Regs.* § 7287.6(b)(1)(A).
45 *Aguilar v. Avis Rent a Car Sys., Inc.*, 21 Cal. 4th 121, 126 (Cal. 1999).
46 *Id.* at 126-27.
comments "unless restrained." Because of this, the court issued an
injunction ordering Lawrence to "cease and desist from using any de-
rogatory racial or ethnic epithets directed at, or descriptive of," Lat-
ino employees of Avis for "as long as he is employed by Avis." The
order also stated that "[d]efendant Avis Rent A Car System, Inc. shall
cease and desist from allowing defendant John Lawrence to commit
any of the acts described [the above quoted paragraph]." The Cali-
fornia Court of Appeals held "that to the extent the injunction pro-
hibits Lawrence from continuing to use racist epithets in the work-
place it is constitutionally sound, but to the extent it reaches beyond
the workplace," the injunction exceeded the scope of the FEHA. The
Court of Appeals ordered the trial court to "redraft the injunc-
tion in a manner that... limits its scope to the workplace," and to in-
clude "an exemplary list of prohibited derogatory racial or ethnic epi-
thets, specifying epithets such as those actually used in the workplace
by Lawrence." Defendants appealed, arguing "that the injunction,
even as limited by the Court of Appeal, constitutes an improper prior
restraint of freedom of expression." The California Supreme Court affirmed the Court of Appeal's deci-
sion, holding that "an injunctive order prohibiting the repetition,
perpetuation, or continuation" of speech found to violate the FEHA
does not constitute a prior restraint. In doing so, the Aguilar Court
noted three factors that must be present to prevent an injunction
from serving as an unlawful prior restraint: (1) the order may be is-
issued only after a jury finds that the defendants engaged in unlawful
employment discrimination; (2) the order must be based on a "con-
tinuing course of repetitive conduct;" and (3) the order must be
"clear and sweep[ ] no more broadly than necessary." These re-

40 Id. at 127.
41 Id. at 128.
42 Id.
43 Id.
44 Id.
45 Id. at 129.
46 Id. at 140.
an injunction against further "sale and distribution of written and printed matter found after
due trial to be obscene"); Pittsburgh Press Co. v. Pittsburgh Human Relations Comm' n, 413
U.S. 376, 389 (noting that there is no First Amendment interest in protecting an activity when
the "activity itself is illegal and the restriction... is incidental" to a valid government interest);
Kramer v. Thompson, 947 F.2d 666, 675 (3d Cir. 1991) (noting that the "Supreme Court has
held repeatedly that an injunction against speech generally will not be considered an unconsti-
tutional prior restraint if it is issued after a jury has determined that the speech is not constitu-
tionally protected").
48 Aguilar, 21 Cal. 4th at 140 (citing Pittsburgh Press Co., 412 U.S. at 390 (noting that an in-
junctive order based on "a continuing course of repetitive conduct" presents less danger that
communication will be suppressed before a court can determine that the communication is not
protected by the First Amendment because the Court will already be familiar with the publica-
tion's effect).
49 Aguilar, 21 Cal. 4th at 140 (citing Pittsburgh Press Co., 413 U.S. at 390).
requirements were satisfied in *Aguilar* because the injunction was issued after a jury found that the defendant's comments constituted unlawful employment discrimination, and because the trial judge determined that there was a "substantial likelihood" that the defendant's "continual and severe" comments would continue unless enjoined.\(^\text{50}\)

The *Aguilar* factors are based on the ones enunciated by the Supreme Court in *Pittsburgh Press*, and they serve a similar function by minimizing the harms the doctrine of prior restraints was developed to address. Again, the requirement that the order must be based on a "continuing course of repetitive conduct" limits the court's scrutiny to the particular instances of speech that are the basis of the lawsuit, instead of permitting government scrutiny of all workplace speech, or all future speech by the defendant.\(^\text{51}\) Similarly, the requirement that the order is clear and sweeps no more broadly than necessary permits the court to enjoin and punish the defendant's violation of FEHA without censoring the defendant's future speech. Unlike the publisher in *Near*,\(^\text{52}\) Lawrence will have a clear notice of the language he must avoid, and the circumstances under which he must avoid it.\(^\text{53}\) *Aguilar*'s requirement that the defendant's conduct may only be enjoined after a jury finds that the conduct constitutes employment discrimination provides an additional check against government efforts to limit freedom of expression, because it guarantees the defendant a jury trial.\(^\text{54}\)

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\(^\text{50}\) *Aguilar*, 21 Cal. 4th at 127.

