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Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard

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COMMENTS

SEXUAL HARASSMENT FROM THE VICTIM'S PERSPECTIVE: THE NEED FOR THE SEVENTH CIRCUIT TO ADOPT THE REASONABLE WOMAN STANDARD

I. INTRODUCTION

As many as fifty percent of all women will experience sexual harassment[1] at some point in their working career.[2] However, a 1988 study indicates that the incidence of sexual harassment for women entering traditionally male occupations is more accurately in the vicinity of seventy-five percent.[3] Sexual harassment has become seriously pervasive over the years; from 1980 to 1988 the number of charges of sexual harassment filed rose from seventy-five to a staggering 7037.[4] Women disproportionately face the brunt of sexual harassment,[5] and the harassment befalls women of all cultures, ages, and occupations.[6] The consequences of sexual harassment, as one can imagine, are crippling.[7]

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1. A renowned author on the topic of sexual harassment defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979).

2. BARBARA A. GUTEK, SEX AND THE WORKPLACE 44 (1985).

3. ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 2 (1991). A study conducted by the United States Merit Systems Protection Board indicated that 42% of all women and only 15% of all men were subjected to some form of sexual harassment. *Id.* at 1; *see also* WILLIAM PETROCELLI & BARBARA K. REPA, SEXUAL HARASSMENT ON THE JOB 6/13 (1992) (An Equal Employment Opportunity Commission spokesperson advised that 728 sexual harassment complaints were filed during the first quarter of 1991, and 1244 were filed during the first quarter of 1992.); Joan Fluegel, *Anti-Discrimination Law—Sexual Harassment and Battery: Mutually Exclusive Remedies for Independent Harms,* 17 WM. MITCHELL L. REV. 627, 628 (1991) (stating that "[w]omen are two and one half times more likely to be harassed by supervisors than their male colleagues").

4. *See* CONTE, *supra* note 3, at 3.

5. GUTEK, *supra* note 2, at 54-55.

6. CONTE, *supra* note 3, at 6; *see also* Fluegel, *supra* note 3, at 628; Alberta I. Cook, *The New Bias Battleground: Sex Harassment,* NAT'L L.J., July 7, 1986, at 11. Because women are subjected to greater incidents of sexual harassment than are men, this Comment will focus exclusively on the sexual harassment of women.

7. *See* CONTE, *supra* note 3, at 8. Examples of the consequences of sexual harassment include work disruptions, financial burdens for both the employee as well as the employer, and personal burdens. *Id.* at 8-9. One survey indicated that a typical Fortune 500 company faces an estimated cost of $282.53 per employee per year (exclusive of litigation expenses)

A primary reason for the pervasiveness of sexual harassment in the workplace is that women regard sexual behavior in the workplace as unacceptable and improper, while men more often view the same conduct as proper and jointly desired.[8] Conduct in the workplace that many men view as commonplace and acceptable may insult women co-workers.[9] Furthermore, when some women lodge complaints against male co-workers or supervisors because of what they perceive as offensive workplace conduct, they are frequently advised that such conduct should be expected in the workplace.[10]

The standard for evaluating the suitability of behavior in the workplace has evolved from the historically gender-neutral "reasonable man" standard to the more recently advanced "reasonable person" standard.[11] Utilizing the latter standard to assess sexual harassment in the workplace requires the factfinder to determine whether the offensive behavior was adequately pervasive and severe enough to alter employment conditions by creating an "intimidating, hostile, or offensive working environment."[12]

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responding to sexual harassment complaints. *Id.* at 9. Conversely, implementing policies aimed at preventing sexual harassment would amount to a cost of merely $8.41 per employee. *Id.*

8. GUTEK, *supra* note 2, at 88-92; *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms,* 42 VAND. L. REV. 1183, 1210 (1989).

9. GUTEK, *supra* note 2, at 43. The table below indicates what men and women perceive to be sexual harassment in the workplace:

	Males	Females
Complimentary comments	21.9%	33.5%
Insulting comments	70.3	85.5
Complimentary looks, gestures	18.9	28.9
Insulting looks, gestures	61.6	80.3
Nonsexual touching	6.6	7.3
Sexual touching	58.6	84.3
Expected socializing	91.1	95.8
Expected sexual activity	94.5	98.0

Id.

10. Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go,* 10 CAP. U. L. REV. 445, 456 (1981).

11. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 21-22 (1988). It is believed the reasonable man standard appeared in tort law in the early 1800s. Randy T. Austin, Comment, *Better Off with the Reasonable Man Dead or the Reasonable Man Did the Darndest Things,* 1992 B.Y.U. L. REV. 479, 481 (1992) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 174 (5th ed. 1984)). The law now recognizes the reasonable person standard to eliminate the manifest gender bias of the reasonable man. *See* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm,* 8 YALE L. & POL'Y REV. 333, 362, n.116 (1990).

12. EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1992); *see also* Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991); Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990); Henson

The "reasonable woman" standard[13] was first set forth in a 1986 Sixth Circuit dissenting opinion authored by Judge Damon Keith as a standard for assessing behavior alleged in sexual harassment claims.[14] The standard was used with approval only one year later by a different panel from the Sixth Circuit[15] and has since been used with increasing frequency.[16] In employing the reasonable woman standard, the courts have focused on the rudimentary discrepancies in the viewpoints of women and men.[17]

This Comment first surveys the history of sexual harassment in the workplace as a viable cause of action.[18] Second, this Comment addresses the development and approval of the reasonable woman standard and examines cases and courts that have adopted this standard in examining behavior in sexual harassment cases. Third, this Comment scrutinizes the progression of sexual harassment cases in the Seventh Circuit and its adoption of a two-pronged analysis. Finally, this Comment sets forth logic for adoption of the reasonable woman standard by the Seventh Circuit and how adoption of this standard would not only deter prevailing discriminatory practices in the workplace, but also would balance the respective positions of men and women in the workplace.

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v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Ebert v. Lamar Truck Plaza, 715 F. Supp. 1496, 1499 (D. Colo. 1987), *aff'd*, 878 F.2d 338 (10th Cir. 1989).

13. "[E]xhaustive research has unearthed no common-law reference to a 'reasonable woman.'" Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUT.-CAM. L.J. 311, 315 (1977).

14. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987). Judge Keith concluded:

> In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. . . . Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.

Id. (citations omitted).

15. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

16. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Stingley v. Arizona, 796 F. Supp. 424, 428-29 (D. Ariz. 1992); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 295 (E.D. Pa. 1991); Harris v. International Paper Co., 765 F. Supp. 1509, 1515 (D. Me. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1199 (D. P.R. 1987), *rev'd in part sub nom.* Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

17. *Ellison*, 924 F.2d at 879-81; *see also* GUTEK, *supra* note 2, at 88-92; Peter Linzer & Patricia A. Tidwell, *Letter to David Dow—Friendly Critic and Critical Friend*, 28 HOUS. L. REV. 861, 862 (1991).

18. The expression "sexual harassment" became widely used in 1976. MACKINNON, *supra* note 1, at 27.

II. HISTORY OF SEXUAL HARASSMENT

A. Title VII

Title VII of the Civil Rights Act of 1964[19] was enacted by Congress to "achieve equality of employment opportunities and remove barriers" in employment.[20] This section of the Act is said to have expanded the potential domain of governmental intercession in employment practices of employers.[21] Title VII has also been labeled an imperative instrument in abdicating discrimination in employment.[22] Title VII states that it is unlawful for employers:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex . . .; or (2) to limit, segregate or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of . . . sex . . . .[23]

The addition of "sex" to the balance of Title VII's proscriptions was added at the last minute in an attempt by opponents to "clock" the bill on the floor of the House of Representatives.[24] The controlling argument opposing this amendment was that sex discrimination was suffi-

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19. 42 U.S.C. § 2000e (1988).

20. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

21. Charles T. Schmidt, Jr., *Title VII: Coverage and Comments*, 7 B.C. INDUS. & COM. L. REV. 459 (1966); *see also Griggs*, 401 U.S. at 431; Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982).

22. Robert F. Conte & David L. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 DRAKE L. REV. 407, 415 (1982-83).

23. 42 U.S.C. § 2000e-2(a)(1) (1988). The full text of this subsection makes it unlawful:

> (1) [T]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee because of such individual's race, color, religion, sex, or national origin.

Id.

An employer under Title VII is one who is (1) engaged in industry that affects commerce and (2) has 15 or more employees working each working day for 20 or more calendar weeks in the present or preceding calendar year. 42 U.S.C. § 2000e(b) (1988). Excluded from this definition are the United States government, corporations wholly owned by the government, Indian tribes, and bona fide private membership clubs exempt from taxation. *Id.*

24. Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977); *see also* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441-42 (1966) (Representative Smith proposed the amendment adding "sex" to the bill's proscriptions "in a spirit of satire and ironic cajolery."). The ultimate purpose of its proposition was to allegedly prevent Title VII from being enacted. Christine Neylon O'Brien et al., *Employer Fetal Protection Policies at*

ciently distinctive from the other proscribed behavior that it should receive individual legislative treatment.[25] No hearings were held on the proposed amendment, and it was swiftly adopted after impetuous debate on the floor of the House of Representatives, passing by a vote of 168 to 133.[26] The lack of a developed and intricate legislative history has left courts without a sufficient and succinct guide to interpret the actual intentions of Congress.[27] Without discerning Congress's full intentions in adding sex discrimination to proscribed employment practices, the courts have chosen to give the Act a broad interpretation.[28]

B. Equal Employment Opportunity Commission

Along with the enactment of Title VII, Congress created an administrative agency, the Equal Employment Opportunity Commission (EEOC), as Title VII's governing body.[29] Congress delegated to the EEOC the administration and enforcement of federal laws prohibiting workplace discrimination.[30] The EEOC is the federal agency responsible for receiving, investigating, and processing employment discrimination complaints.[31] If reasonable cause is discovered through an investigation, the EEOC is authorized to conciliate the complaint[32] and, failing that, is empowered to file suit in federal district court on behalf of the employee.[33]

Work: Balancing Reproductive Hazards with Title VII Rights, 74 MARQ. L. REV. 147, 184 (1991).

25. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986).

26. Vaas, *supra* note 24, at 442. The House of Representatives' debate on the amendment adding sex to proscribed discriminatory practices enveloped only nine pages in the *Congressional Record*. *Id.*

27. *Meritor*, 477 U.S. at 64; *Barnes*, 561 F.2d at 987.

28. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) ("This language evinces a Congressional intention to define discrimination in the broadest possible terms.") The *Rogers* court further required that "the [Equal Employment Opportunity] Commission must be permitted to view a complainant's charge in its broadest reasonable sense." *Id.* at 240; *see also* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

29. 29 C.F.R. § 1601.1 (1992). The EEOC is a bipartisan committee consisting of five members who are principally accountable for managing and executing federal laws prohibiting employment discrimination. J. Clay Smith, Jr., *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 CAP. U. L. REV. 471, 471 (1981).

30. 29 C.F.R. § 1601.1 (1992).

31. *Id.* § 1601.15 (1992). Many states also have a state administrative body for filing complaints concurrently with the EEOC.

32. *Id.* § 1601.24.

33. *Id.* § 1601.27.

If the EEOC determines that reasonable cause is nonexistent or decides not to file suit, it must so advise the employee by forwarding a "Notice of Right to Sue" letter.[34] The employee can then personally file suit within ninety days of receipt of the notice.[35] Generally, employees may not sue until the "Right to Sue" letter is issued.[36]

After its creation, the Commission recognized that workplace harassment based on proscribed issues violated Title VII.[37] In 1980, the Commission established the Guidelines on Discrimination Because of Sex (the "Guidelines"), specifically providing that sexual harassment violated Title VII.[38] The Guidelines define sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (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.[39]

A factor that contributed to creating the language of the Guidelines was the complication experienced in creating a clear definition which would cover a wide variety of workplace conduct.[40] To determine whether certain conduct constitutes sexual harassment, the EEOC examines the account of alleged discriminatory conduct in its entirety, looking at the aggregate of the circumstances.[41] Although the EEOC's

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34. *Id.* §§ 1601.19, 1601.28.

35. *Id.* § 1601.28(e)(1).

36. PETROCELLI & REPA, *supra* note 3, at 6/36.

37. Smith, *supra* note 29, at 471.

38. *Id.* at 472.

39. 29 C.F.R. § 1604.11(a) (1992).

40. Smith, *supra* note 29, at 473. "This difficulty is due to the fact that the same actions which, under one set of circumstances, would constitute sexual harassment, might, under another set of circumstances, constitute acceptable social behavior." *Id.* at 473-74.

41. 29 C.F.R. § 1604.11(b) (1992); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (agreeing with the EEOC's Guidelines in emphasizing the Court's need to view the record as a whole and consider the totality of the circumstances). The courts recognize that for a prima facie showing of sexual harassment, the conduct must constitute more than "sporadic" conduct. Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569, 572-73 (W.D.N.Y. 1987); *see also* Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Co-Worker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 95 (1984-85) ("[M]ost courts have failed to recognize that isolated, sporadic, or insulting incidents of harassment may violate Title VII.").

Guidelines are not mandatory or precedential in any case, courts grant this administrative interpretation great deference.[42] The purpose of the 1980 amendment to the Guidelines was to facilitate judicial and employment comprehension of the nature of proscribed workplace conduct.[43] The Guidelines can be interpreted to protect against both solitary as well as widespread occurrences of sexual harassment.[44] The resulting support in favor of the Guidelines has stimulated victims of workplace sexual harassment to file claims in greater numbers.[45] The final effect of the EEOC's Guidelines, in conjunction with judicial interpretation of them, is the growth of sexual harassment law practice.[46]

III. Elements of Sexual Harassment Claims

The EEOC and its Guidelines recognize two separate theories of sexual harassment. These theories are classically known as (1) quid pro quo sexual harassment[47] and (2) hostile work environment sexual harassment.[48] Each of these theories is discussed below.

A. Quid Pro Quo Sexual Harassment

Under quid pro quo sexual harassment, the employer conditions future employment on demands for sexual favors.[49] By using sex in this fashion, the employer makes sex a term or condition of employment.[50] In quid pro quo cases, the courts recognize that conditioning future employment on sexual favors creates a very strong potential for loss of tangible job benefits.[51] These tangible benefits include adverse

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42. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). The *Griggs* court stated, "Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Id.* at 434.

43. Smith, *supra* note 29, at 472.

44. Merriman & Yang, *supra* note 41, at 95. The courts, however, have not taken such a liberal construction. *Barbetta*, 669 F. Supp. at 572-73.

45. Conte, *supra* note 3, at 3.

46. *Id.* at 1-9.

47. 29 C.F.R. § 1604.11(a)(1)-(2) (1992).

48. *Id.* § 1604.11(a)(3).

49. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). The employer subjected his female employee to various requests for sexual favors, which would result in favorable treatment at work. The employer requested that she accompany him to social outings after working hours and have a sexual relationship with him. She refused the advances, and her position with the company was ultimately abolished. *Id.*

50. Elaine Frost, *Sexual Harassment in the Workplace*, 71 Women's L.J. 19 (1985).

51. Conte, *supra* note 3, at 16.

employment appraisals, denial of job benefits, transfers, demotions, or even termination.[52]

An employee needs to establish the existence of five factors to state a prima facie case of quid pro quo sexual harassment. Those factors are: (1) the employee belongs to a protected group; (2) he or she was subject to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; (4) the harassment affects the employee's terms or conditions of employment; and (5) the existence of respondeat superior liability.[53] During the mid-1980s, quid pro quo sexual harassment actions were far more numerous than hostile work environment actions.[54]

B. Hostile Work Environment Sexual Harassment

In hostile work environment sexual harassment cases, the employee is required to sustain her (or his) employment in an abusive or offensive environment regardless of whether any "tangible job detriment" is suffered.[55] In creating a hostile work environment, the employee may be subjected to sexual jokes, sexual threats or insults,[56] or even sexual photographs or magazines in the workplace.[57]

To establish a prima facie showing of hostile work environment sexual harassment, the employee must prove the existence of factors that are essentially identical to those required for quid pro quo sexual harassment. The elements for hostile work environment sexual harassment include: (1) the employee belonged to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew

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52. *Id.*

53. *See, e.g.*, Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986); Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

54. Merriman & Yang, *supra* note 41, at 87.

55. *See, e.g.*, *Henson*, 682 F.2d at 901. The employee was subjected to sexual inquiries and vulgar language in addition to being asked to engage in sexual relations with her supervisor. *Id.*

56. Paul, *supra* note 11, at 334.

57. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Paul, *supra* note 11, at 334 ("[Sexual harassment] can encompass anything from the verbal and pictorial (crude language, lewd pictures placed on co-workers' desks, sexual limericks inscribed on bathroom stalls, off-color jokes) to offensive physical acts (touching, brushing against, grabbing, indecent exposure).").

or should have known of the harassment and failed to engage in curative action.[58]

C. *Development of Judicial Interpretation of Sexual Harassment*

The first case to recognize a discriminatory work environment as a cause of action was decided in 1971, seven years after the enactment of the Civil Rights Act of 1964.[59] Courts first acknowledged quid pro quo sexual harassment, as opposed to hostile work environment sexual harassment, as a cause of action.[60] When an employer conditions future employment on sexual demands, that conduct is a contributing factor to creating a form of discrimination.[61]

Courts have acknowledged that employers should be held strictly accountable for this conduct, even if engaged in by a mere supervisor.[62] However, liability was premised on the employer's knowledge of the discriminatory conduct.[63] At this early juncture, the courts also recognized that not all sexually laden conduct at the workplace was actionable.[64] After enactment of the EEOC's Guidelines in 1980, however, a strict liability standard was adopted for quid pro quo sexual harassment by

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58. *See, e.g.*, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

59. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). "[T]he relationship between an employee and his [or her] working environment is of such significance as to be entitled to statutory protection." *Id.* at 237-38. The employee, a female of minority ethnicity, was a nurse and was restricted to assisting only patients of a certain ethnic origin. *Id.*

60. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). The employer solicited a sexual relationship with his secretary in return for an "enhanced" employment status. *Id.* at 985 (MacKinnon, J., concurring).

61. *Id.* at 990 (MacKinnon, J., concurring). The court also asserted that this conduct may constitute a criminal violation as well. *Id.* at 995.

62. *Id.* at 1000. The court believed employer liability was premised on the wording of Title VII and the EEOC's guidelines. *Id.* at 997. The court reviewed three premises for employer liability:

> (1) [I]f ambiguous conduct might be violative of the statute, the employer is in the best position to know the real cause, and to come forward with an explanation; (2) the employer, not the employee, can establish prophylactic rules which, without upsetting efficiency, could obviate the circumstances of potential discrimination; [and] (3) the type of conduct at issue is questionable at best, and it is not undesirable to induce careful employers to err on the side of avoiding possibly violative conduct.

Id. at 998.

63. *Id.*

64. *Id.* at 999 ("[T]he advances themselves might be welcome."); *see also* Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) ("Of course, neither the courts nor the [E.E.O.C.] have suggested that every instance of sexual harassment gives rise to a Title VII claim against an employer . . . .").

supervisory personnel, regardless of whether the employee complained or whether the employer was oblivious to the conduct.[65]

As previously noted, a prima facie case of quid pro quo sexual harassment is based on the establishment of five criteria.[66] It is frequently admitted by both parties that the employee belongs to a protected class and that the harassment is based on sex.[67] Once the plaintiff establishes quid pro quo sexual harassment, the burden shifts to the employer to rebut the presumption of sexual harassment by offering authorized, noncircumspect justifications for the employment decision.[68] A plaintiff may prove the existence of quid pro quo sexual harassment, for which an employer may be strictly liable, from a single, isolated occurrence.[69]

In 1981, courts inescapably acknowledged that sexual harassment which does not result in the loss of tangible job benefits was also a form of illegal discrimination based on sex.[70] The circuit court coined the phrase "discriminatory environment" to define this model of actionable sexual harassment.[71] This hostile work environment sexual harassment has also been labeled "noneconomic," "absolute," or "intangible" sexual harassment.[72]

Establishing a prima facie case of hostile work environment sexual harassment also requires the employee to prove the existence of five factors.[73] Again, it is usually undisputed that the complaining employee is a member of a protected class and the harassment is based on sex.[74] The

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65. 29 C.F.R. § 1604.11(c) (1992); *see also Henson*, 682 F.2d at 910 ("We hold that an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee.").

66. *See supra* note 53 and accompanying text.

67. Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986). These same factors are also generally not disputed in hostile work environment cases. *Id.*

68. Guiden v. Southeastern Pub. Serv. Auth., 760 F. Supp. 1171, 1178 (E.D. Va. 1991) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

69. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Hostile work environment sexual harassment, however, may not result in liability for single, isolated occurrences. *Id.*; *see also* Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1469 (1986) (Even though the EEOC's Guidelines allow for recovery for a single episode, courts require a pattern of sexually harassing conduct for a cause of action to survive in hostile work environment claims.).

70. Bundy v. Jackson, 641 F.2d 934, 948 (D.C. Cir. 1981); *see also* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.").

71. *Bundy*, 641 F.2d at 945.

72. Merriman & Yang, *supra* note 41, at 85-86.

73. *See supra* note 58 and accompanying text.

74. *See supra* note 67 and accompanying text.

factor that is significantly disputed is whether the conduct was unwelcome.[75] To be unwelcome, the courts have said the employee (1) must not solicit or invite the conduct, and (2) the employee must see the conduct as distasteful.[76] The difficulty arises in proving that the conduct is unwelcome and repugnant when it occurred.[77] To aid in resolving the question of welcomeness, the courts have relied heavily on the EEOC's Guidelines.[78]

The Guidelines indicate that sexual harassment creates a hostile work environment where the conduct is intimidating, hostile, or offensive, and substantially interferes with work performance.[79] In making this assessment, the courts require the conduct to be "sufficiently pervasive" in altering working conditions.[80] However, the Supreme Court recently concluded that the conduct need not be severe enough to alter the victim's psychological well-being or require the victim to suffer injury in order to be actionable.[81] Both the courts and the EEOC Guidelines suggest that pervasiveness of the offensive conduct is determined by a "totality of the circumstances test."[82] The courts have generally concluded a hostile work environment exists where more than one isolated, offensive occurrence transpires.[83]

The United States Supreme Court expressly recognized the existence of sexual harassment as sex discrimination in violation of Title VII of the Civil Rights Act of 1964 in the landmark case of *Meritor Savings Bank v. Vinson*.[84] The Court, in adopting the advice of the Guidelines, held a

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75. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

76. *Moylan*, 792 F.2d at 749.

77. PETROCELLI & REPA, *supra* note 3, at 2/23.

78. Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991).

