

# THE ROAD TO EQUALITY: THE APPLICATION OF THE REASONABLE WOMAN STANDARD IN SEXUAL HARASSMENT CASES

## I. INTRODUCTION

Ever since the courts have begun to recognize hostile work environment sexual harassment as actionable under Title VII of the Civil Rights Act of 1964,<sup>1</sup> a controversy has arisen over the standard of review which should be used to evaluate these sexual harassment claims.<sup>2</sup> Some courts argue that a reasonable person standard should be applied, a standard that is supposed to be gender-neutral and represent the perspective of society as a whole. The standard, its proponents say, is meant to treat everyone equally by not catering to either sex.

On the other hand, many courts argue that we live in a male-oriented society, thus a standard geared towards what society deems reasonable actually ignores the perception of women. As such, these courts have chosen to evaluate hostile work environment sexual harassment claims using a gender-specific standard, the reasonable woman or reasonable victim standard. Although the reasonable woman standard and the reasonable victim standard are not necessarily identical, they both evaluate sexual harassment claims from the perspective of a reasonable person of the same sex as the victim. By applying a reasonable woman standard, the courts acknowledge that men and women do not perceive behavior in the same way.

Part I of this Note discusses the development of hostile work environment sexual harassment from Title VII to *Harris v. Forklift Systems, Inc.*<sup>3</sup> and examines the different standards applied to hostile environment claims. Part II examines the origins of sexual harassment law. Part III discusses the application of the reasonable person standard to sexual harassment claims. Part IV considers the reasonable woman standard and the reasonable victim standard with regard to evaluating hostile environment claims. Part V examines where we are headed by analyzing two state cases,<sup>4</sup> a new pro-

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<sup>1</sup> 42 U.S.C. § 2000e-2000e-2 (1988).

<sup>2</sup> The first case to recognize hostile environment sexual harassment as a violation of Title VII was *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>3</sup> — U.S. —, 114 S. Ct. 367 (1993).

<sup>4</sup> *Radtke v. Everett*, 442 Mich. 368, 501 N.W.2d 155 (1993); *Lehmann v. Toys R Us*, 132 N.J. 587, 626 A.2d 445 (1993).

posed federal guideline,<sup>5</sup> and the most recent United States Supreme Court case to deal with sexual harassment.<sup>6</sup> Part VI discusses the merits of the reasonable woman standard and why it should be the applied standard in deciding whether conduct is in fact severe enough to create a hostile work environment.

## II. THE ORIGINS OF SEXUAL HARASSMENT LAW

When Congress enacted Title VII of the Civil Rights Act of 1964, it became illegal for employers to discriminate on the basis of sex, race, color, religion or national origin.<sup>7</sup> Although Congress adopted sex as a protected class, it failed to define what was to be considered sex discrimination.<sup>8</sup> Little legislative history existed to help address the adoption of sex as a protected class.<sup>9</sup> As such, difficulty arose in interpreting the extent to which the Act protected women against sexual harassment.

In 1980, the Equal Employment Opportunity Commission (EEOC) addressed this problem of interpretation by issuing a set of guidelines on sexual discrimination.<sup>10</sup> The guidelines acknowledge sexual harassment as a form of sex discrimination under Title VII.<sup>11</sup> These guidelines recognize sexual harassment as actionable when the victim has been subject to at least one of three situations:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such indi-

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<sup>5</sup> 58 Fed. Reg. 51, 266 (1993) (to be codified at 29 C.F.R. § 1609.1) [hereinafter *Proposed Guidelines*].

<sup>6</sup> *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

<sup>7</sup> 42 U.S.C. §§ 2000e-2000e-2 (1988). This provides in part:

"(a) It shall be an unlawful employment practice for an employer

(1) to fail 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 (2) 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 . . . sex . . . ." *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Penny L. Cigoy, Note, *Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 PEPP. L. REV. 1071, 1072-73 (1993). See 110 CONG. REC. 2582, 2584 (1964).

<sup>10</sup> Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1993) [hereinafter *Guidelines*]. The Equal Employment Opportunity Commission is a regulatory agency created by the Civil Rights Act of 1964 to enforce Title VII and investigate any violations. 42 U.S.C. § 2000e (1988).

<sup>11</sup> 29 C.F.R. § 1604.11(a) (1993). The *Guidelines* define sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ." *Id.*

vidual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>12</sup>

Courts have used these guidelines to recognize two types of sexual harassment cases: quid pro quo cases and hostile environment cases.<sup>13</sup> Quid pro quo sexual harassment claims occur when an employer conditions employment opportunities on the employee's acquiescence to sexual demands.<sup>14</sup> Quid pro quo sexual harassment is easy to recognize due to the victim's tangible economic loss.

Hostile work environment sexual harassment claims have only recently been recognized as actionable as a sexual harassment claim. Hostile work environment claims arise when unwelcome sexual conduct interferes with an individual's employment or creates an intimidating, hostile, or offensive work environment.<sup>15</sup> Although the guidelines set forth both types of sexual harassment, it was not until 1986 that hostile work environment sexual harassment claims were deemed actionable as a violation of Title VII.