\(^\text{51}\) See infra note 53.

\(^\text{52}\) See *Near*, 283 U.S. 697, 710 (1931) (noting that the Minnesota statute "gives no definition [of the type of publication to avoid] except that covered by the words 'scandalous and defamatory').

\(^\text{53}\) Some have argued that, while a system of prior restraint "affords individual citizens greater certainty in the law" because "an individual can find out what is permitted and what is forbidden without incurring the danger of criminal sanctions," prior restraints limit free expression and limit the exchange of free ideas. Emerson, supra note 8, at 659. Injunctions like the one in *Aguilar* do not limit free expression, however, they simply enjoin continuing violations of the FEHA. As several commentators have noted, workplace speech is already subject to a number of restrictions, by private employers under the employment-at-will doctrine, by the NLRB, and by the government in public sector employment. See Pierce, supra note 6, at 419-25 (noting that "speech rights in the workplace—whether those of the employee or the employer—have traditionally played second fiddle to other policy and statutory considerations"); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. AND LAB. L. 1, 4 (1998) (noting that the decline of unionization, the threat of layoffs, employer surveillance of e-mail and phone conversations, and "rising corporate political and social partisanship" limit private sector employees' self-expression at work). But see Browne, supra note 6, at 516 (arguing that "the term 'workplace' is not a talisman that extinguishes first amendment protections"); Mark N. Mallery & Robert Rachal, *Report on the Growing Tension Between First Amendment and Harassment Law*, 12 LAB. L.J. 475, 482 (1997) (concluding that "[t]he workplace is not a 'First Amendment free' zone").

\(^\text{54}\) Emerson, supra note 8, at 657 (noting that in the absence of a jury trial, "the procedural protections built around the criminal prosecution . . . are not present").
III. HOSTILE WORK ENVIRONMENT AND THE FIRST AMENDMENT

The trial court’s ability to impose civil liability for speech that violates the FEHA was not at issue in Aguilar.55 The defendants only challenged the trial court’s injunction, and not the underlying decision.56 In addition, the defendants failed to provide the court with a record of the specific comments found to violate FEHA.57 Nevertheless, the California Supreme Court concluded that the imposition of civil liability for “pure speech that creates a racially hostile or abusive environment” under the FEHA does not violate the First Amendment.58 In doing so, the court relied on United States Supreme Court decisions suggesting that “speech of this nature” is not constitutionally protected.59 While these cases involve speech that is sexually, not racially, charged, the United States Supreme Court frequently uses the same analyses in both Title VII race and sex discrimination cases, “citing precedent from the two contexts interchangeably.”60

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55 See Aguilar v. Avis Rent-a-Car System, Inc., 21 Cal. 4th 121, 135 (Cal. 1999) (noting that “[t]he sole issue in the present case is whether the First Amendment also permits the issuance of an injunction to prohibit the continuation of such discriminatory actions”).

56 Id. at 131.

57 Id. at 132 (rejecting defendants’ claim that the enjoined comments consist of protected speech because the defendants “failed to provide this court with a record adequate to evaluate this contention”).

58 Id. at 134.

59 Id. at 134-35 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that a company president’s repeated comments to an employee were sufficiently “severe and pervasive enough to create an objectively [and subjectively] hostile or abusive work environment” under Title VII); Meritor Savings Bank, FSB, v. Vinson, 477 U.S. 57, 67 (1986) (holding that an employee’s allegations, including allegations her employer made inappropriate suggestive remarks, “are plainly sufficient to support a claim for ‘hostile work environment’ sexual harassment”); R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992) (noting that “sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices”)).

