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Robert S. Adler

Ellen R. Peirce

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# THE LEGAL, ETHICAL, AND SOCIAL IMPLICATIONS OF THE "REASONABLE WOMAN" STANDARD IN SEXUAL HARASSMENT CASES

ROBERT S. ADLER\*  
ELLEN R. PEIRCE\*\*

*In this Article, Professors Adler and Peirce examine the development and implications of the "reasonable woman" standard that is gaining increasing acceptance as the appropriate gauge for measuring the offensiveness of the conduct at issue in sexual harassment cases. The authors begin by reviewing the origins of sexual harassment law under Title VII of the Civil Rights Act of 1964, paying particular attention to the history of "hostile environment" causes of action. Professors Adler and Peirce then discuss how and why the reasonable woman standard evolved as an alternative to the conventional "reasonable man" and "reasonable person" standards that had been the usual measures of culpable conduct in sexual harassment cases, and how courts have applied the reasonable woman standard in cases involving a wide range of allegedly harassing behaviors. The authors conclude by discussing a variety of important concerns raised by the implementation of the reasonable woman standard, including the fundamental question of whether it is fair to hold men to a standard of conduct that, because they are men, they may be unable to understand or appreciate fully.*

## INTRODUCTION

MUCH controversy and confusion surround the appropriate standard of review for evaluating "hostile environment"<sup>1</sup> sexual harassment cases.<sup>2</sup> In a 1986 decision, the Supreme Court directed lower

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\* Associate Professor of Legal Studies, Kenan-Flagler School of Business, University of North Carolina; A.B., University of Pennsylvania; J.D., University of Michigan.

\*\* Associate Professor of Legal Studies, Kenan-Flagler School of Business, University of North Carolina; B.A., Bryn Mawr; J.D., Duke University.

1. The term "hostile environment" in sexual harassment cases refers to employment contexts in which unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive work environment. For a discussion of the term's history and development, see *infra* notes 30-152 and accompanying text.

2. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (holding that "a female plaintiff states a prima facie case of hostile 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") (emphasis added); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (asserting that "the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment . . . must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances"), *cert. denied*, 481 U.S. 1041 (1987); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (stating that both a subjective and an objective standard need to be applied in evaluating allegedly harassing conduct).

Within the First Circuit, confusion abounds regarding the appropriate perspective to apply in evaluating harassing conduct. One court has applied a "two perspective standard." See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (stat-

courts to assess, in examining allegedly harassing conduct, whether the conduct was both unwelcome and so severe or pervasive that it altered the plaintiff's working environment.<sup>3</sup> This directive, however, leaves open the question of whose perspective—that of the particular victim, a reasonable person undifferentiated by sex, or a reasonable woman<sup>4</sup>—the fact finder should use to assess the seriousness of the offense. Herein lies the dilemma: When sexual harassment is at issue, “[s]ome see it . . . some won’t.”<sup>5</sup>

Recently, the Equal Employment Opportunity Commission (EEOC) addressed this problem in a publication titled *Policy Guidance on Current Issues of Sexual Harassment*.<sup>6</sup> In that document, the EEOC recommended that “[i]n determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a ‘reasonable person.’”<sup>7</sup> The EEOC further stated that Title VII should not serve as a “vehicle for vindicating the petty slights suffered by the hypersensitive.”<sup>8</sup> That is, unless the challenged conduct substantially affects the work environment of a reasonable person, no Title VII violation will be found.<sup>9</sup> The EEOC did, however, temper this position by pointing out that such an objective standard should take into consideration “the victim’s perspective and not stereotyped notions of acceptable behavior.”<sup>10</sup>

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ing that the trier of fact should consider both the man’s and the woman’s perspectives). Another has adopted a “reasonable person” standard. See *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990). And yet a third has addressed harassing behavior from the standpoint of the particular plaintiff. See *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); see also Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177 (1990) (criticizing both the “reasonable person” and “reasonable woman” standards); Georgia A. Staton & Angela K. Sinner, *Sexual Harassment: the ‘Reasonable Woman’ Standard*, 33 *For The Defense* 6 (Dec. 1991) (analyzing implications of adopting the reasonable woman standard); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 *Harv. L. Rev.* 1449, 1459 (1984) (advocating adoption of a “reasonable woman” standard).

3. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986).

4. Or, alternatively, from the perspective of a reasonable man in those cases in which the plaintiff is male.

5. Eliza G. C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won’t*, *Harv. Bus. Rev.*, Mar.-Apr. 1981, at 76, 92 (finding little recognition of sexual harassment by upper level management). As discussed in a recent article, conduct that women perceive as sexual harassment will not necessarily be perceived as such by men. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 *Am. Psychol.*, 497, 499 (1991); see also *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 n.19 (1st Cir. 1991) (discussing and citing report concerning the different perceptions of men and women toward sexual harassment).

6. Equal Employment Opportunity Comm’n, *Policy Guidance on Current Issues of Sexual Harassment*, N-915-050 (BNA) 89 (March 19, 1990) [hereinafter *Policy Guidance on Current Issues*].

7. *Id.*

8. *Id.* (quoting *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984)).

9. See *id.*

10. *Id.* at 103.

Although the "reasonable person"<sup>11</sup> standard has long been accepted by most courts as the correct measure for evaluating allegedly culpable conduct, most notably in negligence cases,<sup>12</sup> a number of commentators<sup>13</sup> and courts<sup>14</sup> have recently challenged its applicability in cases of sexual harassment. At the heart of this debate, as we shall discuss, is a body of research<sup>15</sup> suggesting that men and women differ in their judgments of what particular behaviors and comments constitute sexual harassment. This issue was summed up succinctly in a recent case:

A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a "great figure" or "nice legs." The female subordinate, however, may find such comments offensive. Such a situation presents a dilemma for both the man and the woman: the man may not realize that his comments are offensive, and the woman may be fearful of criticizing her supervisor.<sup>16</sup>

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11. We presume that the reasonable man standard has been almost universally set aside in favor of the "reasonable person" standard, thereby incorporating, in theory at least, the feminine as well as masculine standard. See *infra* note 212 and accompanying text. One of the earliest reported uses of the reasonable man standard occurred in a 19th century British case, *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837). In that case, the court stated that "[i]nstead . . . of saying that the liability for negligence should be co-extensive with the judgment of each individual . . . we ought rather to adhere to the rule which requires in all cases a regard to caution such as a *man of ordinary prudence* would observe." *Id.* at 493 (emphasis added). The reasonableness test, as it has developed, is intended to reflect changing social mores as well as to present an objective standard that imposes the same behavior on everyone, thereby limiting arbitrary or politically based decision-making by judges. See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts 173-75* (5th ed. 1984); Ronald K. L. Collins, *Language, History and The Legal Process: A Profile of the 'Reasonable Man,'* 8 Rut.-Cam. L.J. 311 (1977).

12. See Keeton et al., *supra* note 11, at 175.

13. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1206 (1989) ("If judges continue to strive for the ostensibly objective perspective in assessing sexual harassment claims, then they will succeed primarily in entrenching the male-centered views of harassment that prevail in many workplaces."); Ehrenreich, *supra* note 2, at 1177 ("My primary purpose is to offer an explanation for how the reasonable person test retains its legitimacy in the face of numerous analytical weaknesses.").

14. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (adopting the reasonable woman rather than the reasonable person standard, explaining that "[i]f we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination"); *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. App. 1991) ("[W]e believe that in a sexual harassment case involving a woman, the proper perspective to view the offensive conduct from is that of the 'reasonable woman,' not that of the 'reasonable person.'"), *appeal granted*, 487 N.W.2d 762 (Mich. 1992).

15. See Alison M. Konrad & Barbara A. Gutek, *Impact of Work Experiences on Attitudes Toward Sexual Harassment*, 31 Admin. Sci. Q. 422 (1986); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 Sex Roles 9 (1986). But see The Roper Org. Inc., *Most Americans Say Sexual Harassment At Work Not A Problem*, Roper Reports No. 92-1 (1992) [hereinafter Roper Poll] (reporting on poll results indicating that, notwithstanding the publicity and public debate attending the Clarence Thomas hearings, sexual harassment in the workplace is not common, and that the vast majority of Americans are satisfied with the way their employers are treating the problem).

16. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).

One study that examined whether women perceive sexual overtures in a different light than men found that men see such comments from women as flattering while women find similar comments from men as insulting.<sup>17</sup> Another study indicates that men view milder forms of behavior such as "suggestive looks, repeated requests for dates and sexist jokes, as harmless social interactions to which only overly-sensitive women would object."<sup>18</sup> Women, however, are more likely to see this behavior as overt harassment.<sup>19</sup>

As suggested above, courts differ on which standard should be used to judge allegedly harassing conduct. While a number of courts adhere to the traditional "reasonable person"<sup>20</sup> standard, others modify the reasonable person standard through a two-step "subjective/objective" approach that explicitly considers the perspective both of the victim and of a reasonable person.<sup>21</sup> Along similar lines, one court has indicated that the fact finder should apply both male and female perspectives in evaluating the conduct at issue.<sup>22</sup> In addition, and most important for our present discussion, a growing number of courts have concluded that the differing social experiences of men and women warrant a new standard in sexual

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17. See Barbara A. Gutek, *Sex and the Workplace* (1985).

18. Ehrenreich, *supra* note 2, at 1207 n.10; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J.L. & Feminism 41, 60 n.64 (1989).

19. See Ehrenreich, *supra* note 2, at 1207-08.

20. See, e.g., *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 580 (10th Cir. 1990) ("reasonable person in plaintiff's position would not have felt compelled to resign"); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (adopting the "reasonable person" approach); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (trier of fact, when judging the totality of the circumstances with respect to the asserted abusive and hostile environment must adopt the perspective of a reasonable person's reaction to a similar environment under like circumstances); *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979, 984 (S.D.N.Y. 1989) (if evidence leads a reasonable person in a similar situation to find the environment offensive, then liability should attach under Title VII); *Hollis v. Fleetguard, Inc.*, 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987) (if reasonable person would not have been affected by the alleged harassing behavior, the claim fails).

21. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990) (maintaining that the subjective factor is crucial because it shows that the alleged conduct injured the particular plaintiff and the objective standard protects the employer from the "hypersensitive" employee); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (concluding that the question of whether the harassment affected the victim should be judged from the perspective of both the victim and that of a reasonable woman). Several Seventh Circuit cases have held that the trial court should apply both an objective and subjective analysis to evaluate the likely effect of the defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff bringing the claim. See *King v. Board of Regents*, 898 F.2d 533 (7th Cir. 1990); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456 (7th Cir. 1990); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989). For the most part, there is no practical difference between this subjective/objective approach and the "reasonable woman" approach. In both cases, the victim must establish both that she individually was offended and that a reasonable woman would also be offended.

22. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).

harassment cases—that of the “reasonable woman.”<sup>23</sup> In 1991, the Ninth Circuit expressly adopted this standard in *Ellison v. Brady*,<sup>24</sup> a case that received widespread publicity.<sup>25</sup> In that case, the Ninth Circuit justified its rejection of the “reasonable person” standard in favor of the “reasonable woman” approach by explaining that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”<sup>26</sup>

The adoption of a “sex-specific” standard raises a host of questions, not the least of which is the issue of whether it is fair to hold males to a standard that, because they are males, they may be unable to appreciate or understand fully. In this Article, we examine the development of the “reasonable woman” standard and consider the legal, ethical and social issues raised by the implementation of such a standard. Section I reviews the general history of sexual harassment causes of action and the leading cases in this area.<sup>27</sup> Section II identifies the different standards of review applied in harassment cases, culminating in a discussion of the reasonable woman standard.<sup>28</sup> Finally, Section III explores the legal, ethical, and social questions that warrant consideration prior to the widespread adoption of the reasonable woman standard as the appropriate gauge for measuring culpable conduct in sexual harassment cases.<sup>29</sup>

## I. ORIGINS OF SEXUAL HARASSMENT LAW

### A. *Pre-EEOC Guidelines*

Although Title VII of the Civil Rights Act of 1964<sup>30</sup> clearly prohibits

23. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (holding that a female plaintiff states a prima facie case of hostile environment when she alleges conduct that a reasonable woman would consider severe and pervasive); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (standard should be that of the reasonable person of the same sex); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (holding that, in a sexual harassment case, “it seems only reasonable” that the person standing in the shoes of the employee should be the reasonable woman); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting in part and concurring in part) (advocating a reasonable victim/woman standard); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (noting significance of the fact that certain conduct affects women more than men).

24. 924 F.2d 872 (9th Cir. 1991).

25. News reports commenting on *Ellison* included the following: Michelle Galen, *Ending Sexual Harassment: Business Is Getting the Message*, Bus. Wk., Mar. 18, 1991, at 98-100; Ruth Marcus, *When Is Flirting At Work Sexual Harassment?*, Wash. Post, Feb. 28, 1991, at A32; and Georgia Sargeant, *Sexual Harassment Cases Still Murky*, 27 Trial 14 (1991).

26. *Ellison*, 924 F.2d at 879.

27. See *infra* notes 30-152 and accompanying text.

28. See *infra* notes 153-180 and accompanying text.

29. See *infra* notes 181-292 and accompanying text.

30. Title VII of The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1988 & Supp. II 1990) [hereinafter Title VII] reads in relevant part:

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,

sex discrimination, there is virtually no legislative history to guide courts in interpreting the extent to which the Act protects women against sexual harassment in the workplace. Sexual harassment<sup>31</sup> was not even identified as a cause of action under the Act by the courts until 1976, more than a decade after the passage of Title VII. In that 1976 case, *Williams v. Saxbe*,<sup>32</sup> the court held that sexual advances directed at the plaintiff by her supervisor were made because of her sex, thereby bringing the matter within the purview of Title VII.

Despite this decision, a number of federal district courts continued to be reluctant to recognize claims for sexual harassment, at least until the publication of the EEOC guidelines on sexual harassment in 1983.<sup>33</sup> In explaining this reluctance, some district courts reasoned that the harassment was personal in nature and thus not solely based on gender.<sup>34</sup> Others held that sexual harassment claims sounded only in tort law.<sup>35</sup>

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terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1988). The inclusion of sex as a protected category under Title VII came as a last minute addition to the Act and was inserted by opponents of the bill in an attempt to defeat it. See 110 Cong. Rec. 2577-84, 2718-21 (1964); Charles Whalen & Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act 233-34* (1985) (characterizing women as "accidental beneficiar[ies]" of the Civil Rights Act); see also Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 Yale J.L. & Feminism 299 n.1 (1991).

31. One scholar, Catherine MacKinnon, defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." Catherine A. MacKinnon, *Sexual Harassment of Working Women* 1 (1979).

32. 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

33. Equal Employment Opportunity Comm'n, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11 (1992) [hereinafter EEOC Guidelines]. The EEOC Guidelines, discussed *infra* notes 38-40 and accompanying text, are interpretive regulations. Although they do not have the force of law, they have been relied on by a number of courts in sexual harassment cases. See *Downes v. Federal Aviation Admin.*, 775 F.2d 288 (Fed. Cir. 1985); *Henson v. City of Dundee* 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). In the first opportunity that the Supreme Court took to discuss the legal effect of the EEOC Guidelines, the Court stated that 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 Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), quoting in turn, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

34. See, e.g., *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). This was one of the first reported cases dealing with sexual harassment. The plaintiffs alleged that their supervisor repeatedly made sexual overtures to them, creating a work situation that became so intolerable they resigned. They sued for relief under Title VII, alleging sex discrimination through sexual harassment. The court found that Title VII was not applicable, commenting that the supervisor's conduct appeared to be "nothing more than a personal proclivity, peculiarity, or mannerism." *Id.* at 163; see also *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (concluding that the alleged harassment was simply an outcome of the inharmonious relationship between the parties), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

35. See *Seritis v. Lane*, 30 Fair Empl. Prac. Cas. (BNA) 423 (Cal. Super. Ct. 1980),

Still others dismissed offensive sexual activity as simply a natural consequence of the attraction between men and women.<sup>36</sup> A number of these decisions were reversed on appeal, however, and the plaintiffs were ultimately allowed to recover under Title VII.<sup>37</sup>

### B. *Impact of the 1983 EEOC Guidelines on Sexual Harassment*

Published in 1983, the EEOC's *Guidelines on Discrimination Because of Sex* (the "EEOC Guidelines") define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>38</sup> Under the EEOC Guidelines, sexual harassment is actionable when coupled with one of three circumstances:

(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 individual, 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>39</sup>

The courts have recognized two variants of sexual harassment, both of which are incorporated in the EEOC Guidelines: "quid pro quo" cases and "hostile environment"<sup>40</sup> cases. A quid pro quo cause of action arises

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*aff'd sub nom.* Seritis v. Hotel and Restaurant Employees Union, 37 Fair Empl. Prac. Cas. (BNA) 1501 (Cal. Dist. Ct. App. 1985). Until passage of the Civil Rights Act of 1991, which provides for compensatory and punitive damages in cases involving *intentional* sexual harassment, federal courts interpreted the Act to provide only equitable remedies such as reinstatement, back pay and injunctive relief. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (to be codified at 42 U.S.C. § 1981a). For a review of common law causes of action for sexual harassment, see Terry M. Dworkin et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 San Diego L. Rev. 125 (1988), and Jane L. Dolkart & E. Lynn Malchow, *Sexual Harassment in the Workplace: Expanding Remedies*, 23 Tort & Ins. L.J. 181 (1987). The use of common law has not been entirely superseded by the 1991 Civil Rights Act, however, because plaintiffs may still opt to pursue common law remedies to avoid the ceiling placed on the amount of recovery under the Civil Rights Act.

