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COMMENTS

SILENCING SPEECH IN THE WORKPLACE: RE-EXAMINING THE USE OF SPECIFIC SPEECH INJUNCTIVE RELIEF FOR TITLE VII HOSTILE ENVIRONMENT WORK CLAIMS

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One of the truths we hold to be self-evident is that a government that tells its citizens what they may say will soon be dictating what they may think. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind.¹

INTRODUCTION

The freedom to speak the words one chooses is fundamental to the American conception of a free society and is subject to strong legal protections.² As such, it is not difficult to imagine that a law prohibiting certain individuals or groups from expressing their opinions in a public forum would draw considerable criticism from the American public and ultimately be doomed in the courts.

But, imagine a court ordering an employer to stop his employees from using the words “nigger,” “polack,” “kike,” “spic,” “guinea,” “honky,” “mick,” “coon,” and “black bitch” in the workplace or risk criminal contempt charges.³ Further, imagine

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1. *Aguilar v. Avis Rent A Car Syst., Inc.*, 980 P.2d 846, 895 (Cal. 1999) (Brown, J., dissenting).

2. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) (refusing to permit assumptions that one can forbid particular words without also running a substantial risk of suppression of ideas).

3. *See Snell v. Suffolk County*, 611 F. Supp. 521, 532 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986) (upholding an injunction based on finding that defendants subjected plaintiffs to racial and ethnic slurs resulting in a hostile work environment). The injunction in *Snell* forbade the posting or

the order forbade *any* racial, ethnic, or religious slurs.⁴ While most people consider such speech abhorrent and repugnant, few would contend that government regulation of such words, regardless of where they are spoken, does not raise serious First Amendment concerns.⁵

Surprisingly, the courts view the situation differently. Legal remedies for workplace discrimination stemming from Title VII⁶

distribution of derogatory bulletins, cartoons, and other written material within a jail by correction officers. *Id.*

4. *Id.* See also *Aguilar* 980 P.2d at 848-50 (upholding the constitutionality of a specific speech injunction requiring defendant's supervisor to "cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees" of Avis). *Aguilar* stemmed from a 1993 lawsuit in which seventeen Latino employees of Avis Rent a Car sued the company and its managers for creating a hostile and abusive work environment under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 129000 et seq.), California's version of Title VII. *Id.* at 849. The complaint alleged that their supervisor repeatedly verbally harassed plaintiffs. *Id.* The court noted that Lawrence routinely called only the Latino employees derogatory names, and continually demeaned them on the basis of their race, national origin and lack of English language skills. *Id.* A San Francisco jury awarded eight of the workers \$135,000 in damages. *Id.* at 849-50. Moreover, Superior Court Judge Carlos Bea ordered Lawrence to stop using such language and ordered Avis not to permit it in the future. *Id.* at 850. Avis did not contest the damage award but appealed the court's injunctive order, arguing that such an injunction amounted to an unconstitutional prior restraint on free speech, under the United States Constitution and the California Constitution. *Id.* at 852. The Court of Appeals concluded that the injunction was constitutionally sound and did not amount to a prior restraint. *Id.* at 850. However, the court did reverse part of the injunction and remanded it to the trial court with directions to "redraft the injunction in a manner that . . . limits its scope to the workplace" and furthermore, to precisely describe the content of the enjoined speech by providing examples of the prohibited epithets. *Id.* The California Supreme Court granted review and in a 4-3 decision, held that the injunction was not an invalid prior restraint on speech, either under the First Amendment or the free speech provisions of the California Constitution. *Id.* at 861. The court stated that the order was not an invalid prior restraint because it was issued only after the jury determined that defendants had engaged in employment discrimination, and that the order simply precluded defendants from continuing their unlawful activity. *Id.* However, three separate dissenting judges in the case all rejected the majority's position. The dissenters each argued that the order constituted a prior restraint because it restricted speech based on the mere assumption that continued utterance of epithets by the defendant would invariably rise to the level of creating a hostile and abusive environment again. *Id.* at 878.

5. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1793 (1992) (arguing that workplace verbal harassment law by its nature implicates the First Amendment).

6. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-5(g) (2000) (allowing injured parties demonstrating a hostile or abusive environment to collect back pay or injunctive relief). Congressional amendments in 1991 expanded the remedies available to plaintiffs to include compensatory and punitive damages. *Id.*

have faced few First Amendment challenges.⁷ Too often, this is because many courts deciding harassment lawsuits fail to even consider free speech issues when determining how to remedy discriminatory work environments.⁸ One reason may be the intense focus today towards eliminating discrimination completely from American society.⁹ Many people consider bigoted speech antithetical to that goal and undeserving of protection.¹⁰

Recent cases are evidence of the price society pays for ignoring the First Amendment implications of harassment law's injunctive remedies.¹¹ The willingness of some courts to issue broad speech injunctions has set the goal of equality in the workplace and the right to free speech in the workplace on a collision course.

This Comment will argue that remedial speech injunctions issued pursuant to a finding that sexist or racist speech created a hostile or abusive work environment are unconstitutional. Part I

7. Volokh, *supra* note 5, at 1793; *cf.* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 597 (5th Cir. 1995) (stating whether some applications of Title VII are necessarily unconstitutional "has not yet been fully explored"). Frustrated with the Supreme Court's evasive attitude toward Title VII, the DeAngelis court called the Supreme Court's pronouncements on the constitutional issues implicated by Title VII "unilluminating." *Id.* But see Kingsley Browne, *Title VII As Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 484 (1992) (arguing that harassment law is unconstitutional when applied to speech guarantees recognized by the First Amendment).

8. See Snell, 611 F. Supp. at 531 (stating that for "reasons beyond the scope of this opinion, the First Amendment does not bar appropriate relief in the instant case of discrimination of the workplace.") The court went on to state that this case did not directly raise such serious constitutional issues directly. *Id.* See also EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1070 (11th Cir. 1990) (upholding injunction prohibiting racially abusive language in the workplace without addressing free speech issues). But see Volokh, *supra* note 5, at 1812 (arguing that harassment law is generally unconstitutional when applied to speech); Cecilee Price-Huish, *Because the Constitution Requires It and Because Justice Demands It; Specific Speech Injunctive Relief for Title VII Hostile Work Environment Claims*, 7 WM. & MARY BILL OF RTS. J. 193, 210 (1998) (advocating specific speech injunctions like that issued in Snell).

9. Maria La Ganga, *Justices Uphold Workplace Ban on Racial Slurs*, L.A. TIMES, Aug. 3, 1999, at A1.

10. See *id.* (advocating specific speech injunctive relief in *Aguilar*, the ACLU applauded the court's decree). In its amicus brief to the *Aguilar* court, the ACLU, a staunch supporter of liberal free speech guarantees, stated it supported "limits on the unrestrained speech of bigots in the workplace, particularly when they are in positions of authority on the job." *Id.*

11. Private employers may implement their own anti-harassment policies, which arguably could include restricting speech in the workplace. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (stating that the First Amendment only applies to government speech restrictions). However, this Comment will only focus on the constitutionality of the government requiring employers, under threat of liability, to suppress harassing speech.

of this Comment discusses the historical roots of Title VII, the use of injunctions under Title VII, First Amendment law on prior restraints, and finally the recent amendments to Title VII authorizing legal remedies such as damages. Part II will focus on how the use of specific speech injunctions to remedy Title VII violations act as an unconstitutional prior restraint of protected speech. Finally, Part III advocates the use of damages as the proper and most effective way to correct past and prevent future discrimination in the workplace.

