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MY BODY IS A SACRED “GARMENT” – DOES THE FIRST AMENDMENT CREATIVE EXPRESSION PROTECTION SHIELD CLOTHING DESIGNERS WHO WORK NAKED?

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I. Introduction

A Warner Brothers employee, Ms. Lyle, sued the writers of the TV program, Friends, for sexual harassment because the writers used sexually explicit coarse and vulgar language during their script writing sessions for the show. In the Supreme Court of California's majority opinion regarding the suit, *Lyle v. Warner Brothers Television Productions*,¹ the majority held, among other things, that the plaintiff's sexual harassment claims were not supported by the facts because the discussions of the Friends writers were not "aimed at Lyle or other female employees"² or "severe or pervasive"³ enough to constitute sexual harassment.

Further, the court concluded that the Friends writers did not treat women differently from men; both sexes were on the receiving end of the writer's crude jokes, comments, drawings, and behavior. Basically, the court considered the sexual conduct as a necessary part of the Friends writers' job because the Friends show was a sexually explicit TV program, and writing for the show

¹ [132 P.3d 211 \(Cal. 2006\)](#).

² *Id.* at 225.

³ *Id.* at 227.

was necessarily going to involve the writers discussing sexual words and conduct, including their own sexual conduct.

While the majority declined to consider whether the writers' crass words and conduct was protected by the First Amendment right of free speech, the concurring opinion tackled this issue with vigor stating the case was more about free speech rights than sexual harassment.⁴ The judge in the concurring opinion opined that creative speech, used to create an employer's constitutionally protected work product (i.e., books, movies, television programs), is protected under the First Amendment, and can never create a hostile work environment unless the speech was directed at the plaintiff.⁵ If the speech was directed "at or about" the plaintiff, then the offending speech is not protected as creative expression under the First Amendment, and the court could then analyze whether such offending speech was sexually harassing speech.⁶

In a more recent case, Mary Nelson, among several other female employees, filed suit against, Dov Charney, the founder of American Apparel, a clothing manufacturing company, claiming that he sexual harassed her during her employment with the company.⁷ Mr. Charney and his attorney subsequently argued, during media interviews, that his vulgar and coarse language would be protected by the First Amendment as creative speech used to create a constitutionally protected work product—fashion instead of TV scripts via the *Lyle v. Warner Brothers Television Productions* analysis.⁸

Nelson's case against Charney eventually went to arbitration. Accordingly, this paper will examine whether the First Amendment creative speech and expression protection, articulated by the

⁴ [Id. at 231.](#)

⁵ [Id.](#)

⁶ [Id. at 234.](#)

⁷ Pet'r's Compl. for Damages, *Nelson v. Am. Apparel, Inc.*, No. BC33028, 2005 WL 1660570 (Cal. Super. Ct. May 4, 2005).

⁸ [Stein, *Dov Charney's Court Case is Totally Complicated*, JEZEBEL \(Oct. 21, 2008\).](#)

court in the concurring opinion of *Lyle*, would have protected Charney's actions and speech had Nelson's case against Charney not been arbitrated.

II. Working Naked

Your coffee tastes particularly fresh this morning. As you walk down the street, head held high, shoulders back, drink in hand, you relish the thought of your new high profile job with a cutting-edge clothing designer: your dream job. As you enter the company's building, you clear your throat, attempting to settle your nerves. You walk into the office for your first official meeting with the founder of the company. Your jaw drops as your naked boss stands up to greet you. He shouts, "Today I am allowing my skin to breathe! Join me, if you like!"

Although one might find this workplace scenario unfathomable, especially in today's hyper-sensitive, politically-correct environment, Mary Nelson alleged similar events occurred during her employment with American Apparel,⁹ a self-proclaimed avant-garde clothing manufacturing company founded by Dov Charney.¹⁰ During September of 2003, Mary Nelson met with Dov Charney at his home to discuss her possible employment with American Apparel.¹¹ "Charney held the meeting in his underwear and also paraded around in a penis and ball cover during the meeting."¹²

⁹ See generally *Id.* Ms. Nelson and others have sued Nelson for sexual harassment. At least four former female employees have filed suit against Charney, Carla Hall, [Lawsuit has fashion mogul in spotlight, L.A. TIMES, Jan. 17, 2008, available at 2008 WLNR 910461](#), including most recently, Wei-Ween Y. Victorino, whose 2008 suit against Charney asserts she was Charney's ex-girlfriend and alleges claims of "theft, fraud, sexual harassment, wrongful termination and breach of contract," [American Apparel founder, former employee trade lawsuits, L.A. TIMES, Dec. 6, 2008, available at 2008 WLNR 23460356](#). Of the three former cases, the court dismissed a case, and the parties settled the other two cases. [Lawsuit has fashion mogul in spotlight, L.A. TIMES, Jan. 17, 2008, available at 2008 WLNR 910461](#).

¹⁰ "If you aren't familiar with American Apparel and Dov [] [Charney's] muttonchopped [sic], handlebar-mustached face, you will be soon enough Dov wants his \$150 million clothing company to become the Starbucks of T-shirts." [Claudine Ko, Meet Your New Boss, JANE MAG., June/July 2004](#).

¹¹ Pet'r's Compl. for Damages, *supra* note 7, at ¶11.

¹² *Id.* A penis and ball cover works "[j]ust like your pants . . . it's an undergarment . . . it covers the penis in the same way any undergarment would." Decl. of Taylor S. Ball in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. Adjud. of Issues, *Nelson v. American Apparel, Inc.*, No. BC33028, 2007 WL 4811459, Ex. A at 16 (Cal. Super. Ct. Dec. 21, 2007).

Nelson's claims of impropriety did not end with this initial business meeting. Nelson alleged that throughout her "employment with American Apparel, Charney subjected Ms. Nelson to a hostile work environment . . . [when] Charney regularly made unwelcome, inappropriate comments and/or suggestive non-verbal signals to Ms. Nelson."¹³

III. "Sexuality is the Fount of My Creativity"

Although Charney denied all of Ms. Nelson's claims¹⁴ and contended that Ms. Nelson had problems of her own,¹⁵ he admittedly wore a "cock sock" at the business meeting¹⁶ and described himself as sexually charged person.¹⁷ He was also emphatic, claiming that he and his company had a zero tolerance policy for sexual harassment.¹⁸ But, like all of Charney's rules for business, the policy had key exceptions. For example, Charney explained that the policy might not prohibit calling a woman a "cunt,"¹⁹ however clarifying that "[i]t would depend on the context"²⁰ We might use the word "[i]f we were producing an advertisement that was . . . a parody or if we were producing marketing materials that somehow were examining that [word]. . . [in fact] at least half a dozen

¹³ Her allegations include: "Charney telling the female workers to 'grow a dick'; dropping his pants in front of [Nelson] and revealing his underwear; touching his penis in front of [Nelson] and stating 'there are a lot of girls out there that need this his cock'; inviting [Nelson] to masturbate with him; showing his employees an advertisement in which Charney appeared with his penis exposed; making comments such as 'pussy wants pussy and the girls today are ten times dirtier than the guys;' referring to women as 'greedy little whores' and 'slut;' referring to [Nelson] as a 'whiney bitch' and an 'emotional bitch;' and continually showing [Nelson] his penis and buttocks." *Id.* at ¶14.