79. *Id.* at 877. The Guidelines deem sexual harassment includes "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11a(3) (1992).

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

81. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993). The Court indicated that focusing on whether the victim's psychological well-being was affected or whether the victim suffered injury could "needlessly focus the factfinder's attention on concrete psychological harm, an element [that] Title VII does not require." *Id.*

82. *Id.* Circumstances that courts may consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

83. Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986); Vermett v. Hough, 627 F. Supp. 587, 605-06 (W.D. Mich. 1986).

84. 477 U.S. 57 (1986).

plaintiff could establish a prima facie case of sexual harassment when no tangible or economic benefits are sacrificed.[85] Thus, a violation of Title VII can be established by demonstrating that the sexual discrimination gave rise to a "hostile or abusive work environment."[86]

In *Meritor*, Michelle Vinson was hired as a bank teller and was ultimately promoted to the position of assistant branch manager. Vinson brought a Title VII action against her supervisor, Sidney Taylor, alleging she had been victimized by Taylor in the form of sexual harassment.[87] Vinson testified that Taylor sought sexual relations with her, claiming she "owed him" for acquiring her job for her.[88] She initially rejected his solicitations, but ultimately surrendered for fear of losing her job.[89] Vinson testified she was also subjected to other forms of sexual harassment: Taylor had forcibly raped her several times both during and after business hours; he exposed himself to her in the ladies room, and fondled her when other employees were present.[90] Vinson chose not to report the degrading and offensive conduct because she was fearful of Taylor, who had previously threatened her life.[91]

The Supreme Court concluded Taylor's conduct violated not only Title VII, but criminal law as well.[92] In violating Title VII, the Court concluded Taylor could not state an affirmative defense by claiming Vinson consented to the sexual conduct.[93] The Court arrived at its decision by determining whether the sexual advances were "unwelcome."[94]

The Court also addressed the issue of employer liability for hostile work environment sexual harassment.[95] The Court of Appeals earlier concluded that employers should be strictly liable for sexual harassment, both quid pro quo and hostile work environment, engaged in by supervi-

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85. *Id.* at 64.

86. *Id.* at 66.

87. *Id.* at 59-60.

88. Vinson v. Taylor, 753 F.2d 141, 143 (D.C. Cir.), *cert. granted sub nom.* PSFS Sav. Bank v. Vinson, 474 U.S. 815 (1985), *and aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

89. *Meritor*, 477 U.S. at 60.

90. *Id.* Although Vinson was not the only employee to be sexually harassed by Taylor, no internal reports were ever made regarding any of the conduct. *Id.* at 60-61.

91. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980).

92. *Meritor*, 477 U.S. at 67.

93. *Id.* at 68. "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." *Id.*

94. *Id.*

95. *Id.* at 69-73.

sory personnel.[96] The Supreme Court rejected this analysis, concluding that imposing absolute employer liability for hostile work environment sexual harassment was erroneous.[97]

The Court agreed with the amicus curiae brief filed by the EEOC regarding employer liability for hostile work environment sexual harassment.[98] The EEOC argued that Congress intended traditional agency principles to apply in determining employer liability.[99] Although the Court refrained from deciding the issue of employer liability in hostile work environment cases, the Court's decision went a long way in abrogating workplace sexual harassment where only a hostile or offensive environment was created without the loss of tangible job benefits.[100]

IV. STANDARDS FOR SEXUAL HARASSMENT CLAIMS

A. *Evolution of the Reasonable Woman Standard*

Although the Supreme Court has not been presented with the opportunity to expand the scope of hostile work environment sexual harassment, federal district court and court of appeals decisions reveal an evolution in defining sexual harassment by that which a reasonable woman would consider hostile or offensive.[101]

The earliest standard articulated by the courts was the "reasonable man standard" or the "man of ordinary prudence."[102] The reasonable

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96. Vinson v. Taylor, 753 F.2d 141, 147 (D.C. Cir.), *cert. granted sub nom.* PSFS Sav. Bank v. Vinson, 474 U.S. 815 (1985), *and aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

97. *Meritor*, 477 U.S. at 72.

98. *Id.*

99. *Id.* at 70. The Court stated of the EEOC's brief:

> Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

Id. (citation omitted). The issue of employer liability created a five to four split. Justice Marshall, writing for the concurrence, argued that "there is . . . no justification for a special rule, to be applied *only* in 'hostile environment' cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors." *Id.* at 77 (Marshall, J., concurring).

100. *Id.* at 65-67; *see also* CONTE, *supra* note 3, at 52 ("[I]n this decision the Supreme Court took an important step towards legitimizing this elusive area of law for complainants and putting employers and harassers on notice that unwelcome sexual conduct will not be tolerated in the workplace.").

101. Steven H. Winterbauer, *Sexual Harassment—The Reasonable Woman Standard*, 7 LAB. L. 811 (1991).

102. Bender, *supra* note 11, at 21 (citations omitted).

man standard was originally believed to be a generic, genderless standard, referring to men and women alike.[103] Although legal writers claim the standard is used generically, studies indicate that today's society still automatically envisions males when they hear the phrase "reasonable man."[104]

The reasonable man standard has become outdated.[105] Recognizing the manifest sexism in the standard, courts adopted the "reasonable person" standard.[106] The perception was that because the reasonable man lost his genderless interpretation, the reasonable person would replace him as the new universal and gender-neutral standard.[107] Legal scholars, however, continue to contend that altering terminology without changing the underlying conception of the term is useless because women are still required to conform to the male perspective of reasonableness.[108]

Research indicates that there are no common-law references to the reasonable woman standard.[109] The reasonable woman standard developed to account for the differences in the perspectives of men and women regarding appropriate workplace conduct.[110] The reasonable woman standard contemplates the female perspective for assessing behavior that was previously reflected in male viewpoints.[111] The legal sys-

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103. *See id.* at 22.

104. FLORA JOHNSON, VERTABIM: WORDS BETWEEN THE SEXES 64 (1980); Collins, *supra* note 13, at 312.

105. Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495, 503 (1988). "[A] casenote at the beginning of the negligence chapter proclaims that the use of the term 'reasonable man' currently is outmoded . . . ." *Id.*

106. Bender, *supra* note 11, at 21.

107. *Id.* at 22.

108. *Id.* at 23; *see also* Abrams, *supra* note 8, at 1189. Conforming to male norms "occurs mainly because the men who constitute the workplace, like most proponents of societally dominant standards, do not recognize the partiality of their norms." *Id.*

109. Collins, *supra* note 13, at 315.

110. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 6-23 (1982) (making general observations on the history of sex discrimination).

111. *Id.* at 171. Gilligan further contends:

> [M]en and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships. Because these languages share an overlapping moral vocabulary, they contain a propensity for systematic mistranslation, creating misunderstandings which impede communication and limit the potential for cooperation and care in relationships. . . .
>
> As we have listened for centuries to the voices of men and the theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak. Yet in the different voice of women lies the truth of an ethic of care, the tie between relationships and responsibility, and the origins of aggression in the failure of connection. The failure to see the different reality of women's lives and to hear the differences in their

tem needs to account for these disparities to discount its historical gender bias against women.[112] Legal commentators agree that men and women possess differing attitudes concerning conduct in the workplace.[113] Although women may differ among themselves as to what constitutes appropriate workplace behavior, a greater disparity exists between men and women on the issue of sexual harassment.[114]

Today, most courts utilize the reasonable person standard in defining and analyzing negligent conduct.[115] Adopting a reasonable woman standard in assessing reasonableness in sexual harassment cases, however, will define as sexual harassment conduct that a reasonable woman would find offensive.[116] The ultimate mission of the reasonable woman standard is to change existing discriminatory practices against women in the workforce.[117] Employing the reasonable woman standard provides more female employees an opportunity to be successful in asserting sexual harassment claims than under the reasonable person standard.[118]

The reasonable woman standard will not establish a higher standard that affords women more protection than men.[119] Analyzing conduct from the female's perspective will still not permit highly sensitive female employees to prevail on sexual harassment charges.[120] Adoption of the reasonable woman standard makes the specific victim's perspective paramount in the assessment of a sexual harassment claim.[121] This standard also will proscribe conduct that had not been considered actionable.[122]

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voices stems in part from the assumption that there is a single mode of social experience and interpretation. By positing instead two different modes, we arrive at a more complex rendition of human experience which sees the truth of separation and attachment in the lives of women and men and recognizes how these truths are carried by different modes of language and thought.