36. See *Miller v. Bank of Am.*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979).

37. See *supra* notes 20-23 and accompanying text.

38. EEOC Guidelines, *supra* note 33, § 1604.11(a).

39. *Id.*

40. Professor MacKinnon was one of the first writers to make a distinction between types of hostile environment: those that create an offensive environment ("condition of work") and those in which a supervisor demands sexual consideration in exchange for job benefits ("quid pro quo"). See MacKinnon, *supra* note 31, at 32-47. On a practical level, there are a number of cases that can be characterized as both "condition of work" or "quid pro quo" sexual harassment. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046, 1046 n.1 (3d Cir. 1977). Quid pro quo sexual harassment is defined in the EEOC Guidelines at 29 C.F.R. § 1604.11(a)(2). "Hostile environment" is defined at 29 C.F.R. § 1604.11(a)(3). The EEOC Guidelines, in a section entitled "Other related practices," also provide for another type of sexual harassment. Where an employment opportunity or benefit is granted because of an individual's "submission to the employer's



when a supervisor offers an economic or other job benefit, or threatens to withhold such benefits (including job retention) in exchange for sexual favors.<sup>41</sup> Quid pro quo claims are analytically similar to "disparate treatment" claims under Title VII,<sup>42</sup> and the same framework governs the burden of proof.<sup>43</sup> That is, the plaintiff must show that she is a member of a protected class, that she was treated differently than members of an unprotected class, and that this treatment was unfair.

The second type of sexual harassment claim, "hostile environment," arises when the unwelcome sexual conduct unreasonably interferes with the individual's job performance, or creates an intimidating, hostile or offensive work environment.<sup>44</sup> Although the courts identified quid pro quo causes of action as early as 1976,<sup>45</sup> they did not apply "hostile environment" analysis<sup>46</sup> until 1981.<sup>47</sup>

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sexual advances or requests for sexual favors," the employer may be liable for unlawful discrimination *against others* who were qualified for, but were denied, the opportunity or benefit. See 29 C.F.R. § 1604.11(g) (emphasis added). The courts have not yet clarified whether a Title VII violation can be established under these circumstances, however. See *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987); *King v. Palmer*, 778 F.2d 878, 881-82 (D.C. Cir. 1985); *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988); *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 499-501 (W.D. Pa. 1988); Equal Employment Opportunity Comm'n, *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism*, N-915-048 (Jan. 1990).

41. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986); *Downes v. Federal Aviation Admin.*, 775 F.2d 288, 290-91 (Fed. Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980); *Williams v. Saxbe*, 413 F. Supp. 654, 667 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); 1 Lex K. Larson, *Employment Discrimination* § 41.64(a) (1992).

42. For a discussion of "disparate treatment" cases, see *infra* notes 251-54 and accompanying text.

43. See *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra* note 2, at 1454-55.

44. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 880-81 (9th Cir. 1991) (fact that female worker received bizarre love letters from a male co-worker established a prima facie case of hostile environment sexual harassment); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (plaintiff established a case for hostile environment harassment by showing that the workplace was pervaded with sexual slurs, insults and innuendo, and that she was subject to vulgar and offensive sexually-related epithets); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982) (cause of action established by showing that plaintiff's supervisor subjected her to numerous demeaning sexual inquiries and vulgarities, and that he repeatedly asked that she have sex with him); *Bundy v. Jackson*, 641 F.2d 934, 943-48 (D.C. Cir. 1981) (plaintiff established cause of action by showing that she was subject to sexual intimidation that was "standard operating procedure" in the defendant's workplace).

45. The first quid pro quo case found actionable under Title VII was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

46. A cause of action for "hostile environment" discrimination first arose in the context of racial discrimination in *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The plaintiff, Rogers, did not claim that her employer had deprived her of a job benefit, but instead charged that the employer's disparate treatment of Hispanic clients created a discriminatory and offensive

C. *Meritor Savings Bank v. Vinson: The Supreme Court Sets a Standard*

Application of "hostile environment" analysis to sexual harassment cases gained considerable momentum as a result of the Supreme Court's ruling in *Meritor Savings Bank v. Vinson*,<sup>48</sup> the case in which the Court first addressed and approved the "hostile environment" theory of sex discrimination. In discussing the elements necessary to establish a hostile work environment cause of action under Title VII, the Court relied upon the applicable EEOC guidelines enacted under Title VII<sup>49</sup> and upon the Eleventh Circuit's reasoning in *Henson v. City of Dundee*.<sup>50</sup>

As described in *Meritor*, Ms. Vinson, the plaintiff, was hired in 1974 by Mr. Taylor, her supervisor, as a teller trainee at the defendant bank. During Ms. Vinson's tenure as a bank employee, Mr. Taylor repeatedly asked her to submit to his sexual advances. Ms. Vinson testified that Mr. Taylor made repeated demands for sexual favors at the office as well as after hours, and that she ultimately acquiesced for fear of losing her job. Ms. Vinson further testified that Mr. Taylor raped her on several occasions, fondled her in front of other employees, pursued her into the women's restroom, and exposed himself to her. This harassment continued for three years.

In 1978, the bank terminated Ms. Vinson, citing excessive use of sick leave as the reason for her firing. Shortly thereafter, she sued the bank and Mr. Taylor alleging a cause of action under Title VII for sexual harassment. The district court, trying the case as *Vinson v. Taylor*, denied

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work environment for its Hispanic employees. The Fifth Circuit concluded that the employer had violated Title VII, stating that the phrase "terms, conditions or privileges of employment" under Title VII is an expansive concept that includes "within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Id.* at 238; *accord* *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032-33 (7th Cir. 1979) (requiring female bank employees to wear uniforms while the men were allowed to wear suits violates Title VII by perpetuating demeaning sexual stereotypes); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (segregated eating clubs condoned but not organized by the employer violated Title VII by creating a discriminatory work environment); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 161 (S.D. Ohio 1976) (demeaning religious slurs by supervisor violate Title VII).

47. *See* *Bundy v. Jackson*, 641 F.2d 934 (D.D.C. 1981). Bundy was subjected to demeaning requests by her supervisors for sexual encounters. When she complained about these acts to a senior supervisor, he casually dismissed her complaints, stating, "any man in his right mind would want to rape you." *Id.* at 940 (citation omitted). The supervisor then proceeded to proposition her. In drawing from the body of hostile environment cases, the court reasoned "[h]ow then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?" *Id.* at 945.

48. 477 U.S. 57 (1986).

49. *See supra* notes 38-39 and accompanying text.

50. 682 F.2d 897 (11th Cir. 1982).

Ms. Vinson relief under Title VII, finding that the sexual activity engaged in was voluntary and that it was not a condition of her employment or advancement on the job.<sup>51</sup> The court further stated that the bank could not be held liable for Mr. Taylor's misconduct because it was without notice of its occurrence.<sup>52</sup>

The D.C. Circuit reversed, holding that because the lower court had analyzed the case strictly from the traditional "quid pro quo" perspective, it had not properly considered whether the evidence supported a "hostile environment" claim.<sup>53</sup> In a 1981 case, *Bundy v. Jackson*,<sup>54</sup> the D.C. Circuit had been one of the first courts to recognize a "hostile environment" cause of action. The D.C. Circuit relied heavily on *Bundy* in its *Vinson* opinion, particularly on its recognition in *Bundy* that a woman

51. 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

52. See *id.* at 42. The findings of fact made by the district court included the following:

[4] Plaintiff was not required to grant Taylor or any other member of [the bank] sexual favors as a condition of either her employment or in order to obtain promotion.

[5] If the plaintiff and Taylor did engage in an intimate or sexual relationship . . . that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.

*Id.* (footnote omitted); see also David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims after Meritor Savings Bank v. Vinson*, 31 St. Louis U. L.J. 239, 251 (1987).

53. See *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985). The Court of Appeals stated:

Vinson's grievance was clearly of the [sexual environment] type and accordingly, her case counseled an inquiry as to whether Taylor "created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."

*Id.* at 145 (quoting *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981)).

54. 641 F.2d 934 (D.C. Cir. 1981). The court in *Bundy* drew parallels from racial and ethnic "hostile environment" decisions in reaching its determination that such a cause of action could be brought for sex discrimination cases. See *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In drawing these parallels, the *Bundy* court reasoned:

The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against the company's minority clients may reflect no intent to discriminate directly against a company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?

*Bundy*, 641 F.2d at 945. It is also interesting to note that the D.C. Circuit Court was one of the first to recognize a quid pro quo claim of sexual harassment. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

may state a valid cause of action under Title VII if she has suffered psychological and emotional injuries, regardless of whether she has also sustained actual economic injury.<sup>55</sup>

The Supreme Court upheld the D.C. Circuit's reversal of the lower court, expressly agreeing that the case should be remanded for consideration under a "hostile environment" theory. The Supreme Court held, however, that the focus on remand should be on the "unwelcomeness" of the conduct and not on the "voluntariness" of the victim's participation.<sup>56</sup> Significantly, the Court rejected the defendant's argument that Title VII protects only those victims who have suffered economic injury, pointing out that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" whether based on sex, race, religion or national origin.<sup>57</sup> The Court further held that a plaintiff establishes a cause of action for sex discrimination under Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment."<sup>58</sup>

In identifying the requirements for a valid claim under Title VII, the Supreme Court cautioned that not all harassment affects a "term, condition, or privilege" of employment within the meaning of Title VII. For example, the "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee'" is not by itself actionable under Title VII.<sup>59</sup> Instead, to state a claim under Title VII, sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions

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55. In *Bundy*, the Court of Appeals had agreed with the plaintiff's claim that "conditions of employment" include the psychological and emotional work environment, i.e., "that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation . . . invokes" a cause of action under Title VII. *Bundy*, 641 F.2d at 944.

In *Vinson*, the Court of Appeals further held that a victim's "voluntary" submission to unlawful discriminatory acts had no bearing on the relevant inquiry: whether such toleration was a condition of Vinson's employment. See *Vinson*, 753 F.2d at 146. The court also found that the employer is absolutely liable for sexual harassment committed by its supervisory employees whether it knew or could have known of such conduct and whether, had the bank known of such conduct, it would have disapproved and stopped it. See *id.* at 147.

56. The Court concluded that the issue of "unwelcomeness" is at the center of Title VII claims, since "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

57. *Id.* at 65.

58. *Meritor*, 477 U.S. at 66. In explaining its rationale, the Court quoted from the Eleventh Circuit's opinion in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982): Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

*Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902).

59. *Meritor*, 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

of [the victim's] employment and create an abusive working environment.'"<sup>60</sup> In determining the severity or pervasiveness of the conduct, the Court directed triers of fact to look to "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"<sup>61</sup>

In *Meritor*, the Supreme Court also acknowledged, for the first time, the elements needed to support a hostile environment claim in a sexual discrimination case. Specifically, the Court concluded that the trier of fact<sup>62</sup> must find that:

1. the employee is 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,<sup>63</sup> knew

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60. *Id.* (quoting *Henson*, 682 F.2d at 904) (alterations in original). Note, however, that while the Supreme Court stated here that the harassment must be both "sufficiently severe . . . and create an abusive working environment," *id.* (emphasis added), the EEOC Guidelines state only that the harassment must "unreasonably interfer[e] with an individual's work performance or creat[e] an intimidating, hostile, or offensive working environment." EEOC Guidelines, *supra* note 33, § 1604.11(a)(3) (emphasis added). The Supreme Court drew its more limiting construction from the Fifth Circuit's opinion in *Rogers v. EEOC*, the first case to adopt a "hostile environment" analysis in a matter involving racial discrimination. See *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). At least one court has asserted that there is no inconsistency between the EEOC's wording and the Supreme Court's interpretation in *Meritor*. See *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991). In contrast, at least one commentator has argued that the Supreme Court specifically intended to adopt the stricter standard of *Rogers* rather than the more lenient construction set forth in the EEOC guidelines. See Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L.J. 35, 60 (1990).

61. *Meritor*, 477 U.S. at 69 (quoting EEOC Guidelines, *supra* note 33, at § 1604.11(b)).

62. Under the Civil Rights Act of 1964, there was no provision for a jury trial. The Civil Rights Act of 1991, however, provides for a jury trial in cases involving intentional discrimination in which the plaintiff requests compensatory and punitive damages. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (to be codified at 42 U.S.C. § 1981a). The introduction of jury trials and the expansion of damages available under Title VII are two of the most significant aspects of the new Act. The addition of these provisions fundamentally changes the legal model underlying federal discrimination laws. The new Act, in providing for expanded money damages, moves these causes of action away from a format in which the goal is conciliation and improvement of employer-employee relations and toward the more adversarial format of a civil trial for tort damages. See Committee on Continuing Professional Educ., ALI-ABA, *The Civil Rights Act of 1991*, at 22 (1992) (compilation of materials addressing the 1991 Civil Rights Act amendments).

63. Although the Supreme Court used the term "respondeat superior," this element, as it has been interpreted, more accurately reflects a negligence standard for employer liability that essentially restates the "fellow-servant" rule. See *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 n.5 (10th Cir. 1990); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 n.7 (M.D. Fla. 1991).

or should have known of the harassment in question and failed to take prompt remedial action.<sup>64</sup>

With these guidelines in mind, it is necessary to explore, as the next step in our analysis, just how courts have determined what constitutes "unwelcomeness," which activities are "based on sex," and what sorts of harassment "affect the terms and conditions" of employment, since it is these issues that courts must choose to interpret through the eyes of a reasonable person,<sup>65</sup> the victim and the reasonable person,<sup>66</sup> or a reasonable woman<sup>67</sup> in evaluating a hostile environment cause of action.

### 1. Was the Behavior "Unwelcome?"

In *Meritor*, the Supreme Court made clear that the issue of "unwelcomeness" is at the center of Title VII claims, stating that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"<sup>68</sup> This finding essentially supported the approach adopted in the EEOC Guidelines, which define sexual harassment as "unwelcome . . . verbal or physical conduct of a sexual nature."<sup>69</sup> In addition, the fact that sexual attraction plays a role in the day-to-day social exchange between employees means that "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected" sexual advances may well be difficult to discern.<sup>70</sup>

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64. *Meritor*, 477 U.S. at 66-69 (1986). These elements were first set forth in *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). Cases in which the courts have expressly employed these standards include: *Hall*, 842 F.2d at 1013 (8th Cir. 1988); *Swentek v. USAIR, Inc.* 830 F.2d 552, 557 (4th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); and *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 527-28 (M.D. Fla. 1988). Other courts, however, have chosen to adopt other elements. For example, in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990), the Third Circuit held that

five constituents must converge to bring a successful claim for a sexually hostile work environment under Title VII: (1) the employees suffered *intentional* discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; (5) the existence of respondeat superior liability.

*Id.* at 1482 (emphasis added) (footnote omitted). In requiring that the discrimination be intentional, the court stated:

The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary when the actions are not sexual by their very nature.

*Id.* at 1482 n.3.

65. For cases that have adopted this standard, see *supra* note 20.

66. For cases that have adopted this standard, see *supra* note 21.

67. For cases that have adopted this standard, see *supra* note 23.

68. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

69. EEOC Guidelines, *supra* note 33, § 1604.11(a).

70. *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring).

Prior to the Supreme Court's decision in *Meritor*, the Eleventh Circuit had provided a general definition of "unwelcome conduct" in *Henson v. City of Dundee*: the challenged conduct "must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."<sup>71</sup> In addition, the EEOC Guidelines direct that, when confronted with conflicting evidence as to whether the acts were welcome, the fact finder should consider "the record as a whole and the totality of the circumstances."<sup>72</sup> If there is a question about the credibility of the parties, or there is some suggestion of "welcomeness," the EEOC suggests that the plaintiff's case will be viewed as being considerably stronger if she has made a contemporaneous protest or complaint, although the fact that she made a belated complaint should also be taken into consideration.<sup>73</sup> Evidence of a contemporaneous complaint is especially critical in those cases in which the defendant might have had reason to believe that his advances were welcome due to a prior consensual relationship with the plaintiff.<sup>74</sup>

In *Meritor*, the Supreme Court directed lower courts to determine "whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome."<sup>75</sup> In their efforts to apply this standard, a number of courts have considered whether the plaintiff herself has a history of using sexually-oriented language, making sexual advances, or engaging in sexual horseplay in the workplace. According to these courts, the plaintiff's involvement in these activities will generally bar a cause of action for sexual harassment under the premise that this behavior indicates that the defendant may have legitimately perceived his allegedly harassing conduct as welcome.<sup>76</sup> Further, the fact that the plaintiff

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71. 682 F.2d 897, 903 (11th Cir. 1982).

72. EEOC Guidelines, *supra* note 33, at § 1604.11(b).

73. *See* Policy Guidance on Current Issues, *supra* note 6, at 95.