¹⁴ *See* Def. Dov Charney's First Am. Answer to Compl., *Nelson v. Am. Apparel, Inc.*, No. BC33028, 2005 WL 6036636 (Cal. Super. Ct. Jul. 12, 2005).

¹⁵ Charney described Nelson as an ineffective employee. She was ". . . unable to control her emotional state [at work] . . ." Decl. of Taylor S. Ball in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. Adjud. of Issues, *Nelson v. American Apparel, Inc.*, No. BC33028, 2007 WL 4811459 Ex. A at 11 (Cal. Super. Ct. Dec. 21, 2007), and unable to ". . . bring the business to American Apparel that she had promised to bring . . .," *Id.* Ex. A at 13.

¹⁶ *Id.* Charney could not remember whether Nelson was present at this particular meeting, but stated that he did not "have a problem with Mary [Nelson] being there . . ." *Id.* Ex. A at 17.

¹⁷ In an interview, Charney declared, "Of course you have me in my underwear in front of high-level employees. Guess what? I design underwear!" [Ruth Andrew Ellenson, *Unfashionable Crisis*, JEWISH J., July 28, 2005.](#)

¹⁸ When answering a deposition question, Charney stated, "Yeah, I believe we have a zero tolerance for sexual harassment." Decl. of Taylor S. Ball in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. Adjud. of Issues, *supra* note 12, Ex. A at 22.

¹⁹ *Id.* at 23.

²⁰ *Id.*

clients have references to the word ‘vagina’ in their corporate name . . . The word ‘cunt’ is part of the vernacular of entertainment culture”²¹

Charney is honest and outspoken about his sexual views. He does not pretend to be sexually inhibited. Charney has sexual relationships with his staff and he enjoys doing so.²² Not only does he not avoid sex and sexual tension in the workplace, he encourages it.²³ Charney “says his aggressiveness and his sexuality is the fount of his creativity – even the key to his success.”²⁴

American Apparel is not a Sears and Roebuck. The store’s advertisements target young buyers who wear the latest trends. Charney’s company pushes clothing towards “ . . . twenty-something [sic] customers . . . [who] don’t mind being marketed to as long as the images look real, unvarnished, and match their own casual attitudes towards sex.”²⁵

Unapologetically, Charney suggests that the law suits filed by Nelson and several other former employees, “misinterpret and misrepresent his company’s modern, creative work environment . . . [I am] being exploited because of . . . [my] success and sexually open persona.”²⁶ Charney thinks American Apparel’s culture is “‘healthy,’ and he has no plans to change it.”²⁷

IV. American Apparel - a “Creative Workplace”

²¹ *Id.* at 23. Charney indicated that he does not have a problem with his employees using foul words in the workplace. “[T]o the extent that we were discussing, ‘Oh, yeah, I heard the word ‘cunt’ on HBO last night,’ or . . . ‘I heard Tony Soprano refer to his psychiatrist as a ‘cunt,’ yeah, we would authorize that kind of dialogue at American Apparel and be very comfortable with it.” *Id.*

²² “I’ve had . . . loving relationships, that I’m proud of . . . I think it’s a First Amendment right to pursue one’s affection for another human being.” Christopher Palmeri, *Living on the Edge at American Apparel*, *BUSINESSWEEK*, June 27, 2005.

²³ *Id.* Charney “. . . claims that he is inspired to do better work when surrounded by women with whom he has relationships.” Ellenson, *supra* note 9.

²⁴ *Id.* Charney contends that the press and society are too hard on him. “I’m being demonized for being a human being . . . This is 2005, sex is now part of the fashion industry. I admit I am passionate. I don’t think I go over the line. Sexuality and sexual words become part of the daily banter of work life in any free society.” *Id.*

²⁵ Palmeri, *supra* note 15.

²⁶ Ellenson, *supra* note 9. Charney, in an attempt at a bad joke, explained to the writer of the Jewish Journal article that, “I could pull my penis out right now, and I guarantee you no one would be offended.” *Id.* The writer did not indicate whether she was offended by Charney’s generous offer.

²⁷ *Id.*

Various types of people inhabit each work environment, and such diverse groups of people create tension: political, moral, economical, religious, and sexual. Nevertheless, both federal²⁸ and state²⁹ laws forbid sexual harassment in the workplace. A court can only determine:

[w]hether an environment is 'hostile' or 'abusive' by looking at all the circumstances. These circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.³⁰

Most of Charney's reported outrageous behavior overstepped these established boundaries.³¹

In defending himself and his actions, however, Charney not only denied Nelsons' sexual harassment claims, but he shielded himself behind a recent California Supreme Court decision. Charney invoked the "creative expression" protection created by the California Supreme Court in *Lyle v. Warner Brothers Television Productions*,³² where the Court ruled that the defendants' normally legally prohibited "sexually coarse and vulgar language" did not violate state or federal sexual harassment laws because the language was "not aimed at [the] plaintiff" and the plaintiff's "creative workplace" necessarily involved discussions of "sexual themes."³³ Citing *Lyle*, Charney argued that Nelson's suit infringed upon his First Amendment right to free speech.³⁴ Assuming Charney's behavior was

²⁸ [Harris v. Forklift Sys., Inc., 510 U.S. 17 \(1993\)](#); [Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17](#); *see also* [29 C.F.R. § 1604.11\(a\)](#) (providing the guidelines for establishing when "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.").

²⁹ *See* Carol Schultz Vento, Annotation, *When is Work Environment Intimidating, Hostile or Offensive, so as to Constitute Sexual Harassment Under State Law*, 93 A.L.R. 5th 47 (2001).

³⁰ [Harris, 510 U.S. at 23](#). "State courts have frequently looked to federal law and interpretation to determine the existence of hostile work environment sexual harassment." *Vento, supra* note 22.

³¹ "In Fiscal Year 2007, [sic] EEOC received 12,510 charges of sexual harassment. 16.0% of those charges were filed by males. [sic] EEOC resolved 11,592 sexual harassment charges in FY 2007 and recovered \$49.9 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation)." [Statistics from the U.S. Equal Employment Opportunity Commission](#).

³² [132 P.3d 211 \(Cal. 2006\)](#).

³³ *Id.* at 215.

³⁴ "Since the beginning of the case we have felt very strongly . . . that much of what Miss Nelson was complaining about is guaranteed by our constitutional right to free speech," said Charney's attorney, Adam Levin, who called his client "a phenomenal businessman and a marketing genius." [Carla Hall, Charney suit sent to arbitrator: Jury won't bear sex harassment](#)

actionable, Charney's defense of "creative expression protection" under the First Amendment of the U.S. Constitution hinges on whether a creative expression protection analysis is necessary to protect speech under the First Amendment and conduct in hostile work environment lawsuits.