Id. at 173-74.

112. Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 868 (1988).

113. Abrams, *supra* note 8, at 1205.

114. *Id.*; *see also* Winterbauer, *supra* note 101, at 817.

115. *See* 57A AM. JUR. 2D *Negligence* § 145 (1989).

116. *See* Winterbauer, *supra* note 101, at 817.

117. *Id.* at 818.

118. *Id.*

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

120. *See* Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 295 (E.D. Pa. 1991).

121. *See* Ernest Calderon, *Two More Nails in the Coffin of Paternalism*, ARIZ. ATT'Y, Sept. 28, 1991, at 14.

122. *See* Vermett v. Hough, 627 F. Supp. 587, 607 (W.D. Mich. 1986). The court concluded that a supervisor who thrust a shotgun into a female employee's crotch and placed a flashlight between her legs, moving it up and out, was not sexual harassment. The court stated of this conduct: "It was not intended . . . to be an act of a sexual nature. . . . Nor do I believe a

B. Development of the Reasonable Woman Standard

The reasonable woman standard emerged from the analysis of sexual harassment claims in the Sixth Circuit in a fiery dissenting opinion.[123] Vivienne Rabidue was discharged because she had trouble getting along with co-workers and customers.[124] Rabidue asserted charges of sexual harassment against her male supervisor, whom she claimed used extremely vulgar and crude language.[125] Rabidue's supervisor regularly "referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits.'"[126] He called Rabidue a "fat ass" and told her, "All [you] . . . need[ ] is a good lay."[127] The company's management was aware of the supervisor's conduct, but was unable to successfully curb it.[128]

In addition to being the recipient of offensive conduct by her supervisor, the entire job atmosphere was described as hostile. Other male employees brought photos of nude or nearly nude women to work.[129] A poster exhibited on the walls of the workplace for eight years showed a naked woman lying on her back with a golf ball between her breasts.[130] Also in the poster was a man standing over the woman with a golf club ready to strike the golf ball, yelling, "Fore."[131] Trial testimony further disclosed that female employees other than Rabidue were also offended by the workplace atmosphere.[132]

The court found that although the supervisor's vulgar language was "annoying," it was not so unexpected as to be seriously detrimental to the female employees.[133] The majority, mimicking the district court's holding, stated:

> 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 news-

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reasonable woman would have found it to be an act of sexual harassment, or to have unreasonably interfered with her employment situation. Childish, yes; sexual harassment, no." *Id.*

123. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

124. *Id.* at 615.

125. *Id.*

126. *Id.* at 624 (Keith, J., dissenting).

127. *Id.* (Keith, J., dissenting).

128. *Id.* at 615.

129. *Id.*

130. *Id.* at 624 (Keith, J., dissenting).

131. *Id.* (Keith, J., dissenting).

132. *Id.* (Keith, J., dissenting).

133. *Id.* at 622.

stands, on prime-time television, at the cinema, and in other public places.[134]

In dissent, Judge Damon Keith severely criticized the standard utilized by the majority for determining whether Rabidue's supervisor had subjected her to actionable sexual harassment.[135] He maintained that the reasonable person standard proves inadequate in responding to women's views of suitable workplace conduct when contrasted to the views of men.[136] Judge Keith proposed a reasonable victim, or a reasonable woman standard, in analyzing the different concepts of appropriate behavior in the workplace.[137] He argued that the majority somehow believed women assume the risk of being the object of crude and offensive working environments.[138] No woman, insisted Judge Keith, should have to work in surroundings where her "sexual dignity and reasonable sensibilities are visually, verbally, or physically assaulted as a matter of prevailing male prerogative."[139]

Judge Keith also disagreed with the majority's assertion that sexually oriented posters and the hatred evinced by the male employees had only a de minimis effect on the female employees.[140] Alternatively, he asserted that the posters and vulgar conduct confirmed that women are still viewed as sex objects.[141] Judge Keith argued that women do not generally condone such degrading sexuality, and the reasonable woman standard would support this proposition.[142] In closing, Judge Keith said of the majority's analysis: "[T]he relevant inquiry at hand is what the

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134. *Id.* In the district court, the majority concluded:

> Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to . . . change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Id. at 620-21 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986)).

135. *Id.* at 625 (Keith, J., dissenting).

136. *Id.* at 626 (Keith, J., dissenting).

137. *Id.* Judge Keith maintained 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." *Id.* (Keith, J., dissenting).

138. *Id.* (Keith, J., dissenting).

139. *Id.* at 626-27 (Keith, J., dissenting).

140. *Id.* at 627 (Keith, J., dissenting).

141. *Id.* (Keith, J., dissenting). "That some men would condone and wish to perpetrate such behavior is not surprising." *Id.* (Keith, J., dissenting).

142. *Id.* (Keith, J., dissenting).

reasonable woman would find offensive, not society, which at one point also condoned slavery."[143]

One year later, a different panel of the Sixth Circuit[144] utilized the reasonable woman standard to determine whether conduct that two female employees were subjected to constituted sexual harassment.[145] Two female employees, Charolette Yates and Cheryl Mathis, alleged their mutual supervisor desired to have sexual relations with them.[146]

The supervisor began discussing personal sexual relations with his first secretary, Mathis, during working hours.[147] He also flooded her with invitations for drinks and meals, and was so bold as to invite himself to her home.[148] Mathis refused these unwelcome invitations and was then subjected to lewd comments regarding her physical appearance.[149] Mathis eventually suffered a breakdown, was hospitalized on two different occasions, and took an extended leave of absence.[150]

Upon her return from sick leave, the harassment resumed with more lewd jokes and comments.[151] Mathis resisted as best she could the onslaught of offensive conduct, and thereafter the supervisor bombarded her with work.[152] When Mathis again sought medical leave, Yates assumed Mathis's position and was subjected to similar conduct from the supervisor.[153] In addition to the behavior Mathis endured, the supervisor also frequently called Yates to his office so he could watch her exit the office and groan.[154] Yates thereafter left Avco's employment.[155]

The record was referred to a magistrate who found that both women had been subjected to sexual harassment, and the district court adopted this finding.[156] In analyzing the claims, the court adopted the reasonable woman standard promulgated by Judge Keith[157] to determine whether the working conditions the two women were suffi-

143. *Id.* (Keith, J., dissenting).
144. Yates v. Avco Corp, 819 F.2d 630 (6th Cir. 1987).
145. *Id.* at 637.
146. *Id.* at 631-32.
147. *Id.* at 632.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 633.
157. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

ciently perturbing.[158] The court recognized that men and women are appalled by different conduct and in different ways. The court further noted it would implement a reasonable man standard in the event a man was the target of the sexually oriented conduct.[159] The court heightened the urgency of a standard relating to the victim's gender by acknowledging the inherent differences in the perceptions of certain behavior by men and women.[160]

In 1991, the Ninth Circuit addressed the issue of sexual harassment via the reasonable woman standard on direct appeal.[161] The court's analysis altered the standard for determining whether sexually laden conduct is severe and pervasive from the traditional reasonable person standard to the reasonable woman standard.[162] The Ninth Circuit recognized that "courts 'should consider the victim's perspective and not stereotyped notions of acceptable behavior'" in making the standard change.[163]

The plaintiff, Kerry Ellison, worked as an agent for the Internal Revenue Service (IRS). She agreed to have lunch with a co-worker, Sterling Gray, and thereafter Gray began to pester her.[164] Gray also sent Ellison several peculiar notes.[165] Ellison reported this conduct to her supervisor and asked if she could try to handle the situation herself.[166] Ellison was scheduled to be away from the office, and while away, Gray sent her a second note.[167]

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158. *Yates*, 819 F.2d at 636. The court stated:

> In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be "the reasonable woman" since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.

