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Radtke v. Everett: An Analysis of the Michigan Supreme Court's Rejection of the Reasonable Woman/Victim Standard: Treating Perspectives that are Different as Though they were Exactly Alike

Paul P. Dumont

COMMENT

RADTKE v. EVERETT: AN ANALYSIS OF THE MICHIGAN SUPREME COURT'S REJECTION OF THE REASONABLE WOMAN/VICTIM STANDARD: TREATING PERSPECTIVES THAT ARE DIFFERENT AS THOUGH THEY WERE EXACTLY ALIKE

I. INTRODUCTION

> *Everyone is prisoner of his own experiences. No one can eliminate prejudices - just recognize them.*[1]

Our society has recognized the evils of gender discrimination. Title VII of the Civil Rights Act of 1964 "is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases."[2] "Sex" was included under the auspices of Title VII to combat discrimination resulting from cultural prejudices regarding gender.[3]

Sexual harassment litigation has forced us to reevaluate

1. Edward R. Murrow, News Commentary, Dec. 31, 1955.
2. Miller v. C.A. Muer Corp., 352 N.W.2d 650, 653 (Mich. 1984).
3. *See* House Legislative Second Analysis, HB 4407, August 15, 1980: Sexual harassment should be explicitly defined and prohibited because it is a demeaning, degrading, and coercive activity directed at persons on the basis of their sex, the continuation of which is often contingent on the harasser's economic control over the person being harassed. It should be outlawed because it violates basic human rights of privacy, freedom, sexual integrity and personal security.

the factor of gender in formulating judicial definitions of reasonable behavior. Currently, the circuit courts are divided regarding the validity of adopting a female perspective when evaluating sexual harassment claims.[4] Since the late 1980's, the federal and state courts, when determining whether sexual behavior has created an abusive or "hostile" environment, have gradually acknowledged that males and females perceive differently the types of sexual behavior appropriate for the employment setting.[5] Such acknowledgment has resulted in the creation and implementation of the reasonable victim/woman standard.[6]

Since 1987, beginning with *Yates v. Avco Corp.*, the reasonable woman standard (hereinafter "RWS") has gradually gained acceptance by the judiciary.[7] The RWS, which is premised on the theory that males and females perceive sexual behavior differently, deems actionable that conduct which offends and intimidates a reasonable woman, including sexual conduct which some males may not find objectionable. The adoption of the RWS, therefore, has allowed women to estab-

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4. The following Federal Circuit Courts have adopted a reasonable victim/woman standard. *See, e.g.*, Newton v. Dept. of Air Force, 85 F.3d 595 (D.C. Cir. 1996) (adopting a reasonable victim standard); Burns v. McGregor Electronic Industries, 989 F.2d 959 (8th Cir. 1993) (adopting a reasonable woman standard); Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (adopting a reasonable woman standard); Jones v. Dept. of Army, 780 F.Supp. 755 (10th Cir. 1993) (adopting a reasonable woman standard); Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (11th Cir. 1991) (adopting a reasonable woman); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (adopting a reasonable woman standard). The following Federal Circuit Courts have adopted a reasonable person standard. *See, e.g.*, Baskerville v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995) (adopting a reasonable person standard); Trotta v. Mobil Oil Corp., 788 F.Supp. 1336 (2nd Cir. 1992) (adopting a reasonable person standard); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991) (adopting a reasonable person standard as opposed to a reasonable "church affiliated" person standard); Harris v. International Paper Co., 765 F.Supp. 1509 (1st Cir. 1991) (utilizing the "reasonable person from the protected group of which the victim is a member" standard).

5. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J. dissenting).

6. Because this note focuses primarily on sexual harassment directed at women, the terms "reasonable victim" and "reasonable woman" are used interchangeably.

7. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); *see also* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Harris v. International Paper Co., 765 F.Supp. 1509 (1st Cir. 1991) (adopting a reasonable victim standard); Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (11th Cir. 1991).

lish prima facie hostile environment claims that would have been held insufficient under the traditional reasonable person standard (hereinafter "RPS").[8]

The Michigan Supreme Court's decision to explicitly reject the RWS in *Radtke v. Everett*[9] illustrates an unwillingness by some courts to accept this progressive instrument of sexual harassment jurisprudence. This comment will analyze and critique the *Radtke* court's rationale for rejecting the RWS in favor of the RPS.