In *Meritor Savings Bank v. Vinson*,<sup>16</sup> the United States Supreme Court held for the first time that hostile work environment sexual harassment constitutes sex discrimination in violation of Title VII.<sup>17</sup> In *Meritor*, Michelle Vinson alleged that her supervisor, Sidney Taylor, had constantly subjected her to sexual harassment during her four years of employment at Meritor Savings Bank. As cited in the case, Taylor repeatedly made sexual demands upon Vinson, both during and after business hours. Vinson testified that she eventually agreed to have sexual relations with Taylor out of

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<sup>12</sup> *Id.* These *Guidelines* are only an administrative interpretation of Title VII, thus they do not have the force of law. However, the *Guidelines*, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), quoting in turn, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>13</sup> Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773, 779 (1993) (citing CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-47 (1979)).

<sup>14</sup> Richard H. Block and Louis Ginsberg, *Is 'Reasonable Woman' Standard Reasonable?*, *N.Y. L.J.*, May 17, 1993, at 2.

<sup>15</sup> See e.g., *Ellison v. Brady*, 924 F.2d 872, 880-81 (9th Cir. 1991); *Radtke*, 501 N.W.2d at 158.

<sup>16</sup> 477 U.S. 57 (1986).

<sup>17</sup> *Id.* at 66. The Court relied on the *Guidelines* to determine the elements necessary to establish a hostile work environment sexual harassment claim under Title VII, since Title VII itself had provided none. Lynn Dennison, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 *OHIO ST. L.J.* 472, 474-75 (1993).

the fear of losing her job if she did not.<sup>18</sup> During her employment at Meritor, Vinson had intercourse with her supervisor some forty or fifty times.<sup>19</sup> In addition, Vinson testified that Taylor fondled her in front of other employees and on several occasions raped her. Vinson stated that she did not report the harassment to Taylor's supervisors because she was afraid of Taylor and the possibility of losing her job.<sup>20</sup>

The Supreme Court held that the focus of a sexual harassment claim should not be whether or not the complainant's sex-related conduct was "voluntary," rather it should be whether or not the sexual advances were "unwelcome."<sup>21</sup> The Court stated that for a sexual harassment claim to be actionable, "it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>22</sup> In order to support a hostile work environment sexual harassment claim, the Court found that certain elements must be established: (1) the employee was a member of a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a "term, condition, or privilege of employment"; and (5) the employer, under the doctrine of respondeat superior, knew or should have known of the harassment in question and failed to take prompt remedial action.<sup>23</sup> In *Meritor*, the Supreme Court determined Michelle Vinson's allegations of harassment were sufficient to constitute a claim of hostile work environment sexual harassment.<sup>24</sup>

While the Supreme Court acknowledged hostile work environment sexual harassment in *Meritor*, it did not provide a specific standard for whose perspective should be used to determine the severity or pervasiveness of the offensive conduct.<sup>25</sup> Therefore, courts have come to recognize two standards of review for hostile work environment sexual harassment claims: the reasonable person standard and the reasonable woman standard. With neither standard being deemed the "right" standard for sexual harassment

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<sup>18</sup> *Meritor*, 477 U.S. at 60.

<sup>19</sup> *Id.* at 60-61.

<sup>20</sup> *Id.* at 61. Vinson was eventually terminated by the bank in 1978. The bank claimed excessive use of sick leave as the reason for her firing. Adler, *supra* note 13, at 781.

<sup>21</sup> *Meritor*, 477 U.S. at 68.

<sup>22</sup> *Id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

<sup>23</sup> See Adler, *supra* note 13, at 784-85 (citing *Meritor*, 477 U.S. at 66-69 (1986)).

<sup>24</sup> *Meritor*, 477 U.S. at 67.

<sup>25</sup> Cigoy, *supra* note 9, at 1078.

claims, courts have divided over which standard to apply when evaluating the pervasiveness of the conduct.

### III. SEXUAL HARASSMENT AND THE REASONABLE PERSON STANDARD

The reasonable person standard, as applied to sexual harassment cases, asks whether a reasonable person, under like circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment, or creating an intimidating, hostile, or offensive working environment.<sup>26</sup> This gender-neutral standard was applied in *Rabidue v. Osceola Refining Co.*<sup>27</sup>

In *Rabidue*, Vivienne Rabidue claimed that she was subjected to sexual harassment by her co-worker, Douglas Henry.<sup>28</sup> Rabidue asserted that Henry was a vulgar individual who made offensive comments about women in general, and, on occasion, directed the vulgarities at Rabidue specifically.<sup>29</sup> In addition, Henry and other male employees displayed pictures of naked or scantily clad women in their offices, to which the plaintiff and other women were exposed.<sup>30</sup> This conduct was distressing to both Rabidue and other female employees at Osceola, Rabidue claimed. Management acknowledged it was aware of Henry's vulgar and crude behavior, but had been unable to do anything to stop his actions.<sup>31</sup>

In order for a victim to prevail, the court determined that she needed to prove that the alleged conduct would interfere with the work performance of a hypothetical reasonable individual.<sup>32</sup> The conduct also needed to affect the psychological well-being of a reasonable person under similar circumstances; it is not enough that the victim was personally offended by the actions. The victim was required to show that not only was she subject to harassing and psychologically damaging conduct, but that a hypothetical reasonable person would have perceived the conduct in the same way with the same effects.<sup>33</sup>

The court denied Rabidue's claim, stating that she had not sustained the burden of proof that she was a victim of Title VII

<sup>26</sup> See *Radtke v. Everett*, 501 N.W.2d 155, 167 (Mich. 1993); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

<sup>27</sup> 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

<sup>28</sup> *Id.* at 615.

