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PERSPECTIVE

"Music as harassment" – a new frontier of hostile work environment claims

By Anthony J. Oncidi and Philippe A. Lebel

On June 7, in *Sharp v. S&S Activewear, LLC*, the Ninth Circuit held that hip-hop and rap music played over loudspeakers in a 700,000-square-foot warehouse could give rise to a hostile work environment sexual harassment claim under Title VII of the Civil Rights Act of 1964. 69 F.4th 974 (9th Cir. 2023). The decision presents a new extension of harassment liability and begs the question of how a California court in the post-#MeToo era might approach this type of undirected, environmental harassment that exists quite literally in the air.

Tired of hearing "very offensive" songs like Eminem's "Stan" and Too $hort's "Blowjob Betty," Stephanie Sharp and several co-workers (including one male) filed a hostile work environment claim under Title VII against S&S. Plaintiffs claimed they could not escape the music because it was "[b]lasted from commercial-strength speakers" that were "placed throughout the workplace" and, sometimes, mounted on forklifts driven around the warehouse. Plaintiffs further claimed the music encouraged male employees to make sexually graphic gestures and remarks, and to openly share pornographic videos.

A trial court dismissed Plaintiffs' Title VII claim because "there was no allegation 'that any employee or group of employees were targeted, or that one individual or group was subjected to treatment that another group was not.'" *Id.* at 978. The trial court held that because the music offended both men and women alike, it could not constitute the basis of a sexual harassment claim.

Yet, the Ninth Circuit saw things differently, implicitly treating the racy popular music as a sort of radioactive isotope that contaminated the entire workplace, essentially irradiating any employee within earshot. The Court found that the repeated and prolonged exposure to music "saturated with sexually derogatory content" could, indeed, constitute "music as harassment." *Id.* at 980-81.

Perhaps most significantly, the Court rejected the "equal opportunity harasser" defense and held that harassment need not be directly targeted at a particular plaintiff, or even a specific protected group of employees, to support a harassment claim. *See Id.* at 982. Thus, the Ninth Circuit rejected the lower court's holding "that the coexistence of male and female plaintiffs dooms a hostile work environment claim." *Id.*

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The outcome in *Sharp* is, in some ways, difficult to reconcile with long-standing precedent under California's Title VII counterpart, the Fair Employment and Housing Act (FEHA). Notably, in 2006, California's Supreme Court held that a fired female assistant who had worked in the writers' room for the television show *Friends* and who complained of hearing lewd and offensive language and observing obscene gestures made by writers did not have a viable harassment claim. *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264 (2006). The Supreme Court determined that "no reasonable trier of fact could conclude such language constituted harassment directed at plaintiff because of her sex within the meaning of the FEHA."

Although the California Supreme Court recognized that a plaintiff could be the victim of sexual harassment even where the conduct (*e.g.*, offensive comments) was not directed at the plaintiff, it held that such claims were subject to a heightened evidentiary burden. *Id.* at 285. Importantly, *Lyle* relied heavily on evidence that much of the sexual comments and conduct underlying the plaintiff's harassment claim did not single women out or impact them more harshly than men. *Id.* at 288 ("[T]he record here reflects a workplace where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes. …[T] he defendant writers' nondirected sexual antics and sexual talk did not contribute to an environment in which women and men were treated disparately").

Of course, there are other bases upon which *Lyle* and *Sharp* might be distinguished, most notably because *Lyle* involved a "creative workplace focused on generating scripts for an adult-oriented come-

dy show featuring sexual themes," whereas *Sharp* involved a group of employees who worked at an apparel company's warehouse – i.e., where there was no arguably expressive purpose to the alleged activities.

However, employers should be cautious about how much to rely on this speech-related distinction. In the wake of the #MeToo movement, the California Legislature amended FEHA, effective 2019, to emphasize that FEHA harassment claims are "rarely appropriate for … summary judgment" and that "[t]he legal standard for sexual harassment should not vary by type of workplace." Cal. Gov't Code § 12923 ("It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past").

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