Id. at 637. In a footnote, the court recognized that the reasonable man standard would be utilized if a male had been the subject of the harassment. *Id.* at 637 n.2.

159. *Id.*

160. *Id.*

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

162. *Id.* at 879.

163. *Id.* at 878 (citing EEOC Compliance Manual (CCH) § 615, ¶ 3112 C, at 3242 (1988)).

164. *Id.* at 873.

165. *Id.* at 874. The first note read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.*

166. *Id.*

167. *Id.* This second note read:

> I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O [sic] so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together,

Ellison became frightened, spoke with her supervisor, and requested either she or Gray be transferred.[168] Gray was subsequently transferred after a counseling session with the supervisor, where Gray was told to leave Ellison alone.[169] Gray filed a union grievance, and a settlement allowed him to ultimately transfer back to the same office where Ellison worked.[170] When Ellison received word of Gray's return, she filed a formal sexual harassment complaint.[171] In the interim, Gray wrote Ellison a third note insisting that he and Ellison were involved in a sexual relationship.[172] The IRS rejected Ellison's claim because a pattern or habit of sexual harassment had not been sufficiently alleged.[173] Ellison next sought relief in federal district court, which decided she failed to make a prima facie showing of hostile work environment sexual harassment.[174]

Upon review, the Ninth Circuit reversed.[175] The court's opinion intimated that the victim's perspective should be considered in weighing the pervasiveness and severity of sexual harassment.[176] Because men and women perceive certain conduct differently, the perspective of the individual being harassed should be accounted for.[177] Conduct that a male may see as tenable, a woman may find offensive and objectionable.[178] The court maintained that the reasonable woman standard would provide a fairer assessment in determining whether the sexual conduct of the harasser was objectionable.[179]

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alone, are striking off such intense sparks. . . . I will [write] another letter in the near future.

Id. (alterations in original).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 874-75.

173. *Id.* at 875.

174. *Id.* The district court maintained Gray's conduct was merely trivial and isolated. *Id.* at 876. As such, a hostile work environment could not be found because isolated and sporadic conduct is not actionable for this type of sexual harassment. Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569, 572-73 (W.D.N.Y. 1987); Merriman & Yang, *supra* note 41, at 95.

175. *Ellison*, 924 F.2d at 873. The court concluded Gray's conduct was "somewhere between forcible rape and the mere utterance of an epithet." *Id.* at 877.

176. *Id.* at 878. "If 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." *Id.*

177. *Id.*

178. *Id.* The court acknowledged that although women as a group may not have the same perspective on all forms of conduct, as a whole they harbor traditional apprehensions that men do not. *Id.* at 879.

179. *Id.*

The Ninth Circuit adopted the reasonable woman standard because it believed that the "sex-blind[ed] reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[180] The court believed that espousing the reasonable woman standard would create a "gender-conscious" scrutiny of conduct which tends to be found in sexual harassment. This gender consciousness would, in turn, equalize the workplace.[181] Embracing the reasonable woman standard would not classify all conduct at the workplace as sexual harassment, but only that which a reasonable victim of the same sex as the plaintiff would see as objectionable.[182]

Critically examining Gray's conduct, the court likened him to a contemporary "Cyrano de Bergerac," and concluded that because Ellison became frightened by the letters, and because her supervisor had a prompt response to the complaints, any reasonable woman would have experienced the same reaction.[183] The court furthermore believed that espousing the reasonable woman standard would be the first step for the courts to eliminate long-standing attitudes contemplating appropriate and acceptable behavior in the workplace.[184] In drawing to a close on this issue, the court stated, "We hope that over time both men and women will learn what conduct offends reasonable members of the opposite sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged."[185]

In addition to the Sixth and Ninth Circuits, district courts in at least three other circuits have proposed adoption of the reasonable woman standard.[186] Justifications for approving the reasonable woman standard for analyzing workplace conduct include accounting for the lack of wo-

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180. *Id.* Like the Sixth Circuit in *Yates*, the Ninth Circuit stated that when a male is the recipient of the sexually offensive conduct, the reasonable man standard is appropriate. *Id.* at 879 n.11.

181. *Id.* at 879.

182. *Id.* at 880. The court noted that sexual behavior welcomed by the female employee would not constitute sexual harassment. *Id.* at 880 n.13.

183. *Id.* at 880. "A reasonable woman could consider Gray's conduct, as alleged by Ellison, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment." *Id.*

184. *Id.* at 881.

185. *Id.*

186. *See* Stingley v. Arizona, 796 F. Supp. 424 (D. Ariz. 1992); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283 (E.D. Pa. 1991); Harris v. International Paper Co., 765 F. Supp. 1509 (D. Me. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D. P.R. 1987), *rev'd in part sub nom.* Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

men in a particular field,[187] protecting the employer from the hypersensitive employee,[188] and paralleling the analysis for sexual harassment to the analysis for race discrimination.[189] One court also allowed expert testimony to establish the validity of the different points of view between men and women.[190]

V. Evaluation of Sexual Harassment Decisions in the Seventh Circuit

In 1985, the Seventh Circuit articulated its belief that Title VII prohibited sexual harassment by an employee's supervisor, but reserved opinion as to Title VII's application to co-employees.[191] Vera Horn filed suit against her former employer, asserting that she was terminated because she rejected the sexual advances of her supervisor, Frank Haas. The alleged suggestive behavior occurred by way of obscene gestures, lewd comments, and sexual leers.[192] Specifically, Haas grilled her about her sexual desires since her divorce and avowed to make her work experience easier if she indulged him.[193]

The Seventh Circuit evaluated Haas's conduct and stated that the behavior "constitutes precisely the kind of 'artificial, arbitrary, and unnecessary barriers to employment,' that Title VII was intended to prevent."[194] The court adopted the EEOC's Guidelines, which imposed strict liability on employers for the conduct of its supervisors.[195] Because the conduct at issue constituted quid pro quo sexual harassment, the court never reached the issue of an appropriate standard for evaluating hostile work environment sexual harassment.[196]

One year later, in 1986, the Seventh Circuit recognized employer liability for hostile work environment sexual harassment.[197] Carol Zabkowicz worked in a warehouse in West Bend, Wisconsin.[198] Zabkowicz's brother-in-law became employed at the same facility, and the warm relationship she shared with other employees began to dis-

187. *Robinson*, 760 F. Supp. at 1524.
188. *Smolsky*, 780 F. Supp. at 294-95.
189. *Harris*, 765 F. Supp. at 1515.
190. *Robinson*, 760 F. Supp. at 1502-09.
191. Horn v. Duke Homes, 755 F.2d 599, 603 (7th Cir. 1985).
192. *Id.* at 601.
193. *Id.* at 601-02.
194. *Id.* at 603 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
195. *Id.* at 604-05.
196. *Id.* at 604.
197. Zabkowicz v. West Bend Co., 789 F.2d 540 (7th Cir. 1986).
198. *Id.* at 542.

integrate.[199] As a result of the conduct she endured, Zabkowicz sought several medical leaves and was diagnosed as suffering from gastrointestinal disease resulting from the sexual harassment she experienced at work.[200]

A charge was filed with the EEOC, motivating disciplinary proceedings against the co-employees involved.[201] Only then did the harassment cease.[202] Again, no standard was articulated by the Seventh Circuit for determining when certain workplace conduct becomes severe and pervasive enough to state a cause of action for hostile work environment sexual harassment.