74. *See id.* Perhaps the most difficult cases are those in which the harassment is preceded by the termination of a romantic relationship. For example, in *Shrout v. Black Clawson Co.*, 689 F. Supp. 774 (S.D. Ohio 1988), the plaintiff brought a sexual harassment cause of action against her supervisor with whom she had terminated a consensual affair. *See id.* at 779. After the affair ended, the supervisor subjected her to unwelcome and degrading sexual remarks, touched her in an offensive manner, and withheld job benefits from her. The supervisor also refused to provide performance appraisals for her. The court found both "quid pro quo" and "hostile environment" types of harassment despite the fact that the plaintiff had not complained to anyone except her supervisor. Explaining its reasoning, the court pointed out that the company had no policy concerning hostile environment and that the plaintiff justifiably feared that the company would not believe her if she did complain and that she might be subject to retaliation. *See id.* at 780-81.

75. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

76. *See, e.g., Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1500-01 (W.D. Mo. 1989) (action barred because plaintiff was an active, encouraging participant in sexually explicit conversations and actions); *McLean v. Satellite Technology Servs., Inc.*, 673 F. Supp. 1458, 1459 (E.D. Mo. 1987) (sexual advances were not unwelcome where "plaintiff was anything but demure [and] she possessed a lusty libido and was no paragon of virtue" and where she often displayed her body at work through photographs of herself and raising her clothes); *Vermett v. Hough*, 627 F. Supp. 587, 599 (W.D. Mich. 1986)

stopped her involvement in these activities prior to the incident or incidents at issue is not necessarily enough to negate this presumption. For example, in *Loflin-Boggs v. City of Meridian*,<sup>77</sup> the plaintiff alleged that her refusal to continue engaging in the use of vulgar language, sexual jokes in the office, and sexual banter established that the conduct was unwelcome. The court denied her harassment claim, however, finding that once a plaintiff has participated in such activities, she must go further than mere abstinence and actively indicate that she now finds such conduct unwelcome.<sup>78</sup> Other courts have denied the plaintiff's claim where the plaintiff has engaged in explicit sexual conversations and bantering.<sup>79</sup> Still other courts have denied the plaintiff's cause of action where the plaintiff issued invitations to the alleged harasser to meet outside the office for dinner or drinks and the harassment took place during these occasions.<sup>80</sup>

A number of courts have also had to deal with the issue of "welcomeness" in the context of cases in which the plaintiff has brought a claim for harassment based on conduct that occurred after the plaintiff had voluntarily engaged in a sexual relationship with the defendant. The question of whether courts can even entertain a harassment claim under these circumstances was resolved in *Meritor*, where the Supreme Court stated that "voluntary" submission to sexual conduct will not necessarily defeat a claim for subsequent sexual harassment.<sup>81</sup> This holding makes

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(plaintiff's participation in office horseplay, sexual joking and vulgarity undermined her claim for a hostile environment); *Ferguson v. E.I. duPont de Nemours and Co., Inc.*, 560 F. Supp. 1172, 1196 (D. Del. 1986) (sexually aggressive conduct and explicit conversations on the part of the plaintiff may bar a cause of action for hostile environment). *But see Swentek v. USAIR, Inc.* 830 F.2d 552, 557 (4th Cir. 1987) (plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive her legal protection against unwelcome harassment).

77. 633 F. Supp. 1323, 1327 (S.D. Miss. 1986), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).

78. *See id.* at 1326-27.

79. *See, e.g., Gan v. Kepro Circuit Sys.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982) (plaintiff regularly engaged in sexually-oriented conversations, used vulgar language and discussed her own sexual encounters; court thus rejected her claim of hostile environment, finding that sexual remarks or propositions by co-workers were the result of her sexual aggressiveness).

80. *See, e.g., Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986) (plaintiff failed to establish a case in part due to the fact that the harassment was induced by her suggestion that the defendant join her at a bar to discuss a promotion); *Sardigal v. St. Louis Nat'l Stockyards*, 42 Fair Empl. Prac. Cas. (BNA) 497 (S.D. Ill. 1986) (plaintiff's claim barred by the fact that she visited the harasser outside work and invited him to her house after the alleged harassment took place); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1177 (M.D. Pa. 1982) (plaintiff's case denied where she flirted with the defendant and asked him on several occasions to her house to dinner despite his refusals).

81. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986); *see also Westmoreland Coal Co. v. West Virginia Human Rights Comm'n*, 382 S.E.2d 562 (W. Va. 1989) (reversing lower court's finding that the relationship was voluntary and therefore not "unwelcome" on grounds that the plaintiff's agreement to submit came only after threats by the harasser to fire her).



sense, particularly considering the fact that the power imbalance between the employer and the employee can make the whole notion of voluntariness highly questionable. Thus, in one case, evidence that the plaintiff stayed in the room and failed to protest her superior's advances did not defeat her cause of action for hostile environment sexual harassment.<sup>82</sup>

In assessing whether the conduct was in fact unwelcome, the EEOC and the courts generally prefer to rely on objective behavior rather than the plaintiff's unexpressed or uncommunicated feelings.<sup>83</sup> In one case, for example, the plaintiff offered as evidence entries in her personal diary indicating that the sexual banter of the defendant was unwelcome.<sup>84</sup> The court ruled against her claim, however, relying instead on evidence that, at work, the plaintiff had not objected to the defendant's behavior and had in fact "demonstrated every willingness to at least condone, if not participate in"<sup>85</sup> the language and conduct at issue.

## 2. Was the Behavior "Based on Sex?"

The second *Meritor* element required to establish a cause of action for hostile environment harassment asks whether the behavior at issue was "based on sex."<sup>86</sup> The primary inquiry here is whether "but for the fact of her sex, [the plaintiff] would not have been the object of harassment."<sup>87</sup> A number of courts and commentators have noted that if the complained-of sexual conduct proves offensive to both males and females, then it may not give rise to a cause of action for sexual harassment because both men and women were accorded like treatment.<sup>88</sup>

As one commentator has noted, those cases that consider whether the defendant's conduct was in fact based on sex fill the air "with a tense combination of lust and contempt."<sup>89</sup> The most obvious cases that satisfy the "based on sex" criterion are those in which the plaintiff is subjected to express sexual advances<sup>90</sup> or intentional touching of intimate body parts.<sup>91</sup> But courts have also recognized other, more subtle behav-

82. See *Rudow v. New York City Comm'n on Human Rights*, 474 N.Y.S.2d 1005, 1008, *aff'd*, 487 N.Y.S.2d 453 (N.Y. App. Div.), *appeal denied*, 489 N.E.2d 1302 (N.Y. 1985).

83. See EEOC Guidelines, *supra* note 33, § 1604.11.

84. See *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1983).

85. *Id.* at 1321.

86. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-69 (1986).

87. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

88. See *Rabidue*, 805 F.2d at 620; *Henson*, 682 F.2d at 620; *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 Mich. L. Rev. 1007, 1020-21 n.99, 1033 n.178 (1978); Comment, *Employment Discrimination—Sexual Harassment and Title VII*, 51 N.Y.U. L. Rev. 148, 151-52 (1976).

89. *Alba Conte, Sexual Harassment in the Workplace* 86 (1990).

90. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

91. The EEOC distinguishes between verbal and physical conduct:

The Commission will presume that the unwelcome, intentional touching of a

ior as being "based on sex."<sup>92</sup> One such category includes harassing behavior that does not necessarily involve sexually explicit conduct or content,<sup>93</sup> but that is directed exclusively or primarily at females and that is motivated by animus against women.<sup>94</sup>

One case that illustrates this "animus" category is *Lipsett v. University of Puerto Rico*,<sup>95</sup> a 1988 First Circuit decision in which a medical resident of a university hospital alleged sexual harassment based on extreme animus displayed by certain doctors toward her and other female residents. Evidence of this animus by the male doctors in charge of the program included the constant disparagement of the women residents, the fact that few women were admitted to the program, the deficiencies in the facilities provided to the women that were admitted relative to those provided to male residents, the chief resident's public declaration to the plaintiff and to other residents of his desire to eliminate all female residents through a "regime of terror," and statements by the chief resident that he intended to "run the plaintiff off" unless she behaved more docilely and that women generally should not go into surgery.<sup>96</sup> The plaintiff alleged, and the court agreed, that she was harassed by both the chief of the program as well as by the male residents, and that she was discharged from the program because of her sex.<sup>97</sup>

Another case illustrative of the animus category is *Delgado v. Leh-*

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charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

Policy Guidance on Current Issues, *supra* note 6, at 105.

92. One of the first courts to recognize a more subtle form of sexual harassment was the D.C. Circuit, which considered whether physically aggressive acts by a male supervisor against a female employee could give rise to a hostile environment claim even though the acts were not of a sexual nature. The court stated:

We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.

*McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

93. In recent years, courts have made it clear that offensive verbal or physical conduct need not be obviously sexual in nature to give rise to a cause of action for sexual harassment. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); *Thompson v. Arkansas Transp. Dep't.*, 691 F. Supp. 1201 (E.D. Ark. 1988); *Delgado v. Lehman*, 665 F. Supp. 460 (E.D. Va. 1987).

94. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("[O]ffensive conduct is not necessarily required to include sexual overtones in every instance.").

95. 864 F.2d 881 (1st Cir. 1988).

96. See *id.* at 887-88.

97. See *id.* at 895.

*man*.<sup>98</sup> The male supervisor in this case consistently demeaned women by referring to them as "babes," repeatedly used the term "women" in a derogatory manner, constantly interrupted women in conversations, and provided women with little professional guidance. In addition, a number of the supervisor's female subordinates allegedly sought and secured transfers because he publicly berated them and demeaned them. The court concluded that these activities formed the basis of an actionable hostile environment cause of action.

There is also another category of "based on sex" cases: those cases that involve behavior disproportionately more offensive or demeaning to women than to men even though it may not necessarily be directed at specific female employees, and that does not necessarily involve animus toward women. These cases typically involve allegations of sexual horseplay at the office, including displays of sexually explicit materials such as photographs,<sup>99</sup> literature,<sup>100</sup> cartoons,<sup>101</sup> or calendars.<sup>102</sup> This category also encompasses cases involving the use of vulgarities and profane language in the workplace.<sup>103</sup> In general, such behavior is seen as creating an "atmosphere" that raises "barrier[s] to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment."<sup>104</sup> This

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98. 665 F. Supp. 460 (E.D. Va. 1987). This and other animus cases indicate that actionable sexual harassment need not involve overt sexual advances or innuendo, but may be based on verbal abuse directed at women that is sufficiently patterned to affect a condition of employment, is directed at the plaintiff and others because of their sex, and is coupled with hostile acts, intimidation, or unequal treatment of women. *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

99. *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988); *Arnold v. City of Seminole*, 614 F. Supp. 853, 856 (E.D. Okla. 1985); *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1629 (W.D. Okla. 1980).

100. *See Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547, 1549-50 (S.D. Fla. 1988); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 571 (W.D.N.Y. 1987).

101. *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); *Gilardi v. Schroeder*, 833 F.2d 1226 (7th Cir. 1987).

102. *See, e.g., Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987).

103. *See Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1017-18 (8th Cir. 1988); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 899 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 571 (W.D.N.Y. 1987); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 213 (E.D. Va. 1988). The EEOC has suggested, in cases in which the alleged sexual harassment consists of verbal conduct, the questions to be explored by the trier of fact should include the following:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?

Policy Guidance on Current Issues, *supra* note 6, at 105.

104. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991).

type of conduct is most likely to constitute a cause of action for hostile environment harassment if there is evidence of a strong pattern showing that the behavior was directed at plaintiff because of her sex<sup>105</sup> and that the behavior affects a condition of employment. Of course, such cases are made stronger if they are coupled with evidence of overt sexual advances.

One example of a case that falls into the "sexual horseplay" category is *Sanchez v. City of Miami Beach*.<sup>106</sup> In *Sanchez*, the court found a hostile work environment based on evidence that the plaintiff, a police officer, was exposed to a barrage of graffiti, posters, and pin-ups that were placed throughout her place of employment and that targeted her specifically. The plaintiff was also the butt of sexual pranks including the receipt of moaning, sighing, and kissing noises over the police radio. In another case within this category, sexual harassment was found where the defendant gave the plaintiff a pornographic magazine, left an article on her desk regarding a "seminar on extra-marital affairs without guilt," and made explicit sexual advances on several occasions.<sup>107</sup>

The much criticized *Rabidue v. Osceola Refining Co.*,<sup>108</sup> a Sixth Circuit case, also falls into the "sexual horseplay" category. The plaintiff in *Rabidue* alleged that she was discharged because of her sex. She based her charge of a hostile environment on the vulgar and obscene comments made regularly by her supervisor concerning women generally and occasionally the plaintiff specifically, and the display by employees of pictures of nude or scantily clad women in their offices and in common work areas.<sup>109</sup> Here, however, the court found that the plaintiff had not stated a valid cause of action because sex-related humor and vulgar jokes abound in certain work environments, and because "Title VII was not meant to—or can—change this."<sup>110</sup> The court further held that the obscenities were "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."<sup>111</sup> This logic<sup>112</sup> has been harshly criticized in a number of circuit court opinions, including other

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105. In most hostile environment cases, it is not difficult to prove that the hostile acts of a defendant were directed at a plaintiff because of her sex. This is not always the case, however. For example, one case in which a court found that the harassment was not directed at the plaintiff because of his sex dealt with a plaintiff who was a jilted lover. The court determined that the female supervisor harassed the employee not because he was a male, but because he had spurned her. Thus, the defendant's actions were the result of a personal vendetta and not sexually discriminatory. See *Huebschen v. Department of Health & Social Servs.*, 716 F.2d 1167, 1169-71 (7th Cir. 1983).

106. 720 F. Supp. 974 (S.D. Fla. 1989).

107. See *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547, 1551 (S.D. Fla. 1988).

108. 805 F.2d 611 (6th Cir. 1986), cert. denied, 406 U.S. 957 (1972).

109. See *id.* at 615.

110. *Id.* at 621 (quoting *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

111. *Id.* at 622.

112. For additional discussion of *Rabidue*, see *infra* notes 133-36 and accompanying text.

Sixth Circuit opinions.<sup>113</sup>

Yet another case that illustrates this category is *Robinson v. Jacksonville Shipyards*.<sup>114</sup> In *Robinson*, the plaintiff was a female welder in a shipyard, historically a predominately male work environment. She brought a successful claim for hostile environment based on the male workers' practices of posting pin-ups of nude women in their lockers and in common areas as well as their use of obscene language.

Although at least one district court has read the EEOC Guidelines as requiring evidence of explicit sexual harassment before a hostile environment claim becomes actionable,<sup>115</sup> *Meritor* seems to make it clear that, in the Supreme Court's view, a hostile environment cause of action is not restricted to instances in which there have been intimidation and ridicule of an explicitly sexual nature.<sup>116</sup> As evidenced by the cases discussed in this section, hostility toward women because they are women can be manifested in nonsexual ways and can give rise to a cause of action regardless of whether it is coupled with sexual conduct claims. Clearly, the persistent use of obscene language and the display of pornography in the workplace are as likely to be regarded as offensive to women who seek to work in an environment "with professional dignity and without the barrier of sexual differentiation and abuse"<sup>117</sup> as are explicitly sexual conduct and propositions.

### 3. Conduct That Is Sufficiently Severe and Pervasive

The third and critical *Meritor* element required to establish a cause of action for hostile environment sexual harassment is that the conduct be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>118</sup> The issue here is whether the workplace atmosphere has become so suffused with hostility toward members of one sex that it alters the conditions of employment for the group.<sup>119</sup> In essence, an employee is forced to "'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'"<sup>120</sup> Not all conduct that may be characterized

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113. The following Sixth Circuit opinions have criticized *Rabidue*: *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), and *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.1 (6th Cir. 1987). Other circuit court opinions critical of *Rabidue* include *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991) and *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990).

114. 760 F. Supp. 1486 (M.D. Fla. 1991).

115. See *Kelsey-Andrews v. City of Philadelphia*, 713 F. Supp. 760 (E.D. Pa. 1989), *aff'd in part, vacated and remanded in part*, 895 F.2d 1469 (3d Cir. 1990).

116. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-66 (1986).

117. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert denied*, 489 U.S. 1020 (1989).

118. *Meritor*, 477 U.S. at 67 (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

119. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988).

120. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson*, 682 F.2d at 902).

as harassing rises to the level of actionable harassment, however. Rather, it is a matter of evaluating the severity and pervasiveness of the conduct—"the totality of the circumstances" in light of "the record as a whole."<sup>121</sup> Both the EEOC and the courts have worked to establish a line, albeit more fuzzy than bright, demarcating acceptable from unacceptable behavior. As the discussion that follows indicates, with a few blatant exceptions,<sup>122</sup> the courts and the EEOC generally seem to agree on what constitutes a hostile environment.