Part II of this comment will discuss both the history of sexual harassment and the evolution of the reasonable woman standard in order to illustrate society's progress toward defining appropriate conduct in the work environment.[10] Parts III-IV will present the *Radtke* court's argument rejecting the reasonable woman standard in favor of the reasonable person standard.[11] Part V invokes feminist theory to critique the premises upon which the *Radtke* rationale is based.[12]

II. BACKGROUND

This section illustrates how both the legislatures' and the courts' interpretation of sexual harassment have evolved to prohibit various forms of sexual behavior in the workplace. Part A discusses briefly the history of sexual harassment law. Part B discusses the evolution of the reasonable woman standard and how this standard has expanded the protective ambit of Title VII to include sexual conduct which was not actionable under a reasonable person standard.

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8. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991). The District Court, using the reasonable person standard, granted the employer's motion for summary judgment. The Court of Appeals, using the reasonable woman standard, held that the plaintiff established a prima facie case of hostile environment sexual harassment.

9. Radtke v. Everett, 501 N.W.2d 155 (Mich. 1993).

10. *See infra* part II.

11. *See infra* parts III-IV.

12. *See infra* part V.

A. HISTORY OF SEXUAL HARASSMENT JURISPRUDENCE

Responding to society's need to equalize opportunities for all persons within the work force, Congress included gender as a classification protected under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII").[13] Under Title VII, an employer shall not discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, *sex* [emphasis added], or national origin."[14] Title VII has eliminated a wide range of impediments to gender equality in the workplace, including inaccurately validated tests,[15] seniority systems,[16] and gender-based height and weight standards.[17] The federal courts, however, have experienced great difficulty in applying Title VII's language to sexual harassment.[18]

In the early and mid-1970's, the federal courts dismissed cases alleging sexual harassment on the grounds that sexual harassment did not constitute a violation of Title VII.[19] For

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13. Civil Rights Act of 1964, Title VII, § 703, amended by, 42 U.S.C. § 2000e-2(a) (1970 & Supp. II 1972). In relevant part the Act provides:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or discharge an individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

14. *Id.*

15. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

16. United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-59 (2nd Cir. 1971).

17. Laffey v. Northwest Airlines, 366 F.Supp. 763, 790 (D.D.C. 1974), *aff'd in part and reversed in part*, No. 74-1791 (D.C. Cir. Oct. 20, 1976).

18. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (1977) (reversed and remanded the lower court's holding that employment conditioned upon acquiescence to sexual requests does not fall within the coverage of Title VII); Corne v. Bausch and Lomb, Inc., 390 F.Supp. 161 (1975) (holding that Title VII does not protect a female employee from a supervisor's repeated verbal and physical sexual advances).

19. Kathleen McKinney & Nick Maroules, *Sexual Harassment*, in SEXUAL CO-

example, in *Barnes v. Train*[20], the United States District Court for the District of Columbia held that a supervisor's retaliation against a female employee who refused his sexual advances was "underpinned by the subtleties of an inharmonious personal relationship."[21] The *Barnes* court reasoned that the supervisor acted independently of his company's policies, and therefore, his actions did not create an arbitrary barrier to continued employment based on gender.[22] The court therefore held that Title VII was inapplicable.

Similarly, in *Corne v. Bausch and Lomb, Inc.*, the court held that a supervisor's repeated verbal and physical advances were nothing more than a "personal proclivity, peculiarity, or mannerism" and that he was satisfying a "personal urge."[23] The court reasoned that Title VII applies only when the employer itself practiced the discrimination. The *Corne* court held that even a supervisor's harassment was not actionable because such conduct had no relationship to the nature of the employment.[24]

Williams v. Saxbe was the first federal court decision to recognize sexual harassment as a Title VII violation.[25] In this case, a supervisor retaliated against a female employee's refusal of his sexual advances by subjecting her to unwarranted reprimands, unfavorable reviews, and ultimately to termination.[26] Holding that the supervisor's conduct constituted sexual discrimination within the definition of Title VII, the court stated,"[t]he conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other. . . ."[27] The holding in *Williams* suggested that Title VII would provide a remedy for women who suffered tangible losses (e.g. termination, unfavorable reviews)

ERCION 30 (Elizabeth Grauerholz, Mary Koralewski eds., 1991).