I. ENDING DISCRIMINATION IN THE WORKPLACE: TITLE VII AND ITS PROTECTIONS

Title VII, which imposed a new standard for liability upon employers, is a seminal Act¹² in the development of employment discrimination law.¹³ The Act authorizes employees to seek injunctive relief in order to remedy past and prevent future workplace harassment.¹⁴ However, many courts are reluctant to issue injunctions targeting specific speech because of their tendency to forbid certain speech prior to utterance.¹⁵ Historically, First Amendment doctrine has rejected content-based restrictions on speech and categorized these restrictions as unconstitutional prior restraints.¹⁶ In an effort to compensate injured workers, Congress, in 1991, expanded the remedies available to employees under Title VII and authorized the courts to award damages.¹⁷

A. *The History of Title VII*

By far the most significant development in employment discrimination law this century was the adoption of Title VII of the Civil Rights Act of 1964.¹⁸ The Act states that it is an unlawful employment practice for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹⁹ In the landmark case *Meritor*

12. 42 U.S.C. § 2000e-5(g).

13. Price-Huish, *supra* note 8, at 197.

14. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

15. *See McLaughlin v. New York*, 784 F. Supp. 961, 977 (N.D.N.Y. 1992) (refusing issuance of speech injunction to remedy Title VII violation because it would constitute unlawful authorization of “gag order” on defendant’s speech). *But see Ryan v. Warrensburg*, 117 S.W.2d 303, 308 (Mo. 1938) (suggesting in dicta that injunction can issue against further publication of defamatory statements once plaintiff secures a jury verdict). However, few courts follow Missouri’s precedent.

16. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828 (1995).

17. The Civil Rights Act of 1991 § 21, 42 U.S.C.A. § 2000e-5 (1994).

18. Price-Huish, *supra* note 8, at 197.

19. 42 U.S.C. § 2000e-2(a)(1) states:

[I]t shall be an unlawful employment practice for an employer . . . to fail

Savings Bank v. Vinson,²⁰ the Supreme Court interpreted this language to mean that employers may be liable for speech and conduct that creates a hostile and abusive work environment.²¹ The Court subsequently held that even words alone violate Title VII, if they have the “purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”²²

Of course, not every utterance of a racial slur or sexual comment violates Title VII.²³ The Court has recognized that for verbal harassment to be actionable, a complainant must demonstrate that the “discriminatory intimidation, ridicule, and

or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

20. 477 U.S. 57, 65 (1986)

21. See *Meritor* 477 U.S. at 65 (defining actionable speech for a Title VII sexual harassment violation to be “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” quoting EEOC Guidelines, 29 CFR § 16.04.11 (a) (1985)). The Court stated that the phrase “terms, conditions, or privileges of employment” detailed in Title VII of the Civil Rights Act of 1964 demonstrates Congress’ intent to eliminate the unequal treatment of men and women and racial minorities in the workplace. *Id.* at 64. The *Meritor* Court also held so long as the environment would be reasonably perceived as hostile and abusive, there is no need for a complainant to also demonstrate that it was psychologically injurious. *Id.*

22. *Id.* at 65. See also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-22 (1993) (allowing speech alone to serve as the basis for a hostile environment claim for the first time). The *Harris* Court imposed limitations on plaintiffs relying on speech to establish their hostile environment claims. *Id.* *Harris* stated that the offending words must rise to the standard of being sufficiently severe as perceived by a reasonable employee and must be pervasive in the workplace making it impossible for an employee to function under his employment terms. *Id.* at 21.

23. See *Meritor* 477 U.S. at 67 (holding the “mere utterance of an . . . epithet which engenders offensive feelings in an employee” does not create a burdensome workplace for an employee under Title VII). See also *Aguilar v. Avis Rent a Car Sys. Inc.*, 980 P.2d 846, 878 (1999) (Mosk, J., dissenting) (highlighting the majority’s concession that not every isolated racial slur or derogatory comment necessarily violates the FEHA or Title VII). In addition, if the complainant does not subjectively perceive the environment to be abusive, the speech or conduct has not sufficiently altered his employment conditions and therefore, does not produce an actionable claim under Title VII. *Id.* at 169.

insult. . . [must be] sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."²⁴ In essence, a plaintiff must demonstrate a repeated pattern of harassment, not just isolated or occasional comments.²⁵

B. Awarding Injunctive Relief Under Title VII

Once a complainant satisfies the burden of proof for liability, the court must determine the adequate remedy.²⁶ Until 1991, only equitable relief, primarily in the form of an injunction prohibiting further harassment²⁷ and ordering back pay, was available in a Title VII case.²⁸

Historically, courts have considered injunctions as the preferred remedy for civil rights litigation. This is because many courts assumed other remedies would not always insure the protection of an individual's constitutional rights as fully in certain situations.²⁹ Courts faced with such difficult tasks as

24. *Harris*, 510 U.S. at 21.

25. *See Id.* at 23 (stating that courts evaluating hostile or abusive environment claims must look to all the circumstances surrounding the speech or conduct). The primary factor distinguishing actionable and non-actionable speech is whether the verbal comments directed at the employee were merely offensive utterances or whether the comments were frequent and severe enough to interfere with an employee's ability to function in the workplace. *Id.*

26. *See generally* *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (holding "case or controversy" requirement of Article III of the United States Constitution dictates that a plaintiff cannot maintain a suit in which no relief can be granted). Emotional satisfaction does not qualify as relief. *Id.*

27. *See, e.g.,* *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995) (holding equitable relief ordinarily available in Title VII workplace harassment cases is the issuance of an injunction prohibiting further harassment, if such an order is necessary under the circumstances to prevent further abuse).

28. 42 U.S.C.A. § 2000e-5(g)(1) (West 1994) states:

[I]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action . . . which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate.

Id.

29. *See* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 6 (1978) (arguing that after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), lower courts looked to injunctions as an effective means of protecting individual's civil rights). Fiss claims *Brown* gave injunctive relief special prominence in the fight against discrimination: "School desegregation not only gave the injunction a greater currency, it also presented the injunction with new challenges, in terms of both the enormity and the kind of tasks it was assigned." *Id.* at 4. The injunction was the tool courts used to restructure national education systems and thus, the potential to effectively remedy other instances where civil rights

desegregating schools or preventing Jim Crow voting laws depended on injunctive relief primarily because it was the only effective remedy in those specific situations.³⁰ In an effort to eradicate discrimination in general, courts went so far as to hold that judges have not merely the power, but the duty to correct and eliminate the present effects of past discrimination.³¹ Subsequent courts examining Title VII issues drew on the civil rights cases as precedent for issuing injunctions to remedy racial or sexual discrimination that caused a hostile environment.³²

However, injunctive relief is not mandatory in Title VII cases.³³ Indeed, when a plaintiff seeks an injunction aimed at prohibiting speech in the workplace, courts presume such orders carry great risks of censorship.³⁴ Thus, the proponent of the injunction must overcome a high burden in order to obtain injunctive relief in such situations.³⁵

In general, plaintiffs requesting injunctive relief must prove that legal remedies are clearly inadequate to correct past discrimination and prevent it in the future.³⁶ Additionally, the

are at risk warrants the continued use of injunctions. *Id.*

30. *Id.* at 87-89.

31. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (stating that where racial discrimination is concerned, courts have not merely the power but the obligation to render a decree which will so far as possible remedy the discriminatory effects of the past as well as prevent further discrimination in the future).

32. *FISS*, *supra* note 29, at 87.

33. *See* *NAACP v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982) (holding only cases with "abundant" evidence of consistent past discrimination justify mandatory injunctive relief). The evidence must be clear and convincing and the proponent of the injunction must show that there is no reasonable probability of the defendant's compliance with the law. *Id.* Without evidence of the kind of lingering effects of the kind that flowed from the long-term systematic discrimination, injunctive relief is not warranted. *Id.* *See, e.g.,* *Spencer v. Gen. Elec. Co.*, 703 F. Supp. 466, 469 (E.D. Va. 1989) (holding injunction is not warranted when specific actions are taken to alleviate the effects of past discrimination). In *Spencer*, the employer obeyed the plaintiff's request for a transfer to a similar position in a different G.E. office at the same pay and offering the same employment responsibilities after she demonstrated she was sexually harassed and suffered a legal injury. *Id.* Furthermore, the court stated it had already awarded the plaintiff nominal damages for proving her hostile environment claim against her employer. *Id.* As such, damages remedied to the legal extent practicable the effects of the plaintiff's harassment. *Id.*

34. *See* *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) (stating that whenever injunctions prohibit speech in some manner, the risk of such orders being unconstitutional is great). *See also* *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986) (emphasizing the Supreme Court has declared the principal purpose of the First Amendment is to prevent prior restraints and that in two centuries of the Court's existence, a prior restraint on pure speech has never been upheld).

35. *Madsen*, 512 U.S. at 764.

36. *See* *McLaughlin v. New York*, 784 F. Supp. 961, 978 (N.D.N.Y. 1992)

plaintiff must present "clear and convincing proof" that after final judgment the defendant is likely to continue to act in violation of Title VII.³⁷ Although proponents of injunctive relief often argue that a prior finding of discriminatory conduct on the part of a defendant is an important consideration when determining whether to issue an injunction,³⁸ courts have consistently held that an injunction should not be granted solely on this broad generalization.³⁹ Furthermore, courts have stated that a presumption that one who violates the law once is likely to do so again is not legally sufficient to support an injunction.⁴⁰

In applying the Civil Rights Act of 1964, the early federal courts regularly enjoined employers from engaging in any discriminatory employment practices both in potential recruitment and hiring⁴¹ and after an employee was retained.⁴² Over time,

(stating the Supreme Court has consistently held prior restraints impermissible where a sufficient after-the-fact remedy exists to correct any potential harm caused by the speech).

37. See *NAACP*, 693 F.2d at 1370 (discussing the burden of proof on a proponent requesting injunctive relief in a Title VII hostile environment claim).

38. See generally *United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953). The Court affirmed a district court's holding that refused injunctive relief because a "reasonable expectation that the wrong would be repeated did not exist." *Id.* In *Grant*, the Court considered the defendant's bona fide expressed intention to comply with the law and in some cases, the character of the past violations. *Id.* at 635. See also *NAACP*, 693 F.2d at 1370 (holding denial of injunctive relief was an abuse of the district court's discretion in light of finding of hostile work environment and the "abundant" evidence of prior discrimination).

39. See *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 833 (5th Cir. 1979) (holding proponent of an injunction cannot base prior restraint on broad generalization that "once a sinner always a sinner."). In *Eaves*, a religious organization and others brought suit challenging the constitutionality of a municipal ordinance regulating the distribution of literature and solicitation of funds at a city-owned airport. *Id.* at 816. The defendant argued the ordinance was permissible because anyone who has violated an ordinance is likely to do so again. *Id.* at 833. The Court rejected the argument. *Id.* at 834. See, e.g., *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (en banc) (holding injunctions cannot be issued based on past findings of discrimination alone). See also *Near v. Minnesota*, 288 U.S. 697, 723 (1931) (holding courts do not engage in a practice of depriving First Amendment rights as a punishment for an offense).

40. *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 833 (5th Cir. 1979).

41. See *NAACP*, 693 F.2d at 1370 (issuing Title VII injunction designed to end discriminatory hiring practices of the City of Evergreen). In *NAACP*, the Eleventh Circuit Court of Appeals ordered the district court to permanently enjoin the City of Evergreen and all its agents from "engaging in any employment practice, including recruitment, appointment, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee . . . on the ground of race or color." *Id.* at 1371.

however, courts began to assume greater responsibility for eliminating workplace discrimination and started issuing more assertive injunctions. Judges began explicitly commanding employers to adopt formal anti-discrimination and harassment policies for the protection of their employees⁴³ and in some rare cases actually enjoined actionable workplace speech.⁴⁴ The use of broad injunctions, particularly orders limiting speech, has engendered nationwide controversy within the courts and especially outside of them.⁴⁵ Although few judges in the past were willing to expand the scope of injunctive relief,⁴⁶ recent decisions

42. *Id.*

43. See *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1527-28 (1991) (D. Me. 1991), *amended by* 765 F. Supp. 1529 (D. Me. 1991) (issuing an injunction ordering employer to cease any activity or policy that "condones racial harassment"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) (granting injunction ordering defendant-company to develop and implement anti-discrimination policy and handbook for its employees). The court stated the policy had to provide employees with education about Title VII, training on how to deal with abusive and hostile environments, and a system for reporting complaints of injured workers. *Id.* The court stated such an injunction appropriately remedied a hostile work environment sexual harassment claim. *Id.* But see *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1216 (D.D.C. 1990) (declining to issue an injunction because the order would force the court to monitor the potential for sexual stereotyping in future promotions at defendant's legal firm). The Court found injunctions, as a remedy for Title VII violations, were intrusive and unnecessary. *Id.*

44. *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 854-55 (1999). See *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1070 (11th Cir. 1990) (enjoining employees from using racially abusive language in the workplace); *EEOC v. Fotios*, 671 F.Supp. 454, 455 (W.D. Tex. 1987) (issuing an injunction which permanently enjoined [defendants] from giving any negative references to any person or company, including prospective employers, regarding the affected class members).

45. See Mark N. Mallery & Robert Rachal, *Report on the Growing Tension Between First Amendment and Harassment Law*, 12 LAB. L.J. 475, 477 (1997) (disagreeing with *Aguilar* majority's determination that the injunction issued was not a prior restraint). Mallery and Rachal maintain that *Aguilar* "is contrary to long-established lines of authority holding the consequences of the listener's reactions to speech may not justify suppression, absent the need to prevent violence." *Id.* at 478. See also Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 644 (1997) (discussing how injunctions in harassment cases erroneously ban isolated statements which do not rise to the level of contributing to a hostile environment). But see *Price-Huish*, *supra* note 8, at 214 (praising the courts that have issued specific speech injunctions and advocating further judicial use of injunctive relief as the primary protection for employees injured in the workplace).