60 Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Ra ising the Lack of Interest Argument, 103 HARV. L. REV. 1750, 1759 n.32 (1990) (citing Johnson v. Transportation Agency, 480 U.S. 616, 631 (1987) (citing a race-based affirmative action case to uphold a sex-based affirmative action plan under Title VII)); Meritor, 477 U.S. at 66-67 (citing Title VII decisions recognizing race-based harassment to support recognition of a cause of action for hostile work environment sexual harassment); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (noting that prior cases “with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment . . . guide our approach” in an analysis of facially neutral standards alleged to disproportionately impact women)); see also Mark Seidenfeld, Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth, 21 RUTGERS L. J. 269, 299 (1990) (noting that, in many cases, “the courts have treated sex and race as equally invidious classifications and applied the same doctrinal analysis to discrimination based on either classification”); Howard Eglit, The Age Discrimination in Employment Act’s Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception, 66 B.U. L. REV. 155, 211 n.257 (1986) (noting that, while the Supreme Court distinguishes between race and sex “in terms of invidiousness for purposes of constitutional analysis . . . the two are equated” for the purpose of Title VII discriminatory impact analysis).
Because *Aguilar* arose under a state statute, the First Amendment implications of Title VII liability for workplace speech were not at issue. This section discusses the factors involved in the creation of a hostile work environment under Title VII, and then discusses the constitutionality of the imposition of civil liability for speech that violates Title VII.

A. Hostile Work Environment

Title VII of the 1964 Civil Rights Act makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Cases of sexual harassment and racial harassment, like *Aguilar*, are often pursued under the theory of hostile work environment discrimination.

The Supreme Court first recognized hostile work environment discrimination in *Meritor Savings Bank, FSB v. Vinson*, when it held that "[t]he language of Title VII is not limited to 'economic' or 'tangible' discrimination." Although *Meritor* dealt with sexual harassment, the Court based its decision on lower court cases recognizing racial harassment as a violation of Title VII. While hostile environment discrimination under Title VII is most often associated with sexual harassment, the concept applies to both race and sex discrimination.

"[N]ot all workplace conduct that may be described as 'harassment' entails a hostile work environment." Speech may contribute to a hostile work environment, but a "mere offensive utterance" alone does not create a hostile work environment. While discriminatory conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" it need "not seriously affect employees' psychological

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62 477 U.S. 57, 64 (1986).
63 See Pierce, supra note 6, at 148-49 (noting that the Court drew "upon the body of developing case law on racial or ethnic hostile environmental harassment . . . [when stating] that 'a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets'") (citing *Meritor*, 477 U.S. at 67).
65 *Meritor*, 477 U.S. at 67.
66 Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); see also *Meritor*, 477 U.S. at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (holding that "mere utterance of an ethnic or racial epithet" would not create a hostile work environment)); International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 336 (1977) (noting that to make out a claim of discrimination under Title VII, the plaintiff "had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts").
well-being." Instead, the test is whether, given "all the circumstances," speech creates an environment that "would reasonably be perceived, and is perceived, as hostile or abusive." Factors to consider include the frequency and severity of the conduct, whether the conduct interferes with the employees' performance, and "whether [the conduct] is physically threatening or humiliating, or a mere offensive utterance." Thus, while a "mere offensive utterance" alone does not constitute a hostile work environment, repeated use of racial epithets, or sexually derogatory language, in a manner that is frequent, humiliating, and interferes with the employee's performance, may create a hostile work environment.

B. Civil Liability for Speech that Creates a Hostile Work Environment, and the First Amendment

A recent line of Supreme Court cases permitting incidental government regulation of speech where the applicable statutes only explicitly limit non-speech elements suggests that anti-discrimination statutes like Title VII do not violate a defendant's First Amendment rights. In United States v. O'Brien, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Under the O'Brien test, government regulation is "sufficiently justified" where: (1) "it is within the constitutional power of the Government;" (2) "it furthers an important or substantial government interest;" (3) "the government interest is unrelated to the suppression of free expression; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance" of the government interest.

The imposition of civil liability for speech that violates Title VII is constitutional under the O'Brien test. First, as the Supreme Court has held, the government has a legitimate interest in preventing discrimination. Second, the government's interest in ending employ-
ment discrimination is independent of any interest in the suppression of free expression. Finally, any incidental restriction on the defendant's alleged First Amendment freedoms is no greater than necessary because liability is only imposed after a jury finds the defendant's speech constitutes hostile work environment discrimination under Title VII.  