20. *Id.*

21. Barnes v. Train, Civ. No. 1828-73 (D.D.C.) (order of Aug. 9, 1974).

22. *McKinney, supra* note 19 at 30.

23. Corne v. Bausch and Lomb, Inc., 390 F.Supp. 161, 163 (1975)

24. *Id.*

25. *McKinney, supra* note 19 at 30; *see,* Williams v. Saxbe, 413 F.Supp. 654 (D.C. Cir. 1976).

26. Williams v. Saxbe, 413 F.Supp. 654, 655-56 (D.C. Cir. 1976).

27. *Id.* at 657.

as a result of sexual harassment.[28] The *Williams* holding, however, only addressed an actual or constructive discharge of an employee, and left open the question of whether a harasser who engages "merely" in intimidating or offensive behavior toward his victim has violated Title VII.

In 1980, in an effort to reduce ambiguity in sexual harassment adjudication, the Equal Employment Opportunity Commission drafted guidelines for the purpose of defining behavior constituting sexual harassment.[29] The guidelines describe the types of workplace conduct that may be actionable under Title VII, namely "quid pro quo" and "hostile environment."[30] Quid pro quo sexual harassment exists when the sexual misconduct of the employer or his agent is directly related to the grant or denial of a tangible economic benefit to an employee.[31] A "hostile environment" exists where "such conduct has the purpose or effect of reasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[32] Although these guidelines are not controlling upon the courts, federal and state courts, as well as state legislatures have looked to them for guidance.[33]

In 1981, the Court of Appeals for the District of Columbia in *Bundy v. Jackson*, interpreting Title VII, held that a "hostile environment" existed when a plaintiff was subjected to sexually stereotyped insults and demeaning propositions which caused her anxiety and debilitation.[34] In *Bundy*, not only was the plaintiff the target of numerous sexual advances by her first line supervisors, but when she complained about these advances to management, the supervisor dismissed her complaints and told her that "any man in his right mind would

28. The court was unable to provide plaintiff with a remedy as the parties did not address what specific relief was appropriate. *Id.* at 663.

29. In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986), (quoting 29 C.F.R. § 1604.11(a)).

30. 29 C.F.R. § 1604.11(a)(3).

31. *Id.*

32. *Id.*

33. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

34. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

want to rape you."[35] The *Bundy* court found that such statements adversely affected the psychological and emotional work environment.[36] The *Bundy* court analogized such intimidating and offensive language to ethnic and racial discrimination which indisputably pollutes the work environment, but does not necessarily result in the loss of any tangible economic benefit.[37] Relying on the Fifth Circuit's holding that racial slurs violate Title VII, the *Bundy* court concluded that sexual harassment "which injects the most demeaning stereotypes into the general work environment" violated Title VII.[38] The *Bundy* holding indicated that the federal courts were willing to apply Title VII prohibitions to verbal abuse based on gender.[39]

In 1986, the United States Supreme Court invoked the hostile environment category of Title VII in *Meritor Savings Bank, FSB v. Vinson.*[40] In *Meritor*, the Court relied on the EEOC guidelines in addition to lower court decisions in concluding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[41] Quoting from *Henson v. Dundee*, a decision of the United States Court of Appeals for the Eleventh Circuit, the Court stated that "[s]exual 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."[42] The *Meritor* Court recognized that not all workplace conduct that

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35. *Id.* at 940.

36. *Id.*

37. *Id.* at 945; *see,* Rogers v. Equal Employment Opportunity Com'n, 454 F.2d 234, (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Judge Goldberg explained:

> . . . terms, conditions, or privileges of employment is an expansive concept which sweeps within its protective ambit the practice of creating a work environment charged with ethnic or racial discrimination . . . [o]ne 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.

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

39. *Id.* at 946.

40. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 57.

41. *Id.* at 67.

42. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

may be described as harassment affects a term or condition of employment.[43] The Court stated that for hostile environment sexual harassment to be actionable, the defendant's behavior must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[44] The Court, however, did not articulate a standard for determining whether a defendant's behavior created such a hostile work environment.

The history of sexual harassment jurisprudence demonstrates that the judiciary has interpreted more broadly the conduct prohibited under Title VII. The next section will discuss how the introduction of the RWS to sexual harassment adjudication has even further expanded the scope of Title VII protection.