The EEOC cites six factors to consider in reaching a "hostile environment" determination:

1. whether the conduct was verbal or physical, or both;
2. how frequently it was repeated;
3. whether the conduct was hostile and patently offensive;
4. whether the alleged harasser was a co-worker or a supervisor;
5. whether others joined in perpetrating the harassment; and
6. whether the harassment was directed at more than one individual.<sup>123</sup>

To determine whether unwelcome sexual harassment rises to the level of actionable sexual harassment, the threshold inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment."<sup>124</sup> Applying this test, the EEOC suggests that sexual flirtation, innuendo, or even vulgar language that is trivial or simply annoying is not generally sufficient to establish a hostile environment.<sup>125</sup> Further, the EEOC states, and most courts have agreed, that isolated instances of offensive sexual conduct or remarks *generally* do not satisfy the test.<sup>126</sup>

121. *Id.* at 69. The following material is taken from the EEOC Guidelines on Discrimination Because of Sex:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts on a case by case basis.

EEOC Guidelines, *supra* note 33, § 1604.11(b).

122. *See, e.g., Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (holding that a workplace permeated with sexually offensive posters and language was the norm and that women should not be offended), *cert. denied*, 481 U.S. 1041 (1987).

123. Policy Guidance on Current Issues, *supra* note 6, at 102.

124. EEOC Guidelines, *supra* note 33, § 1604.11(a).

125. *See* Policy Guidance on Current Issues, *supra* note 6, at 102. These are the types of behavior that many feminists insist are not taken seriously enough by the courts. *See infra* notes 195-202 and accompanying text.

126. *See* Policy Guidance on Current Issues, *supra* note 6, at 103. As the Supreme Court noted in *Meritor*, "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 957 (1972)); *accord Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1987); *Danna v. New York Tel. Co.*, 752 F. Supp.

A single, particularly severe incident of sexual harassment *may* satisfy the test, however, if it involves unwelcome, intentional touching of the victim's intimate body parts. According to the EEOC, "[m]ore so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment."<sup>127</sup> Furthermore, if the victim is subjected to both physical non-intimate and verbal harassment, and/or there is evidence that the sexual harassment is directed at other employees as well, the hostile environment requirements are usually met.<sup>128</sup> The courts and the EEOC generally agree that a hostile environment claim requires a pattern of offensive behavior and that the totality of circumstances should be examined to determine whether the environment was sufficiently hostile.<sup>129</sup>

Courts have had ample opportunity to determine which types and patterns of workplace harassment rise to the level of actionable harassment. The conduct at issue in cases tried to date runs the gamut from sexual remarks and propositions and the display of pornographic pictures and sexually explicit caricatures of plaintiffs, to verbal threats and actual physical assaults. As indicated earlier, unless the behavior is extreme and involves physical assault, the courts usually require that the offensive behavior be established through a series of events or a persistent pattern of behavior.

Courts appear to concur on at least one type of case—those cases that involve offensive sexual physical conduct in conjunction with other offensive behavior (e.g., making lewd and offensive inquiries of the plaintiff

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594 (S.D.N.Y. 1990); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301 (S.D.N.Y. 1987); *Neville v. Taft Broadcasting Co.*, 42 Fair Empl. Prac. Cas. (BNA) 1314 (W.D.N.Y. 1987); *Volk v. Coler*, 44 Fair Empl. Prac. Cas. (BNA) 1111 (C.D. Ill. 1986); *Freedman v. American Standard*, 41 Fair Empl. Prac. Cas. (BNA) 471 (D.N.J. 1986).

127. Policy Guidance on Current Issues, *supra* note 6, at 105; *see also Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986) (plaintiff drugged by employer and raped, then fired at the insistence of the employer's wife); *Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (plaintiff subjected to offensive touching and sexual comments in a moving vehicle).

128. *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987).

129. *See* Policy Guidance on Current Issues, *supra* note 6, at 103; *see also King v. Board of Regents of Univ. of Wisconsin Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) ("Although a single act can be enough . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.") (citations omitted); *accord Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) (fact finder must not only look to the frequency of the incidents but to their severity as well); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (it is not how long the offending conduct lasts but the offensiveness of the individual actions); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989) (factfinder must evaluate frequency as well as gravity; suit does not turn on number of incidents alone); *Scott v. Sears, Roebuck and Co.*, 798 F.2d 210, 213-14 (7th Cir. 1986) (many instances of offensive conduct but none rose to poisonous level); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (pattern required; harassment must be sustained and non-trivial); *Downes v. Federal Aviation Admin.*, 775 F.2d 288, 293 (D.C. Cir. 1985) (isolated and/or trivial remarks not enough).

and other female employees, displaying obscene materials, etc.). Most courts seem to acknowledge that these kinds of acts, or a combination of them, rise to the level of a "hostile work environment" if carried out over a sufficiently prolonged period of time.<sup>130</sup>

But the courts have not reached consensus or applied consistent standards<sup>131</sup> to another type of case—those that deal with the display of sexually explicit pictures in the workplace coupled with the making of sexual remarks and sexual propositions.<sup>132</sup> In *Rabidue v. Osceola Refining Co.*,<sup>133</sup> for example, the basis of the plaintiff's complaint was two-fold: being subjected to a particular employee's extreme vulgarity and obscenities, and the occasional display of pictures of nude or scantily clad women by other employees in their offices or in common work areas. Allegedly fired for her irascible and opinionated personality and her inability to work in harmony with co-workers,<sup>134</sup> the plaintiff subsequently filed a claim of hostile environment sexual harassment with the EEOC, which denied her claim. She then sued in federal district court.

The district court acknowledged that it had not previously addressed a cause of action asserting a violation of Title VII based on a claim of hostile environment and observed that, "[u]nlike the facts [of the cases reviewed], this case involved no sexual propositions, offensive touchings, or sexual conduct of a similar nature that was systematically directed to

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130. See, e.g., *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) (evidence that supervisor made several attempts to kiss and fondle an employee coupled with sexually suggestive remarks was sufficient to defeat a claim for summary judgment); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (evidence that several employees touched plaintiff in a sexually offensive manner and addressed sexual comments to her—along with evidence of on-going sexual graffiti on walls, elevators, and bathrooms—established a hostile environment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988) (verbal sexual abuse against female traffic controllers combined with offensive touching of plaintiff's thighs and breast created a hostile environment); *EEOC v. Gurnee Inn Corp.*, 48 Fair Empl. Prac. Cas. (BNA) 871 (N.D. Ill. 1988) (manager who made sexual comments to female employees, touched them in a sexual manner, attempted to force himself physically on them, and gave preferential treatment to those who acquiesced was guilty of sexual harassment); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987) (display of pornography in the workplace, vulgar comments by supervisors and co-workers, physical contact of a sexual nature, and requirements that women wear skirts to please visiting supervisor may constitute sexual harassment).

131. Compare, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (appropriate standard by which alleged offensive behavior should be judged is that of the *reasonable person*) with *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (in evaluating the severity and pervasiveness of sexual harassment, focus should be on the perspective of the *reasonable woman*).

132. See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Brooms v. Regal Tube Co.*, 44 Fair Empl. Prac. Cas. (BNA) 1119 (N.D. Ill. 1987); *Salazar v. Church's Fried Chicken, Inc.*, 44 Fair Empl. Prac. Cas. (BNA) 472 (S.D. Tex. 1987).

133. 805 F.2d 611 (6th Cir. 1986).

134. See *id.* at 615.



the plaintiff over a protracted period of time."<sup>135</sup> Evidently reluctant to expand the horizons of a hostile environment claim beyond those already established, the Sixth Circuit turned a deaf ear to Ms. Rabidue's allegations, stating:

In the case at bar, the record effectively disclosed that [Mr.] Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. . . . The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment 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 on other public places. In sum, Henry's vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive under 29 C.F.R. § 1604.11(a)(3) as elaborated upon by this court.<sup>136</sup>

A number of courts have strongly disagreed with *Rabidue's* narrow interpretation of Title VII,<sup>137</sup> however, finding hostile environments under similar facts.<sup>138</sup> In the previously discussed case of *Robinson v. Jacksonville Shipyards, Inc.*,<sup>139</sup> for example, a federal district court in Florida addressed the issue of pornographic pictures and pin-ups in the workplace. In this case, the primary basis of the plaintiff's complaint was the posting of pictures depicting nude or partially nude women throughout the shipyard where she worked, combined with pervasive sexual comments by her male coworkers. The plaintiff was able to point out numerous examples of pornographic posters and photographs for the court, one of which depicted a nude female torso with the words "USDA Choice" written across it.<sup>140</sup> The court found that the working environment at the shipyard was abusive in light of the totality of the circumstances, circumstances that included the constant remarks and jokes of a sexual nature, the sexually oriented pictures of women posted throughout the workplace, and the isolation of women by male co-workers.<sup>141</sup>

In its opinion, the district court explicitly rejected the *Rabidue* holding

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135. *Id.* at 622 n.7.

136. *Id.* at 622.

137. *See, e.g.*, *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991) ("We do not agree with the standards set forth in . . . *Rabidue*, and we choose not to follow [that decision]."); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988) (Sixth Circuit criticizes *Rabidue's* narrow reading of Title VII), *cert. denied*, 490 U.S. 1110 (1989).

138. *See, e.g.*, *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that pornographic pictures of women may serve as evidence of a hostile environment); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Fla. 1989) (holding that "a plethora of sexually offensive posters, pictures, graffiti, and pinups placed on the walls throughout the Police Department" and "innumerable childish, yet offensive, sexual and obscene innuendoes and incidents aimed at [the plaintiff] on the basis of sex" give rise to a hostile environment cause of action).

139. 760 F. Supp. 1486 (M.D. Fla. 1991).

140. *See id.* at 1495.

141. *See id.* at 1524-25.

that "a proper assessment or evaluation of an employment environment' . . . includes '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 on voluntarily entering into that environment.'"<sup>142</sup> Instead, the district court specifically stated that "the social milieu of the area and the workplace does not diminish the harassing impact"<sup>143</sup> of the offensive conduct.

Although the prevalence of pornographic photographs in the workplace was greater in *Robinson* than in *Rabidue*, it seems apparent that many courts believe that women should not have to be exposed to *any* such displays in the workplace. As stated by the court in *Andrews v. City of Philadelphia*, "[o]bscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.'"<sup>144</sup>

A number of courts have determined that a hostile environment can also be created by certain non-sexual conduct. In these cases, the courts have held that threats, intimidations, insults, and verbal abuse directed at women can satisfy the "severe and pervasive" test.<sup>145</sup> For the most part, courts that have failed to find a hostile environment where these elements were present have reasoned that the incidents were isolated and lacking in repetitive effect. For example, in *Jones v. Flagship International*,<sup>146</sup> the plaintiff was propositioned by her supervisor on several business trips and was offended by a display of bare-chested mermaid centerpieces at a company function. The Fifth Circuit found that these events were not sufficiently severe or pervasive to constitute a hostile environment. Further, the court suggested that a hostile environment cause of action in which the plaintiff cannot show a tangible lost job benefit requires a higher showing that the conduct was severe and pervasive.<sup>147</sup>

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142. *Id.* at 1525 (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986)).

143. *Id.* (citing *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982)).

144. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989)). It is interesting to note that the *Andrews* court couches its opinion as to what women find sexually offensive with the words "quite possibly," as if the court is not really sure what women in general would think. According to some scholars, there should be no need for such hesitation in cases in which courts adopt the "reasonable woman" standard of review, since it is clear that obscene language and pornography in the workplace are offensive to the reasonable woman. For a discussion of the reasonable woman standard, see *infra* notes 154-74 and accompanying text.

145. See *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); *Delgado v. Lehman*, 665 F. Supp. 460 (E.D. Va. 1987).

146. 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

147. See *id.* at 720-22. Other cases dealing with conduct that courts considered too isolated or lacking in repetitive effect to sustain a cause of action under Title VII include

Along similar lines, the Seventh Circuit found the conduct at issue in *Scott v. Sears, Roebuck & Co.*<sup>148</sup> to be "too isolated and lacking the repetitive and debilitating effect" necessary to sustain a claim for hostile environment.<sup>149</sup> In *Scott*, a co-worker of the plaintiff had invited her to join him at a restaurant after work and suggested that he give her a rub down. In addition, another co-worker had slapped her on the buttocks, and another had made lewd comments about her.<sup>150</sup> In other cases, unjust criticisms coupled with one lewd comment<sup>151</sup> and requests for sexual favors by a co-worker on several occasions over a four month period were each held not sufficiently repetitive to meet the burden of proving a hostile work environment.<sup>152</sup>

## II. DETERMINING THE APPROPRIATE STANDARD OF REVIEW IN HOSTILE ENVIRONMENT CASES: EVOLUTION OF THE "REASONABLE WOMAN" STANDARD

Even assuming that courts can agree on the types and patterns of conduct that establish a hostile environment cause of action, a fundamental issue remains: by what standard should the allegedly harassing acts be judged? In cases to date, courts have applied a variety of standards to determine whether the conduct at issue was "unwelcome" and "sufficiently severe and pervasive."<sup>153</sup> For example, as mentioned in the introduction, some courts have applied the traditional "reasonable person" standard.<sup>154</sup> Other courts have modified the "reasonable person" standard by using a two-step objective (what would the reasonable person

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*Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (posting of obscene cartoons of the plaintiff in men's room for a week were "meager proof" of actionable hostile environment), *cert. denied*, 489 U.S. 1020 (1989), and *Ferguson v. E.I. duPont de Nemours Co.*, 560 F. Supp. 1172, 1181-82 (D. Del. 1983) (where manager slapped plaintiff's rear, invited her in for a "heart to breast" talk, referred to her as his girlfriend in front of other workers, inquired into her sexual proclivities, and made other comments of a sexual nature, acts were not sufficient to constitute sexual harassment given plaintiff's statement that the alleged harasser may not have intended or perceived his conduct as offensive).

148. 798 F.2d 210 (7th Cir. 1986).

149. *Id.* at 214.

150. *See id.* at 211-12.

151. *See Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495 (W.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988).

152. *See Hollis v. Fleetguard, Inc.*, 668 F. Supp. 631 (M.D. Tenn. 1987), *aff'd*, 848 F.2d 191 (6th Cir. 1988); *see also Neville v. Taft Broadcasting Co.*, 42 Fair Empl. Prac. Cas. (BNA) 1314 (W.D.N.Y. 1987) (fact that, on several occasions, plaintiff's supervisor grabbed, kissed and pressed his body against plaintiff did not constitute a hostile environment); *Freedman v. American Standard*, 41 Fair Empl. Prac. Cas. (BNA) 471 (D.N.J. 1986) (co-worker's one obscene phone call, invitation for a date and rudeness were not sufficient to constitute a hostile environment); *Volk v. Coler*, 44 Fair Empl. Prac. Cas. (BNA) 1111 (C.D. Ill. 1986) (occasional use of foul language or gestures by a supervisor insufficient to support a cause of action for hostile environment, since not every instance of bad judgment on the part of a supervisor is actionable).

153. *See supra* notes 68-85, 118-52 and accompanying text.

154. *See supra* note 20 for cases adopting the reasonable person standard.

think?) and subjective (what did this particular victim think?) approach.<sup>155</sup> Still another court recommends judging the behavior from the perspective of both the perpetrator and the victim.<sup>156</sup> And yet another court has suggested that, under certain circumstances, the perspective of the defendant alone should be the focus of inquiry.<sup>157</sup>

Recently, the Ninth Circuit adopted a different, more controversial approach: viewing sexual harassment grievances from the perspective of the reasonable woman.<sup>158</sup> This Section will examine the evolution of this standard and how it is being applied by an increasing number of courts. The next Section will look at the legal, social, and ethical implications of adopting such a standard on a widespread scale.

The adoption of a distinct standard for women is not novel. In past years, a form of the reasonable woman standard has been adopted in certain intentional torts cases<sup>159</sup> and in cases of self defense.<sup>160</sup> The suggestion that such a standard might be appropriate in hostile environment sexual harassment cases first appeared in a *Harvard Law Review* Note in 1984.<sup>161</sup> In that note, the author suggested that the adoption of a reasonable woman standard would protect females from behavior that they found offensive but that males might not necessarily perceive in the same way.<sup>162</sup> At the same time, because the standard assumes the perspective of a *reasonable* woman, males would be protected from the claims of hypersensitive victims. The author further argued that, "[b]y adopting the woman's point of view as the norm, the courts might heighten male sensitivity to the effects of sexually offensive conduct in the workplace."<sup>163</sup>

The first judicial recognition of the reasonable woman standard appeared in Judge Keith's dissent in *Rabidue v. Osceola Refining Co.*<sup>164</sup> As discussed earlier, the majority in *Rabidue* took a "boys will be boys" attitude toward the conduct (the use of persistent obscene language and the placement of obscene posters in the workplace) that the plaintiff found offensive, adopting as the standard of review that of a "reasonable person's reaction to a similar environment."<sup>165</sup> Citing the *Harvard Law Review* Note just discussed, Judge Keith recommended in his dissent that

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155. See *supra* note 21 and accompanying text for cases adopting the "objective/subjective" perspective.

156. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

157. See *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 551 (N.D. Ill. 1984) ("focus of the question of sexual harassment should be on the defendant's conduct, not the plaintiff's perception or reaction to the defendant's conduct").

158. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

159. See William L. Prosser, *The Law of Torts* 37 (4th ed. 1971).

160. See *State v. Wanrow*, 559 P.2d 548, 558-59 (Wash. 1977).

161. See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra* note 2, at 1459.

162. See *id.*

163. See *id.*

164. 805 F.2d 611, 626 (6th Cir. 1986).

165. *Id.* at 620.

the court should have instead adopted the perspective of the reasonable victim, a perspective that, according to Judge Keith, "simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant."<sup>166</sup> Addressing the majority's view that Title VII could not change a social environment in which women are pictured as sex objects in multiple dimensions, Judge Keith stated that "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."<sup>167</sup>

Since *Rabidue*, several courts have expressly adopted the reasonable woman standard recommended by Judge Keith.<sup>168</sup> The standard did not receive much publicity or widespread support, however, until the Ninth Circuit's decision in *Ellison v. Brady*.<sup>169</sup> The plaintiff, Ms. Ellison, worked as a revenue agent for the Internal Revenue Service (IRS) in California. The defendant, a male co-worker, sought repeatedly to pursue a social relationship with her. The plaintiff was upset by these unwelcome advances and attempted to avoid contact with him. Subsequently, while Ms. Ellison was away on business, the defendant wrote her a long, amorous letter. At trial, she testified that she thought that the defendant was "crazy . . . nuts" and that she did not know what he would do next.<sup>170</sup> Although her supervisor attempted to resolve the issue, he did not do so to her satisfaction, and she filed a formal complaint with the IRS. The Treasury Department rejected Ms. Ellison's complaint on the basis that there was no pattern or practice of harassment as required by the EEOC regulations. Ms. Ellison then appealed to the EEOC. The EEOC affirmed the Treasury Department's decision, but on different grounds—that the IRS had taken adequate action to prevent the repetition of the conduct.

Ms. Ellison subsequently sued in federal district court. The district court judge granted the government's summary judgment motion "on the ground that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment."<sup>171</sup>

The Ninth Circuit, on appeal, ruled in Ms. Ellison's favor. In doing so, it became the first court expressly and emphatically to adopt the "reasonable woman" standard in hostile environment cases. As the court explained it, "[w]e adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of

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166. *Id.* at 626 (citing *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra* note 2, at 1459).

167. *Id.*

168. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

169. 924 F.2d 872 (9th Cir. 1991).

170. *Id.* at 874. The facts presented here appear on pages 873-75 of *Ellison*.

171. *Id.* at 875.

women.”<sup>172</sup> As support for this view, the court cited literature and research<sup>173</sup> showing that women interpret conduct of a sexual nature differently from men.<sup>174</sup>

The court noted that it was adopting the standard despite the fact that it would apply to males whose innocent, well-intentioned comments were perceived as harassing from the reasonable woman’s perspective:

We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment. That is because Title VII is not a fault-based tort scheme.<sup>175</sup>

The Ninth Circuit also pointed out that analyzing the facts from the harasser’s perspective might lead one to believe that the defendant in *Ellison* was merely a “modern-day Cyrano de Bergerac.”<sup>176</sup> Measured from the reasonable victim’s perspective, however, such behavior was outside the norm, giving rise to fear of further harassment and possible physical harm.

In creating a “reasonable woman” standard, the *Ellison* court clearly intended to establish aggressive new guidelines for conduct in the workplace rather than adhere to a traditional standard that, in its view, simply reinforced prevailing levels of discrimination.<sup>177</sup> Although it is premature to judge the full effect of this case, a number of federal and state courts have adopted some version of the *Ellison* approach.<sup>178</sup> For exam-

172. *Id.* at 879.

173. *See id.* at 879 n.9.

174. The court stated:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. 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. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

*Id.* at 879 (footnotes omitted).

175. *Id.* at 880 (footnote omitted).

176. *Id.*

177. *See* Eric J. Wallach & Alyse L. Jacobson, ‘Reasonable Woman’ Test Catches On, *Nat’l L.J.*, July 6, 1992, at 21.

178. *See* *Austen v. Hawaii*, 759 F. Supp. 612, 628 (D. Haw. 1991); *Jensen v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 (D. Minn. 1991) (used the *Ellison* test to certify a class in a gender discrimination case); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me.) (using *Ellison* by analogy in a racial “hostile environment” case), *vacated in part for other reasons*, 765 F. Supp. 1529 (1991); *Carillo v. Ward*, 770 F. Supp. 815, 822 (S.D.N.Y. 1991); *Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 294 (E.D. Pa.

ple, in analyzing comments made by a male supervisor to the female plaintiff, a federal district court in Hawaii stated that "[h]e referred to her in ways which reasonable women consider to be typical of males who consider women inferior."<sup>179</sup> Using *Ellison* by analogy in a racial harassment case, another court stated that "the fact-finder must 'walk a mile in the victim's shoes.'"<sup>180</sup> Generally, courts that have adopted the reasonable woman standard in sexual harassment cases seem intent on eradicating this particular form of discrimination by replacing a standard that reflects older, male-generated workplace norms with a standard that is more in tune with today's ideal of a dual sex, equal status work environment.

The fact that a number of courts have adopted the *Ellison* reasonable woman standard suggests that it will play an increasingly important role in sexual harassment cases. For that reason, it is important to explore in some depth the full implications of adopting such a standard to replace more traditional measures for evaluating allegedly harassing conduct.

### III. IMPLICATIONS OF ADOPTING A "REASONABLE WOMAN" STANDARD

Applying a "reasonable woman" standard in Title VII cases raises numerous legal, ethical, and social questions. Undoubtedly, the most troubling question is whether it is proper or fair to impose liability, including potential liability for substantial money damages<sup>181</sup> on men (and on their employers) for well-intentioned behavior that they do not realize is illegal or offensive.

#### A. *Sexual Harassment: Facts and Figures*

Practical experience and a substantial body of research data suggest that the behavior of many men in the workplace annoys and offends many women. Estimates of the number of women who feel they have been sexually harassed in the workplace range from forty percent,<sup>182</sup> to

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1991); *Radtke v. Everett*, 471 N.W. 2d 660, 664 (Mich. Ct. App. 1991), *appeal granted*, 487 N.W.2d 762 (Mich. 1992); *T.L. v. Toys 'R' Us, Inc.*, 605 A.2d 1125, 1135 (N.J. Super. Ct. App. Div. 1992).

179. *Austen v. Hawaii*, 759 F. Supp. 612, 628 (D. Haw. 1991).

180. *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me.), *vacated in part for other reasons*, 765 F. Supp. 1529 (1991).

181. As discussed *supra* note 62, the Civil Rights Act of 1991 authorizes compensatory and punitive damages for cases involving *intentional* sexual discrimination in employment. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (to be codified at 42 U.S.C. § 1981a).

182. See, e.g., Riger, *supra* note 5, at 497 (citing U.S. Merit Systems Protection Board, *Sexual harassment in the federal workplace: Is it a problem?* (1981)) (first comprehensive national survey of sexual harassment among federal employees determined that roughly 40% of working women report having experienced sexual harassment, and updated study in 1988 found that frequency of harassment had remained constant since the original study).

fifty percent,<sup>183</sup> to sixty percent.<sup>184</sup> In fact, one report estimates the true figure to be as high as ninety percent.<sup>185</sup> Studies show that most incidents involve men over 35 years old harassing women under the age of 34.<sup>186</sup> In over eighty percent of the cases, according to one study, the harasser occupies a more powerful position in the organization than the victim.<sup>187</sup> Relatively few of the victims are men—only about fifteen percent.<sup>188</sup>

Although women have historically considered it “career suicide” to take formal action against their harassers,<sup>189</sup> a growing number of women have begun breaking their silence.<sup>190</sup> For example, since 1980, over 38,500 persons, the vast majority of whom are women, have filed sexual harassment complaints with the EEOC.<sup>191</sup> Moreover, the number is on the rise. In 1986, the Commission received 4,504 complaints.<sup>192</sup> In 1991, that number rose to 6,675.<sup>193</sup> Based on the reported rate of increase, the EEOC seemed likely to receive over 9,000 complaints in 1992.<sup>194</sup>

### B. *Men's Intentions and Motives*

One of the most controversial aspects of the sexual harassment debate centers on the reasons for men's harassing behavior. On the one hand, some would agree with the reader responding to a survey conducted by *Working Woman* magazine who asserted that harassing behavior is motivated by men's desire to control women rather than by sexual desire. According to this view, “[t]he harasser wants a victim, not a playmate,

183. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 n.19 (1st Cir. 1988) (citing a number of studies documenting sexual harassment in the workplace, including one that maintains that nearly 50% of working women are sexually harassed on the job).

184. See Ronni Sandroff, *Sexual Harassment: The Inside Story*, *Working Woman*, June 1992, at 47, 48 (survey by *Working Woman Magazine* found that 60% of women who responded reported being sexually harassed).

185. See David E. Terpstra & Susan E. Cook, *Complainant Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 *Personnel Psychol.* 559, 559 (1985).

186. See Sandroff, *supra* note 184, at 48.

187. See *id.*; see also Riger, *supra* note 5, at 497 (citing several studies that “[w]omen with low power and status, whether due to lower age, being single or divorced, or being in a marginal position in the organization are more likely to be harassed”).

188. See Riger, *supra* note 5, at 497.

189. See, e.g., Sandroff, *supra* note 184, at 47, 50 (according to *Working Woman* survey, among women who have been harassed, “only 40 percent told the harasser to stop, and just 26 percent reported the harassment”); Riger, *supra* note 5, at 497 (noting that “[d]espite the high rates found in surveys of sexual harassment of women, few complaints are pursued through official grievance procedures”).

190. See Jane Gross, *Suffering in Silence No More: Fighting Sexual Harassment*, N.Y. Times, July 13, 1992, at A1, D10.

191. See H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 68 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 606 n.63.

192. See Gross, *supra* note 190, at D10.

193. See *id.*

194. See *id.*



and a woman with modest dress, makeup and comportment is just as likely—maybe even more likely—to be harassed.’”<sup>195</sup> On the other hand, a number of courts<sup>196</sup> and commentators<sup>197</sup> have concluded that a great deal of what women consider to be sexual harassment constitutes innocent, well-intentioned behavior by men. To say that this behavior is innocent and well-intentioned, however, is not to say that those who analyze it think it should be ignored or excused. To the contrary, critics of male behavior assert that, despite men’s benign intentions, behavior that offends women should be prohibited and punished. As Professor Nancy Ehrenreich writes:

I . . . believe that some men who engage in (what I would call) harassing behavior do so with neither conscious hostility towards women nor an awareness of the effect of their conduct, and I have no doubt that such men would feel personally wronged by judgments declaring their conduct harassment. (Other men, of course, are perfectly aware of what they are doing.) Nevertheless, I am convinced . . . that while the elimination of inequality in society inevitably makes some people feel wronged—entailing, as it does, a reduction in the social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them—that fact

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195. Sandroff, *supra* note 184, at 49 (quoting a Washington professor).

196. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (“[C]omplete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.”); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (“Although men may find [obscene language and pornography] harmless and innocent, it is highly possible that women may feel otherwise.”); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988):

A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a “great figure” or “nice legs.” The female subordinate, however, may find such comments offensive. Such a situation presents a dilemma for both the man and the woman: the man may not realize that his comments are offensive, and the woman may be fearful of criticizing her supervisor.

*id.*; *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991):

[I]t is important to analyze and understand the different perspectives of men and women. [B]ecause of their historical vulnerability in the work force, women are more likely to regard a verbal or physical sexual encounter as a coercive and degrading reminder that the woman involved is viewed more as an object of sexual desire than as a credible coworker deserving of respect.

(citations omitted), *appeal granted*, 487 N.W.2d 762 (Mich. 1992).

197. See, e.g., Ehrenreich, *supra* note 2, at 1207-1208 (noting that men tend to view some forms of sexual harassment as “harmless social interactions to which only overly-sensitive women would object”); *Staton & Sinner*, *supra* note 2, at 10 (arguing that Title VII should apply to behavior that many men would not “even realize is inappropriate, or which may have been well-intentioned”); *Riger*, *supra*, note 5, at 499 (“Men tend to find sexual overtures from women at work to be flattering, whereas women find similar approaches from men to be insulting . . . . Whatever the cause, a reasonable man and a reasonable woman are likely to differ in their judgments of whether a particular behavior constitutes sexual harassment.”); *Abrams*, *supra* note 13, at 1203 (noting that a “characteristically male view, which depicts sexual taunts, inquiries or magazines as a comparatively harmless amusement . . . pervades many recent court opinions”).

does not justify its perpetuation.<sup>198</sup>

The recent passage of the Civil Rights Act of 1991<sup>199</sup> makes it even more important for men and their employers to address this issue, since intentional sexual harassment under Title VII now carries the potential for substantial compensatory and punitive damages.<sup>200</sup>

### C. *Differences Between the Sexes*

To conclude that male behavior, however innocent and well-intentioned from the man's point of view, can offend many women indicates the existence of fundamental differences in attitudes and approaches between the sexes. Such a view challenges the notion that women and men are virtually interchangeable in the workplace. Although this realization may trouble proponents of absolute equality in employment, the fact is that recent research strongly suggests major differences between the sexes on a number of dimensions not previously recognized.<sup>201</sup> For example, Professor Deborah Tannen's research has focused on the differences between men's and women's conversational styles. Despite her misgivings about the differences between the sexes, she insists they are real and significant:

The desire to affirm that women are equal has made some scholars reluctant to show they are different, because differences can be used to justify unequal treatment and opportunity. Much as I understand and am in sympathy with those who wish there were no differences between women and men—only reparable social injustice—my research, others' research, and my own and others' experience tell me that it simply isn't so. There *are* gender differences in ways of speaking, and we need to identify and understand them. Without such understanding, we are doomed to blame others or ourselves—or the relationship—for the otherwise mystifying and damaging effects of our contrasting conversational styles.<sup>202</sup>

Why do men and women have such different perspectives? Professor Tannen suggests that, in the case of conversational styles, the sexes differ because they grow up in different worlds:

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198. Ehrenreich, *supra* note 2, at 1194-95.

199. *See supra* note 62.

200. *See infra* notes 242-60 and accompanying text.

201. *See, e.g.*, Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982) (arguing that men and women approach moral decision-making from different perspectives); Deborah Tannen, You Just Don't Understand: Women and Men in Conversation 17 (1990) (recognizing that men and women approach conversations from different perspectives); Abrams, *supra* note 13, at 1187-97 (citing a number of feminist scholars who perceive differences on a number of dimensions between the sexes and stating that "[d]escribing the world as if socially created gender differences did not exist seems to me a strained and misleading undertaking"); Riger, *supra* note 5, at 499 (citing a number of analyses that recognize "clear-cut and persistent" gender differences in the perception of what constitutes sexual harassment).

202. Tannen, *supra* note 201, at 17.

Even if they grow up in the same neighborhood, on the same block, or in the same house, girls and boys grow up in different worlds of words. Others talk to them differently and expect and accept different ways of talking from them. Most importantly, children learn how to talk, how to have conversations, not only from their parents but from their peers.<sup>203</sup>

If such differences exist in conversational styles, one should not be surprised to find even greater differences in attitudes toward sex. Presumably the gender differences cited by Professor Tannen with respect to conversational styles produce dramatically different views between men and women regarding what constitutes sexual harassment.

On this point, Professor Kathryn Abrams argues that women are more sensitive to sexual matters, offering several reasons why this is so: women often feel their positions in the work force are precarious, and therefore "are likely to construe disturbing personal interactions, stereotypical views of women, or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment."<sup>204</sup> Moreover, their greater physical and social vulnerability to sexual coercion makes many women wary of sexual encounters. Accordingly, "the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience."<sup>205</sup>

Although studies such as these strongly suggest that substantial differences exist between the sexes, other data challenge this view. A recent poll by the Roper Organization<sup>206</sup> based on interviews with 1,026 employed men and women found that:

Despite the uproar following the Clarence Thomas hearings, sexual harassment [sic] in the workplace is not common, and the vast majority of Americans are satisfied with the way their employers are treating the problems . . . . Moreover, the survey finds no great difference between men and women in their perceptions of the relative severity of the problem and on the definitions of what constitutes sexual harassment.<sup>207</sup>

Whatever the reason for the differences—if they exist—with respect to the extent of sexual harassment, courts have expressed concern that applying the traditional "reasonable man's" or "reasonable person's" standard in sexual harassment cases may excuse behavior that most men find acceptable but that irritates and offends many reasonable women.<sup>208</sup>

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203. *Id.* at 43.

204. Abrams, *supra* note 13, at 1205.

205. *Id.*

206. See Roper Poll, *supra* note 15.

207. *Id.* at 1.

208. According to the *Ellison* court:

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. . . . Instead, a gender-con-

Yet, as we discuss below, applying a "reasonable woman's" standard raises other important concerns.

