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ABSTRACT

This document is comprised of California state statutes, federal legislation, and court litigation pertaining to hate speech and the First Amendment. The document provides an overview of California education code sections relating to the regulation of speech; basic principles of the First Amendment; government efforts to regulate hate speech, which have generally been unsuccessful; Supreme Court tests to determine the free speech rights of public employees; court decisions regarding clubs, student activities, and the Equal Access Act; and the legal definitions of a hostile environment and harassment (sexual and racial). (LMI)

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HATE SPEECH AND THE FIRST AMENDMENT

California School Boards Association

December 2, 1995

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I. EDUCATION CODE SECTIONS RELATING TO THE REGULATION OF SPEECH

A. Education Code Section 48907

1. Governing Boards shall adopt rules and regulations relating to the exercise of free expression by students upon school premises. The regulations shall include reasonable provisions for the time, place and manner of conducting such activities.

2. Such rules and regulations shall not prohibit the right of students to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, or other insignia and the right of expression in official publications . . .

   except that expression . . . which is obscene, libelous or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

B. Education Code Section 48950

1. The governing board of a district operating one or more high schools shall not make or enforce any rule subjecting any high school student to disciplinary sanction solely on the basis of conduct that is speech or other communication that when engaged in outside a campus, is protected from governmental restriction by the First Amendment to the U.S. Constitution or Section 2 of Article 1 of the California Constitution.

2. Prior restraints of material prepared for official student publications are generally prohibited. The phrase "official publications" refers to material produced by students in journalism, newspaper, yearbook, or writing classes and distributed to the student body. Section 48907. Lopez v. Tulare Joint Union High School District, 40 Cal.Rptr. 762 (1995) (School Board may constitutionally ban profane language from student produced film.)

3. "Nothing in this section prohibits the imposition of discipline for harassment, threats or intimidation, unless constitutionally protected." (Emphasis added.) Section 48950(d).

- Harassment is defined in Section V, below. In California the word "threat" is defined to mean those statements that, according to their language and context, convey a gravity of purpose and likelihood of execution. Lowell v. Poway Unified School District, 847 F.Supp. 780 (S.D. Cal., 1994)(The court interpreted Education Code Section 48950, and found that a threat to shoot a counselor over a scheduling change, under the circumstances, did not meet the above standard, and was protected expression under the First Amendment.)

4. Nothing in this section prohibits a governing board from adopting rules and regulations that are designed to prevent hate violence directed at students which denies them their full participation in the educational process, so long as the rules and regulations conform to standards established by the First Amendment to the United States Constitution and Section 2 of Article 1 of the California Constitution.

5. Significantly, the Legislature, in the uncodified portions of Chapter 1363 made certain findings with respect to free speech and "hate violence" issues. However, some of the Legislature's findings are inconsistent with U.S. Supreme Court decisions or are too vague to be of much assistance in determining what is protected speech, or what is unprotected "hate violence."

   a. "Free speech rights, both on and off campus, are subject to reasonable time, place and manner regulations."

      - This statement is true, but it is incomplete. See the discussion of time, place and manner regulations in Section II.D., below.

   b. The Legislature includes a frequently cited portion of the Supreme Court's decision in Tinker v. Des Moines School District:

      "Students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate... [A student] may express his opinions, even on controversial subjects, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others . . . . But conduct by the student, in class our out of it...which for any reason . . . whether it stems

from time place, or type of behavior . . . materially disrupts classwork or involves substantial disorder, or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."

- What does this quote mean in the context of speech or expression which is racially or sexually derogatory? (The same question applies to speech which denigrates an individual because of ethnicity, national origin, religion, sexual orientation, disability, or political beliefs, etc.)

c. All students have the right to participate fully in the educational process free from discrimination and hate violence. Schools have an obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity as guaranteed by the state and federal constitutions.

- But what does this mean with respect to the constitutional guarantees of free expression?

d. Hate violence on campuses creates a hostile environment and jeopardizes equal educational opportunity.

e. Hate violence means any act of physical intimidation, or physical harassment, physical force or physical violence, or the threat of physical force or of physical violence, that is directed against any person or group of persons, or the property of any person or group of persons because of the ethnicity, race, national origin, religion, sex, sexual orientation, disability, or political or religious beliefs of that person or group.

- Will regulations adopting this definition of hate violence pass muster under constitutional standards?

- Will limiting the definition of hate violence to physical manifestations take such regulations out of the realm of impermissible First Amendment limitations?