<sup>29</sup> *Id.* Henry commonly referred to women as "cunt," "whores," "pussy" and "tits," and specifically called Rabidue a "fat ass." *Id.* at 624 (Keith, J., dissenting).

<sup>30</sup> *Id.* at 615.

<sup>31</sup> *Id.* The court described Henry's behavior as an "offensive personality trait." *Id.*

<sup>32</sup> *Id.* at 620.

<sup>33</sup> *Id.*

sexual harassment.<sup>34</sup> The court held that Henry's vulgarity did not substantially affect the workplace environment and the pictures were not that offensive "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."<sup>35</sup> In stating that Rabidue was not subjected to a hostile work environment, the court suggested that Rabidue, who had been characterized by her employers and co-workers as "abrasive, rude, antagonistic, extremely willful, [and] uncooperative,"<sup>36</sup> took on the risk of harassment based on her personality and the prevailing work environment.<sup>37</sup> Based on all the facts presented before it, the court found that a reasonable person would not have grounds for a sexual harassment claim under Title VII.

The reasonable person standard is meant to be a gender-neutral standard, a standard that represents the views of society as a whole. However, we live in a male-oriented society and the standard tends to lean towards the male point of view. In reality, the reasonable person standard is a reasonable man standard, which ignores the perspective of a woman in a crime most often perpetrated against women.<sup>38</sup>

#### IV. SEXUAL HARASSMENT AND THE REASONABLE WOMAN STANDARD

While the majority in *Rabidue* applied a reasonable person standard, Judge Keith's dissent in that case is often considered to be one of the major forces behind use of the reasonable woman

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<sup>34</sup> *Id.* at 622.

<sup>35</sup> *Id.* The majority's rationale and resulting "reasonable person" standard, with consideration of a multitude of additional factors, flows from the assumption that Title VII's purpose is not to eliminate sexual harassment entirely from the workplace, but rather to ensure that levels of sexual harassment in the workplace do not exceed levels in society generally. Dennison, *supra* note 17, at 482.

<sup>36</sup> *Rabidue*, 805 F.2d at 615.

<sup>37</sup> *Id.* at 620. Specifically, the court states, "[a]ccordingly, a proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." *Id.*

<sup>38</sup> By applying the reasonable person standard, "the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." *Id.* at 626 (Keith, J. dissenting).

standard.<sup>39</sup> Judge Keith disagreed that Rabidue had not sustained the burden of proof to state a claim of sexual harassment under Title VII. Judge Keith recognized that sexual discrimination occurred in the workplace and that Rabidue received little support from her supervisors, but was instead repeatedly undermined.<sup>40</sup> Rabidue was constantly given secondary status in a sexually discriminating workplace.<sup>41</sup>

Judge Keith criticized the majority for suggesting that Rabidue assumed the risk of harassment by accepting a job at Osceola.<sup>42</sup> While the judge agreed that Title VII was not meant to change the fact that in some work environments, sexual jokes, sexual conversations and girly magazines will exist, he argued that to condone this kind of behavior would mean that if an employer maintained an anti-Semitic workplace environment, a Jewish employee assumes the risk of harassment by taking the job, and a court could not find the behavior to be protected by Title VII.<sup>43</sup> Keith stated, "[n]o woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative . . . ."<sup>44</sup>

In his dissent, Judge Keith recognized the differences in perspectives between men and women on what is appropriate sexual conduct.<sup>45</sup> In order to take into account this divergence in views, Keith proposed that rather than use the reasonable person standard, the court should adopt the perspective of the reasonable victim.<sup>46</sup> In this case, the court should have evaluated the plaintiff's claims using the reasonable woman standard, or, in other words, "whether the conduct complained of is offensive to the reasonable woman."<sup>47</sup> Although Judge Keith's reasonable victim/reasonable woman standard was not adopted by the majority in *Rabidue*, it has come to be adopted by the majority in later decisions.

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<sup>39</sup> *Rabidue*, 805 F.2d at 623. Judge Keith actually borrowed the idea of the reasonable woman standard from a law review article. See Note, *Sexual Harassment Claims of Abusive Worker Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984). *Id.* at 626.

<sup>40</sup> *Id.* at 624.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 626.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Judge Keith also refused to believe that women "condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Id.* at 627.