#### D. *Competing Standards*

The term "reasonable man" is burdened by an enormous amount of historical baggage. Dating back at least two hundred years,<sup>209</sup> the term undeniably evolved from extremely male-oriented legal and cultural roots. As A.P. Herbert noted in a 1928 commentary, "[i]n all [the] mass of authorities which [bear] upon this branch of the law there is no single mention of a reasonable woman."<sup>210</sup> To the contrary, early American jurisprudence equated the degree of diligence required of women with that which the law expected of children or incompetents.<sup>211</sup>

Although we have not undertaken an empirical study on this point, we believe that most courts and scholars have in recent years abandoned the term "reasonable man" in favor of the term "reasonable person."<sup>212</sup> Presumably, this alternative term encompasses both sexes and is gender-neutral. The more traditional "reasonable man" or "reasonable person" standard was applied in many areas of law.<sup>213</sup> In their conventional application, these terms generally carried two meanings: (i) an ideal, albeit not perfect, person whose behavior served as an objective measure against which to judge our actions and (ii) an average or typical person possessing all of the shortcomings and weaknesses tolerated by the community.<sup>214</sup>

In the context of the Title VII debate, the latter meaning is key.<sup>215</sup> That is, those courts that have moved to the "reasonable woman" standard intend it to describe average or typical women—women who react

scious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.

Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

209. According to Professor Ronald Collins, one of the first references to the phrase is found in Sir William Jones's 1796 work on the law of bailments. See Collins, *supra* note 11, at 312-13.

210. Alan Patrick Herbert, *Misleading Cases in the Common Law* 13 (1928) (quoted in Collins, *supra* note 11, at 315).

211. See Collins, *supra* note 11, at 316 (citing Daniels v. Clegg, 28 Mich. 32, 41-42 (1873)).

212. Informal evidence of this trend is found in the fact that a Lexis search for the term "reasonable person" in federal appeals court opinions published after 1990 was not allowed to proceed because it would have retrieved more than 1,000 cases. In contrast, the same search for "reasonable man" found only 86 cases.

213. According to Professor Collins, the "reasonable man" standard was the recognized standard for reviewing culpable conduct in administrative law, bailment law, constitutional law, contract law, criminal law, and the law of trusts. It was also the traditional measure in the study of legal ethics. See Collins, *supra* note 11, at 313.

214. See *id.* at 314.

215. The "ideal but not perfect" standard serves as a model for judging the conduct of those accused of committing torts, not for gauging the appropriate response of those against whom torts are committed. Arguably an "ideal but not perfect" reasonable person or reasonable woman would be less vulnerable to sexual harassment than would be a more typical individual.

differently to situations than do most men but who, at the same time, are neither hypersensitive to<sup>216</sup> nor unoffended by<sup>217</sup> by men's workplace behavior.

### E. *Models of Sexual Harassment Views*

In reviewing the approaches that courts have adopted to date in distinguishing between the reasonable man and reasonable woman perspectives, we find it helpful to consider the various views that courts *could* take on this issue. We identify five general possibilities, each of which is reviewed below.

First, it is conceivable that what reasonable men and reasonable women consider sexual harassment might not overlap at all. If such a model accurately described the state of attitudes in the American workplace, any attempt to develop a "reasonable person" test would create a null set (unless, of course, one were simply to choose one sex as reasonable and reject the other as unreasonable).<sup>218</sup> In such a case, behavior considered harassing by one sex would not be considered so by the other. Common sense suggests that this model is inaccurate, since both reasonable men and reasonable women regard certain male conduct toward women (e.g., rape and other physical attacks, lewd sexual overtures, and the sending of obscene letters) with disgust or distaste. Reasonable members of both sexes, we suggest, would find these actions to constitute sexual harassment. Even male perpetrators of these extremely coercive acts, except perhaps those lost to insanity, would concede their impropriety.

Figure 2 illustrates the equally unlikely possibility that reasonable men and women might view behavior with respect to sexual harassment from precisely identical perspectives. If this model reflected the true state of

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216. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (employers need not "accommodate the idiosyncratic concerns of the rare hyper-sensitive employee"); *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 530 (M.D. Fla. 1988) ("Title VII liability attaches when the case is proved as to the reasonable person, and it does not extend further based on any hypersensitivity of a particular plaintiff."); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984) ("Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive."); *Radtke v. Everett*, 471 N.W.2d 660, 665 (Mich. Ct. App. 1991) (plaintiff cannot prevail if she has an "idiosyncratic or hypersensitive" reaction to co-worker's behavior), *appeal granted*, 487 N.W.2d 762 (Mich. 1992).

217. See, e.g., *Reed v. Shepard*, 939 F.2d 484, 486 (7th Cir. 1991) (no sexual harassment where court found "[b]y any objective standard, the behavior of the male [co-workers] toward Reed revealed at trial was, to say the least, repulsive. But apparently not to Reed . . . . [S]he . . . relished reciprocating in kind."); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301 (S.D.N.Y. 1987) (plaintiff admitted that instances of alleged harassing behavior did not interfere with her work ability), *cited with approval in Robinson*, 118 F.R.D. at 530; *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) (plaintiff contributed to and apparently enjoyed situation alleged to be harassing behavior), *cited in Robinson*, 118 F.R.D. at 530.

218. Historically, of course, courts did adopt one view—the reasonable man standard—to the exclusion of all other perspectives. See *Collins*, *supra* note 11, at 312-15. We find no support for such an approach today, however.

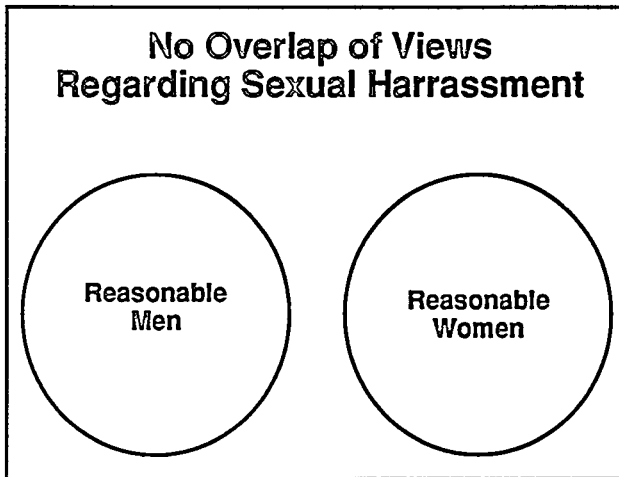


Figure 1



Figure 2

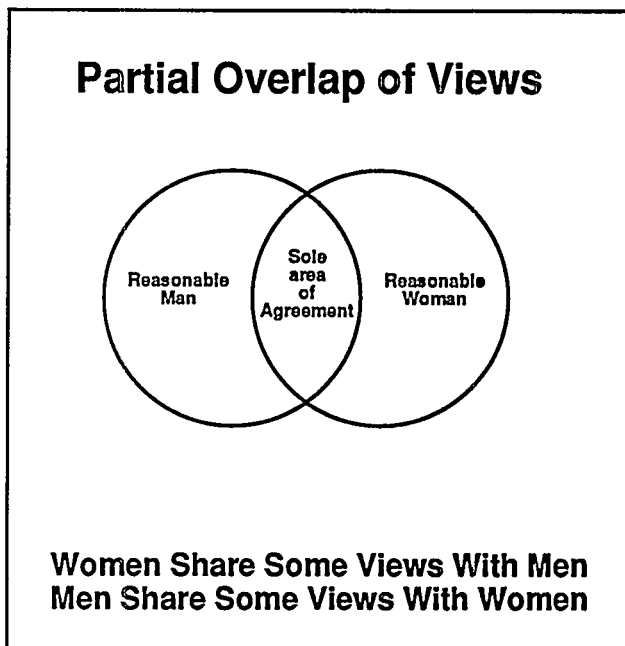
affairs, there would be no need for a “reasonable woman” standard. Instead, courts could simply apply the “reasonable person” standard, since this standard would by definition fully reflect the views of both reasonable men and reasonable women. It is this model, however, that a number of courts and scholars have strongly challenged in recent years.<sup>219</sup> According to these critics, men and women may see some behavior similarly, but they see other behavior quite differently. Of course, whether broad, meaningful differences exist between the perspectives of the sexes remains a question that is subject to ongoing research and

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219. See *supra* notes 195-205 and accompanying text.

debate.<sup>220</sup>

The next three models illustrate possibilities in which some, but not all, of men's and women's views toward sexual harassment overlap. Figure 3 depicts the possibility that reasonable men and reasonable women share some views, but that men view some behavior as harassment that women do not and that, conversely, women view some behavior as harassment that men do not. Assuming that Figure 3 presented a realistic



**Figure 3**

picture of the sexes' attitudes toward harassment (an assumption that seems highly improbable), the task of deciding which conduct violates Title VII and which does not would be daunting. Obviously, courts would reject a test that implicates only the behavior that one sex or the other considers to be harassment, since that would exclude acts such as rape and sexually-oriented physical abuse that reasonable members of both sexes see as harassing. Choosing only the area on which both sexes agree (the intersection of the two circles in Figure 3) would permit a

220. See, e.g., Roper Poll, *supra* note 15 and accompanying text (surveying perceptions of men and women regarding what constitutes sexual harassment). As noted by Burns W. Roper, chairman of the Roper Organization,

[t]he most significant finding to me is how similarly men and women view the issue of sexual harassment. While sexual harassment may be hard to define in the abstract, both sexes seem to know it when they see it—and neither men nor women think harassment is rampant in their own workplaces.

*Id.* at 2.

form of "reasonable person" test, but would fail to consider the serious additional concerns on which the sexes disagree. Perhaps the more realistic approach would be to include offensive conduct that falls into the circle representing *either* sex plus any behavior included in the area of overlap. Thus, the definition of a "reasonable person" under this model would be offensive conduct that reasonable members of either or both sexes consider sexual harassment.

Although theoretically possible, this model implies a reality not suggested in any research or court rulings of which we are aware. Most researchers would undoubtedly agree that many women take offense at certain behavior of men that men think acceptable. The reverse, however, seems questionable—i.e., that many men consider certain conduct to be sexual harassment that women do not also consider improper. Of course, one can conjure up situations in which, for example, some men might take umbrage at a female superior's insistence on calling them "sensitive" or "considerate" in violation of the "macho" image that they prefer to project. But such situations would seem rare, if they exist at all. For the most part, we find it difficult to imagine harassing behavior that men find offensive that would not also be offensive to women.

Along similar lines, Figure 4 illustrates the possibility that reasonable men completely share women's views regarding sexual harassment, but that reasonable men see *additional* behavior as harassment that reasonable women do not. To say the least, this model flies in the face of current research and recent court rulings.<sup>221</sup> For the same reasons that we questioned the practical application of the previous model, we also find this model unrealistic.

Figure 5 describes a world in which reasonable women completely share men's views regarding sexual harassment, but in which women consider *additional* behavior as harassment that reasonable men do not. As we have noted, although by no means a unanimous view,<sup>222</sup> this model comports with the current research and commentary of many scholars in this area and with the thinking of a growing number of courts.<sup>223</sup> Under this model, courts that wish to extend Title VII to include behavior that falls within both circles can do so in one of two ways: they can define all conduct within either of the circles as offensive to a "reasonable person," or they can indicate that they will apply a "reasonable woman" standard that encompasses all behavior falling into either circle. The trend seems to be toward the latter approach.<sup>224</sup>

Precisely what behavior is it that troubles women, yet appears inno-

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221. See *supra* notes 13-15 and accompanying text.

222. See *supra* notes 195-208 and accompanying text.

223. See *supra* notes 168-80. But see Roper Poll, *supra* note 15 and accompanying text.

224. To say that this is the direction in which the courts seem headed is not to say that a majority has yet accepted the reasonable woman standard. We also note that the EEOC, always an influential voice in this area, phrases its test differently. The agency evaluates the harasser's conduct from "the objective standpoint of a 'reasonable per-



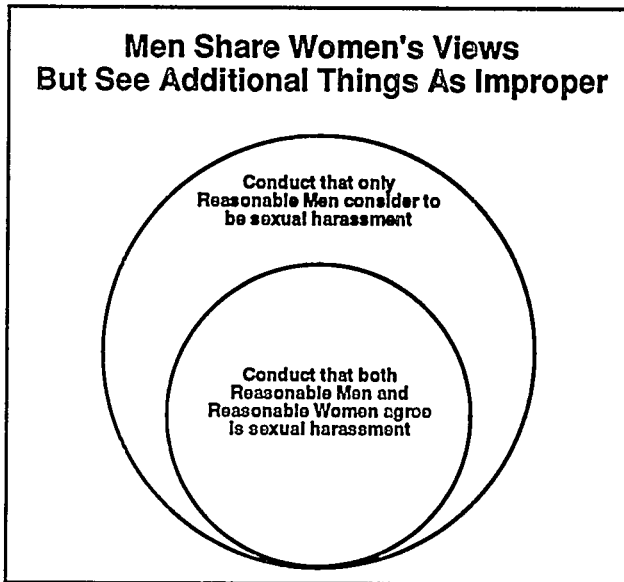


Figure 4

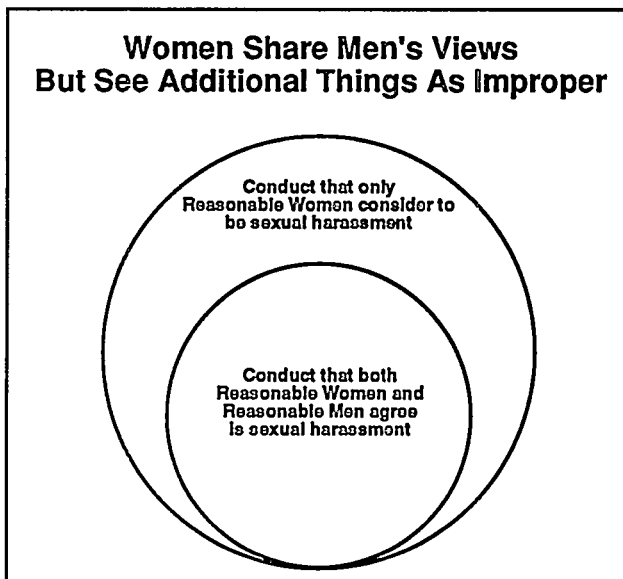


Figure 5

cent to men? Unfortunately, as several courts have indicated, there is no clear answer under Title VII. The problem is compounded by the fact

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son,' ” but also insists that “[t]he reasonable person standard should consider the victim’s perspective.” Policy Guidance on Current Issues, *supra* note 6, at 102-03.

that “[c]onduct considered harmless by many today may be considered discriminatory in the future.”<sup>225</sup> For those courts that apply a “reasonable victim’s” or a “reasonable woman’s” standard, then, the standard for what constitutes sexual harassment will change as the views and attitudes of women change.<sup>226</sup>

To say that the standard is a fluid one is not to say that the question of what constitutes offensive conduct remains a complete mystery. A review of recent sexual harassment cases reveals at least some broad patterns and trends. These cases indicate that, among the types of behavior not generally viewed as offensive by male workers but objected to by female employees are the pervasive use of obscene language by co-workers,<sup>227</sup> displays of pornography in common areas and in the plaintiff’s personal work space,<sup>228</sup> and the conduct of male supervisors who tell female subordinates that they have a “‘great figure’” or “‘nice legs’”<sup>229</sup> or who write repeated unwelcome love letters.<sup>230</sup>

As we have noted, a number of writers and researchers have suggested an expanded view with respect to other conduct that fits into the “men see nothing wrong; women find it offensive” category. Professor Ehrenreich would include “milder” forms of harassment, such as “suggestive looks, repeated requests for dates, and sexist jokes.”<sup>231</sup> Professor Abrams would include “verbal sexual abuse, casual touching, and dissemination or display of pornography.”<sup>232</sup> Professor Riger adds that “more subtle forms of behavior such as sexual jokes or comments” offend many women and should be considered sexual harassment.<sup>233</sup> Above all, Riger believes that “policymakers and others need to learn to ‘think like a woman’ to define which behaviors constitute harassment.”<sup>234</sup> Whether behavior of this type troubles working women as much as these authors

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225. *Ellison v. Brady*, 924 F.2d 872, 879, n.12 (9th Cir. 1991) (citation omitted).

226. *See Radtke v. Everett*, 471 N.W.2d 660, 665 n.10 (Mich. Ct. App. 1991), *appeal granted*, 487 N.W.2d 762 (Mich. 1992).

227. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990).

228. *See id.*; *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 530-31 (M.D. Fla. 1988). *But see Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (expressing disagreement with district court’s determination that presence of obscene drawing of plaintiff on walls of men’s room constituted harassment), *cert. denied*, 489 U.S. 1020.

229. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (hypothetical example cited by court to illustrate behavior considered innocent by male supervisor, but offensive to a female subordinate); *accord Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

230. *See Ellison*, 924 F.2d at 880.

231. Ehrenreich, *supra* note 2, at 1208. Professor Ehrenreich argues that the “persistent behavior of this ‘milder’ sort is just as disturbing to many women as is overt quid pro quo harassment.” *Id.* (citation omitted).

232. Abrams, *supra* note 13, at 1206. Abrams states that “If these . . . forms of employment discrimination against women are to be corrected, and if the norms that permit them to flourish are to be modified, then courts must employ a standard that reflects women’s perceptions of sexual harassment.” *Id.*

233. Riger, *supra* note 5, at 503.

234. *Id.*

assert remains unclear, however.<sup>235</sup>

#### F. *Legal Liability for Innocent Reasonable Acts*

To the extent that courts impose liability on men's conduct that stems from innocent and reasonable motives, courts apply a form of strict liability. To analogize to section 402A of the Restatement of Torts, liability would attach to men's behavior despite the fact that they have exercised "all possible care"<sup>236</sup> in their conduct toward women.