46. See *McLaughlin*, 784 F. Supp. at 977 (rejecting plaintiff's plea for an injunctive order enjoining defendants from speaking about her in a derogatory manner). The court stated it would encounter an "insurmountable constitutional barrier" in enforcing the plaintiff's proposed remedy because the order would authorize the court to impose a prior restraint on defendant's

indicate a new willingness by courts to enjoin actionable workplace speech despite the evident First Amendment implications.⁴⁷

C. The Prior Restraint Doctrine

The primary reason courts hesitate to issue injunctions restricting speech is that such orders often create an invalid prior restraint of constitutionally protected free speech.⁴⁸ A “prior restraint” is a judicial or administrative order forbidding certain speech that is issued before the speech occurs.⁴⁹ Permanent injunctions that forbid specific speech are “classic examples of prior restraints.”⁵⁰

The American legal system is wary of prior restraints because of the principle that a democratic society prefers to punish individuals who abuse the rights of speech after the violation occurs rather than prior to it.⁵¹ This approach is based on the theory that courts rarely know in advance what an individual will say before he speaks; thus, the risk of impermissible censorship is substantial when speech injunctions are involved.⁵² Faced with such high risks, courts only approve government-imposed restraints on a citizen’s freedom of speech in certain very limited circumstances.⁵³

Although not invalid per se, prior restraints are the “most serious and the least tolerable infringement on First Amendment rights.”⁵⁴ As such, a prior restraint is subject to a heavy presumption of constitutional invalidity.⁵⁵ Proponents of a prior

speech. *Id.* Furthermore, the court stated that the plaintiff’s request ignored the “overwhelming” precedent prohibiting prior restraints on speech. *Id.*

47. *See, e.g.,* *Aguilar v. Avis Rent a Car Sys., Inc.*, 980 P.2d 846, 856-57 (1999) (holding that specific speech injunctive relief does not act as a prior restraint of speech after a court has deemed an environment to be hostile or abusive).

48. *Id.* at 878. (Mosk, J., dissenting)

49. *Id.* at 878-79.

50. *Alexander v. United States*, 509 U.S. 544, 550 (1993).

51. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring).

52. *See Madsen v. Women’s Health Ctr., Inc.* 512 U.S. 753, 764 (1994) (holding that the high risk that injunctions will censor protected speech requires a “somewhat more stringent application of general First Amendment principles” to speech injunctions).

53. *See Int’l Soc’y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 833 (1979) (holding speech may be restrained in situations where it would be subject to regulation without violating the First Amendment). *See also* *N.Y. Times Co. v. United States* 403 U.S. 713, 730 (1971) (stating that speech may be regulated when it will “surely result in direct, immediate, and irreparable damage.”).

54. *Nebraska Press Ass’n*, 427 U.S. at 559.

55. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (holding any prior restraint is subject to a “heavy presumption against its constitutional validity.”).

restraint must prove that restricting protected speech is warranted due to specific compelling circumstances despite the broad guarantees of the First Amendment.⁵⁶ Not surprisingly, proponents rarely meet that burden of persuasion.

Remedial speech injunctions, similar to those issued in *Aguilar v. Avis Rent a Car System*⁵⁷ and *Snell v. Suffolk County*,⁵⁸ act as a prior restraint. Courts frequently deem them invalid because they regulate the content and viewpoint of specific speech restrictions prohibited by First Amendment doctrine.⁵⁹ Such injunctions tend to prohibit speech based on its expressive message⁶⁰ and its potential to offend the person who hears it.⁶¹ Issuing an order that prohibits the utterance of words which convey and embody a particular bias obstructs the free flow of viewpoints central to the speech guarantees of the First Amendment.⁶²

56. See *Eaves*, 601 F.2d at 833 (noting that the Supreme Court has never explicitly defined the burden placed on a proponent of prior restraint). The courts only requirement seems to be that the proponent demonstrate compelling circumstances. *Id.* See generally *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (holding that states have a compelling interest in eradicating racial or ethnic discrimination in housing and employment). However, the Court clarified that the means a state uses to combat discrimination must not collide with the principles of the First Amendment. *Id.*

57. *Aguilar*, 980 P.2d at 850.

58. *Snell v. Suffolk County*, 611 F. Supp. 521, 532 (1985).

59. See *Rosenburger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding injunction that regulates speech on the basis of its topic is content-based regulation and therefore presumptively invalid). Furthermore, the Court regards viewpoint-based regulation as "an egregious form of content discrimination" because it tends to have a chilling or deterrent effect on the particular views or biases that a speaker expresses about a topic. *Id.* at 829. The Court stated that regulation that has such an effect on speech is presumptively invalid. *Id.*

60. *Reno v. ACLU*, 521 U.S. 844, 867-68 (1997).

61. *Id.* See *Aguilar*, 980 P.2d at 891 (Brown, J., dissenting) (arguing that the remedial speech injunction upheld by the majority creates a dangerous precedent that an idea that happens to offend someone in the workplace is not constitutionally protected despite the principles of the First Amendment). See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating the whole purpose of the First Amendment is to promote the free exchange of ideas, even those society considers offensive or disagreeable). See generally *Nat. Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (upholding the First Amendment right of group of neo-Nazis to march through the streets of predominantly Jewish community of Skokie, Illinois while wearing Nazi uniforms displaying swastikas); *Cohen v. California*, 403 U.S. 15, 24 (1971) (noting America places such a high value on the free exchange of ideas that even offensive ideas are judicially tolerated and safeguarded). In *Cohen*, unpopular views were being expressed. *Id.* at 25. However, as the Court stated, "one man's vulgarity is another's lyric" and therefore deserves constitutional protection. *Id.*

62. See *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (1995) (noting that when Title VII is applied to sexual harassment claims founded solely on verbal insults or pictorial or literary matter, the statute

Despite the tendency of injunctions to regulate expressive content and specific viewpoints, a court may nonetheless issue an injunction if the proponent can prove the restrictions on speech are “necessary to serve a compelling state interest and that the injunction is narrowly drawn to achieve that end.”⁶³ Courts have repeatedly held that the state has a compelling interest in eradicating discrimination in the workplace.⁶⁴ However, utilizing injunctions as prior restraints is not the preferred means of achieving that goal.⁶⁵ Indeed, courts rarely find that a speech restraint is warranted without sufficient evidence that allowing the speech creates a cognizable danger of recurring discrimination.⁶⁶ Even if the plaintiff can prove there is a compelling necessity for a permanent injunction, the court must still ensure that the injunction is not so overbroad or vague that it would encompass protected speech.⁶⁷

D. Damages as an Alternative Remedy Under Title VII

In 1991, Congress passed a radical set of amendments to the Civil Rights Act of 1964 in an effort to better remedy the injured party in Title VII cases.⁶⁸ The long awaited changes explicitly

imposes content and viewpoint based restrictions on speech). *See also* R.A.V. v. St. Paul, 505 U.S. 377, 391-93 (1992) (holding that a state may not prohibit only those fighting words expressing a viewpoint of racial intolerance).

63. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762-63 (1994). *See also* *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

64. *Aguilar*, 980 P.2d at 852. *See R.A.V.*, 505 U.S. at 391-93.

65. *See McLaughlin*, 784 F. Supp. 961, 977 (1992) (rejecting plaintiff's contention that Title VII authorizes the court to impose a prior restraint on speech that does not amount to fighting words or is obscene). The plaintiff in *McLaughlin* alleged that after she was fired, the defendants “blacklisted” her and thus prevented her from getting another job in New York. *Id.* at 977. At trial, she sought damages and a permanent injunction enjoining the defendants from speaking about her in a derogatory manner. *Id.* at 977. The court denied the request for injunctive relief holding that a plaintiff is not entitled to an injunction against the defendant's future speech. *Id.* at 978.