- What is a meant by intimidation, harassment, force, or violence? What is meant by a threat?

II. BASIC PRINCIPALS OF THE FIRST AMENDMENT

A. The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2542 (1992); and Texas v. Johnson, 109 S.Ct. 2533, 2540 (1989).

B. Restrictions are permitted on the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." R.A.V., supra, 112 S.Ct. at 2543.

1. Obscenity - Miller v. California, 93 S.Ct. 2607 (1973).

   a. Applies only to depictions or descriptions of sexual conduct.

   b. Three part test:

      (1) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex (i.e., a shameful or morbid interest in nudity, sex or excretion);

      (2) Whether the work depicts or describes, in a patently offensive way , sexual conduct specifically defined by the applicable state law; and

      (3) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

2. Defamation - A false and unprivileged publication that exposes any person to hatred, contempt, ridicule, or that causes him or her to be shunned or avoided, or which has a tendency to injure him or her in his or her occupation.

3. "Fighting Words" - Chaplinsky v. New Hampshire, 62 S.Ct. 766, 769 (1942): "Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

a. In Chaplinsky, a Jehovah's witness was convicted for calling a police officer a "God damned racketeer" and a "damned fascist." The conviction was based on a statute which provided as follows:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or prevent him from pursuing his lawful business or occupation."

b. Chaplinsky set out a two part definition of fighting words: (1) words which by their very utterance inflict injury and (2) words which by their very utterance tend to incite an immediate breach of the peace.

c. Chaplinsky has been significantly narrowed. The first part of the definition is now regarded as protected speech. The second part of the definition now requires that the words must "naturally tend to provoke violent resentment," and must be "directed at the person of the hearer."

d. In order to constitute fighting words, speech must not merely breach decorum but also must tend to bring the addressee to fisticuffs.

4. Urging the violation of law.

The constitutional guarantees of free speech and free press do not permit government to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Brandenburg v. Ohio, 89 S.Ct. 1827, 1829 (1969).

(The Court reversed the conviction of a Ku Klux Klan leader who advocated violence against Jews and Blacks. "But if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, its possible that there might have to be some revengeance [sic] taken.")

C. When is conduct protected speech? [Texas v. Johnson, 109 S.Ct. 2533, 2399 (1989)]

1. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play the Court asks two questions:

   a. Was an intent to convey a particularized message present?

   b. Was the likelihood great that the message would be understood by those who viewed it?

2. In Texas v. Johnson, the Court found that the burning of the American flag at a demonstration protesting the policies of the Reagan administration was expressive conduct protected by the First Amendment.

3. Similarly, the wearing of armbands in Tinker v. Des Moines Independent Community School District was protected expressive conduct.

4. Any government regulation of expressive conduct must be independent of the content of the expression, i.e., may only regulate the nonspeech elements of the conduct, e.g. the time, place, and manner of the speech.

5. Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338 (1995) where the Court found that Boston's St. Patrick's Day - Evacuation Day parade constituted expressive conduct, because the marchers are making some sort of collective point, entitling the parade organizers to the protection of the First Amendment when determining who to allow to participate in the parade.

D. Time, place, and manner restrictions - regulation of conduct

All speech is conveyed through physical action, e.g. talking, writing, distributing pamphlets, etc., and while the freedom of belief is absolute, the freedom to convey beliefs cannot be. The government may reasonably regulate speech related conduct through content neutral time, place, and manner regulations.

1. Public forums - Certain public property is historically associated with the exercise of First Amendment rights, e.g. pamphleteering, broadcasting, picketing, etc., such that denial of all access to it for the purpose of exercising such rights is forbidden. Streets, sidewalks, and parks fall into this category. Nevertheless, speech in such public places may be regulated by reasonable time, place, and manner restrictions.

   a. The regulation must be content neutral, both as to subject matter and viewpoint.

   b. Any regulation of expressive content must be narrowly tailored to serve a significant government interest. Capitol Square Review and Advisory Board v. Pinette, 115 S.Ct. 2440 (1995). (Court found unconstitutional city's prohibition of placement of cross on public property where the property was a public forum.)

   c. Any regulation of content must leave open alternative channels of communication.

2. Nonpublic forums - Most places other than streets, parks, and sidewalks are not public forums, either because they are not historically linked to speech and assembly or because such activities would be inconsistent with their use, e.g., government workplaces, school-sponsored activities, and mailboxes. Speech in nonpublic forums may be regulated as to time, place and manner if:

   a. The regulation is viewpoint neutral. Content, however, may be regulated; speech as to certain subject may be prohibited. But once a subject is authorized, viewpoint discrimination is not allowed. For example, a school board outside of California could prohibit all articles in the student newspaper on nuclear power. However, it could not allow articles in favor of nuclear power and prohibit articles opposed to nuclear power.