V. Lyle v. Warner Brother's Television Productions

In *Lyle*, plaintiff Amaani Lyle filed suit against the writers of the *Friends* television show for sexual harassment in violation of California's Fair Employment and Housing Act (FEHA).³⁵ While the trial court held that Lyle could not factually "establish her FEHA claims of . . . [sexual] harassment to any defendant," the Court of Appeals reversed the lower court's decision.³⁶ On appeal, the Supreme Court reversed the Court of Appeal's decision on Lyle's sexual harassment claim,³⁷ but did not address "the potential of infringement on defendants' constitutional rights of free speech."³⁸ In the concurring opinion by Justice Chin, four of the justices agreed with the majority's decision but disagreed with the majority's reasoning—that the Lyle case was about sexual harassment.³⁹ Instead, the concurring justices maintained that the pertinent issue was the *Friends* writers' First Amendment free speech rights.⁴⁰

allegations against designer, L.A. TIMES, Jan. 25, 2008, available at 2008 WLNR 1461845.

³⁵ 132 P.3d at 215-16.

³⁶ *Id.*

³⁷ *Id.* Although both parties petitioned the California Supreme Court for review, the court denied Ms. Lyle's petition but granted the defendant writers' petition on the following issues: "(1) Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the FEHA? and (2) Does the imposition of liability under the FEHA for sexual harassment based on such speech infringe on defendant's rights of free speech under the First Amendment to the federal . . . or the state Constitution[s]?" *Id.*

³⁸ *Id.*

³⁹ *Id.* at 231 (conurrence by Justice Chin).

⁴⁰ *Id.*

The executive producers of *Friends* hired Lyle as a writer's assistant.⁴¹ During Lyle's job interview, the producers told her that the series' scriptwriters used sexually explicit language during their writing sessions because the show necessarily "dealt with sexual matters."⁴²

During Lyle's employment she heard sexually explicit statements from and observed sexually explicit behaviors by the writers at meetings, in the hallway, and in the break room.⁴³ Some of the offensive statements and behaviors included the writers discussing their sexual preferences,⁴⁴ oral sex experiences, and fantasies.⁴⁵ The writers drew dirty pictures⁴⁶ during meetings and discussed their sexual relationships with their wives⁴⁷.

In its majority opinion, the California Supreme Court recognized that both California and federal law forbid employers from sexually harassing employees in the workplace. This includes creating a "hostile or abusive work environment"⁴⁸ or making unwanted sexual advances toward an employee in exchange for a "condition of employment."⁴⁹ Because Lyle alleged only a hostile or

⁴¹ [Id. at 217.](#)

⁴² [Id.](#)

⁴³ [Id.](#)

⁴⁴ [Id.](#) (The producers "spoke of [their] preferences for blond women, a certain bra cup size, 'get[ting] right to sex' . . . not 'mess[ing] around with too much foreplay', . . . and 'love of young girls and cheerleaders'").

⁴⁵ [Id.](#) (One producer "spoke of his fantasy about an episode of the show in which the *Friends* character 'Joey' enters the bathroom while the character 'Rachel' is showering and has his way with her" and joked how another one of them could have had sex with one of the *Friends* actresses but "missed his chance to do so." The producers also questioned whether one of the female actresses was capable of "sexually servicing her boyfriend" or producing children because her vagina contained "dried twigs." [Id.](#)

⁴⁶ [Id.](#) (A producer "had a 'coloring book' depicting female cheerleaders with their legs spread open; he would draw breasts and vaginas on the cheerleaders during the writers' meetings. The book was left on his desk or sometimes on the writers' assistants desks." [Id.](#)

⁴⁷ [Id.](#)

⁴⁸ [Id. at 218.](#) The court acknowledged that this prohibition emanates from both the California Fair Employment and Housing Act, Cal. Gov. Code §12900, et seq., and title IV of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. [Id. at 219.](#)

⁴⁹ [Id.](#) "[T]he prohibition against sexual harassment includes protection from . . . unwelcome sexual advances . . . or the creation of a work environment that is hostile or abusive on the bases of sex." [Miller v. Dep't of Corrs., 115 P.3d 77 \(Cal. 2005\).](#)

abusive work environment claim, she did not have to prove that the *Friends* writers or any other Warner's Brothers employees made unwanted sexual advances toward her in exchange for favors.⁵⁰

Furthermore, the majority used the United States Supreme Court's definition of a hostile work environment⁵¹ as one involving conduct that is "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abuse to employees because of their sex."⁵² Sexually harassing behavior "includes 'verbal, physical, and visual harassment . . .'"⁵³ such as " . . . epithets, derogatory comments, or slurs on the basis of sex; . . . assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on the basis of sex; and . . . derogatory posters, cartoons, or drawings on the basis of sex."⁵⁴ In addition, Lyle was required to show that the writers directed their sexually harassing behavior directly toward her or generally towards women in the office.⁵⁵

To decide the case, the majority employed both an "objective and subjective"⁵⁶ reasonable person test⁵⁷ where the Court considered the totality of the circumstances, common sense, social context, and whether the incidents were isolated or routine.⁵⁸ Moreover, the Court considered the

⁵⁰ *Id.* at 219. "Here, plaintiff does not contend defendants subjected her to unwelcome sexual advances as a condition of employment; rather, she alleges defendants created a hostile or abusive work environment. For this type of claim, plaintiff need not show evidence of unwanted sexual advances." *Id.*

⁵¹ See *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993).

⁵² *Id.* at 220.

⁵³ *Id.* at 221 (citing *Cal. Code Regs., tit. 2, § 7290.6, subd. (b)*) and other Circuit court cases.

⁵⁴ *Id.* For its definition, the court relied on *Cal. Code Regs., tit. 2, § 7287.6 subd. (b)(1)(A), (B), & (C)*.

⁵⁵ *Id.* at 222 ("[A] hostile work environment sexually harassment claim is not established 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 women in general.) The court stated "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment' and create a hostile work environment." *Id.* at 222 (citing *Onscale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1993)).

⁵⁶ *Id.* at 223. "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one the victim in fact perceived to be so.'" *Id.* at 223 (citing *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998)). In other words, the court wanted Lyle to prove that not only did she think that her workplace was hostile or abusive, but that a reasonable person in her situation would feel the same way.

⁵⁷ *Id.* at 222-23.

⁵⁸ *Id.*

sexual conduct unseen or unheard by Lyle that was directed at people other than Lyle as “less severe” than sexual conduct directed at others which Lyle did see or hear.⁵⁹

Based on these conventions, the majority held, among other things, that Lyle’s sexual harassment claims were not supported by the facts. The discussions and behaviors of the *Friends* writers were neither “aimed at [Lyle] or any other female employees”⁶⁰ nor “severe or pervasive” enough to satisfy the claims made by Lyle.⁶¹ The court noted:

‘nondirected’ conduct was undertaken in group sessions with both male and female participants present, and that women writers on the *Friends* production also discussed their own sexual experiences to generate material for the show [That] the writers commonly engaged in discussions of personal sexual experiences and preferences and used physical gesturing while brainstorming and generating script ideas for this particular show was neither surprising nor unreasonable from a creative standpoint The fact that certain discussions did not lead to specific jokes or dialogue airing on the show merely reflected the creative process at work and did not serve to convert such nondirected conduct into harassment because of sex.⁶²

According to the Court, the *Friends* writers did not treat women differently than men since both sexes were on the receiving end of the writer’s crude jokes, comments, drawings, and behavior.⁶³

The Court concluded that sexual discussions were a necessary part of the job as the show is itself a sexually explicit program and therefore the writers must discuss sexual words and conduct, including drawing from their own sexual experiences.⁶⁴

⁵⁹ [Id. at 224](#). The court acknowledged that Lyle had “personally witness[ed]” all of the alleged sexual conduct.