Professor Richard Fallon has argued that Title VII may not pass the third requirement of the O'Brien test because "the First Amendment has to limit the legislature's power to enact 'general' statutes that aim at prohibitable conduct but sweep in speech that the legislature adjudges harmful only because of its content." To illustrate his argument, Fallon imagines a city ordinance that generally prohibits race- and sex-based discrimination in housing, public accommodations, education, and private club membership, forbidding "all public or private acts and utterances tending to create a racially or sexually hostile environment." Fallon argues that this ordinance "would surely offend the First Amendment" and suggests that Title VII would have similar problems, noting that "Title VII's prohibition against speech that creates a hostile work environment must be distinguished ... on some ground other than the 'generality' of the statutes' prohibitions or the 'incidental' character of their restrictions on speech."  

Title VII does not have the same generality problems as Fallon's imagined ordinance. Title VII's purpose is to "eliminate ... discrimination in employment," including discrimination "against any individual with respect to his ... terms [and] conditions ... of employment, because of such individual's race, color, religion, sex, or national origin." Rather than prohibiting "all public or private acts and utterances tending to create a racially or sexually hostile environment," hostile environment employment discrimination only encompasses conduct or speech that is "sufficiently severe or pervasive than incidents that are relatively minor or infrequent."
"to alter the conditions of [the victim's] employment . . ." Title VII is not a general prohibition against racially- or sexually-charged offensive utterances, but a specific prohibition against discrimination in employment conditions, including discrimination that occurs when speech creates or contributes to a hostile work environment.

Title VII liability might also be imposed under R.A.V. v. St. Paul. In R.A.V., Justice Scalia, writing for the majority, enunciated the secondary effects test, stating that "words in some circumstances violate laws directed not against speech but against conduct" where the speech is "swept up incidentally within the reach of a statute directed at content rather than speech." Thus, speech that contributes to a hostile work environment may be "swept" within the scope of Title VII, which is aimed at racially or sexually discriminatory conduct in the workplace. In addition, Scalia specifically noted that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." Although dicta, Scalia's specific recognition that "sexually derogatory 'fighting words'" may violate Title VII provides further evidence that the imposition of civil liability for speech that is found to violate Title VII does not violate the First Amendment.

Five years earlier, in Boos v. Barry, the Court held that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" While several commentators have argued that under Boos, the "creation of a hostile [work] environment is [not] a prohibitable secondary effect," Boos can be distinguished from a hostile work environment employment discrimination case. Boos dealt with a Washington,
D.C. ordinance prohibiting the display of any sign within 500 feet of a foreign embassy if the sign would bring the embassy's government into "public odium" or "public disrepute." On its face, the purpose of the Boos statute was to regulate speech based on the speech's emotional impact. Title VII's purpose is not to regulate speech based on the speech's emotional impact. While hostile work environment discrimination involves conduct that may be "humiliating," and that interferes with another employee's performance, the purpose of Title VII is not to regulate the content of speech but "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment...." Comments that constitute a hostile work environment are not illegal because they hurt the plaintiff's feelings, but because they are part of a pattern of discriminatory treatment that alters the plaintiff's "terms and conditions of employment" solely because of the plaintiff's race or sex.

Even if Title VII did not fall within the secondary effects test, the Supreme Court's decisions in Harris, R.A.V. and Mitchell make it "virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing [or racially discriminatory] speech." The United States Supreme Court's recognition that words may violate Title VII clearly demonstrates that "spoken words are not constitutionally protected."
IV. TITLE VII INJUNCTIONS AND THE FIRST AMENDMENT

Title VII provides for injunctive relief "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint." While some district courts have discussed the use of injunctions against speech found to violate Title VII, a federal court has yet to find that these injunctions do not constitute a prior restraint. In Robinson v. Jacksonville Shipyards, Inc., the trial court generally found that an injunction against conduct found to constitute sexual harassment did not violate the defendant's First Amendment rights, noting that "the pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment." The Robinson court did not specifically address the question of prior restraint.

In McLaughlin v. New York Governor's Office of Employee Relations, the trial court refused to enjoin the defendants from continuing to blacklist the plaintiff, stating that it "could not possibly design an order that would be concise enough to avoid chilling defendants' protected speech." The McLaughlin court also noted that "[t]he Supreme Court has consistently directed that prior restraints are wholly impermissible when a sufficient after-the-fact remedy exists," finding that the plaintiff could bring a defamation suit if the blacklisting continued.