<sup>45</sup> *Id.* at 626. Judge Keith would have had the courts adopt a perspective that would "allow courts to consider the salient sociological differences [between men and women] as well as shield employers from the neurotic complainant." *Id.* (citing *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra* note 39, at 1459).

<sup>46</sup> *Rabidue*, 805 F.2d at 626.

<sup>47</sup> *Id.* at 627. Judge Keith noted, "unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." *Id.* at 626.

In *Andrews v. City of Philadelphia*,<sup>48</sup> the court implemented the reasonable victim/reasonable woman standard. Two female police officers, Priscilla Kelsey Andrews and Debra Ann Conn, claimed that they were harassed by their supervisors and fellow employees because of their sex.<sup>49</sup> Both individuals worked in the Accident Investigation Division of the Philadelphia Police Department ("AID"), which was mostly male and had been determined to be "one of the sexist, racist units in the Police Department."<sup>50</sup> Obscenities referring to women were often used by male officers, and pornographic pictures of women were displayed in the locker room.

The male officers showed hostility to the female officers by refusing to assist the women in their work, although they helped each other.<sup>51</sup> Besides these general complaints about the work environment at AID, Andrews claims that her work was hindered by co-workers stealing her cases and other work product, and by the destruction of some of her case files.<sup>52</sup> Andrews also contended that her personal property was vandalized, that she received anonymous phone calls at her unlisted phone, and that her supervisor, Sergeant Doyle, acted toward her in a sexually suggestive manner.<sup>53</sup> Andrews also alleged that she was physically injured when someone put lime in her locker and on her clothing.<sup>54</sup>

Conn's claims of sexual harassment were relatively the same as Andrews'. She experienced vandalism, lost files, and received obscene phone calls at her unlisted number.<sup>55</sup> In addition, Conn was harassed by the other squad members placing pornographic magazines and sexual objects in her desk.<sup>56</sup> Conn stated that she complained to her superior, Sergeant Byrne, about the offensive conduct and language, but that nothing was done.

To evaluate the complaints, the court adopted five elements that must be fulfilled for a person to bring a successful hostile work environment sexual harassment claim.<sup>57</sup> These elements present

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<sup>48</sup> 895 F.2d 1469 (3d Cir. 1990).

<sup>49</sup> *Id.* at 1471.

<sup>50</sup> *Id.* at 1472.

<sup>51</sup> *Id.* at 1473.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1473-74.

<sup>54</sup> *Id.* at 1474. Andrews was severely burned by the lime substance. *Id.*

<sup>55</sup> *Id.* at 1474-75.

<sup>56</sup> *Id.* at 1475.

<sup>57</sup> *Id.* at 1482. The five elements are:

- (1) the employees suffered intentional discrimination because of their sex;
- (2) the discrimination was pervasive and regular;
- (3) the discrimination detrimentally affected the plaintiff;

both objective and subjective tests that must be established for a claim.<sup>58</sup> The elements acknowledge an individual's particular injuries, while not giving relief unless a reasonable person of the same sex would have viewed the conduct as offensive. The objective reasonable victim standard "protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment."<sup>59</sup> The court held that the common use of derogatory language relating to women can be viewed as evidence of a hostile work environment, and that what may be deemed as harmless and innocent by men can be regarded as offensive to a woman trying to interact with her fellow employees with professional dignity.<sup>60</sup> While the court in *Andrews* did not explicitly define what it meant by the standard, "the reasonable person of the same sex as the victim," it does appear from the court's reasoning that the court intended for it to be interpreted in the same fashion as the reasonable woman standard.<sup>61</sup>

In *Ellison v. Brady*,<sup>62</sup> the court focused on the perspective of the victim as it applied the reasonable woman standard.<sup>63</sup> Here, Kerry Ellison, a revenue agent for the Internal Revenue Service (IRS) in its San Mateo office, was being harassed by her co-worker, Sterling Gray.<sup>64</sup> Gray asked Ellison to lunch, and on the first occasion, she accepted.<sup>65</sup> However, after that lunch Gray began to annoy Ellison and hang around her desk.<sup>66</sup> He then repeatedly asked her out on dates, either for lunch or for a drink after work. After the initial lunch, Ellison refused each one of Gray's invitations, and tried to stay away from the office during lunch time to avoid encounters.<sup>67</sup> Eventually, Gray began to send Ellison notes stating his

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(4) the discrimination would detrimentally affect a reasonable person of the same sex in that position;

(5) the existence of respondeat superior liability. *Id.*

<sup>58</sup> *Id.* at 1483. Of the five elements noted *supra* note 57, the subjective standard is represented by (3) the discrimination detrimentally affected the plaintiff. The objective standard is represented by (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1485-86.

<sup>61</sup> Cigoy, *supra* note 9, at 1087.

<sup>62</sup> 924 F.2d 872 (9th Cir. 1991).

<sup>63</sup> *Id.* at 878.

<sup>64</sup> *Id.* at 873-75.