B. HISTORY OF THE REASONABLE WOMAN STANDARD

In late 1986, five months after *Meritor* was decided, the United States Court of Appeals for the Sixth Circuit decided *Rabidue v. Osceola Refining Co.*[45] Ms. Rabidue claimed that a co-worker's propensity to refer to women as "whores," "cunts," and other derogatory obscenities, in addition to the display of sexually explicit posters throughout the facility, created a hostile work environment.[46] The majority applied a reasonable person standard and held that the evidence, even when viewed in a light most favorable to Rabidue, did not demonstrate that "this single employee's vulgarity substantially affected the totality of the workplace."[47] The court characterized the conduct Rabidue complained of as merely a legitimate expression of the cultural norms of the workers, and that the prevailing depictions of women in the media suggested that such conduct was not unreasonably offensive.[48]

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43. *Id.* at 67; *see* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("mere utterances of an ethnic or racial epithet which engender offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII).

44. *Id.* (quoting Rogers v. EEOC, *supra* note 43 at 38).

45. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

46. *Rabidue*, 805 F.2d at 623-24.

47. *Id.* at 622.

48. *Id.* The majority stated:

In *Rabidue*, Judge Keith dissented and proposed a standard of review based on the perspective of a reasonable victim in determining the severity of the defendant's conduct. Judge Keith stated that "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."[49] Judge Keith stated that the reasonable victim standard would allow courts to consider "salient sociological differences as well as shield employers from the neurotic complainant."[50] Judge Keith also rejected the majority's reasonable person standard as "enforcing an essentially male viewpoint under the guise of universality,"[51] by which the courts determine reasonableness based upon prevailing social norms.[52]

The *Rabidue* opinion is noteworthy because the holding illustrates the limitations of the RPS in defining harassing conduct.[53] The *Rabidue* majority, by focusing on whether the defendant's conduct violated prevailing social norms, ignored the possibility that our social norms reflect a male perspective of what constitutes appropriate sexual behavior in the workplace.[54] The majority's analysis provided a vivid example of how the RPS reinforces cultural norms that perpetuate inequality in the workplace. Furthermore, *Rabidue* illustrates how the outcome of a sexual harassment case can be determined by the standard adopted by the court.[55]

> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees . . . [t]he 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 in other public places.

Id.

49. *Rabidue*, 805 F.2d at 626.

50. *Id.*

51. *See also*, Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1196 (1990).

52. *Rabidue*, 805 F.2d at 626.

53. *See* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1193-94 (1990).

54. *Id.* at 1205.

55. *See also* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The Court of

In the 1987 case of *Yates v. Avco Corp.*, the Court of Appeals for the Sixth Circuit, the same circuit that decided *Rabidue*, adopted the reasonable victim standard in determining whether a constructive discharge resulted from a hostile work environment.[56] The *Yates* court recognized that men and women interpret offensive or intimidating behavior in different ways.[57] The court held that the severity of the defendant's conduct should be viewed from the perspective of the reasonable person "standing in the shoes of the employee."[58] The court reasoned that the RWS should be applied since the plaintiff in this type of case has been discriminated against based solely upon gender.[59]

In 1991, in *Ellison v. Brady*, the United States Court of Appeals for the Ninth Circuit explicitly adopted the perspective of a reasonable woman for determining whether the defendant's conduct was actionable under Title VII.[60] In that case, Kerry Ellison, an agent for the IRS, received two "love notes" in which a co-worker declared his romantic feelings in a bizarre manner that frightened Ellison.[61] The *Ellison* court relied on the EEOC guidelines and on lower court decisions advocating focus on the victim's perspective in determining whether the defendant's conduct had created a hostile work environment.[62] The *Ellison* court found that a reasonable person standard is not only an insufficient standard for defining unacceptable behavior in the workplace, but a standard that

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Appeals for the Ninth Circuit adopted the reasonable woman standard and under this standard reversed and remanded the trial court's order granting summary judgment for the defendant.

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

57. *Id.* The court stated "were this a sexual harassment case involving a male subordinate, the 'reasonable man' should be applied. We acknowledge that men and women are vulnerable in different ways and offended by different behavior." *Id.*

58. *Id.*

59. *Id.*

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

61. *Id.* at 874.