66. *See Spencer v. General Elec. Co.*, 703 F. Supp. 466, 468 (1989) (holding that permanent injunctive relief compelling dissemination of comprehensive anti-sexual harassment policy was inappropriate in this case). The court found no cognizable danger of recurrent discriminatory behavior for two reasons: first, the employee primarily responsible for creating the hostile environment no longer worked for the defendant company; second, the defendant had already created and implemented an anti-sexual harassment policy after the lawsuit. *Id.* *See also* *Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983) (holding “emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.”).

67. *Aguilar*, 980 P.2d at 876.

68. *See* H.R. REP. NO. 102-40, pt. I, at 148 (1991), *reprinted in* 1991 U.S.C.A.N. 549 (finding compelling need to permit recovery of legal relief under Title VII to make victims of intentional discrimination whole for their losses).

enabled plaintiffs to sue for compensatory and even punitive damages in addition to injunctive relief, formerly the only available remedy.⁶⁹ The amendments focused on furthering the stated congressional purpose behind Title VII of making a person “whole” and fully compensating the injured party for proven legitimate pain and suffering.⁷⁰

Additionally, by passing the new amendments, Congress intended to encourage employers to privately eliminate discriminatory workplace environments, and thus, eliminate the need for judicial interference in the workplace.⁷¹ Under the amended version of Title VII, companies could be forced to pay large damages awards to injured employees and face costly litigation if they refused to act proactively to prevent workplace discrimination.⁷² Because of this, many argue that the new legal remedies are the most effective deterrent for Title VII violations.⁷³

II. THE THREAT TO THE FIRST AMENDMENT: SPECIFIC SPEECH INJUNCTIONS AS INVALID PRIOR RESTRAINTS ON WORKPLACE

69. *Id.* See *Martin v. Nannie and the Newborns, Inc.*, No. 94-6365, 1995 WL 307558, at *1 (W.D. Okla. May 11, 1995) (noting that prior to 1991 amendments, plaintiffs were restricted to reinstatement, back pay, and front pay in addition to declaratory and injunctive relief).

70. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (stating the purpose of Title VII is to sufficiently remedy persons for injuries suffered because of unlawful employment discrimination); *cf.* *International Bd. of Teamsters v. United States*, 431 U.S. 324, 354 (1977) (indicating that compensation and deterrence are equally important under Title VII).

71. See Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 *STANFORD L. REV.* 175, 191 (1993) (discussing how the threat of injunctive relief alone did not compel employers to eradicate their discriminatory workplace environments). However, the author argues that when Title VII was amended to include the prospect of a back pay award or compensatory damages, employers suddenly became more willing to self-examine and to self-evaluate their employment practices. *Id.* at 191. Injunctive relief provided no such catalyst for employers. *Id.*

72. See Ronald James, *Protecting Your Company Against Sexual Harassment*, *FOUNDRI MANAGEMENT & TECHNOLOGY*, Aug. 1, 1998, 1998 WL 10890807, at *2 (discussing how plaintiffs' attorneys have found ways to get around the \$300,000 liability cap of the Civil Rights Act of 1991, depending on the size of the company). Attorneys often combine Title VII claims with state tort allegations, such as assault and battery, intentional infliction of emotional distress, invasion of privacy or violation of public policy, in order to be able to recover larger damages awards. *Id.* Moreover, state anti-discrimination laws may not provide for damage caps and thus may also be joined as part of the federal claim. *Id.*

73. See *Aguilar*, 980 P.2d at 894 (Kennard, J., dissenting) (pointing out that few employers would continue to tolerate discriminatory speech in the workplace after shouldering the cost of litigation and large damages awards). “I think that remedy (damages) is sufficient to deter any ‘unwarranted racial discrimination.’” *Id.*

EXPRESSION

This section will demonstrate how specific speech injunctions in Title VII are presumptively invalid because they act as a prior restraint on speech in the workplace⁷⁴ and regulate speech solely on the basis of its content and viewpoint.⁷⁵ Although the state has a compelling interest in eradicating workplace discrimination,⁷⁶ specific speech injunctions are not necessary to achieve that goal.⁷⁷ Moreover, courts are unable to narrowly tailor the injunctions to only restrict unprotected speech.⁷⁸ Damages are the proper remedy for hostile work environment claims because they are more effective in eliminating past discrimination and preventing it in the future and do not pose the constitutional problems that hinder injunctions.⁷⁹

A. *Specific Speech Injunctions Act as a Prior Restraint*

A prior restraint is a judicial order forbidding certain communications before they occur.⁸⁰ Thus, specific speech injunctions, such as those issued in *Aguilar* and *Snell*, are examples of prior restraints.⁸¹ For instance, the *Aguilar* order forbade employees from saying specific racial or ethnic epithets at work, no matter the context of their usage or whether the listener welcomed the speech.⁸² In effect, the order “freezes” the speaker’s ability to communicate protected speech freely and, like most injunctions, acts as a prior restraint.⁸³ Thus, specific speech injunctions, which bar the speaking of protected speech prior to

74. *McLaughlin v. New York*, 784 F. Supp. 961, 978 (N.D.N.Y. 1992).

75. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828 (1995).

76. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391-93 (1992).

77. *See McLaughlin*, 784 F. Supp. at 978 (noting that the Supreme Court will not authorize prior restraints when other remedies exist to correct any harm that might occur from the injurious speech).

78. *See Aguilar*, 980 P.2d at 885 (Kennard, J., dissenting) (demonstrating how issued injunction was not narrowly tailored).

79. *Id.* at 893-94; James, *supra* note 72, at *2.

80. *Aguilar*, 980 P.2d at 878-79.

81. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (holding that permanent injunctions that forbid specific speech are classic examples of prior restraints). The *Aguilar* and *Snell* injunctions both forbid certain speech prior to utterance and therefore acted as a prior restraint on the speaker’s ability to speak freely.

82. *Aguilar*, 980 P.2d at 850. *See generally Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (noting whether workplace speech is in fact discriminatory depends on “surrounding circumstances, expectations, and relationships” between speaker and listener). Moreover, the Court stated that hostile environment determinations can rarely be made just by words being spoken or acts being performed. *Id.*

83. *See Reno v. ACLU*, 521 U.S. 844, 867-68 (1997) (holding injunctions prohibiting speech solely because of communicative impact are prior restraints and content-based).

utterance, directly implicate the established rights preserved in the First Amendment.⁸⁴

B. Specific Speech Injunctions Regulate Speech On the Basis of Content and Viewpoint

Consistently, courts have held that injunctions that prohibit speech on the basis of topic are clearly content-based regulations and are therefore presumptively invalid under the Constitution.⁸⁵ Similarly, the First Amendment prohibits government suppression of free expression of specific viewpoints.⁸⁶ Remedial speech injunctions, such as those the *Aguilar* and *Snell* courts issued, are content and viewpoint sensitive because they impose special prohibitions on speakers who express unpopular, even offensive views on disfavored subjects.⁸⁷

Both the *Aguilar* and *Snell* courts held that future use of racial and ethnic epithets in the workplace is enjoinable when such speech was previously found to constitute employment discrimination.⁸⁸ In both cases, the courts justified enjoining future offensive speech solely because of its potential to offend some employees. For example, the *Snell* court justified enjoining corrections officers from speaking racial slurs such as “spic” and “nigger” towards inmates because they were “harsh” and “crude” expressions.⁸⁹ Such orders restrict the content and viewpoint of a speaker’s future communication. By forcing a speaker to exclude words that the judge determines to be offensive, the courts are in

84. See *McLaughlin*, 784 F. Supp. at 978 (stating injunctions chill speech with the threat of criminal or civil sanctions but prior restraints “freeze” speech because they remove it from society before society has opportunity to hear the message).

85. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828 (1995).

86. See *id.* (stating that courts regard viewpoint discrimination as “an egregious form of content discrimination” and thus invalid under First Amendment analysis).

87. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 116 S. Ct. 2338, 2350 (1995) (holding that gays and lesbians must be allowed to march under their own, identifiable banners in the privately sponsored St. Patrick’s Day parade). “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 [the ordinance’s] purpose. . . .” *Id.*

88. *Aguilar*, 980 P.2d at 862 (1999); *Snell v. Suffolk County*, 611 F.Supp. 521, 526 (1985).

89. See *Snell*, 611 F. Supp. at 531 (suggesting an absolute ban was warranted because of the was corrections officers expressed racial and ethnic slurs, an absolute ban was warranted). Moreover, the *Snell* court justified its complete prohibition of racial joking by stating “only a radical shock to the mores can succeed in bringing home to these officers the necessity of eschewing overt hostility so that equal working conditions for all employees can exist as Congress intended.” *Id.*

effect removing the message of racial intolerance from society.⁹⁰ Moreover, although racial slurs are detestable, they do not fall with any traditionally recognized area of unprotected speech.⁹¹

Moreover, courts are mistaken in concluding that enjoining the future use of slurs or derogatory epithets in the workplace would not act as suppression of speech by prior restraint.⁹² Certainly, no judge can predetermine the effect of using any specific slur from a list of verboten words.⁹³ It is impermissible and unlawful for a court to create regulations based on unfounded presumptions of what the speaker *might* say and how his communication *might* affect the listener.⁹⁴ For the courts to permit such assumptions would be to allow repression of speech before the consequences of its utterance could occur.⁹⁵

90. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391-393 (1992) (holding that a state cannot mandate specific prohibition of fighting words which express a viewpoint of racial intolerance).

91. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding fighting words, which by their utterance inflict injury or tend to incite an immediate breach of peace, are not constitutionally protected). See also *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that obscenity is not within the area of constitutionally protected speech); *Kramer v. Thompson*, 947 F.2d 666, 675 (3rd Cir. 1991) (stating that defamatory speech is not protected by the First Amendment).

92. See *Dailey v. San Francisco*, 44 P. 458, 459 (1896) (stating that the right to express oneself cannot be restrained before it is exercised).

The right of a citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes.

Id.

93. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (dictating that a hostile environment determination requires complete examination of circumstances in the workplace). The *Harris* Court implied that speech alone, without regard to its frequency, its context, or its effect on the listener, could create a hostile environment. *Id.*; *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998) (noting that whether workplace speech is in fact discriminatory depends on "surrounding circumstances, expectations, and relationships" between speaker and listener).

94. See *Forsyth, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (stating that listener's reaction to speech is not a content-neutral basis for regulation). In *Forsyth*, the county argued that an ordinance assessing a fee towards individuals who wished to assemble and parade was constitutional although the fee assessed for those activities directly depended on an administrator's measure and examination of the message being expressed. *Id.* at 134-35. The county argued that the ordinance was content neutral because it was aimed only at the secondary effect, the cost of adequately determining proper security for parade participants. *Id.* The Court rejected the county's argument stating that presumptions that speech might offend or excite individuals did not justify financially burdening that speech. *Id.*

95. See *Reno v. ACLU*, 521 U.S. 844, 867-68 (1997) (holding an injunction is content-based when it prohibits speech for its communicative impact and its potential to offend the person who hears it). Content-based regulations are

C. There is No Compelling State Interest in Specific Speech Injunctions

Despite the presumption that specific speech injunctions act as invalid prior restraints, courts might allow such orders if the government could demonstrate a compelling state interest that justifies the prior restraint.⁹⁶ Undoubtedly, the state has a compelling interest in abolishing employment discrimination.⁹⁷ Indeed, a judge tasked with the responsibility of remedying a hostile workplace must issue a remedy that both corrects past discrimination and prevents future discriminatory conduct.⁹⁸ However, there is no clear and convincing proof that specific speech injunctions, especially when they act as a prior restraint on protected speech, are indispensable to promote the state's interest.⁹⁹

The argument that speech restrictions are necessary to promote the state's interest adequately is speculative and riddled with defects. Proponents of specific speech injunctive relief typically argue a defendant's prior acts of discrimination, which ultimately lead to legal liability, justify a prior restraint.¹⁰⁰ The typical theory rests on the unfounded posit that a bigot who violates the law is likely to do so again unless prevented.¹⁰¹

presumptively invalid under the First Amendment. *Id.* at 867. Courts should not penalize speech before it is known what was said, to whom, and with what effect. *Aguilar v. Avis Rent a Car System, Inc.*, 980 P.2d 846, 878 (1999) (Mosk, J., dissenting). The dissenting judge in *Aguilar* stressed such factors can never be determined in advance and thus deserve constitutional protection. *Id.* But see *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (stating that "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"). See also *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (finding that speech restriction did not constitute an invalid prior restraint). The Court in *Arcara* limited its holding to situations where the prior restraint is not directed at the expressive content of the speech and does not substantially eliminate other opportunities for expression. *Id.*

96. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

97. See *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (holding that a state may prohibit ethnic and racial discrimination and has a compelling interest in doing so).

98. *McLaughlin v. New York*, 784 F. Supp. 961, 975 (N.D.N.Y. 1992).

99. See *Aguilar v. Avis Rent a Car System, Inc.*, 980 P.2d 846, xxx (1999) (Kennard, J., dissenting).

100. *NAACP v. City of Evergreen*, 693 F.2d 1367, 1370 (1982).

101. See *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (1987) (holding that an employer who takes curative actions to remedy a discriminatory work environment only after being sued fails to provide sufficient assurances it will not repeat the violation to justify denial of injunctive relief). See also *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (holding that an injunction passes constitutional muster, when it targets and eliminates "no more than the exact source of the 'evil' it seeks to remedy.").

However, courts have consistently ruled that such generalizations do not present a compelling argument that there is a “real and immediate threat of future injury” thus necessitating a prior restraint on speech.¹⁰² To hold otherwise would force the court to constantly speculate as to the content and effect of the future speech of the defendant prior to utterance—a role courts consistently refuse to perform.¹⁰³ While some may argue that the judiciary has a responsibility to encourage conduct that combats racial discrimination,¹⁰⁴ courts cannot justify an invalid prior restraint based on their interest in preventing bigots from conveying their message of intolerance.¹⁰⁵ To do so would not only violate the fundamental principles behind the First Amendment but threaten the very ideals of a democratic society.¹⁰⁶

Moreover, the government cannot meet its weighty burden of persuasion by relying on a weak conjecture that a person’s prior unlawful acts necessarily predicts future unlawful behavior. Such a conclusion defies common sense and legal logic. An employer who has previously engaged in verbal harassment that produced a hostile environment may not thereafter be enjoined from engaging in or permitting similar offensive speech on the theory that it has the potential to produce a hostile work environment in the future. Potential discrimination does not legally amount to a real and immediate threat of harm. Thus, there is no compelling legal

102. *Int’l Soc’y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 833 (1979).