⁶⁰ [Id. at 225](#). The court also pointed out that Lyle did not set forth material facts as to the “objective severity or pervasiveness of the incidents,” and she provided a “deficient” showing regarding her “subjective perceptions of the epithet incidents.” [Id. at 228](#).

⁶¹ [Id. at 228](#).

⁶² [Id. at 225](#). In an attempt to prove their point, the majority’s opinion noted that the writers’ “explicit sexual references typically were replaced with innuendos, imagery, similes, allusions, puns, or metaphors in order to convey sexual themes in a form suitable for broadcast on network television. For example, ‘motherfucker’ was replaced with ‘mother kisser,’ ‘testicles’ with ‘balls,’ and ‘anal sex’ with ‘in the stern.’” *Id.* at fn 9.

⁶³ [Id. at 228](#).

⁶⁴ *Id.* The court remanded the case and ordered the district court to affirm the summary judgment relating to plaintiff’s sexual harassment claims in favor of the defendant. [Id. at 231](#).

An equally interesting part of the *Lyle* decision was Judge Chin's opinion written on behalf of the concurring judges.⁶⁵ While the majority opinion did not consider whether the First Amendment protected the writers' crass words and conduct, the concurring opinion vigorously tackled this issue.⁶⁶ Judge Chin wrote on behalf of the concurring judges:

I agree that the trial court properly granted summary judgment in favor of defendants under the relevant statutes. I write separately to explain that any other result would violate free speech rights under the First Amendment of the United States Constitution and its California counterpart, article I, section 2 of the California Constitution⁶⁷

In his opinion, Judge Chin crafted First Amendment "creative expression protection." He cited all the obvious authority: "the First Amendment protects creativity,"⁶⁸ "the First Amendment protects entertainment,"⁶⁹ and "the First Amendment protects motion pictures."⁷⁰ He then suggested that the First Amendment also protects "creative speech" that does not rise to sexually harassing speech,⁷¹ i.e., speech not directed at the plaintiff. He claimed that the writers' alleged sexually harassing speech words and behavior qualified as creative expression emerging from a creative workplace, and therefore, "free speech rights are paramount."⁷²

Judge Chin cited familiar examples. A shipyard where men place pictures of Playboy Magazine centerfolds in the workplace environment would not qualify for the "creative expression" protection under the First Amendment and as a shipyard is not an expressive workplace and a

⁶⁵ I will not analyze the correctness of the majority court's analysis and decision regarding Lyle's sexual harassment claim.

⁶⁶ *Id.*

⁶⁷ *Id.* Seemingly in an attempt to "stir the pot," Judge Chin also said, "This case has very little to do with sexual harassment and very much to do with core First Amendment free speech rights." *Id.*

⁶⁸ [Winter v. DC Comics](#), 69 P.3d 473 (Cal. 2003).

⁶⁹ [Zacchini v. Scripps-Howard Broad. Co.](#), 433 U.S. 562, 578 (1977).

⁷⁰ [Burstyn, Inc. v. Wilson](#), 343 U.S. 495, 501-502 (1952).

⁷¹ [Lyle](#), 132 P.3d at 231.

⁷² [Id.](#) at 232. "Lawsuits 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 speech rights." *Id.*

female employee could claim she worked in a sexually hostile environment.⁷³ However, a woman employed at a museum could not allege a hostile or abusive work environment when the museum curated a Playboy Magazine centerfolds exhibit saluting the beauty of a woman's body. Here the display is a product of creative expression born from the museum's expressive workplace.⁷⁴

Judge Chin supported the creative process taken by Friends writers despite how unorthodox their process was. "The writers here did at times go to the extremes in the creative process. They pushed the limits—hard. . . . But that is what creative people sometimes have to do."⁷⁵ Additionally, Judge Chin cited an amicus brief⁷⁶ that explained the creative process:

[T]he process creators go through to capture the necessary magic is inexact, counterintuitive, nonlinear, often painful-and above all delicate. And the problem is even more complicated for group writing. Group writing requires an atmosphere of complete trust. Writers must feel not only that it's all right to fail, but also that they can share their most private and darkest thoughts without concern for ridicule or embarrassment or legal accountability [A] certain level of intimacy is require to do the work at its best, and so there is an implicit contract among writers: what is said in the room, stays in the room The creative process must be unfettered, especially because it can often take strange turns, as many bizarre and potentially offensive ideas are suggested, tried, and in the end, either discarded or used.⁷⁷

The writers of the famously controversial TV show "All in the Family," which dealt with issues of race, could not have produced scripts for that show if the writers had to worry about an employee suing them for racism.⁷⁸ Accordingly, Judge Chin emphasized:

We must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability for sexual harassment for that portion deemed unnecessary. Creativity is, by its nature, creative. It is unpredictable. Much that is not obvious can be necessary to

⁷³ *Id.* at 233. See also [Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT 391 \(2002\)](#).

⁷⁴ [Lyle, 132 P.3d at 233](#). See also [McGowan, supra note 73](#).

⁷⁵ [Lyle, 132 P.3d at 233](#).

⁷⁶ Lawyers wrote and filed the amicus brief on behalf of the Writers Guild of America; the Directors Guild of America; the Screen Actors Guild; and "named individuals representing a 'who's who' of television and motion picture writers and directors." *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

the creative process . . . courts may not constitutionally ask whether challenged speech was necessary for its intended purposes.⁷⁹

Judge Chin further noted that all of the writer's discussions, including the alleged offensive speech, were necessary for the writers to produce scripts for the show. Accordingly, the Court should protect the speech as creative speech under the First Amendment.⁸⁰

Judge Chin formulated the following rule: "creative" speech, used to create an employer's constitutionally protected work product made in furtherance of protected creative expression, is protected under the First Amendment, and can never create a hostile work environment unless the speech is directed at the plaintiff.⁸¹ If the speech was directed "at or about" the plaintiff, then the offending speech is not protected by the First Amendment and a court could begin analyzing whether such offending speech was sexually harassing speech.⁸²

This test presents the proper balance . . . here, in the creative context, free speech is critical while the competing interest-protecting employees involved in the creative process against offensive language and conduct *not directed at them*-is, in comparison, minimal. Neither plaintiff nor anyone else is required to become part of a creative team. But those who choose to join a creative team should not be allowed to complain that some of the creativity was offensive or that behavior not directed at them was unnecessary to the creative process.⁸³

Accordingly, a woman may not bring a "hostile work environment" sexual harassment claim if she works in a workplace where employees create work product using offensive words and behavior as the process and products are protected as creative expression under the First Amendment.⁸⁴

⁷⁹ *Id.*; see also *Id.* at 234. ("[I]t is meaningless to argue, as the plaintiff does, that much of what occurred in this process did not make its way into the actual shows.")

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* At the end of his opinion, Judge Chin, quoting another case, exclaims, "We must '[a]lways remember [] that the wildest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit . . .'" *Id.* at 235 (citing *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 695 (1959)).