62. EEOC Compliance Manual (CCH) § 615, para. 3112, C at 3242 (1988) (courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior"). *See,* Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (adopting "reasonable woman" standard advocated by the dissent in *Rabidue*). *Cf.*, State v. Wanrow, 88 Wash.2d 221, 239-41 (1977) (en banc) (adopting reasonable woman standard for self-defense).

may condone the behavior Title VII aims to eliminate.[63]

The court reasoned that women collectively share common concerns regarding sexual behavior of which many men are unaware.[64] For example, the fact that women are disproportionately victims of rape and sexual assault suggests that women may reasonably believe that a harasser's mild behavior may foreshadow a violent act.[65] The *Ellison* court stated that a reasonable person standard ignores the sociological experiences of women while it incorporates the perspective of males who represent the majority of perpetrators.[66]

Each citing *Ellison*, seven of the twelve federal circuits have since adopted the reasonable victim standard when analyzing the severity of sexual harassment.[67] Three circuits have adopted the reasonable person standard[68] while the other two have not committed to either standard.[69] The adoption of the RWS suggests that our society is willing to reconsider the types of behavior that it will tolerate in the work environment. Due to the federal courts' decision to consider sexual behavior from the perspective of the victim, employers have been alerted that discrimination can result from abusive or offensive language,[70] or from conduct (such as posting pornography) that stigmatizes women as sexual objects.[71] The reasonable victim standard allows courts to eradicate the more subtle, but equally discriminatory, forms of sexual harassment that place artificial barriers before one gender and not the other.[72]

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63. *Ellison*, 924 F.2d 872, 878 (9th Cir. 1991).

64. *Id.* at 879; *see,* Ehrenreich, *supra* note 51 at 1207 ("[M]any men . . . tend to view the milder forms of harassment such as suggestive looks, repeated requests for dates, and sexist jokes, as harmless social interactions to which only sensitive women would object").

65. *Id.*

66. *Id.*; *see,* Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (discussing how many recent judicial opinions reflect a tendency by judges to adopt a "male" view regarding sexual conduct in the workplace).

67. *See supra* note 4.

68. *See, e.g.*, Baskerville v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995); Trotta v. Mobile Oil Corp., 788 F.Supp. 1336 (2nd Cir. 1992); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).

69. Neither the Third nor the Fourth Circuit have considered the issue.

70. *See,* Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987).

71. *See,* Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (11th Cir. 1991).

72. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard*

In 1993, in *Harris v. Forklift Systems, Inc.*, the United States Supreme Court addressed the question regarding the standard to be employed in assessing harassing conduct.[73] In *Harris*, the Court unanimously held that Teresa Harris was not required to demonstrate that the harassing conduct of which she complained had "seriously affected her psychological well-being."[74] While the Court did use the term reasonable person in discussing the appropriate standard, a subsequent sentence suggests that the Supreme Court has not ruled out the possibility of adopting a reasonable victim standard. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."[75] The language "reasonably be perceived" does not necessarily preclude a reasonable victim standard as it implies a standard adopting the victim's perspective.

Furthermore, the *Harris* Court listed the following factors to be considered when evaluating the circumstances of a hostile environment, including the frequency and severity of the conduct, whether the conduct is "physically threatening or humiliating," and whether it "unreasonably interferes with an employee's work performance."[76] Such factors suggest further that a reasonable woman standard is appropriate. For example, a female is more likely to be feel physically threatened than a male under similar circumstances due to the disparity

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in Theory and in Practice, 77 CORNELL L. REV. 1398, 1400 (1992); *See also* Ehrenreich *supra* note 51 at 1219.

73. Harris v. Forklift Systems, Inc., 126 L. Ed. 2d 295 (1993).

74. The U.S. Supreme Court stated:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Id. at 302.

75. *Id.*

76. *Id.* The U.S. Supreme Court stated:

> The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 303.

in size and strength that exists between males and females.[77] As the Court did not address directly the issue of whether a reasonable woman standard should be adopted, the issue was left open to future litigation and debate.[78]

III. *RADTKE v. EVERETT*

The Michigan Supreme Court in *Radtke v. Everett* expressly rejected both the efficacy and the validity of the RWS, holding that a RWS was not only unnecessary to sexual harassment adjudication, but antithetical to the intent of the Michigan Civil Rights Act.[79] Part A will discuss the facts and procedural history of the *Radtke* decision. Part B will discuss the *Radtke* Court's analysis and reasoning behind its decision to reject the RWS.