      (1) "[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141, 2145 (1993).

(2) See also, Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995) (The decision to not fund a Christian literary magazine constituted viewpoint discrimination when other literary magazines were funded.)

b. The regulation need only be reasonably related to a legitimate government purpose.

III. EFFORTS BY GOVERNMENT TO REGULATE HATE SPEECH HAVE GENERALLY BEEN UNSUCCESSFUL

A. R.A.V. v. St. Paul, 112 S.Ct. 2538 (1992)

1. Facts - St. Paul enacted the following ordinance: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

a. Several teenagers assembled a cross and burned it inside the fenced yard of a black family.

b. The Minnesota Supreme Court upheld the conviction by finding that the ordinance only applied to fighting words.

2. Holding - The U.S. Supreme Court found the ordinance to be facially unconstitutional.

a. "The ordinance applies only to fighting words that insult, or provoke violence on the basis of race, color, creed, religion or gender. Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."

b. "In its practical operation...the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination...fighting words that do not themselves invoke race, color, creed, religion or gender - aspersions upon a person's mother, for example - would seemingly be usable ad

libitum in the placards of those arguing in favor of racial... tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence on the basis of religion. St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." (Emphasis added.)

c. The Supreme Court's problem with the St. Paul ordinance was that it was underinclusive. Theoretically, the Court would have affirmed a conviction based on a general fighting words ordinance (see the discussion of fighting words, above, and Chaplinsky), but because the St. Paul ordinance singles out particular messages it offended the First Amendment.

d. St. Paul argued that the viewpoint discrimination was justified because it is narrowly tailored to serve compelling state interests. St. Paul asserted that the ordinance helps to ensure the basic human rights of groups that have historically been subjected to discrimination. However, the Court concluded that content discrimination is not reasonably necessary to achieving the government's compelling interest.

B. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338 (1995) (Holding that government could not compel private parade organizers to include a gay, lesbian and bisexual group in its parade.)

C. In Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993), defendant Mitchell led a group of blacks who severely beat a white boy. Mitchell was convicted of aggravated battery, with a sentence enhancement because he intentionally selected his victim on account of the victim's race. The court found that the statute authorizing the sentence enhancement did not violate Mitchell's free speech rights by punishing his biased beliefs.

It may be the case that courts will uphold increased levels of discipline where the victim of any given misconduct is selected because of his or her race, sex, ethnicity, religion or political beliefs, etc.

California Penal Code Section 422.7 enhances the penalty for violent crimes where the victim is selected on the basis of race, color, religion, ancestry, national origin, disability, gender,or sexual orientation.

D. Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich, 1989).

1. Facts - The University of Michigan adopted a policy on discrimination and discriminatory harassment. The policy prohibits behavior, verbal or physical that stigmatizes or victimizes on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin etc., and that threatens an individual's academic efforts, employment or participation in University sponsored extra-curricular activities, or creates a hostile environment with respect to such endeavors.

   The plaintiff was a graduate student in psychology whose specialty was in the field of biopsychology. The plaintiff asserted that certain controversial theories positing biologically-based differences between sexes and races might be perceived as "sexist" and "racist" by some students, and he feared that discussion of such theories might be sanctionable under the policy.

2. Holding - The policy was found to be both too broad and too vague. Government may not prohibit broad classes of speech, some of which may be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. The policy was also found to be too vague because use of the words "stigmatize" and "victimize" are general terms which elude precise definition. Just because a statement may "victimize" or "stigmatize" does not, in and of itself, strip the statement of protection under the First Amendment.

E. UWM Post v. Board of Regents of the University of Wisconsin, 774 F.Supp. 1163 (E.D. Wis., 1991).

1. Facts: The University of Wisconsin as part of its "Design for Diversity" plan added a rule to its code of student conduct. The rule authorized disciplinary action against students in non-academic matters and read in pertinent part as follows:

   "For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or physical conduct, if such comments epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual; and

2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."

A group of University of Wisconsin students subject to disciplinary action sued to enjoin enforcement of the regulation.