103. *See In re Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986) (stating that the court asked to order a prior restraint necessarily must judge the contested speech in the abstract).

104. *See Mari Matsuda, A Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2357-58 (1989) (promoting an approach where racist speech is treated as a separate category of unprotected speech). Matsuda argues that setting aside the worst forms of racist speech for special treatment is a neutral approach that will better serve First Amendment interests. *Id.* at 2357. Alternatively, she suggests that courts that are uncomfortable with creating such precedent may instead stretch existing First Amendment exceptions, such as the fighting words doctrine and the content/conduct distinction to justify a valid restraint on racist speech. *Id.* However, she acknowledges that these approaches ultimately weaken First Amendment protections. *Id.*

105. *See, e.g., American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 334 (7th Cir. 1985) (rejecting attempts by the government to regulate written material in order to prevent readers from developing certain ideas). The court held that an Indianapolis ordinance that created a civil rights cause of action allowing women to sue pornographers because they further the “subordination” of women was unconstitutional. *Id.* at 332. The court reasoned the so-called “civil rights” measure was mere censorship disguised. *Id.*

106. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

basis for granting specific speech injunctive relief in employment discrimination cases.

D. Specific Speech Injunctive Orders are Overbroad

Similarly, specific speech injunctions cannot be narrowly drawn to further the state's interest in preventing a recurrence of a hostile work environment.¹⁰⁷ This is due to the fact that despite the specificity of the description of the prohibited words in such injunctions, they still "burden more speech than necessary to serve a significant government interest," and thus are overly broad.¹⁰⁸

One major constitutional problem plaguing specific speech injunctive relief is the remedy's failure to precisely target the "evil" that Title VII aims to combat without also impeding protected expressive communication.¹⁰⁹ By design, these specific speech injunctions such as the ones used in *Aguilar* prohibit every explicit utterance of a racial or ethnic slur in the workplace, not just the utterances that actually produce a hostile work environment.¹¹⁰ As such, the orders allow the suppression of individual incidents of offensive speech, even when that speech, on its own, does not create a hostile environment.¹¹¹

Such a situation arose in the *Aguilar* case where the injunction prohibited the defendant from using certain epithets to address or describe Hispanic employees anytime and anywhere in the workplace.¹¹² The injunction went beyond precluding the defendants from continuing their unlawful activity. It directly targeted protected speech.¹¹³ First, it restrained the defendant from making future offensive statements at work even if the statements were made outside of the presence and knowledge of plaintiffs or other Hispanic employees.¹¹⁴ Furthermore, the injunction enjoined the defendant from expressing his discriminatory speech towards employees who would not be injured by the speech nor perceive it as creating a hostile

107. See generally *Frisby v. Schultz*, 487 U.S. 474, 485 (1998) (holding a regulation is narrowly drawn, for First Amendment purposes, if "it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy").

108. *Id.*

109. *Id.*

110. See Volokh, *supra* note 5, at 1815 (arguing that once speech injunction is ordered, the standard for liability in harassment law is altered). Volokh claims a hostile work environment can be the sum of various speakers saying things that alone would not create a Title VII claim. *Id.* But by preventing all offensive statements, he argues courts are suppressing speech that may actually not create a hostile environment. *Id.*

111. *Id.*

112. *Aguilar v. Avis Rent A Car Sys. Inc.*, 980 P.2d 846, 848 (Cal. 1999).

113. See *id.* at 878-79 (Mosk, J., dissenting) (arguing that offensive speech should be protected unless and until it produces a demonstrable harmful effect).

114. *Id.* at 849.

environment.¹¹⁵ As a result, the injunction extended far beyond the precisely targeted evil of the discrimination by prohibiting future protected speech that would not create a discriminatory environment.¹¹⁶

Even if specific speech injunctions, such as the *Aguilar* order, could be narrowly drawn to prohibit the defendant only from directing racial slurs to the particular employees he previously harassed, they would still prohibit more speech than necessary. The critical factor is that not every utterance of a racial or ethnic slur in the workplace violates Title VII.¹¹⁷ Rather, a Title VII plaintiff must show that the workplace is permeated with discriminatory insult and ridicule which is sufficiently severe or pervasive to alter the workplace conditions.¹¹⁸ Specific speech injunctions vitiate this standard.¹¹⁹ Once the injunction is issued, there no longer is any need to show what was said, how often it was said, or what the surrounding circumstances were, all critical factors in determining whether a hostile environment existed.¹²⁰ Rather, an isolated use of a listed epithet, however repugnant, immediately spawns civil or even criminal liability as a violation of the injunction even though it could not violate Title VII.¹²¹

E. An Award of Damages is the Best Remedy for Title VII Hostile Work Environment Violations

The best and most effective remedy for a Title VII violation is an award of damages. Traditionally, the courts have preferred granting legal remedies instead of injunctive relief.¹²² Damages are more favorable for redressing workplace discrimination claims because they eliminate the complex constitutional implications inherent in speech injunctions. Moreover, damages awards are more capable of discouraging discrimination in the workplace, which is the whole purpose behind Title VII.

115. *Id.*

116. *Id.* at 879 (Mosk, J., dissenting).

117. *Id.*

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

119. *Volokh, supra* note 5, at 1815.

120. *Id.*

121. *But see* *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980) (finding a hostile environment cannot be predicated on a few isolated incidents). The court in *Murphy Motor Freight Lines* held that racial comments uttered as part of casual conversation are incidental and do not constitute Title VII violations. *Id.*

122. *See* *Walgreen Co. v. Sara Creek Property Co., B.V.*, 966 F.2d 273, 75 (7th Cir. 1992) (stating that damages awards are the preferred remedy, particularly in contractual cases). As such, the proponent of an injunction must demonstrate that a damage award is inadequate and a denial of injunctive relief will cause "irreparable harm." *Id.* The *Walgreen* court stated that irreparable in the injunction context means not rectifiable by a final judgment decree. *Id.*

Proponents of injunctive relief argue that prior restraints are necessary because there is no guarantee that damages will eliminate workplace discrimination.¹²³ On the contrary, an award of damages, particularly in light of the potential for large monetary awards,¹²⁴ will serve as an adequate and effective deterrent.¹²⁵ It is illogical to conclude that once a Title VII violation has been found and damages awarded, an employer would continue to tolerate recurring discriminatory speech in the workplace. If damages are consistently awarded, companies will find it in their best interest to develop internal mechanisms to abolish workplace discrimination rather than be sued again. Thus, the threat of costly repeated litigation and potentially large damage awards would play a crucial role in the remedial process.¹²⁶

Moreover, damages and not specific speech injunction, further the compensatory goal behind Title VII. While Title VII has always concentrated on providing a means for correcting the social problems created by workplace discrimination, the goal of the Act has recently shifted more towards adequate compensation for victims.¹²⁷ In passing the 1991 Amendments to the Civil Rights

123. See *McLaughlin v. New York*, 784 F. Supp. 961, 977 (1992) (denying plaintiff's request to prospectively enjoin defendants from speaking about her in a derogatory manner). In *McLaughlin*, the plaintiff argued the compelling circumstances surrounding her sexual harassment in the office entitled her to guarantees from the court that her employer could be restrained from in effect "blacklisting" her within the labor field. *Id.* The court disagreed. *Id.* The court rationalized that such an injunction would constitute an invalid prior restraint on the defendant's speech. *Id.* It rationalized that the damage the plaintiff would suffer from having further negative references spoken about her within the working community would "pale" in comparison to the damages created by an invalid prior restraint. *Id.* But see FISS, *supra* note 29, at 75-77 (arguing that remedying a civil rights violation with monetary damages is often not an adequate remedial measure).