A. FACTS AND PROCEDURAL HISTORY

Plaintiff Tamara Radtke was employed as an unregistered veterinary technician for defendant Clarke-Everett Dog and Cat Hospital, P.C., beginning January, 1984.[80] On Sunday, May 29, 1988, Radtke, as commonly occurred, was working alone with defendant Everett to provide weekend emergency veterinarian services.[81] When Radtke suggested that she and Everett take a break, Everett joined her in the hospital's lounge and sat down next to her on the sofa.[82] Radtke believed Everett's behavior was inappropriate and attempted to

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77. *See* Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989). The author explains:

> While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence.

Id.

78. *See, e.g.*, Radtke v. Everett, 501 N.W.2d 155 (1993).
79. *Id.* at 166-67.
80. *Id.* at 159.
81. *Id.*
82. *Id.*

get up from the couch. Everett restrained her by firmly placing his arm around her neck and holding her down.[83] After she forcefully escaped his grip, Radtke rebuffed Everett's further advances by stating: "You don't want to do this. I don't want to do this. You're married. I'm married."[84] When Everett responded by caressing Radtke's neck, Radtke again protested, but Everett ignored her pleas.[85] Everett tried to kiss Radtke by grabbing her neck and pushing his face toward hers.[86] Radtke successfully pushed Everett away, and the working day was finished without further incident.[87]

In December 1988, Radtke filed a civil suit against Everett and the hospital in the Grand Traverse Circuit Court.[88] Radtke alleged that she was "1) sexually harassed in violation of the Civil Rights Act of 1964; 2) constructively discharged on the basis of sex; 3) the victim of assault and battery; and 4) denied access to her personnel files in violation of the Employee Right to Know Act, M.C.L. section 423.501 et seq.; M.S.A. section 17.62(1) et seq.[89] Radtke's sexual harassment claim was based on the theory that Everett's actions had created a hostile work environment under Title VII.[90]

The trial court dismissed the Employee Right to Know Act claim by stipulation.[91] In August, 1989, the trial court granted defendant's motion for summary judgment as to the remaining counts.[92] The trial court ruled that Radtke failed to state a violation of the Michigan Civil Rights Act because her hostile environment claim was based upon a single incident of sexual harassment, which as a matter of law, did "not rise to the level of severity and persistence which would permit recovery."[93] The trial court also dismissed Radtke's constructive discharge claim because it was dependent on a finding of a hostile work

83. *Id.*
84. *Radtke*, 501 N.W.2d at 159.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Radtke*, 501 N.W.2d at 160.
89. *Id.*
90. *Id.*
91. *Radtke*, 501 N.W.2d at 160.
92. *Id.*
93. *Id.*

environment.[94] The court also ruled that Radtke's assault and battery claim was barred by the exclusive remedy provision of the Worker's Disability Compensation Act.[95]

The Michigan Court of Appeals reversed on all counts.[96] Regarding the hostile environment claim, the court, sua sponte, rejected the Michigan judiciary's precedent of using a reasonable person standard in making the determination whether a hostile work environment existed.[97] The Court of Appeals found that under the reasonable woman standard, Radtke's "single incident could be sufficiently severe under some circumstances to support a finding" of a hostile work environment.[98]

The Supreme Court of Michigan affirmed the Court of Appeals' holding that Radtke had alleged a prima facie case of a hostile work environment.[99] The Court, however, rejected the lower court's use of the reasonable woman standard.[100] The Court held that the appropriate standard to be used in determining a hostile work environment was the "objective" reasonable person standard, and that the "gender conscious" reasonable woman standard was "violative of the legislative intent of the act, undermine[d] uniform standards of conduct, and [was] ultimately unnecessary."[101]

B. COURT'S ANALYSIS

While the Michigan Supreme Court held that Radtke had made a prima facie case of hostile environment sexual harassment, the Court rejected the Court of Appeal's adoption of the RWS. First, this section will discuss the Michigan Supreme Court's analysis of Radtke's hostile environment sexual harassment claim. Second, this section will discuss the Michigan Supreme Court's rationale for rejecting the RWS.