2. Holdings: The Plaintiffs argued that the regulation was overbroad. The University argued that the regulation only applied to "fighting words." The court held that since elements of the regulation do not require that the regulated speech, by its very utterance, tend to incite violent reaction, the rule goes beyond the present scope of the fighting words doctrine.

a. While the regulation does cover some language that will provoke a violent response it also covers speech that will not provoke such a response.

b. The court rejected the University's argument, which relied on the Supreme Court's decision in Meritor Savings v. Vinson, 106 S.Ct. 2399 (1986), that the regulation was constitutional because it parallels Title VII's prohibition on the creation of a hostile working environment.

F. IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.Supp. 386 (4th Cir., 1993)

1. Facts: Fraternity was sanctioned by the University for staging an "ugly woman contest" in a campus cafeteria.

2. Holdings:

a. The "ugly woman contest" was inherently expressive and entitled to First Amendment protection under the First Amendment, even as low grade entertainment.

b. The contest is protected expressive conduct under Texas v. Johnson. The contest was intended to convey a message. Fraternity's purposeful nonsensical treatment of sexual and racial themes was intended to impart a message that the

University's desire to promote diversity and equal educational opportunity, should be treated humorously.

c. Relying on R.A.V. v. St. Paul, the court concluded that despite the University's substantial interest in maintaining an educational environment free of discrimination and racism and providing gender-neutral education, the University could not accomplish its goal by silencing speech on the basis of viewpoint.

G. DiBona v. Matthews, 269 Cal.Rptr. 882 (1990).

1. Facts: A community college instructor and student brought an action against the college's administration after the administrators had cancelled a drama class in which a controversial play containing racially derogatory language was to have been performed. The cancellation was in part motivated by complaints from the black community.

2. Holdings:

a. The court distinguished the cases allowing school administrators greater latitude in regulating expressive activity in the K-12 setting and found that the First Amendment applies with the same force on a college campus as it does in the community at large. Healy v. James, 92 S.Ct. 2338 (1972). Section 66301 is consistent with this statement.

b. The court also found that college officials may limit the drama curriculum to works of an acceptable literary quality and they undoubtedly are entitled to broad deference where such determinations are made in advance rather than, as in this case, sometime after the class has already begun to meet.

IV. FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

A. Unlike expression by students, the determination of whether expression by public employees is protected from adverse action requires a balancing of the right of public employees as citizens to comment on matters of public concern and the government's interest in the effective and efficient fulfillment of its responsibilities to the public. The Supreme Court has established very specific tests for determining whether adverse action against public employees violates the employee's First Amendment rights.

1. The three-part analysis for determining whether a public employer's conduct has impermissibly infringed upon a public employee's First Amendment rights was articulated in Mt. Healthy City Board of Education v. Doyle, 97 S.Ct. 568 (1977).

   a. The public employee first has the burden of proving that as a matter of law, his conduct was constitutionally protected.

   b. The employee must then demonstrate that this conduct was a "substantial factor" or "motivating factor" in the employer's adverse employment decision.

   c. However, even if the employee is able to establish that his conduct was protected and that the employer retaliated as a result of that conduct, the employer can negate legal causation if he demonstrates by a preponderance of the evidence that he would have reached the same decision absent the protected conduct.

2. Resolution of the first prong of the Mt. Healthy test depends upon the two step analysis derived from Pickering v. Board of Education, 88 S.Ct. 1731, 1734-35 (1968), and Connick v. Myers, 103 S.Ct. 1684, 1690 (1983).

   a. First, the court must determine whether the speech involves a "matter of public concern."

   b. The court must then balance the "interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." See also, Waters v. Churchill, 114 S.Ct. 1878 (1994) and Jeffries v. Harleston, 115 S.Ct. 502 (1994), decision on remand, 52 F.3d 9 (2nd Cir., 1995) ("Waters indicates that the government's burden is to make a substantial showing of likely interference and not an actual disruption.")

3. According to the Supreme Court's decision in Connick: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

4. Dambrot v. Central Michigan University, 839 F.Supp. 477 (E.D. Mich., 1993), affirmed, 55 F.3d 1177 (6th Cir., 1995).

a. Facts: Dambrot was the white basketball coach at CMU. Most of the members of the team were black. In a locker room talk he referred to players as "niggers" and "half-niggers." Many players and Dambrot testified that the term was used in a "positive and reinforcing" manner during the closed-door locker room team meeting. There was no evidence to the contrary.

CMU's affirmative action officer investigated, concluded that the word "nigger" was incapable of being used positively and that its use violated CMU's "discriminatory harassment policy." Dambrot was suspended for five days.