<sup>65</sup> *Id.* at 873.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

feelings for her.<sup>68</sup> These letters, coupled with Gray's prior actions, frightened Ellison. Ellison notified Bonnie Miller, who supervised both Ellison and Gray, of the notes and of the fact that she was frightened and upset.<sup>69</sup> As a result, Gray was temporarily transferred to another job site for six months.<sup>70</sup> When Ellison learned that Gray was to return to San Mateo, Ellison requested a transfer upon his return.<sup>71</sup> At that point, Ellison filed a formal complaint alleging sexual harassment with the IRS.<sup>72</sup> The Treasury Department rejected Ellison's complaint, because according to the department it did not present a pattern of sexual harassment covered by the EEOC regulation.<sup>73</sup> Consequently, Ellison filed a complaint in federal district court, which ruled that she had not established a prima facie case of hostile work environment sexual harassment.<sup>74</sup>

On appeal, the Ninth Circuit found that Gray's conduct created an abusive work environment and was severe and pervasive enough to alter the conditions of Ellison's employment.<sup>75</sup> The court found that not only was Gray's conduct toward Ellison not "isolated and genuinely trivial,"<sup>76</sup> but that it created a hostile work environment. By applying its theory that a claim for sexual harassment should be analyzed from the victim's perspective, the court held "that a female plaintiff states a prima facie case of hostile work environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."<sup>77</sup> The court expressed its understanding that men and women do not necessarily have the same perceptions and "that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of wo-

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<sup>68</sup> *Id.* at 874. One of these notes said, "I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 875.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 878.

<sup>76</sup> *Id.* at 876.

<sup>77</sup> *Id.* at 879 (citing *Andrews*, 895 F.2d at 1482 (sexual harassment must detrimentally affect a reasonable person of the same sex as the victim)); *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) (adopting "reasonable woman" standard set out in *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting)); *Comment, Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984); *but cf. State v. Wanrow*, 88 Wash. 2d 221, 289-41, 559 P.2d 548, 553-59 (1977) (en banc) (adopting reasonable woman standard for self-defense).

men."<sup>78</sup> Men often believe that women are overreacting when women find male conduct offensive.<sup>79</sup> Women have a greater concern about sexual behavior in the workplace. Women have been raised in a society where they are very vulnerable to rape and sex-related violence.<sup>80</sup> Therefore, the court in *Ellison* adopted the reasonable woman standard to ensure that both men and women can have the chance to work without having to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."<sup>81</sup>

The court further explained its use of the reasonable woman perspective by stating that a reasonable person standard tends to be male-biased "and tends to ignore the experiences of women."<sup>82</sup> A gender-conscious standard does not afford women greater protection; rather it puts women on an equal footing with men in the workplace by recognizing the effects of sexual harassment on women.<sup>83</sup> The reasonable woman standard recognizes that sexual harassment will be experienced differently by women than by men.

## V. WHERE ARE WE GOING?

Since the federal courts have not yet come to an agreement on which standard to apply in evaluating sexual harassment claims, it is not surprising that there is no unity among the state courts either.

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<sup>78</sup> *Ellison*, 924 F.2d at 879. "[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. [footnote omitted] Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault." *Id.*

<sup>79</sup> The court noted that if the facts of this case were looked at from the harasser's perspective, Gray could be portrayed "as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words." However, when measured from the reasonable woman's perspective, the behavior was unacceptable. *Id.* at 880.

<sup>80</sup> Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989). Abrams explains, "While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." *Id.*

<sup>81</sup> *Ellison*, 924 F.2d at 880 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

<sup>82</sup> *Id.* at 879.

<sup>83</sup> *Id.*

In Michigan, the state supreme court chose the reasonable person standard to make its decision in *Radtke v. Everett*.<sup>84</sup> Tamara Radtke was employed as an unregistered veterinary technician at Clarke-Everett Dog and Cat Hospital, which is jointly owned by Dr. James Clarke and the claimed harasser, Dr. Stuart Everett. Radtke alleged that there was only one incident of harassment, and that prior to that incident she had a good working relationship with Everett.<sup>85</sup> On one occasion Radtke and Everett were working alone, providing emergency veterinary services.<sup>86</sup> After a long day, the two decided to relax in the hospital's lounge. Radtke claimed she sat down on the couch, and when Everett came to sit down next to her, she attempted to leave the couch.<sup>87</sup> However, at that moment, Everett physically restrained her. Once she was able to free herself, Radtke expressed her displeasure with the situation. Despite her protests, Radtke claimed that Everett caressed her and tried to kiss her.<sup>88</sup> After the alleged advances, the two went back to work and finished the day without episode. The next day, Radtke tendered her resignation. She claimed that the incident created a hostile working environment and that she had suffered severe emotional pain as a result.<sup>89</sup> Radtke brought her case under the Michigan Civil Rights Act.<sup>90</sup>

The Michigan Supreme Court rejected the application of the reasonable woman standard, and instead applied an objective reasonableness standard.<sup>91</sup> The court found that the legislature clearly intended for standards of conduct to be defined by the objective reasonable person, not the subjective perceptions of the plaintiff.<sup>92</sup> It deemed the standard more appropriate because it

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<sup>84</sup> 501 N.W.2d 155 (Mich. 1993).