⁸⁴ *Id.* at 236. See Jonathan Segal, *The Expressive Workplace Doctrine: Protecting the Public Discourse from Hostile Work Environment Actions*, 15 UCLA ENT. L. REV. 1 (2007). In his article, Professor Segal names this theory the "expressive workplace doctrine." "The Expressive Workplace Doctrine tilts the hostile work environment balance toward greater speech protection. This is in line with First Amendment law's tendency to prioritize free expression over other interests when regulating liability for speech. The proposal properly protects individuals' and expressive enterprises' abilities to

As an illustration of this rule, an editor could not bring a hostile work environment sexual harassment claim against an author who writes stories involving crude, vulgar, and sexually explicit language and conduct.⁸⁵ In this scenario, the author's "offending" speech is used to create the work product, the story, which is protected as creative expression under the First Amendment. In another example, a caterer on a movie set who witnessed the shooting of a scene between two or more actors involving crude, vulgar, and sexually explicit language and conduct⁸⁶ could not bring a hostile work environment sexual harassment claim against the producers, writers, or actors because the First Amendment protects their conduct and speech. The offending speech, the actor's words and actions performed in the furtherance of the script, is used to create the work product, the movie, which is protected as creative expression under the First Amendment. Potential defendants in each of these hypothetical cases could successfully claim creative expression protection under the First Amendment.

VI. The Test: Deciding When Creative Expression Protection Applies

Unless directed at an employee or group of employees, an employer's or employee's words or actions fall under creative expression protection when:

1. The complainant is an employee in the workplace;
2. The employee's offending words or behavior are made while engaged in the creative process used to create the protected product;

disseminate and discuss their viewpoints, leading to a populace that is better able to seek out truth and make informed democratic choices. Additionally, this rule contains safeguards designed to ferret out employers who would use an exemption as a pretense to discriminate against protected classes as well as incentives for employers to accommodate workers who might wish to opt out of jobs where they would have to regularly encounter offensive speech."

⁸⁵ E.g., LEWIS LIBBY, *THE APPRENTICE* (Graywolf Pr. 1996). "[In *The Apprentice*] Libby does not shy from the scatological. The narrative makes generous mention of lice, snot, drunkenness, bad breath, torture, urine, 'turds,' armpits, arm hair, neck hair, pubic hair, pus, boils, and blood (regular and menstrual) . . . [h]omoeroticism and incest also figure as themes." [Laura Collins, *Scouter's Sex Shocker*, THE NEW YORKER, Nov. 17, 2005.](#)

⁸⁶ E.g., the movie *Wild Orchid* (1990). "'Wild Orchid,' which is now R rated, was originally an X-rated film and still thinks like one. It demonstrates just how tedious and coy a soft-core porn film can be," [Janet Maslin, *Wild Orchid Reviews/Film: This Lady Killer Bites*, N.Y. TIMES, Apr. 29, 1990.](#)

3. The product is classified as creative expression protected by the First Amendment.⁸⁷

Returning to a previous example, a writer who writes stories involving crude, vulgar, and sexually explicit language and conduct is protected under the First Amendment even if the writer's editor is offended by the novel's contents, unless the writing is specifically directed at the editor. By accepting the position as an editor at a publishing company, the editor agrees to edit the writer's stories and by extension the editor has voluntarily joined a creative process. However, creative expressive protection extends beyond the production of works protected by the First Amendment. For example, the writer is protected under creative expression protection even if the publishing company's *in-house accountant* is offended when the accountant and author discuss the story during a sales meeting. The accountant, by agreeing to work for the publishing company, has voluntarily joined a creative process workplace as an employee of that workplace. Because the writer used the offending words during the process of creating the writer's story, a protected form of creative expression, the writer's words would be protected under the First Amendment. Consequently, a court's first step in applying creative expression protection is determining whether the speech and conduct took place in a creative workplace.

VII. Designing and Marketing Fashion – A Creative Workplace?

American Apparel manufactures an array of casual clothing for men, women, children, and even babies.⁸⁸ The company designs and sells everything from shirts, pants, sweaters and swimwear to socks, panties, underwear, and bras.⁸⁹ The pictures of models advertising each product are

⁸⁷ See [Segal *supra* note 84, at 6.](#)

⁸⁸ [AMERICAN APPAREL ONLINE STORE, \(last visited Dec. 30, 2014\).](#)

⁸⁹ *Id.*

sexually suggestive but not sexually explicit.⁹⁰ Not surprisingly, the American Apparel website also proudly contains a link to its “Provocative Ads.”⁹¹ It is clear that American Apparel uses sex to sell its clothing.

Sex sells, and the fashion industry is not shy about using sex to sell clothing.⁹² Dov Charney certainly asserts that sexual language and acts are essential to the creative process used by clothing designers and manufacturers in creating fashion. A government website describes a fashion designers job: a fashion designer may research current and future fashion trends, attend trade shows, sketch and design clothing using both sketchpads and computers, choose colors and fabrics, oversee technical designers, create prototypes and patterns, and work with manufacturers and suppliers.⁹³

The website also describes a fashion designer’s workplace environment:

Fashion designers employed by manufacturing establishments, wholesalers, or design firms generally work regular hours in well-lighted and comfortable settings. Designers who freelance generally work on a contract, or by the job. They frequently adjust their workday to suit their clients’ schedules and deadlines, meeting with the clients during evenings or weekends when necessary. Freelance designers tend to work longer hours and in smaller, more congested environments, and are under pressure to please clients and to find new ones in order to maintain a steady income. Regardless of their work setting, all fashion designers occasionally work long hours to meet production deadlines or prepare for fashion shows.⁹⁴

However, designing, creating, and marketing clothing necessarily involves discussion of body parts, i.e., coverage, design, practicality, size, shape, form, fit, etc. Furthermore, the creation of sexy advertisements would also include discussions of sex, i.e., coverage, body positions, purpose, and

⁹⁰ This statement is, of course, my own opinion, and I will not analyze this issue according to legal standards. Others will differ according to their own beliefs, morals, and standards. Many people in a conservative community likely would describe these pictures as, at the very least, racy.

⁹¹ *Id.* [AMERICAN APPAREL ONLINE STORE](#). “Here is a small selection of ads we’ve been running recently. To see more of our provocative photography, visit the gallery.”

⁹² “Sex has been used to sell fashion for decades, with brands such as Calvin Klein, Abercrombie & Fitch and Guess among the earliest and most relentless envelope pushers. More recently, trend-setting designer Tom Ford influenced a more homoerotic approach during his tenure at Gucci and Yves St. Laurent.” [Lamont Jones, Fashion Industry using sex to sell ad nauseam, PITTSBURG POST-GAZETTE](#) (last visited Dec. 30, 2014).

⁹³ [US Dept. of Lab., Bureau of Labor Statics, OCCUPATIONAL OUTLOOK HANDBOOK: FASHION DESIGNERS \(2008-2009\)](#).

⁹⁴ *Id.*; [Fashion Designer, ACADEMY OF COUTURE ART](#) (last visited Nov. 21, 2014).

target audience by employees overseeing the production of racy or sexually provocative advertisements.