News of the incident spread throughout the CMU community and became the subject of a student demonstration and further complaints. Dambrot's contract to serve as head coach was not renewed.

b. The court found CMU's "discriminatory harassment policy" to be unconstitutional based on decisions discussed above. R.A.V., and Doe v. University of Michigan.

c. The court, however, upheld the termination of Dambrot under Connick and Waters, because it found that the speech was not on a matter of public concern, and Dambrot was not, therefore, protected from adverse government action.

V. CLUBS, STUDENT ACTIVITIES, AND THE EQUAL ACCESS ACT

A. In 1984, Congress enacted the Equal Access Act (20 U.S.C. §§ 4071-74) with the stated goal of affording student religious and political groups a "fair opportunity" to use public secondary school facilities. This Act provides that secondary schools that receive federal funding and allow "noncurriculum related student groups" to meet on school property, i.e., schools that have a "limited open forum," also must accommodate, on equal terms, all noncurriculum student groups, including any concerned with religious, political, or philosophical issues.

B. The Equal Access Act does provide some specific limitations on religious clubs:

1. Sponsorship of the club is not allowed;

2. Meetings can only be during "non-instructional time." This has always been interpreted to mean before or after classes were held, but recently the Ninth Circuit Court of Appeals determined that it also includes lunch time if no classes are held at lunch time. Ceniceros v. Board of Trustees of the San Diego Unified School District, Daily Journal D.A.R. 12973 (09/29/95).

3. The club cannot be "directed, controlled, conducted, or regularly attended by 'nonschool persons;'" and,

4. School personnel may be present "only in a nonparticipatory capacity." In May v. Evansville - Vanderburgh School Corp., 615 F.Supp. 761 (S.D. Ind. 1985), aff'd, 787 F.2d 1105 (7th Cir. 1986), the court ruled that the Act does not protect religious meetings attended solely by teachers and teacher aides.

C. In Board of Westside Community Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356 (1990), the U.S. Supreme Court held that to be "curriculum related," the subject of the group must be directly related to a course or body of courses offered by the school, or soon to be offered, or if participation in the group results in academic credit.

D. In determining what constitutes a meeting under the Equal Access Act, a district court declared that to be protected by the Act, a student activity must be the same type of activity that the school permits other student groups to engage in within a limited open forum. Thompson v. Waynesboro Area School District, 673 F.Supp. 1379 (M.D. Pa. 1987). Using this analysis, the court determined that distribution of a religious newspaper in the school hallway was not a "meeting" under the Act because the school had not allowed any other noncurriculum-related groups to distribute literature in the hallway. The court also concluded that a student activity is not a "meeting" unless it is voluntary. To be voluntary, the court held, such activities must be student-initiated, must occur in a meeting place, and must be capable of being ignored by students choosing not to participate.

E. Schools that have limited open forums may wish to attempt to limit the activities of noncurriculum-related groups by restricting these groups' access to the school public address system and bulletin boards while allowing access for curriculum-related groups.

VI. HOSTILE ENVIRONMENT HARASSMENT DEFINED

A. The Supreme Court has recognized that hostile environment harassment claims are cognizable under Title VII for discrimination on the basis of race, ethnicity and gender. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399, 2404-2405 (1986). In Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir., 1991), the court of appeals applied the standard sexual harassment analysis to a case involving allegations of racial harassment.

1. Title IX not only prohibits the sexual harassment of students by teachers [Patricia H. v. Berkeley Unified School District, 830 F. Supp. 1288 (N.D. Cal., 1993)], it prohibits the sexual harassment of students by students. Doe v. Petaluma City School District, 830 F.Supp. 1560, 1575-1576 (N.D. Cal., 1993) (In order to obtain monetary relief, intent to discriminate must be established.)

2. Title VI would be interpreted similarly in the context of student to student harassment on the basis of race or national origin.

3. Analytically, claims of harassment based on religion should be treated no differently than claims of harassment because of race or sex. In the context of Title VII, the EEOC has expressed this opinion.

B. The Supreme Court's recent decision in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993), provides a definition of sexual harassment that can be applied to all other forms of prohibited hostile environment harassment:

1. The Court said that an employer is guilty of sexual harassment if the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"

2. Consistent with prior decisions, the Court held that unlawful discrimination need not be economic or tangible. Furthermore, the Court said that a sexual harassment victim does not have to have a specific physical or mental injury to prove that sexual harassment occurred.

3. The Court stated that the following factors may be used to determine whether sexual harassment exists: the frequency of the discriminatory conduct; the conduct's severity; whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and whether the conduct unreasonably interferes with an employee's work performance.

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