Three months later, the Seventh Circuit articulated a standard for determining when hostile work environment sexual harassment becomes actionable.[203] Maxine Scott was training to work as an auto mechanic at Sears.[204] Scott alleged that the senior mechanic subjected her to a hostile work environment.[205] She alleged that the male senior mechanic incessantly propositioned her, winked at her, and suggested that he give her a massage.[206] Scott further alleged that a co-worker slapped her on the buttocks and that another said, "[S]he must moan and groan while having sex."[207]

The Seventh Circuit acknowledged the Supreme Court's establishment of hostile work environment sexual harassment as a viable cause of action.[208] The court alluded that victims of such conduct are most often female.[209] By acknowledging that women are more likely to be victims of sexual harassment, the court was only a step away from looking at the offensive conduct from the victim's, and hence the female's, perspective. Instead, the court adopted the district court's conclusion that the conduct was not severe, crippling, or pervasive enough to be actionable.[210]

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199. *Id.* The district court had concluded that a sexual harassment "campaign" had been waged against Zabkowicz. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986).

204. *Id.* at 211.

205. *Id.*

206. *Id.*

207. *Id.* at 211-12.

208. *Id.* at 212-13.

209. *Id.* at 213. "Such severe harassment becomes discriminatory because it deprives the victim (usually female) of the right to participate in the work place on equal footing with others similarly situated." *Id.*

210. *Id.* at 213-14. The district court had adopted an objective test in analyzing hostile work environment sexual harassment: "[W]hether an employee is sexually harassed is gener-

In 1989, the Seventh Circuit finally articulated a standard to analyze workplace behavior in hostile work environment sexual harassment claims.[211] The court abstained from adopting the *Sears* court's objective test, and articulated a two-pronged inquiry.[212]

Helen Brooms, a black nurse, was subjected to both racial and sexual innuendos by the human resources manager of the company.[213] The conduct continued despite her avoidance of the manager's sexual advances and protests to the sexual comments.[214] Brooms complained about the manager's conduct, and he was subsequently reprimanded.[215] The conduct resumed a month later, however, when he showed Brooms two photos, one portraying an interracial act of sodomy and the other depicting bestiality.[216] He indicated that she was hired for the purposes indicated in the photos.[217] The manager also threatened to kill Brooms.[218] Brooms subsequently left work to seek medical assistance for depression caused by the incessant abuse.[219]

The Seventh Circuit adopted a two-pronged test, incorporating both a subjective and an objective standard for assessing the feasibility of a hostile work environment cause of action.[220] The court cited *Rabidue v. Osceola Refining Co.*[221] as adopting the same standard.[222] The court articulated its test:

> [A] district court must . . . [consider] the likely effect of a 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. Only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and

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ally an objective determination and . . . the focus of the question of sexual harassment should be upon the defendant's conduct, not the plaintiff's perception or reaction to the defendant's conduct." Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047, 1056 (N.D. Ill. 1985), *aff'd*, 798 F.2d 210 (7th Cir. 1986).

211. Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

212. *Id.* at 418.

213. *Id.* at 416.

214. *Id.*

215. *Id.*

216. *Id.* at 417.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 418.

221. 805 F.2d 611 (6th Cir. 1986).

222. *Brooms*, 881 F.2d at 418-19.

the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII.[223]

The court concluded that a reasonable person's work performance would have been interfered with and that the reasonable employee's psychological health would have been at risk because of the manager's conduct.[224] The Seventh Circuit continues to analyze hostile work environment sexual harassment using this two-pronged standard.[225]

VI. Adoption of the Reasonable Woman Standard in the Seventh Circuit

The drawback of the Seventh Circuit's present two-pronged standard is that it fails to account solely for the perspective of women who are the targets of sexually degrading and offensive conduct. The Seventh Circuit's standard looks at the conduct from the perspective of both the reasonable person and the reasonable woman (the victim). However, this two-pronged standard fails to properly account for the victim's reaction because the reasonable person's perspective of the conduct may be drastically different. The Seventh Circuit should seek to eliminate the prong that considers the workplace conduct from the perspective of the reasonable person. In doing so, the standard would assess the conduct solely from the reasonable victim's, and more often the reasonable woman's, perspective.

Women are disproportionately the victims of workplace sexual harassment.[226] Articulating an objective standard for reasonable conduct does not consider the disparities that exist between men and women in judging what constitutes objectionable behavior.[227] Conduct that male employees see as innocent could very well be objectionable in today's workplace.[228] Although congressional legislation will never rid all refer-

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223. *Id.* at 419.

224. *Id.* at 420.

225. *See* Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 459 (7th Cir. 1990); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990).

226. *See supra* notes 1-7 and accompanying text.

227. Schoenheider, *supra* note 69, at 1486; *see also* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987) ("[T]he reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men.").

228. Cook, *supra* note 6, at 11. "'The difficulty is [managers'] perceptions of sex harassment . . . such as calling a female employee 'sweetie' or 'honey'. Sometimes, . . . what they think is innocent, subtle, cute or normal is just unacceptable today." *Id.* (quoting Garrett Reilly, manager of General Electric's employee compliance programs).

ences to sex and sexual conduct from the workplace,[229] utilizing the woman's perspective will aid in diminishing the prevalent use of such behavior. Adopting the reasonable woman standard will provide recognition that the perspectives of women in the workforce are being considered and accepted.[230] Adopting the woman's perspective when women are victims of sexual harassment will also encourage greater male awareness to the repulsive nature of sexually laden behavior in the workplace.[231] Likewise, use of the standard will deter future objectionable workplace conduct and create equality between men and women.[232]

Acceptance of the reasonable woman standard means overcoming objections raised by those who would continue to espouse a reasonable person standard.[233] One argument raised against adoption of the reasonable woman standard is that men will be guilty of sexual harassment even without knowing their conduct is severe and pervasive to the reasonable woman.[234] Several responses address this argument.

The Ninth Circuit in *Ellison v. Brady*[235] argued that the reasonable woman standard would force more employers to establish policies to prevent future sexual harassment and to severely reprimand those who engage in such conduct.[236] A second response to this argument is that regardless of whether the man realizes he has engaged in offensive behavior, the end product is that women are being forced to work in a sexually offensive work environment.[237] The purpose of enacting Title VII was not to "codify prevailing sexist prejudices."[238]

A third response to this argument is that no employee should have to tolerate a working environment filled with verbal exploitation, unwanted physical exchanges, or vulgar photographs of their gender.[239] Behavior alleged to constitute sexual harassment is often loathsome to reasonable

229. Fred W. Suggs, Jr., *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAW. 176, 178 (1985).

230. *See* Collins, *supra* note 13, at 323.

231. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984).

232. *Id.* at 1458.

233. Ellison v. Brady, 924 F.2d 872, 884-85 (9th Cir. 1991) (Stephens, J., dissenting).

234. *Id.* at 880.

235. 924 F.2d 872 (9th Cir. 1991).

236. *Id.*

237. MACKINNON, *supra* note 1, at 27. A 1976 study by *Redbook* Magazine stated that 75% of women receiving unwelcome sexual behavior characterize it as disconcerting, humiliating, or terrifying. *Id.* (citing REDBOOK, Nov. 1976, at 217).

238. *Ellison*, 924 F.2d at 881.