Realistically, designing fashion involves the same process as creating a sexually explicit movie, novel, or television program. Judge Chin's description of the *Lyle* writers' creative process would probably mirror the definition of the creative process for fashion design. The process necessitates sharing one's ideas "without concern for ridicule, embarrassment or legal accountability" and requires a "certain level of intimacy . . . to do the work."⁹⁵ Like writers working on books or manuscripts, the creative process used by fashion designers should be "unfettered, especially because it can often take strange turns, as many bizarre and potentially offensive ideas are suggested, tried, and, in the end, either discarded or used."⁹⁶ Accordingly, the product created in a fashion design workplace may qualify as creative expression protected by the First Amendment.⁹⁷ The question, however, is whether Dov Charney's actions were made primarily during the creative process used to create his fashion design products.

VIII. The Not So Good, the Bad, and the Really Ugly

Dov Charney's comments and behavior, as described by Mary Nelson in her lawsuit, fall into two distinct categories.⁹⁸ First are his words and actions that a court might protect as creative expression; 1) Charney holding a meeting with Nelson where he wore only a "cock sock" because he was researching the product; 2) Charney showing his employees an advertisement in which Charney appeared with his penis exposed; and 3) Charney dropping his pants and revealing his underwear to

⁹⁵ [Lyle](#), 132 P.3d at 233 (quoting amicus curiae brief representing the Writers Guild of America, West, Inc.).

⁹⁶ *Id.*

⁹⁷ See *Id.* at 233-34.

⁹⁸ In this article, I only discuss some of Nelson's allegations; Ms. Nelson made other allegations. Further, I only analyze whether Charney could claim creative expression protection for these words and actions, not the legality of those words and behaviors in and of themselves.

Nelson and other employees and wearing only underwear at work.⁹⁹ Charney's other comments and behavior do not merit creative expression protection because Charney directed those words and actions directly at Nelson or women generally.¹⁰⁰

First, Nelson met Charney at his house in Los Angeles to discuss her potential employment with American Apparel.¹⁰¹ Charney wore a "cock sock" during the meeting.¹⁰² Charney asked Nelson and the other sales associates present at the meeting whether American Apparel should include the cock sock in its clothing line.¹⁰³ The scriptwriters in *Lyle* used sexually explicit speech when creating their product, a television script, so they could obtain feedback from each other on show ideas.¹⁰⁴ Similarly, Charney modeled a potential product, a revealing undergarment, so he could obtain his business team's sales predictions on the potential product. In both instances, the alleged harassers were in the process of creating their ultimate product. As such, both Nelson and Lyle witnessed the creative process, which is protected by the First Amendment. Therefore, Nelson would not win a sexual harassment suit solely based on this claim.

However, Lyle was an employee of Warner Brother's Television, whereas Nelson, at this time, was a *potential* employee of American Apparel.¹⁰⁵ And notably, Judge Chin, in his concurring opinion, stated that an employee who joins a creative team cannot complain about potentially offensive behavior used in the creative process.¹⁰⁶ Without analyzing whether Charney's actions

⁹⁹ Pet'r's Compl. for Damages, *supra* note 1, at ¶11, 14.

¹⁰⁰ "Charney telling the female workers to 'grow a dick'; touching his penis in front of [Nelson] and stating 'there are a lot of girls out there that need this cock'; inviting [Nelson] to masturbate with him; making the comments such as 'pussy wants pussy and the girls today are ten times dirtier than the guys'; referring to women as 'greedy little whores' and 'slut'; referring to [Nelson] as a 'whiney bitch' and an 'emotional bitch'; and continually showing [Nelson] his penis and buttocks." *Id.* at ¶14.

¹⁰¹ Pl.' Mary Nelson's Opposition to Def. American Apparel and Dov Charney's Mot. to Compel Pl. to Respond to Dep. Questions, *Nelson v. American Apparel, Inc.*, No. BC 333028, 2007 WL 4811496, Ex. B at 298-310, 306-12 (Cal. Super. Ct. Nov. 30, 2007).

¹⁰² *Id.* at 306-08.307.

¹⁰³ *Id.* at 307.

¹⁰⁴ [Lyle, 132 P.3d at 218.](#)

¹⁰⁵ Pet'r's Compl. for Damages, *supra* note 1, at ¶10-11.

¹⁰⁶ [Lyle, 132 P.3d at 234.](#)

violated or were protected by other laws, creative expression should not protect Charney in this situation where he paraded nearly naked in front of a *non-employee*. Nelson, at that time, had not accepted employment with Charney's company, and thus had not voluntarily joined the creative process. Therefore, a court should not provide Charney with creative expression protection under the First Amendment for his offending words and behavior in this situation.

A court's denial of creative expression protection in this instance is justifiable. Courts should utilize creative expression protection only when an offended employee voluntarily participates in or joins a creative team. But by disallowing Charney's creative expression protection in this circumstance, a court would prevent an employee from relying on protection against a prospective employee who was unaware of the particular eccentricities of that creative workplace.

Finally, Lyle witnessed the offensive behavior during the group's primary purpose, creating a script for the *Friends* television show. However, fashion design was not the primary purpose for the meeting at Charney's house that day, and recognizing this context is essential to applying creative expression protection. The parties met Charney at his house to discuss Ms. Nelson's potential employment, not design fashion. Therefore, creative expression should not protect Charney's offensive behavior.¹⁰⁷

Second, during Nelson's employment with American Apparel, Nelson, along with other employees, was also shown an American Apparel advertisement featuring Charney and his exposed penis.¹⁰⁸ Again in *Lyle*, creative expression protected the offensive words and behavior used by the

¹⁰⁷ Pet'r's Compl. for Damages, *supra* note 1, at ¶10. I base this analysis on events alleged in the complaint. Subsequent depositions reveal many factual discrepancies concerning this allegation that might affect my legal analysis of this situation: the date of the meeting, whether Nelson was an actual employee at the time of the meeting, and whether Charney discussed the cock sock as a potential product during the meeting.

¹⁰⁸ An employee who worked on American Apparel's advertisement and marketing campaigns stated, "American Apparel's marketing department has created advertisements with sexually suggestive photographs and provocative copy. [I]t . . . has used porn stars as models and sexual frankness and sexually explicit language are used in its marketing and public relations . . . [m]ost American Apparel print advertisements convey a sense of sexual freedom. American Apparel also uses provocative in-store advertising." Defs.' Notice of Mot. & Mot. in Limine No. 1 for an Order Precluding

writers during script development, and although Lyle was offended by those actions a creative product protected by the First Amendment.

Similarly, creative expression protection would protect Charney in this instance. By this time, Nelson had voluntarily accepted employment with Charney for American Apparel. American Apparel advertised its product using the print ad, just as a commercial would advertise a television show; the advertising departments developed the advertisements using a creative process. Just because Charney's pose in the advertisement offended Nelson does not invalidate creative expression protection. Nelson, like all other employees at American Apparel, knew that the company's workplace was a creative one and involved sexual themes. Accordingly, a court should dismiss Nelson's complaint that this illustration of creativity, the development of advertising for the protected product, was offensive.

