No More Music in the Workplace: Analyzing *Sharp v. S&S Activewear*

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In the court decision *Sharp v. S&S Activewear*, the Ninth Circuit ruled that workplace music with allegedly "sexually graphic, violently misogynistic" lyrics can create a hostile work environment and support an employment discrimination claim. The lawsuit was filed by eight employees, seven women and one man, who worked in an apparel company in Reno, Nevada. It was alleged that the managers and employees routinely played sexually graphic and violent music throughout the 700,000-square-foot warehouse, including a song from Too $hort allegedly glorifying prostitution and Eminem's "Stan."

According to the lawsuit, the employees allegedly complained about the music "almost daily." Also, they complained that the music led some employees to pantomime sexually graphic gestures, yell obscenities, make sexually explicit remarks, and share pornographic videos. Significantly, neither the employees nor the court explained how the music "caused" this behavior. Despite allegations of harassing conduct, the court's focus remained on the music itself. The court seemingly accepted as a truism that music can cause sexually oriented inappropriate workplace behavior.

The employer prevailed at the district court level via a motion to dismiss the suit. The employees appealed. Reversing the district court, the Ninth Circuit panel ruled that employees could state a Title VII sexual harassment claim based on the warehouse music. Specifically, the court harkened back to the *Meritor Savings Bank v. Vinson's* standard for Title VII sexual harassment claims, noting that plaintiffs may state such claims by establishing that "discrimination based on sex has created a hostile or abusive work environment."[1] The Ninth Circuit then held that plaintiffs alleging that "music with sexually derogatory and violent content, played constantly and publicly throughout a workplace, can foster a hostile or abusive environment and thus constitute discrimination because of sex." Thus, the Ninth Circuit reinstated the claims, allowing them to proceed against the employer.

The Ninth Circuit's decision seems to have weakened the standard for Title VII claims to only require the "fostering" of a hostile or abusive work environment rather than creating such an environment. Additionally, the Ninth Circuit relied on the assumption that sexually explicit music lyrics can create discrimination based on sex or gender, regardless of whether all genders can be and are offended by the music. Previously, the lower district court ruled that employees could not state a claim for Title VII harassment because the music was equally offensive to men and women.

Writing for the three-judge panel, Judge Margaret McKeown noted that "[o]bjectionable conduct is not 'automatically discrimination merely because the words used have sexual content or connotations."[2] The judge stated that this standard prevents Title VII from becoming a "general civility code" for the American workplace. Despite these supposed limitations, Judge McKeown held in the next paragraph that "the music at S&S allegedly infused the workplace with sexually demeaning and violent language, which may support a Title VII claim even if it offended men as well as women." The judge quoted "[a] raft of case law [that] … establishes that the use of sexually degrading, gender-specific epithets … has been consistently held to constitute harassment based on sex."[3] Failing to distinguish between sexually explicit comments actually made by a manager or employee versus lyrics in commercially popular music, such as from a radio station being played at work, the court held that "the sort of 'repeated and prolonged exposure to sexually foul and abusive music' that Sharp alleges falls within a broader category of actionable, auditory harassment that can pollute a workplace and violate Title VII." The court cited cases from other circuits to support this indiscriminate treatment of radio music as equivalent to spoken words in the workplace.

The Ninth Circuit in *Sharp v. S&S Activewear* ultimately recognized "'sexually graphic, violently misogynistic' music as one form of harassment that can pollute a workplace and give rise to a Title VII claim." The court

1 477 U.S. 57 (1986).

2 Citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

3 Citing *Forrest v. Brinker Int'l Payroll Co., LP*, 511 F.3d 225 (1st Cir. 2007).

stated, "Whether sung, shouted, or whispered, blasted over speakers or relayed face-to-face, sexist epithets can offend and may transform a workplace into a hostile work environment that violates Title VII."[4]

The Ninth Circuit's ruling lays the groundwork for a new class of sexual harassment claims based on workplace music selections or other nonpersonal communications. The court's decision raises many more troubling questions than answers. For example, must employers prohibit music in the workplace? Must employers prescreen music lyrics before employees can play music audible to others? Should employers prohibit any music with lyrics in the workplace, or will mere acoustic versions of songs with known sexually explicit lyrics also give rise to Title VII claims? Should employers prohibit employees from "singing along" with music, even if merely listening with earbuds and singing to themselves? Should employers prohibit employees from turning on the radio in company vehicles? Must employers ban employee phone ringtones that are potentially offensive? Can employers be liable for elevator music? Even workplace karaoke is now fraught with peril.