124. See also James, *supra* note 72, at *2; see also Zemelman, *supra* note 71, at 191.

125. See *Aguilar*, 980 P.2d at 882 (Mosk, J., dissenting) (stating that a threat of repeated litigation is a potent remedy for eliminating employment discrimination). Justice Mosk noted that the high costs of defending litigation and jury awards—including compensatory damages, attorney's fees and punitive damages—are more effective in preventing future workplace discrimination than the possibility of an individual supervisor being jailed for contempt. *Id.*

126. *United States v. N.L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973) (holding backpay awards, the only form of damages allowed prior to 1991 Amendments to Civil Rights Act of 1964, serve a critical role in the remedial process). The *N.L. Industries* court reasoned that if backpay is consistently awarded by courts, companies would find it in their best interest to remedy their employment procedures without court intervention. *Id.*

127. See H.R. REP. NO. 102-40, pt. I, at 148 (1991) (noting that victims of intentional discrimination often endure substantial economic losses). The Education and Labor Committee, which conducted hearings prior to recommending the 1991 Amendments, heard testimony from several victims of

Act of 1964, Congress recognized that earlier remedies available for injured plaintiffs—such as allowing victims only to recover equitable relief for proved Title VII violations—were not accomplishing the Act's stated goal of making victims "whole for injuries suffered on account of unlawful discrimination."¹²⁸ As such, by allowing for compensatory and punitive damages, the amendments emphasized Congress' intent that Title VII be treated more like a traditional tort.¹²⁹

Implicitly, the new changes also indicated the importance placed on compensating victims to the fullest extent.¹³⁰ This is precisely the result Title VII was meant to achieve. If a plaintiff suffers years of severe mental and emotional distress, embarrassment and humiliation, it is unreasonable to assume that a specific speech injunction could adequately compensate him for his injuries.¹³¹ For one, a specific speech injunction is inherently limited in its powers and by definition, it can only prevent future harassment.¹³² In no way could it provide a means for compensating the victim for his past physical or mental suffering.¹³³ As such, injured parties demonstrating extensive suffering due to workplace discrimination can only receive partial relief, far from the "whole" Congress intended.¹³⁴

Not only is an award of damages more within the spirit of

sexual harassment. *Id.* The committee concluded that discrimination does cost employers and employees money in terms of lost wages, missed work days and medical insurance costs. *Id.*

128. H.R. REP. NO. 102-40, pt. I, at 148.

129. *See Zemelman, supra* note 71, at 188 (arguing that Title VII has evolved into "a public-policy enforcing statute, designed to promote employer responsibility, to a compensatory, tort-like statute, aimed at making victims whole").

130. H.R. REP. NO. 102-40, pt. I, at 148.

131. *Cf. Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) (finding little incentive for a Title VII plaintiff to bring forth a complaint when injunctive relief is the only remedy available). If the plaintiff can only get an injunction forcing her employer to end the discrimination, few plaintiffs will want to undertake expensive court costs and endure the humiliation of bringing forth their difficult situations. *Id.*

132. *Compare Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (holding court has responsibility to render decree which eliminates the discriminatory effects of past discrimination while preventing future acts once a Title VII plaintiff was successful), *with Mitchell*, 629 F. Supp. at 643 (arguing the most a successful Title VII plaintiff could recover is an "order to her supervisor and to her employer to treat her with the dignity she deserves").

133. *Mitchell*, 629 F. Supp. at 643. *See also Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 834-35 (W.D. Tex. 1973) (holding that recognition of psychological injuries suffered from discrimination is proper in Civil Rights Act cases). The *Humphrey* court was one of the few courts to recognize that victims of discrimination often suffered from psychological injuries, rather than physical injuries. *Id.*

134. *Albemarle Paper Co.*, 422 U.S. at 418.

Title VII's remedial function, it is judicially more efficient than issuing an injunction. By its nature, legal relief provides a final decree and ends a court's involvement in a case.¹³⁵ In contrast, injunctions require continuing court supervision.¹³⁶ The court must monitor the workplace to insure that the speech injunction is being fully upheld both by employers and employees.¹³⁷ Thus, injunctions inevitably undercut the efficiency of the remedial goals provided by Title VII.

Moreover, forcing a court to maintain such a supervisory role is costly.¹³⁸ Courts will have to devote substantial resources of time and money to preventing violations as well as remedying them.¹³⁹ Because specific speech injunctions prohibit isolated use of offensive words, court calendars could become overwhelmed just with resolving claims that injunctions have been violated.¹⁴⁰ Such a result is an intolerable abuse of judicial economy.

III. MAKING THE VICTIM "WHOLE": REDRESSING DISCRIMINATION THROUGH DAMAGES AWARDS

Clearly, proponents of specific speech injunctions cannot overcome the longstanding presumption in the courts that such orders act as an invalid prior restraint on speech. Speech injunctions are unconstitutional and ineffective in eradicating workplace discrimination. However, damage awards offer a legally sound remedy for injured Title VII plaintiffs.

Moreover, damages act as a more effective deterrent to workplace discrimination because they force employers to comply with Title VII regulations under pain of potentially expensive litigation. Thus, courts must stop issuing specific speech injunctions and instead adopt a policy to consistently award

135. *Walgreen Co.*, 966 F.2d at 276.

136. *Id.*

137. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1215 (D. D.C. 1990) (refusing an injunction because it would force the court to monitor a company indefinitely in order to ensure it discontinued discriminatory hiring practices).

138. *See Walgreen Co.*, 966 F.2d at 276 (finding that pain and suffering are not easily quantifiable). However, the court believes a "crude estimate" of those types of damages is better than granting a wrong-doer a meaningless punishment. *Id.*

139. *See N.L. Industries, Inc.*, 479 F.2d at 378 (ordering the court to monitor a company's practices to ensure it complies with obligations until Title VII). The injunction ordered specifically maintains the district court's jurisdiction over the company, implicating its supervisory position over future discrimination. *Id.*

140. *See generally Volokh, supra* note 5, at 1813-14 (arguing that injunctions transform the standard of liability under Title VII). Employers today are not just liable for those actions of employees that create a hostile environment but also those violations of the injunction. *Id.* Each violation creates liability and thus requires a judicial intervention. *Id.*

damages to injured Title VII plaintiffs. Courts have a responsibility to injured Title VII plaintiffs to ensure discrimination stops and will not occur again in the future. By adopting such a policy, courts would deter workplace discrimination, which is Title VII's primary purpose.

CONCLUSION

Critics of specific speech injunctions have correctly determined that when such orders are applied to Title VII violations the injunctions endanger free speech guarantees. Although courts have a duty to remedy and prevent discrimination in the workplace, their responsibility cannot quash the rights of citizens to be protected from invalid prior restraint on their speech. But courts do just that when they issue speech injunctions.

In today's business world companies go to great lengths to avoid lengthy and costly litigation. As such, the possibility of paying repeated large damages awards to employees creates an incentive for employers to implement their own anti-discrimination policies for their workplace. Thus, damages awards, not speech injunctions, are the most effective legal tool for eliminating workplace discrimination for the present and future workforce.