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94. *Radtke*, 501 N.W.2d at 160.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Radtke*, 501 N.W.2d at 168.
100. *Id.* at 160.
101. *Id.* at 169.

1. Radtke's Hostile Environment Sexual Harassment Claim

The Michigan Supreme Court began its analysis by looking to the Michigan Civil Rights Act, which states that conduct or communication of a sexual nature constitutes sexual discrimination when "such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive . . . environment."[102] The court then laid out the five elements necessary to establish a prima facie case for hostile work environment: 1) the employee belonged to a protected group; 2) the employee was subjected to communication or conduct on the basis of sex; 3) the employee was subjected to unwelcome sexual conduct or communication; 4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and 5) respondeat superior.[103]

The court found that Radtke's claim satisfied the first three elements of the test.[104] The court also held that Radtke satisfied the fifth element of the test.[105] The court thus framed as its key issue the question of whether the facts of this case supported the fourth prong of the test.[106] The court was required to determine whether Everett "intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work

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102. *Radtke*, 501 N.W.2d at 162 (quoting M.S.A. § 3.548(101)(h)(iii)).

103. M.S.A. §§ 3.548(103)(h), 3.548(202)(1)(a).

104. Radtke v. Everett, 501 N.W.2d 155, 162-63 (Mich. 1993). Radtke met the first element of the action because Radtke, a female, was a member of a protected class. Radtke met the second element because she showed that but for the fact of her gender, she would not have been the object of harassment. The defendant, a heterosexual male, stipulated that his conduct was an "innocent romantic overture." Radtke met the third element as she provided sufficient evidence that the sexual conduct was unwelcome. *Id.*

105. *Id.* at 168. The court held that the respondent superior element of the test was met by Radtke because the alleged perpetrator was her employer. Everett had the power to hire and fire Radtke and to control her working environment. Everett also paid her wages and owned the corporation employing Radtke. *Id.* at 169.

106. *Id.* at 163.

environment."[107] The trial court held that Radtke had failed to satisfy the fourth prong of the test; a single incident of sexual harassment, as matter of law, did "not rise to the level of severity and persistence which would permit recovery."[108]

The Court of Appeals reversed the trial court's holding regarding not only the fourth prong of the test, but as to all counts.[109] The Court of Appeals adopted and applied a reasonable woman standard to determine whether a hostile work environment existed.[110] Under the RWS, the court held that "a single incident could be sufficiently severe under some circumstances to support a finding" of a hostile work environment.[111] The court concluded that the evidence presented by Radtke satisfied all five prongs of the test and therefore was sufficient to permit a trial regarding the issue of a hostile work environment.[112]

The Michigan Supreme Court rejected the Court of Appeal's adoption of the RWS and reaffirmed the application of the RPS.[113] Nonetheless, the Court did find that Radtke had satisfied the fourth prong of the hostile environment test.[114] The Court held that a single incident of sexual harassment could be sufficient to constitute a violation of the Michigan Civil Rights Act if the incident was extremely traumatic, as in the case of a rape or violent sexual assault.[115] Under the facts

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107. *Id.* at 162.

108. Radtke v. Everett, Circuit Court for the County of Grand Traverse, Decision and Order on defendant's Motion for Partial Summary Disposition, August 11, 1989, p. 2.

109. *Radtke*, 501 N.W.2d at 160.

110. *Id.* (quoting Radtke v. Everett 189 Mich. App. 346, 355 (1991)). The Court of Appeals stated:

> [A] female plaintiff states an actionable claim for sex discrimination caused by hostile-environment sexual harassment under the state Civil Rights Act where she alleges conduct of a sexual nature that a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment by creating an intimidating, hostile, or offensive employment environment.

Id.

111. Radtke v. Everett, 189 Mich. App. 346, 356 (1991).

112. *Radtke*, 510 N.W.2d at 160.

113. *Id.* at 167.

114. *Id.* at 168.