Furthermore, entire industries may be held liable for harassment based on the Ninth Circuit's broad decision. All employees in the music industry are potential plaintiffs to the extent the employees are working on music production that involves sexually explicit lyrics. Must employers now warn security guards and equipment operators of potentially sexually explicit lyrics before those employees go to work at an Eminem concert, and would such warnings be enough to avoid a harassment claim? Additionally, if nonpersonal communications alone are sufficient to state Title VII claims, the movie and television industries, which routinely produce shows involving sexual-related content, are potential targets. Does a camera operator on the set of "Sex and the City" now have a valid harassment claim? Furthermore, online content producers and hosting companies of all types might be defending harassment claims based on the content that is audible or visible to their employees. If a YouTube employee views sexually explicit content, can this give rise to claims of Title VII harassment? All of these scenarios raise the exact precaution Judge McKeown recognized and then ignored—that Title VII was not intended as a "general civility code" in the workplace.

The court's holding also raises broader questions for discrimination law. What if employers play religious-based music in the workplace? Will this give rise to religious discrimination claims? Can a Christian-based radio station be audible at work? What if employees listen to "calls to prayer" on a phone alarm as a reminder to pray at certain times of the day at the workplace? The days also may be numbered for the famous Leonard Cohen song "Hallelujah" being played at work.

The breadth of grounds for workplace harassment claims continues to expand and now includes any nonpersonal communication or verbiage, regardless of the source. Despite giving tacit recognition to the prohibition against Title VII becoming a "general civility code" for the workplace, the Ninth Circuit's ruling in *Sharp v. S&S Activewear* may have opened the door to precisely this unintended expansion.

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4 The case has been sent back to the district court to continue. Significantly, no motion for an en banc hearing was filed at the Ninth Circuit, likely due to futility.

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A Pacific Northwest native, Ms. Van Meter has over 25 years of experience representing private, public, and not-for-profit entities throughout the Pacific Northwest and is recognized by her peers as a leading trial attorney. Her practice most recently has focused on employment advice and litigation, while she also has extensive experience in general civil litigation, including mass torts, drug and medical device and products liability, construction defects, negligence, condemnation, insurance coverage, and multidistrict litigation in state and federal courts in Oregon and Washington. Ms. Van Meter's background includes over 8 years in the Oregon Department of Justice's Civil Litigation Section as a senior assistant attorney general and trial attorney.

Ms. Van Meter began her legal career working for local private law firms but then took advantage of an opportunity in Vietnam, teaching commercial law and company law at RMIT-Saigon. Returning from Vietnam, Ms. Van Meter taught constitutional law and evidence at Lewis & Clark Law School. While working as a trial attorney, she obtained a master of studies (MSt) degree in human rights law at the University of Oxford, and a PhD in international law at the University of Birmingham (England). Ms. Van Meter continues teaching, including graduate school classes in ethics, sustainability, and social responsibility as well as law, history, and finance classes to middle and high school students. As a professor and teacher, she has gained the ability to explain complex legal matters in understandable ways.

In addition to serving her clients, Ms. Van Meter serves her community extensively and is a past member of the Oregon Government Ethics Commission (governor's appointment), past elected Oregon Bar House of Delegates member, past president of the Marion County Bar Association, past president of Oregon Women Lawyers, past president of the US District Court of Oregon Historical Society, and a former volunteer criminal prosecuting attorney in Hood River County. She is currently on the Oregon State Bar Nonprofit Law Executive Committee and is a member of the Nonprofit Association of Oregon.