239. Paul, *supra* note 11, at 345.

people generally.[240] The purpose of the reasonable woman standard is to combat existing stereotypes and common discriminatory practices that have become prevalent in today's workplace. This objective cannot be accomplished if we continue to look at the offensive conduct from a perspective other than the victim's.

A second challenge to adopting the reasonable woman standard raises the issue of whether it is sensible to foster the reasonable woman's perspective in evaluating the suitability of behavior by male co-workers and/or supervisors. Legal scholars and courts contend that employing this softer standard will allow the hypersensitive female employee to prevail on petty claims.[241]

Confrontation of this challenge requires a realization that the standard is aimed at considering the societal differences between men and women.[242] Women have traditionally been expected to observe workplace norms that have been propounded by men.[243] Because men typically govern workplace conduct and are the perpetrators of sexual harassment, they fail to contemplate how a woman will respond to the conduct.[244] The reasonable woman standard is meant to account for the reasonable female's perspective. Thus, a mere compliment couched in sexual terms will not constitute a prima facie showing of sexual harassment.[245]

Although some legal scholars contend that sexual harassment claims for hostile work environment are petty, a closer examination of the issue will show that is not the case.[246] Only conduct that a reasonable woman

240. *Id.*

241. *Ellison*, 924 F.2d at 885 (Stephens, J., dissenting).

242. Abrams, *supra* note 8, at 1185.

243. *Id.* at 1189.

244. *Id.* at 1202-03.

245. *Ellison*, 924 F.2d at 880.

246. EDMUND WALL, SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS, 227 (1992). The cases show that the alleged harassing conduct is really quite shocking. *Id.*; *see* Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (Female employee was told that sexually harassing conduct might stop if she submitted to the propositions.); Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981) (The female who had to contend with her supervisor's sexual advances complained and was told that "[a]ny man in his right mind would want to rape you."); Stingley v. Arizona, 796 F. Supp. 424, 427 (D. Ariz. 1992) (Female employee was nicknamed "I.B.T.," an abbreviation for "itty bitty titties," and was poked in the buttocks by a co-worker who said he was "checking to see if 'the meat was done.'"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1498 (M.D. Fla. 1991) (Female employee had to endure remarks such as "Hey pussy cat, come here and give me a whiff," "The more you lick it the harder it gets," "I'd like to get in bed with that," and "I'd like to have some of that."); Perkins v. General Motors Corp., 709 F. Supp 1487, 1492 (W.D. Mo. 1989) (Female employee who was forced to have sex with her supervisor had to endure him putting a pistol into her

finds adequately severe and pervasive to create a hostile and offensive work environment will be actionable.[247] To many women who are victims of sexual harassment, it is crystal clear when they have been harassed within the definition of Title VII.[248] The standard itself is progressive, and courts should recognize that a woman's perspective of what constitutes acceptable workplace behavior will in all likelihood change over the years.[249]

Acceptance and implementation of the reasonable woman standard requires the recognition that claims which may have failed under the reasonable person standard will conceivably succeed under the reasonable woman standard.[250] The reasonable woman standard is not meant to allow all allegations of sexual harassment to prevail, but to judge the reasonableness of the conduct from the victim's (i.e., the woman's) viewpoint. The reasonable woman is not less reasonable than the genderless reasonable person.[251] Her viewpoint of what constitutes reasonable and appropriate workplace behavior is the only difference and should be properly accounted for.

Despite the expression of opinion against adoption of the reasonable woman standard, the standard has substantially more foundation for its support. Women have had to face sexual harassment in the workforce for decades.[252] Sexual harassment advocates degradation of women by reinforcing their historically subordinate function in the workplace.[253] The consequences of sexual harassment to the employer are tremen-

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vagina and cocking it.); Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1197 (D. P.R. 1987), *rev'd in part sub nom.* Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (Plaintiff, a female surgeon, was told by her male supervisor that women were not fit to be surgeons and could not be relied upon when menstruating or "in heat."); Vermett v. Hough, 627 F. Supp. 587, 598 (W.D. Mich. 1986) (A male co-worker thrust his shotgun case into the plaintiff's crotch, put it up to his nose, and said, "Umm, smells good.").

247. WALL, *supra* note 246, at 227-28.

248. PETROCELLI & REPA, *supra* note 3, at 2/27.

249. Winterbauer, *supra* note 101, at 818 (citing Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991)).

250. *Id.* at 818.

251. *See generally* Linzer & Tidwell, *supra* note 17, at 863 ("[W]e should be aware that these multiple points of view are always present before we talk about reasonableness at all."); Collins, *supra* note 13, at 323 ("The meaning of reasonableness should in the future be construed to allow for a gender-free standard, which can be respected by all people who value its meaning.").

252. Schoenheider, *supra* note 69, at 1461.

253. CONTE, *supra* note 3, at 5.

dous.[254] The possibility for psychological harm caused by sexual harassment requires both courts and employers to accept a standard that contemplates a woman's perception of acceptable workplace conduct.[255] The cost of sexual harassment to the federal government is likewise astronomical.[256] Application of the reasonable woman standard should ultimately lower this cost once employers and employees become aware of the kinds of conduct in the workplace that can be actionable.

Sanctioning offensive, crude, and unbusiness-like sexual behavior in the workplace will only serve to reinforce the subordination and inequality of women in the workplace.[257] Ignoring the viewpoint of the victim (the woman) will result in an abuse of economic power over the woman in the workplace.[258] The courts are not immune from historical norms that have pervaded the workplace.[259] The courts must be the first place to institute a change that will have an immense impact on the future workplace for women. Eliminating employment discrimination against women and changing societal norms about appropriate workplace conduct requires the courts to propound a standard that analyzes sexual harassment by a woman's sensory experience.[260]

VII. CONCLUSION

The reasonable woman standard was not articulated to provide women with greater protection in the workplace than men. The standard

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254. *See supra* notes 51-52 and accompanying text. The victim may suffer headaches, nervousness, insomnia, depression, and even emotional breakdowns. Schoenheider, *supra* note 69, at 1464.

255. Marlisa Vinciguerra, *The Aftermath of* Meritor*: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1737-38 (1989).

256. Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1298-99 (1992). A study by the Merit Systems Protection Board indicates the cost of sexual harassment to the federal government exceeded $100,000,000 per year. *Id.*

257. Schoenheider, *supra* note 69, at 1465.

258. MACKINNON, *supra* note 1, at 1. MacKinnon states:

> Intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible. Contained by internalized and structured forms of power, it has been nearly inaudible. [It has c]onjoined with men's control over women's material survival. . . .
>
> Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. . . . American society legitimizes male sexual dominance of women and employer's control of [female] workers [by allowing sexual harassment to prevail in the workplace].

Id. at 1-2.

259. Brenneman, *supra* note 256, at 1299-304.

260. Abrams, *supra* note 8, at 1206.

was implemented to give women a chance to reject the welcomeness of any workplace conduct that a woman finds objectionable, but that her male co-worker does not. Assessing suitable workplace behavior from the woman's perspective will help to reduce, if not eliminate, sexual inequality in the workplace.

The Seventh Circuit should take a definitive step and alter its two-pronged test for hostile work environment sexual harassment by eliminating the prong analyzing whether the reasonable person would find the conduct sufficiently severe and pervasive, and instead adopting the reasonable woman standard. As one legal scholar wrote, "[t]he perspective of the reasonable man [or the reasonable person] who has not experienced the plaintiff's harassment is no more objective [than the reasonable woman], it simply reflects a different type of subjectivity."[261]

Because women are more likely than men to be afflicted by offensive workplace behavior, adopting the woman's perspective will allow courts and employers to realize that conduct once condoned in the workplace is no longer appropriate and acceptable behavior among employees, unless mutually solicited.

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261. *Id.* at 1210.