<sup>85</sup> *Id.* at 159.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 159.

<sup>90</sup> *Id.* at 160. The Civil Rights Act states that "an employer shall not . . . discriminate against an individual with respect to employment, compensation, or discriminate against an individual with respect to employment, because of . . . sex." MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 1994). "Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: (i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . (ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment . . . (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive . . . environment." MICH. COMP. LAWS ANN. § 37.2103 (West 1994).

<sup>91</sup> *Radtke*, 501 N.W.2d at 164.

<sup>92</sup> *Id.* at 165.

looks at community standards, rather than at an individual one.<sup>93</sup> The court believed that the reasonable person standard was flexible enough to allow gender to be considered without removing general community standards from the evaluation.<sup>94</sup> The court emphasized the need for uniformity in conduct, and found that a gender-specific standard would defeat this goal.

The *Radtke* court went further to state that a gender-conscious standard does not help women, but instead promotes the subordination of women.<sup>95</sup> It said that the reasonable woman standard assists in maintaining the stereotypes of women as more sensitive and fragile, thus needing special protection. The court argued that the reasonable woman standard degrades women and hinders a woman's chance for equality because it holds women out as "different" from men.<sup>96</sup> The Michigan Supreme Court adopted the reasonable person standard saying it believed that the reasonable woman standard is counterproductive.<sup>97</sup>

While the Michigan court rejected the reasonable woman standard, the New Jersey Supreme Court wholeheartedly accepted the standard in *Lehmann v. Toys 'R' Us*.<sup>98</sup> Theresa Lehmann alleged that she was sexually harassed by her supervisor, Don Baylous, while she was employed at Toys 'R' Us.<sup>99</sup> At first Lehmann observed Baylous' direct offensive sexual comments and touching of other female employees.<sup>100</sup> Later, Baylous began to direct his conduct towards Lehmann herself. Baylous, on several occasions, made sexually suggestive and offensive comments towards Lehmann.<sup>101</sup> On one occasion, Lehmann claimed that Baylous had lifted up her shirt, causing her to run out of his office crying. Lehmann complained about Baylous' conduct to Baylous' boss, Bill Frankfort.<sup>102</sup> She later spoke to Eric Jonas, Toys 'R' Us' manager of employee relations, about the improper conduct.<sup>103</sup> Lehmann was later informed by Frankfort that Baylous had been spoken to about his conduct.

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<sup>93</sup> *Id.* at 166.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 167.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 626 A.2d 445 (N.J. 1993).

<sup>99</sup> *Id.* at 448.

<sup>100</sup> *Id.* at 449.

<sup>101</sup> *Id.* Lehmann testified that Baylous had, at various times, directed her to "stick your tits out at" a new boss, and to "write a memo to cover your ass . . . because you have such a cute little ass." *Id.*

<sup>102</sup> *Id.* at 450.

<sup>103</sup> *Id.*

Nevertheless, Baylous' offensive conduct did not cease. He continued to make inappropriate comments. In addition, Baylous did not stop touching female employees. Lehmann reported these actions to Jonas, who told her that she was paranoid.<sup>104</sup> After speaking with Howard Moore, the executive vice-president in charge of purchasing, and Laurie Lambert in personnel, the only relief she was offered was the possibility of a transfer within the company, which she refused.<sup>105</sup> The day after meeting with Lambert, Lehmann gave two weeks notice of her resignation.<sup>106</sup>

To establish a cause of action for hostile work environment sexual harassment, four elements must be satisfied.<sup>107</sup> To state a claim, one must prove that the complained of conduct:

- (1) would not have occurred but for the employee's gender; and it was
- (2) severe or pervasive enough to make a
- (3) reasonable woman believe that
- (4) the conditions of employment are altered and the working environment is hostile or abusive.<sup>108</sup>

The court, in applying this test, adopted the reasonable woman test to evaluate whether or not a plaintiff has a valid claim for sexual harassment. The court points out that the standard that it has presented covers both men and women, the only difference being that a male plaintiff would have to allege conduct that a reasonable man would believe as sufficient to alter the conditions of his employment and create a hostile working environment for men.<sup>109</sup> The court stated that under this standard, a single incident of harassment is grounds for a Title VII claim.<sup>110</sup> Emphasis is placed on the fact that it is not the victim's injury that must be severe and pervasive, but it is the harasser's conduct that must fulfill this requirement; victims do not have to be severely psychologically af-

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* Lehmann refused the transfer, protesting, "why should I have to transfer when I worked so hard for this job that I love after six years of being in this company?" *Id.*

<sup>106</sup> *Id.* Lehmann did not complete her final two-week period, due to an upsetting encounter with Baylous. *Id.* at 451.

<sup>107</sup> Lehmann, at 453. The court created this four-prong test because it felt that the EEOC Guidelines were insufficient to define a cause of action. In addition, the test set forth in *Andrews*, *supra* note 36, contained too many analytical difficulties to be used here. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 454.