Lastly, Charney offended Nelson when, on several occasions, he showed her his underwear and he paraded around work in his underwear. For instance, Nelson attended a meeting where Charney received an agitating phone call. In response, Charney pulled down his pants and screamed "And they can kiss my ass" into the phone.¹⁰⁹ On another occasion during an employee meeting held at a restaurant, Charney stood in the middle of a table and pulled his pants down around his ankles to reveal two pairs of underwear he was wearing, one blue and one pink. Charney then made a speech spanning several minutes about the underwear.¹¹⁰

First Amendment creative expression should not protect Charney's behavior of pulling his pants down during a work meeting in response to an irritating phone call. While Charney's behavior occurred at his creative workplace, he did make not his offending behavior during the creation of his

Evidence of Speech and Conduct Protected Under First Amendment and California Constitutions, *Nelson v. American Apparel, Inc.*, No. BC33028, 2007 WL 4811452 at 15 (Cal. Super. Ct. Dec 21, 2007); Decl. of Alexandra Spunt, at ¶3-4.

¹⁰⁹ Pl. Mary Nelson's Opp'n to Def. s' Mot. to Compel, *Nelson v. American Apparel, Inc.*, No. BC33028, 2007 WL 4811496 at 52 (Cal. Super. Ct. Nov. 30, 2007).

¹¹⁰ Decl. of Taylor S. Ball, *supra* note 4, at 53.

protected product. Nelson and the other employees were not immersed in or even witnessing the creative process when Charney revealed his underwear. Rather, he pulled his pants down because he wanted to make a point to the caller.¹¹¹ Even if Charney was making a point to his employees that he would not let anyone bully him, he did not make the comment during some sort of creative process, but was merely responding to a business phone call. Unlike Lyle, who witnessed offensive behavior by writers involved in the creative process of writing a television show, Nelson and the others employees were merely bystanders to Charney's obscene temper tantrum. Again, denying Charney creative expression protection for this incident is reasonable because doing so protects employees from offensive or uncomfortable behavior not used by fellow employees in the creation of a protected product. In other words, employees cannot claim blanket protection for offensive behavior that another employee claims created a hostile work environment merely because the employees work together in a creative environment. Additionally, the employee must show that the employee made the offensive words or behaved offensively while "involved in the creative process."¹¹²

Moreover, Charney offended Nelson when he wore only underwear at the office during regular work hours.¹¹³ Charney's exposing and wearing his underwear in the workplace and during work meetings should not qualify for creative expression protection. Although Charney might claim that he was "modeling" the underwear or "discussing" the underwear for business or employee moral purposes, he was not creating a protected product, American Apparel underwear. In fact, he

¹¹¹A seemingly useless gesture because the caller could not see Charney.

¹¹²[Lyle, *supra* note 80, at 234.](#)

¹¹³ Charney admitted to working in his underwear at the American Apparel business office. He claimed he did so in an attempt to make his design employees laugh and because he was a fitting model for the underwear and participated in photo shoots; he summed up his defense of his actions by stating "there is no evidence to say that you can't walk around in your underwear all day anywhere in the United States of America." Decl. of Taylor S. Ball in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. Adjudication of Issues, *Nelson v. Am. Apparel, Inc.*, No. BC33028, 2007 WL 4811459, Ex. A at 52-53 (Cal. Super. Ct. Dec 21, 2007).

admitted purpose for wearing underwear in the workplace was entertaining his employees.¹¹⁴ And while it may be true that you can “walk around in your underwear all day anywhere in the United States,”¹¹⁵ doing so, at least in Charney’s case, does not qualify for creative expression protection under the First Amendment.

The lack of creative expression protection for Charney is reasonable. A designer, novelist, director, or actor ought not be able to justify their titillating, self-proclaimed “creative” actions by hiding behind the First Amendment. Once a court grants this protection, the First Amendment trumps any hostile work environment analysis.

IX. To Be or Not To Be: Should First Amendment Creative Expression Protection Analysis Trump Sexual Harassment Analysis?

As Professor Sangree aptly notes in her short legislative history of Title VII of the Civil Rights Act, the law’s prohibitions on sexual harassment have been “interpreted by courts to reflect a compelling governmental interest in eradicating sex discrimination on all fronts, including employment.”¹¹⁶ However, whether Title VII hostile work environment prohibitions may suppress protectable First Amendment speech is hotly debated.¹¹⁷ While some argue that courts should not apply sexual harassment law to speech or conduct protected under the First Amendment’s creative expression protection,¹¹⁸ others argue that undirected hostile work environment speech and conduct can still create a hostile work environment and that such speech and conduct is not necessarily protected by the First Amendment.¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (Aug. 1992); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (Winter 1995).

¹¹⁷ Sangree, *supra* note 116, at 483.

¹¹⁸ Volokh, *supra* note 116, at 1848.

¹¹⁹ See Sangree, *supra* note 116.

Creative expression protection safeguards undirected speech—sexually charged speech or conduct not aimed at the complainant.¹²⁰ A court need not perform a separate or distinct creative expression protection analysis to protect any speech or conduct that might fall within this narrow exception. However, since creative expression protection does not apply to speech and conduct directed at the complainant, the courts could not apply creative expressive protection analysis in most cases of alleged sexual harassment.¹²¹ Also, courts applying federal and state sexual harassment law to speech and conduct not directed at the complainant must analyze the context in which the non-directed behavior occurred.¹²² This context determines whether the undirected speech and conduct creates a hostile work environment.¹²³

Therefore, a court's analysis under federal and state sexual harassment law would necessarily include an analysis of the workplace environment since the court must consider the totality of the circumstances, i.e., the context of the situation, when analyzing whether the undirected speech or conduct is frequent, severe, and pervasive enough to create a hostile work environment.¹²⁴ In other words, the court would account for the creative workplace while determining whether certain behavior created a hostile work environment.¹²⁵

Take for example the instance where Nelson was shown the advertisement with Charney's exposed penis.¹²⁶ An analysis under the elements of the First Amendment creative expression protection, indicate that this behavior would fall within the confines of the exception.¹²⁷ However, analysis under federal and California hostile environment law would necessitate that a court consider the creative workplace environment while analyzing the elements of a hostile work environment and

¹²⁰ See [Lyle, 132 P.3d at 215, 230-31](#).

¹²¹ See [id. at 222](#).

¹²² See Sangree, *supra* note 108, at 535-47.

¹²³ *Id.* “[W]hether speech is protected depends not only on its content but also depends on its context.” *Id.* at 536.

¹²⁴ See Sangree, *supra* note 108, at 491-93.

¹²⁵ *Id.*

¹²⁶ Pet'r's Compl.for Damages at ¶ 14.

¹²⁷ See [Lyle, 132 P.3d at 231-32](#) (Chin, J. concurring).

considering the totality of the circumstances.¹²⁸ Just as the majority in *Lyle* considered the creative workplace when analyzing Lyle's claims, any court analyzing Nelson's hostile work environment claims would have to do the same.¹²⁹

Again, hostile work environment law would require courts to consider that Charney and Nelson were both employees at American Apparel and that the offending speech and conduct, the discussion of a potential advertisement for American Apparel featuring the penis of the owner of the company, took place in a creative environment.¹³⁰ The court would determine whether Charney's behavior targeted Nelson or a group of women because of gender, and if the speech was severe or pervasive enough to establish a hostile work environment using these facts.¹³¹ Therefore, a First Amendment analysis would be redundant regarding this narrow issue.