While the McLaughlin court did not believe it could design an order "concise enough to avoid chilling defendants' protected speech," the three factors adopted by the Aguilar court and the current precautions used by federal courts issuing Title VII injunctions would allow federal courts to issue permanent injunctions for speech that creates a hostile work environment without creating an unlawful prior restraint.

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100 42 U.S.C. § 2000e-5(g).
102 In Snell v. Suffolk County, a district court found that the First Amendment did not bar the court from granting an injunction ordering the employer to announce and enforce an anti-discrimination policy forbidding the use of racial epithets, jokes and the posting or distribution of derogatory material in the workplace. 511 F. Supp. 521, 531 (E.D.N.Y. 1985). While the injunction ordered the employer to monitor its employees' speech, it did not directly enjoin individual employee defendants' speech. The Snell court did not address the issue of prior restraint or discuss the reasoning behind its decision, noting that none of the parties "raised the issue and it would be inappropriate for the court to address it on its own motion." Id.
104 Id. at 1535.
106 Id. at 978.
107 Id.
108 Id.
Injunctions are appropriate where a monetary award alone is unsatisfactory, “either because, as in the case of mental suffering, valuation is impossible, or because accurate measurement of the harm is difficult.” Courts already issue permanent injunctions “to remedy a broad range of Title VII violations,” including: ordering employers to discontinue employment tests that adversely impact minorities; requiring employers to cease and desist discriminatory practices against women; and “requiring an employer with a history of management acquiescence in sexually harassing conditions” to announce a management policy against harassment, and to adopt and require “education, training, and development of effective complaint procedures.”

In addition, courts already employ a number of strategies to monitor the use of Title VII injunctions, including invalidating injunctions that are overly broad or too general, and requiring plaintiffs who request an injunction to meet a heightened standard of proof.

The three-factor test developed in *Aguilar* further limits the danger that an injunction might serve as a prior restraint on the defendant’s speech. The requirements that the injunction is based on a continuing course of repetitive conduct and sweeps no more broadly than necessary limit the danger of “universal” government inspection, because the injunction only covers speech by the defendant in the workplace that has specifically been found to violate Title VII. There is little danger that the injunction will suppress communication before it occurs, because the injunction will only be issued after the plaintiff establishes the defendant’s pattern of speech and a jury finds the speech violates Title VII. Under Title VII, the plaintiff

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[111] See, e.g., *Davis v. Richmond*, 803 F.2d 1322, 1328 (4th Cir. 1986) (invalidating an injunction that forbade the defendant to commit “further violations of Title VII on the grounds that the injunction was overly broad”) (citing NLRB v. Express Publ. Co., 312 U.S. 426, 436 (1941) (holding that an injunction prohibiting an employer from committing further violations of the NLRA impermissibly subjected the employer to contempt proceedings for conduct “unlike and unrelated to . . . [the violation] with which . . . [it] was originally charged”).

[112] See, e.g., *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 895-96 (5th Cir. 1978) (holding that the portion of an injunction prohibiting defendants from “[d]iscriminating on the basis of color, race, or sex in employment practices or conditions” was too general, and failed to describe in reasonable detail the acts or act the injunction was intended to restrain).

[113] See, e.g., *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987) (holding that a plaintiff must establish “irreparable injury” or “imminence of further retaliation” to get an injunction under Title VII).

[114] See generally, supra note 9 and accompanying text (Emerson’s list of policy reasons behind the general presumption against prior restraints).

[115] Emerson, supra note 8, at 665.

[116] See *Development in the Law-Injunctions*, supra note 109, at 1009, noting that the danger that an injunction will deter future communication: is absent when the injunction is phrased to prevent repetition of a specific defamatory statement already published, rather than to prevent all possible defamation in the future . . . . If courts confine themselves to narrow injunctions against specific communications instead of broad decrees, judicial supervision need be no more continuous than in
must prove not only that the defendant made the statements, but that the statements constituted hostile work environment discrimination.7 Therefore, the burden of initial action is on the plaintiff, not the defendant, and there is less propensity for an adverse decision. The jury verdict requirement also guarantees that the defendant will receive the procedural protections of a jury trial and provides an opportunity for public appraisal, reducing the danger of abuse of government power.