Casting a wide liability net under Title VII is not a new approach. The EEOC has long interpreted Title VII as forbidding conduct that "has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment,"<sup>237</sup> and the *Ellison* Court noted the "no fault" nature of Title VII in explaining its adoption of the reasonable woman standard:

We note that the reasonable victim standard we adopt today classifies conduct as unlawful . . . even when harassers do not realize that their conduct creates a hostile working environment . . . . That is because Title VII is not a fault-based tort scheme. "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation" of co-workers or employers.<sup>238</sup>

Further, courts have historically been willing, in certain types of cases, to hold an actor liable for harmful behavior despite the actor's good intentions.<sup>239</sup> For example, courts have for many years applied liability without fault to the owners of animals that inflict physical harm or property damage, to those individuals who engage in abnormally dangerous activi-

235. See Roper Poll, *supra* note 15 and accompanying text.

236. Restatement (Second) of Torts § 402A(2)(a) (1965). This section imposes liability on product sellers "although the seller has exercised all possible care in the preparation and sale of his product." *Id.*

237. EEOC Guidelines, *supra* note 33, § 1604.11(a)(3) (emphasis added).

238. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (citation omitted); see also *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me.) ("Victims need establish neither the fault nor the discriminatory intent of their employers and co-workers to succeed under Title VII."), *vacated in part for other reasons*, 765 F. Supp. 1529 (1991); *Staton & Sinner*, *supra* note 2, at 9 ("Title VII was not designed to be a fault-based scheme.").

239. See Keeton et al., *supra* note 11, at 536. According to the authors:

Tort liability never has been inconsistent with the ignorance which is bliss, or the good intentions with which hell is said to be paved. A trespasser is not excused by the honest, reasonable belief that the land is his own; a bona-fide purchaser of stolen goods is held liable for conversion; the publisher of a libel commits a tort, although he has no means of knowing the defamatory nature of his words. There are many situations in which a careful person is held liable for an entirely reasonable mistake. In all this there is nothing new. Socially, and legally, these defendants are at fault; whether they are individually so, in spite of the fact that they are blameless, appears to be entirely a matter of definition, rather than of substance, and the argument leads only to a pointless dispute over the meaning of a word.

*Id.* (footnotes omitted).

ties, and to the producers of manufactured products.<sup>240</sup>

Of course, saying that ample precedent exists for applying strict liability generally does not answer the question of whether strict liability should be applied in Title VII cases specifically. Despite the fact the Professor Prosser and his co-authors seem comfortable with the concept of no-fault tort liability,<sup>241</sup> most people sense a substantial moral difference between offenses committed deliberately and those done unwittingly, and the question of intent figures prominently in many civil and most criminal cases.<sup>242</sup> Moreover, as discussed in the section that follows, the 1991 amendments to the Civil Rights Act have upped the ante considerably. Previously, Title VII violations carried only relatively mild sanctions: back pay and injunctive relief.<sup>243</sup> Under the new amendments, however, intentional violations are now subject to punitive and expanded compensatory damages.<sup>244</sup>

### G. *Damages for Intentional Violations Under the Civil Rights Act of 1991*

Historically, the primary federal statute for recovering damages for employment discrimination has been section 1981 of the Civil Rights Act of 1866.<sup>245</sup> In the past, however, damages under section 1981 were available only in intentional discrimination cases in which the discrimination was based on the race of the victim.<sup>246</sup> This changed with the Civil Rights Act of 1991, under which victims of intentional discrimination on the basis of sex, religion, or disability are now entitled to recover compensatory and punitive damages,<sup>247</sup> albeit with some limita-

240. See generally *id.* at 534-83 (overview of strict liability).

241. See *id.* at 535-36. As the authors argue:

There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a person by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong. The distinction still remains between the person who has deviated from the standard, and the person who has not.

*Id.* (footnote omitted).

242. For example, the question of whether a killing was done intentionally, recklessly, or unwittingly can make the difference between a defendant being convicted for murder or walking free.

243. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (1991) (to be codified at 42 U.S.C. § 1981a); Equal Employment Opportunity Comm'n, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct, N-915.002 (BNA) 441-42 (Dec. 27, 1991).

244. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (to be codified at 42 U.S.C. § 1981a).

245. 42 U.S.C. § 1981 (1988).

246. In particularly egregious cases, plaintiffs could also recover punitive damages. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), cited in H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 65 (1991); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

247. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (to be codified as 42 U.S.C. § 1981a).

tions.<sup>248</sup> If, as seems likely, courts continue to adopt a "reasonable woman" standard and to expand the types of conduct that constitute a "hostile environment" under Title VII, the 1991 Civil Rights Act will become a battleground of major proportions, especially with respect to what constitutes "intentional" discrimination. Specifically, those courts that have adopted a "reasonable woman" standard that encompasses conduct that "harassers do not realize . . . creates a hostile working environment"<sup>249</sup> will have to decide whether such conduct falls within the intent requirement of the 1991 amendments.

The most directly analogous precedents for determining the meaning of "intent" in this context are the so-called "disparate treatment" cases under section 1981 and Title VII of the Civil Rights Act—cases that require a showing of discriminatory intent for a plaintiff to recover.<sup>250</sup> Presumably, the courts will look to this established case law for guidance regarding what constitutes "intentional" discrimination under the 1991 amendments.

In "disparate treatment" cases, courts generally follow the guidelines set forth by the U.S. Supreme Court in *Texas Department of Community Affairs v. Burdine*.<sup>251</sup> First, a plaintiff must establish a "prima facie" case in which she shows that (1) she is a member of a protected class, (2) she is otherwise situated similarly to members of the unprotected class, and (3) she was treated differently from members of the unprotected class.<sup>252</sup> Once the plaintiff has established this prima facie case, the burden then shifts to the employer to produce evidence that the reason for treating the plaintiff differently was not an "invidious" one (i.e., the employer must show that its treatment of the employee was not motivated by a discriminatory intent).<sup>253</sup> The employer must further produce a legitimate nondiscriminatory reason for treating the plaintiff differently from members of the unprotected class. The burden then shifts back to the plaintiff, who must prove by a preponderance of the evidence that the employer's articulated reason was merely a "pretext" for discrimination.<sup>254</sup>

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248. Unlike race discrimination cases, for which there are no limits on recoveries, damages for cases involving intentional discrimination under the 1991 Civil Rights Act are capped, with the cap limits determined by the number of persons employed by the defendant. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991) (to be codified at 42 U.S.C. § 1981b(3)).

249. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

250. The two leading disparate treatment cases are a Supreme Court case, *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), and the case discussed in the subsequent paragraphs, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

251. 450 U.S. 248 (1981).

252. See *id.* at 252-53. The Court first articulated these standards for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For an example of how a court applies these general guidelines to determine whether a prima facie case exists, see *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1307-09 (7th Cir. 1985).

253. See *Riordan v. Kempiners*, 831 F.2d 690, 696 (7th Cir. 1987).

254. See, e.g., *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991) (employee has burden of showing that employer's reason for denial of promotion was "pretext" for

Whether the courts will adopt this model to address cases in which a reasonable man innocently creates a hostile working environment remains to be seen. These cases are difficult because the offensive conduct is clearly intentional in the sense that the defendant will have committed a volitional, voluntary act. The defendant will not, however, have intended—either from his perspective or that of a “reasonable man”—anything improper. Yet, his behavior would have offended a “reasonable female” employee, thereby qualifying the plaintiff’s claim as a Title VII cause of action in those courts that have adopted the reasonable woman standard.

Based on our review of current law, we question whether the courts will impose damages for intentional sexual harassment in these cases. In analogous “disparate treatment” cases, many courts look for a discriminatory “animus” indicating that the defendant was in fact motivated by ill will or meanness.<sup>255</sup> Simply using bad judgment, as in cases involving employment favoritism towards relatives that effectively denies opportunities to members of a protected class, has been found not to rise to the level of discriminatory intent.<sup>256</sup> Moreover, several courts have held that acts committed in good faith, even if the acts are in fact discriminatory or otherwise improper, do not demonstrate discriminatory intent.<sup>257</sup>

Traditional tort principles place the concept of intent on a sliding

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discrimination); *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1303 (7th Cir. 1991) (“pretext” may be demonstrated either directly by persuading court that discriminatory reason more likely motivated employer, or indirectly by showing that employer’s proffered reason is unworthy of belief); *Hayes v. Invesco, Inc.*, 907 F.2d 853, 858 (8th Cir. 1990) (overruling district court’s determination that employer’s reason for differential treatment of black clinical nursing instructor was “pretextual”).

255. See *Hill v. Mississippi State Employment Serv.*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 188 (1991); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987).

256. See *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989).

257. See, e.g., *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 189-90 (1st Cir. 1990) (where employer terminated black employee on possibly mistaken assumption that employee had instigated a fight with co-worker, fact that employer might have been mistaken tended to negate discriminatory intent so long as hospital acted in good faith); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (where employer’s reason for alleged discriminatory act was honestly described, but poorly founded, court will not find discriminatory intent), *cert. denied*, 484 U.S. 977 (1988); *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987) (in evaluating discriminatory intent, court should look to employer’s motivation, not applicant’s perceptions or even objective assessment of what qualifications are required for particular position); *Linder v. Prudential Ins. Co.*, 743 F. Supp. 1237, 1245 (W.D. Tex. 1990) (employer’s action, if based upon sincere belief in business necessity, does not constitute discriminatory intent even where court concludes that employer acted improperly); *Howze v. Adams*, 689 F. Supp. 20, 25 (D.D.C. 1988) (fact that employer’s decision violated federal personnel law did not demonstrate discriminatory intent); *Grier v. Casey*, 643 F. Supp. 298, 309 (W.D.N.C. 1986) (to find that employer’s action was non-discriminatory, trier of fact need only determine that employer had good faith belief that employee’s performance was unsatisfactory and that asserted reason for the action was not a mere pretext for discrimination).

scale<sup>258</sup> demarcated by at least five possible categories of intentional or quasi-intentional behavior: (i) mere inadvertence, (ii) acts in disregard of consequences likely to follow, (iii) acts that invade the rights of another under a mistaken belief of committing no wrong,<sup>259</sup> and (iv) acts where the motive is a malevolent desire to do harm.<sup>260</sup> Our reading of the "disparate treatment" cases convinces us that the courts tend to find intentional violations only with respect to the last category. If this is true, one would imagine that the "reasonable man who innocently creates a hostile working environment" cases will not trigger damages under the 1991 amendments to the Civil Rights Act. It is entirely possible, however, that those courts willing to apply a "reasonable woman" standard will adopt an extremely expansive view of what constitutes intentional discrimination under the 1991 Amendments.

#### H. *Concerns About the "Reasonable Woman" Standard*

As Professor Ehrenreich has noted, no substantial change in social policies is pain-free.<sup>261</sup> The move toward a "reasonable woman" standard certainly qualifies as a substantial change in policy, the implementation of which will create a number of potential problems that warrant discussion. The analysis that follows should not be read as indicating that we either reject or endorse the new standard. We do, however, see several potential trouble spots that should be considered by the courts and by advocates of an expansive "reasonable woman" standard under Title VII.

##### 1. Overreaction

The adoption of the reasonable woman standard carries a strong potential for overreaction by corporate officials who find that their companies are subject to a standard that presents such a moving and unclear target. As previously noted,<sup>262</sup> courts that have adopted the "reasonable woman" standard have indicated that, as women's views change, workplace behavior that is acceptable today may violate Title VII tomorrow. With this in mind, risk-averse personnel managers and other corporate supervisors may well adopt rules that go well beyond the law to ensure

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258. See Keeton et al., *supra* note 11, at 37.

259. For example, where the defendant, over the protests of the plaintiff, tried to set a broken arm and caused severe harm. See *id.*

260. See *id.*

261. According to Ehrenreich:

[A]ll acts by any one group (or individual) are inevitably harmful to others. One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit.

Ehrenreich, *supra* note 2, at 1221 (footnote omitted). Although we hesitate to look at the world as one huge "zero-sum" game, we agree with Ehrenreich that major policy shifts often require painful trade-offs among competing interests.

262. See *supra* notes 225-30 and accompanying text.

that their companies will not face Title VII liability.<sup>263</sup> For example, some companies might adopt rules that threaten employees with immediate dismissal for any physical contact, other than perhaps a simple handshake, with fellow employees on the job.<sup>264</sup> Or companies might bar any display of nudity in the workplace, including in works of art, on the assumption that nudity, however aesthetically portrayed, may offend someone.<sup>265</sup> Similarly, to deal with concerns about “suggestive looks” in the office,<sup>266</sup> companies might adopt complex rules that prohibit “sexual staring” or “offensive watching” by their employees.<sup>267</sup> Further, in an effort to combat both dirty jokes and jokes that demean women, companies might flatly prohibit the telling of jokes in the workplace.<sup>268</sup> We could go on, but we trust the point is clear: companies faced with potential liability under rapidly evolving and vague standards<sup>269</sup> may feel the need to protect themselves by adopting intrusive and, ultimately, unfair, workplace restrictions. In particular, many harried corporate executives may simply decide that they have neither the time nor the resources to conduct workplace polls on a regular basis to determine with precision which types of conduct currently offend their female employees. As a result, they will tend to operate with a meat axe rather than a scalpel, putting in place broad, prophylactic rules in an attempt to reduce the risk of Title VII litigation and liability.

## 2. Fewer Women Hired

Under the “doctrine of unintended consequences,” which states that attempts at reform sometimes produce effects opposite to those intended, it is possible that some employers in jurisdictions that adopt the “reasonable woman” standard will become wary of hiring women. For example,

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263. Our experience as faculty in a business school has sensitized us to the challenges that face corporate officials in addressing new workplace rules. Because most laws present “gray zones” in which it is not clear whether one’s practices comply with the rules, companies often try to insulate themselves from liability by drawing “bright line” rules that bar conduct that even hints of a potential violation.

264. Needless to say, kissing under mistletoe at an office Christmas party would be forbidden under this sort of rule.

265. See *infra* note 279.

266. See Ehrenreich, *supra* note 2, at 1207.

267. A company might, for example, define “sexual staring” as any glance at an employee that exceeds one second or that is directed below the employee’s neck. The question then becomes how to enforce the rule—perhaps by hiring office enforcers or using office informants!

268. Again, a “bright line” rule such as this would work to insulate a company from liability because, the company hopes, it would eliminate any vagueness or ambiguity regarding what constitutes a “dirty” joke or a joke that demeans women.

269. We do not suggest that Title VII is the only area of the law that requires employers to deal with changing and vague standards. Publishers, for example, face evolving “contemporary community standards” that define what constitutes obscenity. See *Miller v. California*, 413 U.S. 15, 24 (1973). We suspect, however, that the lines defining what constitutes obscenity under the many Supreme Court decisions in this area are somewhat clearer for publishing companies than are the boundaries separating acceptable from unacceptable conduct toward employees under recent Title VII decisions.



when a company hires women to fill traditionally male jobs, it may feel the need to implement immediate and, perhaps, costly changes in the workplace to ensure that nothing in the environment offends the new women workers. The unclear and evolving rules regarding what offends "reasonable women" will also create concerns that, despite its best efforts, a company will be found to have tolerated behavior and conditions later determined to constitute harassing conduct or a hostile environment. Faced with these prospects, the company may simply adopt an explicit strategy to structure jobs in the "sex is a bona-fide occupational qualification" mold<sup>270</sup> or, more likely, continue its unenthusiastic approach to hiring women. In other words, companies in reasonable woman jurisdictions may be reluctant to hire women if every one hired carries a heightened threat of a lawsuit.

### 3. Freedom of Speech

Although we tend not to see an increased push for "politically correct" speech in the workplace, a trend that we deplore, as an imminent danger, there are legitimate freedom of speech concerns associated with the widespread adoption of a "reasonable woman" standard. At the outset, we note that the recent Supreme Court ruling in *R.A.V. v. City of St. Paul*<sup>271</sup> clearly raises more questions than it answers regarding permissible restrictions of free speech. In that case, the Court invalidated, by a 5-4 vote, a city ordinance banning certain types of "hate speech" on the ground that the ordinance improperly imposed "content discrimination" on otherwise proscribable speech. Writing for the Court, Justice Scalia stated that the city could not ban hate speech if the only categories covered by the ordinance were speech directed at race, color, creed, religion, or gender. In the Court's opinion, the ordinance must ban either all such speech or none of it. For the city to do otherwise would, in effect, "license one side of the debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."<sup>272</sup>

In an apparent effort to assuage the concerns of those who might conclude that, like the hate speech ordinance, hostile environment rules promulgated under Title VII are also unconstitutional because they prohibit only certain offensive words,<sup>273</sup> the majority specifically stated that under the so-called "secondary effects" doctrine, the incidental regulation of speech under Title VII would not be considered unconstitutional

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270. See EEOC Guidelines, *supra* note 33, § 1604.2 for the agency's rules regarding "sex as a bona fide occupational qualification."