Judge Chin began his concurring opinion in *Lyle* by asserting, "[t]his case has very little to do with sexual harassment and very much to do with core First Amendment free speech rights."¹³² He also recognized the conflict between free speech concerns and laws designed to prevent sexual harassment in the workplace, but he was adamant that because the *Friends* producer's product was creative expression, the court must apply a First Amendment analysis to the *Lyle* case.¹³³

However, Judge Chin made these statements and proceeded with only a First Amendment analysis knowing, based on the majority's opinion, that the *Friends* writers' behavior did not create a hostile work environment. Therefore, the conflict between his creative expression protection analysis and the federal and State of California hostile work environment sexual harassment laws was not possible.¹³⁴

¹²⁸ See Sangree, *supra* note 108, at 491-93.

¹²⁹ [Lyle, 132 P2d at 215](#).

¹³⁰ See Sangree, *supra* note 108, at 491-93.

¹³¹ *Id.*

¹³² [Lyle, 132 P.3d at 231](#) (Chin, J. concurring).

¹³³ *Id.* at 232.

¹³⁴ See [Id.](#) at 231-35.

“Numerous scholars have defined the aims underlying First Amendment speech protection . . . [to] include: . . . (3) the promotion of individual autonomy and the development of personality as a vital emotional outlet, as well as a tool for individual development; and (4) the encouragement of social stability by providing outlets for discord, thus permitting peaceable resolution of conflict and promoting a healthy tolerance of difference.”¹³⁵

However, when judges omit the analysis of a claimant’s hostile work environment claim and merely proceed with a First Amendment creative expression protection analysis of the accused’s speech and conduct, the judge ignores the claimants equally important “right to equal employment opportunity [which] includes a right to be free from harassment based on . . . characteristics such as gender or race.”¹³⁶ Accordingly, when an employee alleges a sexual harassment claim based on a hostile work environment, judges should apply a hostile work environment analysis instead of a First Amendment analysis. Doing so allows the court to properly focus on the alleged victim’s sexual harassment claims, not the defendant’s defense. Doing so is reasonable because, while considering the elements of a hostile work environment claim, that judge will consider the work environment that the conduct took place in, thereby including creative expression protection analysis while simultaneously negating any need for a further First Amendment analysis.

Alternatively, if a court considers a First Amendment creative protection analysis is necessary to a hostile work environment claim, courts should apply a First Amendment analysis only once the court has performed a hostile work environment analysis and has found the accused’s conduct created a hostile work environment. While doing so may alleviate a court’s First Amendment concerns, the court’s analysis under this scheme does not hastily dismiss a complainant’s hostile

¹³⁵ See Sangree, *supra* note 116, at 506.

¹³⁶ See [Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHIK L. Rev. 701, 704 \(1995\)](#) (footnotes omitted).

work environment claims and indicates to the public that the First Amendment analysis will not automatically trump an analysis of seemingly offensive speech or conduct.¹³⁷

X. The Verdict: Dov Charney – Creative Genius, “Dirty [Young] Man,” or Both?

Nelson and Charney attempted to settle their case.¹³⁸ As part of their proposed settlement agreement, Charney would pay Nelson \$1.3 million dollars. In exchange, Nelson could not discuss the settlement and she had to participate in a “sham” arbitration proceeding – one where the proceeding had a “preordained outcome that would allow . . . Charney to publicly declare victory . . . by issuing a press release stating that the arbitrator’s decision ‘puts an end to the sexual harassment claims against Charney and the company.’”¹³⁹ Although Nelson and her attorney purportedly agreed to the settlement terms, they did not attend the arbitration.¹⁴⁰ Accordingly, Charney never paid Nelson the agreed-upon damages.¹⁴¹

American Apparel, endeavoring to compel Nelson to attend arbitration, appealed to the California Second Appellate District Court.¹⁴² The court ordered that Nelson participate in new arbitration where the arbitrator would determine whether Nelson had violated her settlement agreement with Charney and American Apparel.¹⁴³ The appeals court also addressed the validity of the arbitration clause, calling the clause potentially illegal because, as a result of the predetermined

¹³⁷ See also [Jonathan Segal, *The Expressive Workplace Doctrine: Protecting the Public Discourse from Hostile Work Environment Actions*, 15 UCLA LR 1 \(2008\)](#). Courts have indicated that protecting persons from a hostile work environment is a compelling state interest. See Sangree, *supra* note 116, at 483.

¹³⁸ [Nicholas Casey, *Court Criticizes Arbitration Pact in American Apparel Harassment Case*, WALL STREET J., Nov. 4, 2008, at B1](#). Charney and Nelson entered into a settlement agreement the day before the trial was to commence. *Id.*

¹³⁹ *Id.*; see also Nelson v. American Apparel, No. B205937, 2008 Cal. App. LEXIS 8663 (Cal. Ct. App. 2008).

¹⁴⁰ Casey, *supra* note 120; Nelson, Cal. App. LEXIS 8663, at *1, *11.

¹⁴¹ Casey, *supra* note 120; Nelson, Cal. App. LEXIS 8663, at *12.

¹⁴² *Id.* at *1. “First, Defendants seek to arbitrate the issue of whether plaintiff, Mary Nelson, and her attorneys *breached* the settlement agreement by failing to appear in San Francisco at an “arbitration” with foreordained facts and a predetermined award which would be followed by the issuance of a misleading press release. Second, defendants seek to compel arbitration of whether plaintiff or her attorneys *breached* the confidentiality provisions of the settlement agreement.” *Id.*

¹⁴³ Casey, *supra* note 120; Nelson, 2008 LEXIS 8663 at *21.

arbitrator's decision and the subsequent press release, the parties would mislead the public and the press since "no real arbitration of a dispute [would] occur[] and [the] plaintiff [would] receive \$1.3 million in compensation."¹⁴⁴

Ultimately, Charney and his attorney intimidated Nelson and other plaintiffs by deploying a the First Amendment defense. While watering a seed creates a flower, Charney's unprotected words and behavior certainly would not have created fashion and his defense withers when scrutinized and evaluated. He created a controversy that might qualify for some other legal protection, or at the very least as a strange attempt at garnering attention for himself and American Apparel, but most of his discussed actions do not merit creative expression protection.

XI. Conclusions: Not the End but the Beginning

Many American citizens would find Charney's actions appalling and contemptible. But "[i]f we don't believe in freedom of expression for people we despise, we don't believe in it at all."¹⁴⁵ As such, the First Amendment is not a license for illegal behavior, no matter how creative one might be. Creative conduct that creates a hostile work environment does not, and must not, escape the law's grasp.

"The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."¹⁴⁶ However, "[t]he liberty of the individual must be . . . limited; he must not make himself a nuisance to other people."¹⁴⁷ And that includes your naked boss.

¹⁴⁴ Casey, *supra* note 120; Nelson, 2008 LEXIS 8663 at *23-4. While the court raised this issue, it did not determine whether the settlement agreement was legal or enforceable. *Id.*

¹⁴⁵ [Orhan Kemal Cengiz, *Genocide, freedom of expression*, TODAY'S ZAMAN \(Aug. 22, 2010\)](#). My investigation of Charney indicates that he is not the most well liked person in America.

¹⁴⁶ JOHN STUART MILL, ON LIBERTY (Agora Publ'ns 2003).

¹⁴⁷ *Id.*