The effect of the Aguilar three-factor test may best be demonstrated through the creation of a model injunction. Cecilee Price-Huish has suggested that the following model injunction would offer "appropriate, meaningful, and contextual relief to the victims" in the Robinson case:

Jacksonville Shipyards is ordered immediately to cease any policy, activity, or omission that allows, perpetuates, or condones sexual harassment. Furthermore, Jacksonville Shipyards, and all employees thereof, are ordered immediately to refrain from using any abusive, hostile, or harmful speech that is directed toward female employees or is spoken in the presence of female employees that implicates considerations of sex or gender in the workplace. Any workplace use of, or references to, the following words... will be considered violative of this order: cunt, whore, bitch, dick. This list is a non-exclusive list that is meant to provide guidance and context in determining whether other words are violative of this order. This injunction also prohibits the workplace use of any other words, through speech or any other form of verbal or non-verbal communication, that a reasonable person could reasonably understand to invoke or incite similar meaning, communicative import or emotive impact as the explicitly prohibited words.12

Huish’s model injunction is overly broad, and would probably be struck down under Aguilar and Pittsburgh Press. First, under Aguilar, the injunction should be limited to “a specific pattern of speech” that has been found to violate Title VII.121 While Huish provides a list of words that will violate the order, she further enjoins the defendants from using any communication “that a reasonable person could reasonably understand to invoke or incite similar meaning... as the explicitly prohibited words.”122 This model injunction is not limited to conduct by the defendant which has been found to violate Title VII,

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117 But cf. Near v. Minnesota, 283 U.S. 697, 709 (1931) (noting that the Near statute required the plaintiffs to prove publication, but not “to prove the falsity of the charges that have been made” against the defendant, or even to allege that the articles were “not true” or “malicious”).
118 Price-Huish, supra note 88, at 215.
121 Aguilar v. Avis Rent a Car, 21 Cal. 4th 121, 140 (Cal. 1999).
123 See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 390 (1973) (holding that an injunction against speech will be upheld if the order does not go into effect before the conduct in question has been found to be illegal); Aguilar, 21 Cal. 4th at 138.
but implicates any speech about "sex or gender in the workplace" by any of the defendant's employees. *Pittsburgh Press* and *Aguilar* both require the injunction to be based on "a continuing course of repetitive conduct," yet Huish's injunction encompasses behavior that may not have been part of the pattern of conduct presented at trial.

*Robinson* is a challenging case because it involved several different types of sexual harassment from a number of employee-defendants. Male employees posted pornographic photos in the workplace, repeatedly requested sexual favors from the plaintiff, painted sexually explicit phrases in the plaintiff's work area, and continually complained about having women in the workplace. A list of words alone cannot adequately describe all the conduct to be enjoined, both because of the varying types of harassment and because the plaintiffs could not remember every single epithet used against them.

Because of its complexity, however, *Robinson* is a good example of how the three-factor test developed in *Pittsburgh Press* and *Aguilar* can effectively address speech that creates a hostile work environment without creating a prior restraint on the defendant's expression. I propose the following injunction, under the requirements of *Pittsburgh Press* and *Aguilar*:

Jacksonville Shipyards is ordered immediately to cease any policy, activity, or omission that allows, perpetuates, or condones sexual harassment. Jacksonville Shipyards, and Defendant Employees, are ordered immediately to refrain from the workplace use of, or reference to, the following words, through speech or any other form of verbal or non-verbal communication: cunt, whore, dick, and bitch. In addition, the Defendant Employees are ordered to cease any derogatory sexual or gender-related comments directed at female employees of Jacksonville Shipyards, and to refrain from any uninvited touching of female employees, while in the Jacksonville Shipyards workplace.