<sup>110</sup> *Id.* at 455. The court states, "[n]o purpose is served by allowing that harm to go unremedied merely because it was brought about by a single, severe incident of harassment rather than by multiple incidents of harassment." *Id.*

fectured before they may bring a sexual harassment claim.<sup>111</sup> All a female victim must show is that a reasonable woman would consider the work environment hostile.

The New Jersey Supreme Court justified its use of a gender-specific standard by arguing that it is not a subjective standard, but an objective one. By not focusing on the individual's reactions but instead looking at the reasonable person of that sex, it is allowing for flexibility while still acknowledging that the sexes do not always perceive conduct in the same light.<sup>112</sup> The court found, unlike the court in *Radtke*, that a gender-neutral standard fails to recognize the differences between male and female perspectives on sexual harassment.<sup>113</sup> The reasonable person standard, "glosses over that difference, which is important here, and it also has a tendency to be male-biased, due to the tendency of courts and our society in general to view the male perspective as the objective or normative one."<sup>114</sup> In *Lehmann v. Toys 'R' Us*, Theresa Lehmann fulfilled her burden of proof, and under a reasonable woman standard stated a valid claim for hostile work environment sexual harassment under Title VII.

For years, *Meritor Savings Bank v. Vinson* was the only case to be heard by the United States Supreme Court on the issue of sexual harassment in the workplace. However, in 1993, the Court agreed to hear its second case on the issue of sexual harassment. In *Harris v. Forklift Systems Inc.*,<sup>115</sup> the Supreme Court determined to resolve the question of whether conduct must seriously affect an employee's psychological well-being in order to be actionable for hostile work environment sexual harassment. Teresa Harris was a manager at Forklift Systems, Inc. She alleged that the president of Forklift, Charles Hardy, had created a hostile work environment.<sup>116</sup> Hardy often insulted Harris because of her gender and made frequent sexual comments towards her. Some of these sexual comments were made in front of others.<sup>117</sup> In addition, Hardy sometimes asked Harris and other female employees, "to get coins

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<sup>111</sup> *Id.* at 456. The court was agreeing with the Ninth Circuit's comment in *Ellison*, that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety or debilitation" before they can bring a claim. *Ellison*, 924 F.2d at 878.

<sup>112</sup> *Lehmann*, 626 A.2d at 459.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> \_\_\_ U.S. \_\_\_, 114 S. Ct. 367 (1993).

<sup>116</sup> *Id.* at 369.

<sup>117</sup> *Id.* In front of other employees, Hardy occasionally told Harris, "[y]ou're a woman, what do you know." *Id.*

from his front pants pocket."<sup>118</sup> He also threw objects on the ground in front of Harris and other women and asked them to pick them up.<sup>119</sup> Harris complained to Hardy about his conduct. He then apologized and promised he would stop. However, Hardy later renewed his offensive behavior, at which time Harris quit.

The lower federal courts held that Harris had not presented an actionable claim for sexual harassment. Although some of Hardy's comments may have "offended [Harris], and would offend the reasonable woman," it was not severe enough to affect Harris' psychological well-being.<sup>120</sup> The Supreme Court held that the district court erred in relying on the factor of psychological well-being to determine if Harris had suffered injury. Title VII does not require concrete psychological harm to be the focus of the evaluation of a hostile work environment claim.<sup>121</sup> While Title VII may bar conduct that affects a person's psychological well-being, it does not limit itself to this. To determine if an environment is hostile or abusive, one needs to look at all the circumstances, for no single factor is necessary to have a valid claim. If a victim has not experienced psychological harm, it no longer means that she has not been subject to a hostile work environment.

Perhaps the most uncertain part of the Supreme Court's decision lies in its application of a standard to evaluate the sexual harassment claim. The Court states, "[c]onduct pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview."<sup>122</sup> The Supreme Court applies the reasonable person language, yet it offers no further explanation of its use as a standard. In the oral arguments before the Supreme Court, Harris' attorney declined the invitation to use a reasonable woman standard in evaluating the issue.<sup>123</sup> Amici curiae briefs, offered to propose the use of the reasonable woman standard or no reasonableness element at all, were apparently ignored by the Court.<sup>124</sup> The Court appeared to be making a statement without backing it up, perhaps for a reason. While some courts may see the use of the reasonable person language as evi-

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 369-70.

<sup>121</sup> *Id.* at 371.

<sup>122</sup> *Id.* at 370.

<sup>123</sup> *Employment Discrimination: Sexual Harassment On the Job; Hostile Work Environment*, U.S.L.W., Oct. 26, 1993, at § 3.