271. 112 S. Ct. 2538 (1992).

272. *Id.* at 2548.

273. For example, Title VII has typically been interpreted as covering only certain categories of discrimination, such as race, color, sex, or national origin. Thus, Title VII protects an employee against racial taunts or abusive sexual slurs, but not, say, against co-workers who mock his southern accent or his "Southernness." *See Williams v. Frank*, 757 F. Supp. 112, 120 (D. Mass. 1991).

under the Court's reasoning in *R.A.V.*<sup>274</sup> But this attempt to distinguish regulation under Title VII from the St. Paul ordinance drew a skeptical response from Justice White and the other dissenting justices. To them, "hostile environment" rules directly address the impact of speech on the victimized worker in same manner that the majority's opinion prohibited.<sup>275</sup> In making this point, however, neither Justice White nor any of the other dissenters suggested that they viewed Title VII regulation as constitutionally suspect. Instead, they simply pointed out the inconsistency in the majority's opinion. Whatever the merits of either side's argument, it seems clear that none of the nine justices saw *R.A.V.* as a real threat to Title VII.

Despite the implicit assurance in *R.A.V.* that Title VII rules appear consistent with the First Amendment, we share some of the concerns of Professor Kingsley Browne, who argues that the courts and commentators too quickly dismiss First Amendment concerns arising from hostile environment cases.<sup>276</sup> Addressing this issue, Professor Browne raises a number of fairly compelling points:

Far from having an "incidental effect" on the right of speech, regulation of offensive speech has as its primary purpose the limitation of "offensive" expression, often in the form of "offensive" ideas, that has no relation to any threat of future action. Although advocates of such regulation may argue that there is no desire to censor ideas, only to guarantee equal participation of women or blacks in the workplace, the fact remains that the purpose of the regulation is to prohibit expression because of the ideology expressed.<sup>277</sup>

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274. Under this doctrine, regulations that legitimately target conduct incidentally accompanying speech do not violate the First Amendment so long as the regulations are not directed at the content of the speech. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968). According to the *R.A.V.* majority, the key to the constitutionality of such "speech/conduct" regulations is that the government "does not target conduct on the basis of its expressive content." *R.A.V.*, 112 S. Ct. at 2546-47.

275. According to Justice White:

Title VII is similar to the St. Paul ordinance that the majority condemns because "it impose[s] special prohibitions on those speakers who express views on disfavored subjects." . . . Under the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review; because a general ban on harassment in the workplace would cover the problem of sexual harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment.

*R.A.V.*, 112 S. Ct. at 2557 (alteration in original) (citation omitted). Moreover, according to Justice White, the speech regulated in hostile environment cases is the conduct that is prohibited in many cases, and penalizing this expression under Title VII "reaches beyond any 'incidental' effect on speech." *Id.*

276. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991); see also Cathleen M. Mogan, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants From Having Their Cake and Eating It Too*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 543, 571-73 (1992) (discussing the "grinding tension" between freedom of expression and the rights of women and minorities).

277. Browne, *supra* note 276, at 515.

Browne particularly takes issue with what he terms the "thought-control" rationale of restricting expression that runs through the reasoning of judges and academics. Criticizing this reasoning, he reiterates Justice Brandeis' celebration of the First Amendment's "freedom to think as you will and to speak as you think,"<sup>278</sup> as "a duty to think as you are told and to speak as you are told to think."<sup>279</sup>

We see considerable merit in Browne's argument. If, in the workplace, we permit only speech that "reasonable women" consider acceptable, we run a very real risk of suppressing basic First Amendment freedoms. We continue to subscribe to the proposition that, with the possible exception of speech that constitutes insubordination or a clear violation of legitimate work rules, the best antidote to hateful or harassing speech in the workplace is not suppression, but debate and refutation.

#### 4. A Multitude of "Reasonable Victim" Standards

Title VII bars discriminatory behavior based not only on sex, but also based on race, color, religion, or national origin. If the courts are to apply a "reasonable woman" standard in sexual harassment cases, does this suggest that a "reasonable victim" standard will apply in other hos-

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278. *Id.* at 549 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

279. *Id.* According to Browne:

It is but a small step from requiring a person to refrain from expressing beliefs in the hope that he will cease to hold them to requiring a person to express beliefs in the hope that he will begin to hold them. If the state may justify a prohibition on a person's saying "blacks are inferior" by pointing to the effect of the prohibition on a person's beliefs, the state should have equivalent power to require that a person affirm a belief in racial equality on the ground that repeated affirmation will cause the person to come to believe it, and, once having come to believe it, to conform his actions to his newly acquired beliefs. . . . In addition to its Orwellian overtones, the assumption that beliefs can be altered by forbidding expression is probably wrong.

*Id.* at 549-50. One recent law review comment dismisses Browne's concerns by arguing that restricting sexually explicit photographs and other behavior found to be sexually harassing should occur only in work situations that have been traditionally male dominated or in workplaces where the sexes are segregated by job. See Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. Miami L. Rev. 403, 448 (1991). Although qualifying restrictions on speech and expression in this limited way has a surface appeal, one might question the wisdom of conditioning the right to free expression upon whether it makes those exposed to it uncomfortable. Free speech ought not be restricted simply because others find it offensive. Moreover, we see no evidence that supporters of restrictions on speech and expression in the name of reducing sexual harassment accept the limitations suggested by Ms. Horton. See, e.g., Dana S. Connell, *Effective Sexual Harassment Policies: Unexpected Lessons from Jacksonville Shipyards*, 17 Employee Relations L.J. 191 (Autumn 1991) (urging employers generally to adopt rules barring the display or possession of "sexually suggestive" materials). One approach cited with approval by Connell defines "sexually suggestive materials" as those that depict "a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the [workplace] and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body." *Id.* at 200-01.

tile environment cases? We see no basis for refusing to extend the reasoning in *Ellison* and similar sexual discrimination cases to causes of action involving other classes protected under Title VII.

One court has already extended the reasoning of *Ellison* to racial discrimination cases. In *Harris v. International Paper Co.*,<sup>280</sup> the district court judge explicitly adopted the standard of the "reasonable black person" in determining whether a work setting constituted a hostile environment, stating that "[t]he appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member."<sup>281</sup>

Further, at least one judge, inspired by the *Ellison* case, would apply a "reasonable nonadherent" test in matters involving religious rights. In *Murray v. City of Austin*,<sup>282</sup> the plaintiff, an atheist, challenged the City of Austin's right to use a Christian cross in its insignia. Although the Fifth Circuit rejected the plaintiff's freedom of religion claims,<sup>283</sup> Judge Goldberg's dissent challenged the majority's view that the city had acted properly, raising the same arguments used by the court in *Ellison*.<sup>284</sup> Had this case been brought under Title VII by a city employee offended by having to wear such an insignia, the majority would have found it more difficult to dismiss the plaintiff's claims, at least if it followed the *Ellison* rationale.

If consistency rules in those courts that adopt the "reasonable woman" standard, we see no way for them to avoid adopting similar standards in cases involving race, color, religion, or national origin. To say the least, this presents serious concerns for corporate officials who must comply with Title VII in future years as increasing numbers of women and racial, ethnic, and religious minorities enter the job market.<sup>285</sup> Tailoring the

280. 765 F. Supp. 1509 (D. Me.), *vacated in part for other reasons*, 765 F. Supp. 1529 (1991).

281. *Id.* at 1516 n.12.

282. 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992).

283. *See id.* at 158 (5th Cir. 1991). According to the majority, the cross did not violate the establishment clause given the length of time it had used the insignia, and given that it had no proselytizing effect and did not endorse religion. *See id.*

284. Judge Goldberg argued that:

Majoritarian adherents, construing a government action devoid of religious purpose, may not perceive the endorsement message that the minority receives with stinging clarity. Only through sensitivity to the nonadherent can we effect the constitutional values inherent in the Religion Clauses. *Cf. Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir. 1991) (adopting perspective of "reasonable woman" in order to effect statutory aim of sex discrimination statute). Yet, by insisting that the test be an objective one—a "reasonable nonadherent" test—the endorsement inquiry retains the ability to discount the perceptions of a hypersensitive plaintiff.

*Murray*, 947 F.2d at 165 (Goldberg, J., dissenting).

285. *See* William B. Johnston, Hudson Institute, *Workforce 2000: Work and Workers For the Twenty-first Century* (1987). This report from the Hudson Institute, which forecasts substantial demographic changes, has sometimes been misinterpreted to indicate that white males will no longer be in the majority in the year 2000. This is incorrect. What will change is the mix of new entrants in the workforce. By the year 2000, non-

workplace to avoid offending "reasonable Haitians," "reasonable blacks," "reasonable Asians," "reasonable Rastafarians," "reasonable Muslims," as well as "reasonable women," may prove to be an insuperable task.

### 5. Rights in Conflict

Closely related to, but conceptually distinct from, the issue of accommodating the rights of a multitude of "reasonable victims" protected under Title VII is the problem of resolving conflicts among the protected groups. How, for example, is an employer to deal with the claims of Muslim women that the relatively skimpy attire worn by other female employees offends their more restrictive dress code? Similarly, how should a supervisor respond to a Jewish employee who claims to be deeply pained by office Christmas parties or pictures of Jesus displayed by her Christian co-workers?

Virtually none of the courts or commentators who have addressed the "reasonable victim" or "reasonable woman" issue in harassment cases has explicitly discussed how to resolve such conflicts between protected groups.<sup>286</sup> Following the principles adopted in the "reasonable woman" cases and the authors cited in those cases, the most likely approach would be to resolve conflicts by accommodating the concerns of "reasonable victims" in whichever group the court determined to be less powerful. Presumably one would not search for a middle-ground "reasonable person" solution because that would diminish the less powerful group's ability to participate on an equal footing<sup>287</sup> with the relatively more powerful group.<sup>288</sup>

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white, women, and immigrants will make up more than five-sixths of the new entrants in the job market. *See id.* at 85-103. Only 15% of new entrants to the labor force in the years 1987 to 2000 will be native white males, compared to 47% in 1987. *See id.* at xiii.

286. *See, e.g.*, Ehrenreich, *supra* note 2, at 1217-19 (recognizing, but failing to suggest solutions to, such conflicts).

287. As stated by the *Ellison* court:

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. . . . [A] gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.

*Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

288. Professor Deborah A. Stone offers what we believe to be a view typical of many current commentaries. According to Professor Stone, in determining which group's standard of behavior should prevail in a harassment case, the test should: "reflect how the action looks to the weaker party, given the real disparity of power. It is a mockery of the liberal ideal of autonomy to interpret a potentially coercive relationship from the point of view of the person who has the power to coerce." Deborah A. Stone, *Race, Gender, and the Supreme Court*, *The American Prospect* 63, 69 (Winter 1992). Her view is widely shared. *See, e.g.*, Riger, *supra* note 5, at 503 (arguing that in deciding which sex's definition of harassment should prevail, policymakers "need to learn to 'think like a woman'" in order to equalize power in the workplace); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986) (advocating an "anti-

There are some obvious practical problems with this approach. For example, do we really expect employers to order female employees to wear veils at work or to stop wearing lipstick because doing so deeply offends female employees from other disadvantaged groups? Must women who have fought for the right to wear slacks on the job give up that right because a newly hired immigrant finds it painful, as a "reasonable immigrant," to work in an atmosphere where such modes of dress are permitted?

We cannot necessarily resolve these conflicts by saying that members of protected minority groups in the workforce must simply accept existing majority practices that deeply offend them. The point of "hostile environment" cases is that members of the majority must alter behavior, including acts that they consider innocent, reasonable and well-intentioned, that disturbs protected minorities.<sup>289</sup> The majority may disregard the feelings of the protected minority member only if she is hypersensitive for her group.

## 6. Fairness

To us, one of the most ethically difficult problems raised by current interpretations of Title VII is that behavior considered to be innocent by reasonable men may in fact be found illegal in a court of law. As we have documented, however, a growing number of courts find no significant problem in requiring men to take on this burden. Many commentators, including Professor Stone, agree:

Are men supposed to be mind-readers, you ask? Well, yes. Parents, who exercise inordinate physical and psychological control over children, are morally and legally obliged to understand their children's

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subordination" policy that removes any policy which contributes in intent or effect to the subordination of a historically dominated group).

289. In criticizing this approach, Professor Browne notes:

Ironically, though couched in terms of discriminatory treatment, the real claim in many harassment cases is that the work atmosphere did *not* change in response to the addition of women (or minorities) to the environment. The rationale is that conduct that appears harmless to men may be offensive to women, although such reasoning seems inconsistent, at least superficially, with the view that Title VII "rejects the notion of 'romantic paternalism' towards women." For example, the court in *Andrews v. City of Philadelphia* rejected the argument that the environment was not a hostile one because "a police station need not be run like a day care center," stating that neither should it have "the ambience of a nineteenth century military barracks," although an all-male police station having such an ambience would certainly not violate Title VII. The court also noted that although men might find the obscenity and pornography that pervaded the workplace "harmless and innocent," women might well "feel otherwise," and such expression may be "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." *As a consequence, a locker room atmosphere that was perfectly legal before the entry of women into the job becomes illegal thereafter.*

Browne, *supra* note 276, at 487-88 (emphasis added) (footnotes omitted).

needs, even when their children can't talk. They are not free to abuse children because the children don't protest. In any situation of power, the powerful have a moral obligation to see the world from the point of view of those they govern or control, and to exercise power in the interests of the governed. Just consent is what makes power legitimate instead of tyrannical. . . . As long as men are in positions of power, the burden is on them to anticipate how their actions affect weaker people. This is the burden that goes with the privilege of power.<sup>290</sup>

It is obviously true that, as Professor Stone argues, the powerful should not simply run roughshod over the weak. But this does not automatically translate into imposing legal liability whenever the powerful unintentionally offend the weak. We do not, for example, bar the rich from wearing expensive clothes or eating elegant meals simply because this conduct may distress the poor. Professor Stone's parent-child analogy also overlooks the intimacy of family life, which is very different from the atmosphere of the workplace. In the family context, society places enormous, albeit not unbridled, discretion in the hands of parents with respect to their children's punishment, education, and life-styles, however unhappy that may make children on occasion. In modern society, we would never provide this much discretion to employers.

One finds it hard to avoid the conclusion that Professor Stone and others would impose liability under Title VII whenever men in powerful positions unintentionally engage in behavior that pains relatively less powerful women. But the all-encompassing nature of this approach troubles us. In our opinion, the right to sue and collect damages should derive from a stronger moral base than a worker's discomfort at well-intentioned behavior of questionable offensiveness. Further, until society reaches a stronger consensus on the proper response to "mild" forms of sexual harassment such as a male employee making comments about a female coworker's appearance, staring at a woman's figure, or touching a female coworker in a non-sexual manner, it seems premature to permit employees offended by this conduct to sue in pursuit of large money damages.<sup>291</sup>

As with many interesting and important social and legal questions, the dividing line between what is acceptable and unacceptable is not clear. At some point, however, the commendable effort by women to restructure the workplace environment can take on oppressive tones of its own. If we are to avoid excessive "political correctness" or "sexual correctness" in the workplace, we must promote a spirit of tolerance that forgives well-intentioned slights from above and below.

On this point, we return to Professor Tannen's discussion regarding

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290. Stone, *supra* note 288, at 69.

291. Of course, any of these behaviors, if carried to an extreme, can present a problem that might justify a lawsuit. But feminist writers such as Ehrenreich, Riger, and Abrams also argue that milder versions of these behaviors should be considered sexual harassment. See *supra* notes 231-34 and accompanying text.

the different conversational styles between men and women. In that discussion, she strikes a strong note for tolerance on the part of both sexes:

Many experts tell us we are doing things wrong and should change our behavior—which usually sounds easier than it turns out to be. Sensitivity training judges men by women's standards, trying to get them to talk more like women. Assertiveness training judges women by men's standards and tries to get them to talk more like men. No doubt, many people can be helped by learning to be more sensitive or more assertive. But few people are helped by being told they are doing everything all wrong. . . . The biggest mistake is believing there is one right way to listen, to talk, to have a conversation—or a relationship. Nothing hurts more than being told your intentions are bad when you know they are good, or being told you are doing something wrong when you know you're just doing it your way.<sup>292</sup>

We recommend that courts apply Professor Tannen's perspective to sexual harassment cases, balancing the very real need to provide appropriate relief to the victims of sexual harassment with understanding and tolerance toward well-meaning companies and individuals who are at least trying to do the right thing.

#### CONCLUSION

Efforts to eradicate social evils such as sexual discrimination inevitably raise substantial legal and ethical issues. This Article has addressed one such issue: whether the benefits of applying the reasonable woman standard in sexual discrimination cases brought under Title VII will outweigh the questions and risks raised by the standard. As with any new legal norm, it will be difficult to assess the true impact of the reasonable woman standard until several years of application have elapsed. Our discussion has not been intended to reject or condemn the new standard so much as it has been to point out that trying to protect the rights of one group unavoidably results in some restriction of the rights of other groups. In some cases, this is justifiable. In others, it is not. We will watch with great interest to see how the benefits and risks balance out in the great "reasonable woman" debate.

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292. Tannen, *supra* note 201, at 297-98.