This model injunction meets all of the requirements set out by *Aguilar* and *Pittsburgh Press*. The injunction is "clear and sweeps no more broadly than necessary," because it only enjoins the defendant employees' behavior, in their capacities as employees of Jacksonville Shipyards, while they are at the workplace. The requirement that the order may only be issued after a jury has found that the defendants engaged in employment discrimination is met because the order enjoins only behavior by Jacksonville Shipyards and the defen-

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1. *Pittsburgh Press Co.*, 413 U.S. at 390; *Aguilar*, 21 Cal. 4th at 140.
3. *See id.* at 1501 (noting that the female employees' "recollection of specific incidents was hampered by the commonplace, daily nature of the comments").
4. *See supra* notes 27-35, 47-54 and accompanying text.
5. *Pittsburgh Press*, 413, U.S. at 390; *Aguilar*, 121 Cal. 4th at 140.
dant employees that the trial court found to be hostile work environment sexual harassment. Finally, the order is based on a "continuing course of repetitive conduct." Under this line of reasoning, critics argue that an injunction will not really end the use of sexually or racially discriminatory speech in the workplace, because co-workers will simply use other words, or continue to harass the plaintiff without mentioning race or sex. While a single injunction or statute will not end all discrimination, and may not instantly transform a hostile work environment into a harmonious one, injunctions will help end the "most serious" types of discrimination, and play a crucial role in preventing the creation of hostile work environments. Courts should use injunctions in cases where continuing patterns of speech clearly indicate a hostile work environment to show that the court is serious about ending employment discrimination. The real issue is not the limitation of employee speech, but the increased effectiveness of Title VII and the greater incentive for employers to institute and enforce policies preventing employment discrimination, including a hostile work environment.

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129 Robinson, 760 F. Supp. at 1502.
130 Pittsburgh Press Co., 413 U.S. at 390; Aguilar, 21 Cal. 4th at 140.
131 Plessy v. Ferguson, 163 U.S. 537, 551 (1895).
132 See Alexander, supra note 6, at 72 (noting that blatantly racist statements may be replaced by statements that do not specifically mention race, but carry racist implications) (citing Henry Louis Gates, Jr., Let Them Talk, THE NEW REPUBLIC, Sept. 20 and 27, 1993 at 45).
133 General harassment alone does not violate Title VII. See Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1995) (holding that "general taunting and torment, if not racially discriminatory, are not actionable"); Gillum v. Federal Home Loan Bank of Topeka, 970 F. Supp. 843, 848 (D. Kan. 1997) (holding that criticism must contain a gender-specific reference in order to constitute sexual harassment in violation of Title VII).
134 H.R. Rep. No. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393 ("No bill can or should lay claim to eliminating all the causes and consequences of racial and other types of discrimination against minorities . . . . It is, however, possible for the Congress to enact legislation which prohibits and provides and necessary the means of terminating the most serious types of discrimination.").
135 Both private and public employers have the right to impose their own anti-discrimination policies on employees. See Pierce, supra note 6, at 131 n.21, 132 n.24 (noting that, "[a]lthough constrained by the First Amendment, government may restrict speech that impairs efficiency and productivity in the workplace") (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987) (holding that workplace speech in government employment is protected under the First Amendment)); Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (holding that freedom of speech is not limited by private constraints on speech).
136 See Judy Greenwald, Employer Must Enforce Gag Order On Worker: Court, BUS. INS., Aug. 9, 1999, at 2 (quoting Gerald Maatam, a partner in the Chicago firm Baker & McKenzie, who notes that, "if I'm a risk manager and I want to create the best workplace possible, [Aguilar] is a favorable decision because it says I have leeway (as an employer) to institute disciplinary procedures against employees' who use racial epithets and try to defend their conduct on First Amendment grounds).
CONCLUSION

While *Near* established a general presumption against prior restraints, injunctions against speech are not per se unlawful prior restraints. As the California Supreme Court held in *Aguilar*, an injunction against speech found to violate an anti-discrimination statute is not a prior restraint if: (1) the order is based on a continuing course of repetitive conduct; (2) the order is clear and sweeps no more broadly than necessary; and (3) the order is issued after a jury finds that the defendants engaged in unlawful employment discrimination. When combined with the precautions already used by courts issuing Title VII injunctions, the *Aguilar* three-factor test minimizes the harms that the doctrine of prior restraint was developed to address, while permitting the courts to offer a more complete and effective remedy to victims of hostile-environment employment discrimination.

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128 *Aguilar v. Avis Rent a Car*, 21 Cal. 4th 121 (Cal. 1999).