<sup>124</sup> *Sexual Harassment Ruling Wins Praise But May Not Give Guidance on Some Issues*, DLR, Nov. 19, 1993.

dence of the Supreme Court adopting it as law, others will view the lack of analysis as leaving the door open to further interpretation.<sup>125</sup>

On July 13, 1993, the EEOC issued new proposed guidelines dealing with harassment.<sup>126</sup> These proposed guidelines would adopt a reasonable person standard for determining whether conduct was sufficiently severe or pervasive to create a hostile or abusive working environment.<sup>127</sup> However, this reasonable person standard is meant to consider the perspective of the alleged victim, including her gender.<sup>128</sup> In proposing a reasonable person standard, which includes consideration of the victim's sex, the EEOC has chosen an approach that allows for interpretation. Emphasis on the consideration of the victim's characteristics suggests that the EEOC reasonable person standard is actually a reasonable victim standard. However, until the proposed guidelines are applied and addressed, there is only speculation as to how they will be interpreted by the courts.<sup>129</sup>

#### VI. IN DEFENSE OF THE REASONABLE WOMAN STANDARD

In *Radtke v. Everett*, the court stated "the 'reasonable woman' standard may reinforce the notion that women are 'different' from men and therefore need special treatment . . ." <sup>130</sup> In some respect, that is exactly what the reasonable woman standard is trying to suggest. The standard is meant to express that men and women have differing opinions on what constitutes sexual harassment. Research has shown that men and women have different perceptions regarding sexual conduct at work. Men are more likely to find sexual comments or conduct directed at them to be flattering and harmless.<sup>131</sup> On the other hand, women are more likely to find the same sexual comments or conduct to be intimidating and offen-

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<sup>125</sup> *Id.*

<sup>126</sup> *Proposed Guidelines*, *supra* note 5.

<sup>127</sup> *Id.* The *Proposed Guidelines* provide: (c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age or disability. It is not necessary to make an additional showing of psychological harm. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> In *Harris v. Forklift*, the Court chose not to address the EEOC's new regulations. *See Harris*, 114 S.Ct. 367 (1993).

<sup>130</sup> *Radtke*, 501 N.W.2d at 167 (1993).

<sup>131</sup> *Abrams*, *supra* note 80, at 1206, (citing BARBARA GUTER, *SEX AND THE WORKPLACE* 47-54 (1985)).

sive.<sup>132</sup> Men are also less likely than women to perceive certain behavior, such as receiving love letters, as harassment.

This conflict in perception is heightened by continued application of the reasonable person standard in hostile work environment sexual harassment cases. By applying this standard, courts are applying a male-biased standard.<sup>133</sup> Most judges and employers are male and typically apply their own perspective, ignoring how a woman might feel differently. Compounded with the fact that society is a male-oriented society, with male-oriented perceptions, there is little chance for a woman to achieve true gender-neutrality with the application of the reasonable person standard. The reasonable person standard ignores the experience of women.<sup>134</sup> The reasonable woman/reasonable victim standard accounts for the difference in male and female perceptions. It does not establish a higher level of protection for women than men, it just allows women to participate in the workforce on equal footing with men.<sup>135</sup>

In order to achieve this equality in the workforce, there needs to be a push for acceptance of the reasonable woman/ reasonable victim standard. One possible way for this to occur is through a broad interpretation of the new proposed EEOC guidelines on sexual harassment.<sup>136</sup> If the EEOC's reasonable person standard is perceived as requiring consideration of the victim's gender when applied to sexual harassment claims it is, in effect, the same as the reasonable victim standard. When the determination of whether verbal or physical conduct is severe or pervasive enough to create a hostile working environment includes the perspective of the alleged victim's gender, it gives a woman the possibility of knowing her reasonable reaction to the conduct will not be ignored because a male perspective was applied. The new EEOC guidelines would not be read as gender-neutral; instead they would consider the victim's gender and to that extent be gender-specific.

## VII. CONCLUSION

Sexual harassment has become a serious problem in today's workforce. Although Title VII has been in effect since 1964, there has been a large increase in sexual harassment claims in recent

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1203.

<sup>134</sup> *Ellison*, 924 F.2d at 879.

<sup>135</sup> *Id.*

<sup>136</sup> *Proposed Guidelines*, *supra* note 5.

years.<sup>137</sup> But despite the increase in numbers of cases, there is still no agreement among the courts as to which standard of review should be used in hostile work environment claims. Many courts still rely on the reasonable person standard, a standard which treats all people the same, by applying a male-oriented standard which hurts women and ignores the obvious differences in perception between men and women regarding conduct.

On the other hand, several courts have come to recognize the obvious differences and acknowledge them in evaluating sexual harassment claims. The reasonable woman/reasonable victim standard, in contrast to what its opponents believe, does not promote the subordination of women. In fact, the gender-specific standard promotes equality for the sexes by recognizing their differences in perception and not devaluing the fact that the two sexes do not always think alike.

Until this conflict is clearly resolved, it is unlikely that either standard is going to be universally adopted. Unless the Supreme Court addresses the issue, the battle of the standards will wage on. In hostile work environment sexual harassment cases, the only reasonable standard is one that takes into account the victim's perspective.

*Deborah B. Goldberg*

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<sup>137</sup> Since the Anita Hill/Clarence Thomas hearings, the EEOC estimates that it received fifty percent more claims in 1992 than it did during the same period in 1991. See Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law — Will It Really Make a Difference?*, 26 IND. L. REV. 227, 260 (1998) (citing Marilyn Adams, *Sex Harassment Charges Up Sharply*, BOSTON GLOBE, July 13, 1992, at 3).