115. *Id*; *see*, del Valle Fontanez v. Aponte, 660 F.Supp. 145, 149 (D.P.R. 1987);

of the instant case, the Court held that Radtke had presented evidence of an incident of sufficient severity to permit a jury trial.[116] The Supreme Court therefore affirmed the ruling of the Court of Appeals that Radtke had alleged a prima facie case of a hostile work environment.[117]

2. The *Radtke* Court's Rationale for Rejecting the Reasonable Woman Standard.

The *Radtke* court acknowledged that the standard to be used in determining the existence of a hostile work environment has been subject to debate.[118] Therefore, the court addressed the validity of adopting a RWS to determine the existence of a hostile work environment. Relying on the language and the purpose of the Michigan Civil Rights Act (hereinafter "MCRA" or "the Act"), the court rejected a RWS.[119]

First, the court held that the plain meaning of the MCRA mandated the use of an objective reasonableness standard.[120] In its analysis the court referred to Webster's Third International Dictionary to define the words "hostile," "intimidating," and "offensive." Without any further explanation, the court held that a close reading of the definitions mandated an objective examination of the reasonableness of the defendant's con-

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Vermett v. Hough, 627 F.Supp. 587, 605-606 (W.D. Mich. 1986) (stating "the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incident").

116. *Radtke*, 501 N.W.2d at 168. The court stated:

> The alleged conduct, combined with the reality that the employer was the perpetrator, permits the single incident to be sufficient to reach the jury. Although the same conduct perpetrated by a coworker might not constitute a hostile work environment, when an employee in a closely knit working environment restrains an employee and physically attempts to coerce sexual relations, the totality of the circumstances permits the jury to determine whether defendant's conduct was sufficient to have created a hostile work environment.

Id.

117. *Id.* at 170.

118. *Radtke*, 501 N.W.2d at 164.

119. *Id.*; *see*, M.C.L. § 37.2103(h); M.S.A. § 3.548(103)(h).

120. *Id.*; *see* subsection 103(h)(iii) which states "Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive . . . environment." *Id.*

duct as such terms are determined primarily by objective factors.[121] The court, therefore, concluded that the requisite objectivity could only be attained under the RPS.[122]

Second, the court noted how Anglo-American jurisprudence had applied a RPS for well over a century before the adoption of the MCRA.[123] The court reasoned that if the legislature intended a departure from that standard, it certainly would have explicitly mandated that alteration.[124]

Third, the court reasoned that a RPS should be applied because it is sufficiently flexible to incorporate gender differences,[125] enabling the trier of fact "to look to a community standard rather than an individual one."[126] The court reasoned that a RPS considered the "totality of the circumstances," and was therefore flexible enough to incorporate gender as a factor without jeopardizing the stability of uniform standards.[127]

Fourth, the court further supported its adoption of a RPS by criticizing the objectivity of a RWS. The court reasoned that only a RPS will prevent hypersensitive plaintiffs from recovering.[128] The court stated: "[t]he alternative to an objective standard would be to accept all plaintiffs' subjective evaluations of conduct, thereby imposing upon an employer liability for behavior that, for idiosyncratic reasons, is offensive to an employee."[129]

The court further reasoned that a gender-conscious standard (e.g. RWS) unduly emphasizes gender and inappropriately focuses on a particular plaintiff while it concomitantly undermines society's need for uniform standards of conduct.[130] The

121. *Id.*
122. *Radtke*, 501 N.W.2d at 164.
123. *Id.* at 165.
124. *Id.* at 166.
125. *Id.*
126. *Id.*
127. *Radtke*, 501 N.W.2d at 166.
128. *Id.* at 165.
129. *Id.* at 164.
130. *Id.* at 166.

court decided that "a gender-conscious standard eliminates community standards and replaces them with standards formulated by a subset of the community."[131] The court reasoned that acceptance of a gender-conscious standard would lead to the fragmentation of legal standards to the detriment of society.[132] The court stated that "a multitude of ethnic groups, national origins, religions, races, cultures, as well as divergences in wealth and education, would demand as many standards."[133]

The court summed up its reasoning by declaring that a gender-conscious standard is contrary to the intent of the MCRA.[134] The court stated that a gender-conscious standard could reinforce the very sexist attitudes the Act is attempting to counter.[135] The court declared that a RPS is permeated by stereotypical assumptions of women which suggest that women are sensitive, fragile, and in need of a more protective standard.[136] The court concluded its argument by insisting that "distinguishing women for special protection puts them back in the disadvantaged position which led to the need for special protection in the first place."[137]

IV. CRITIQUE

In *Radtke*, the Michigan Supreme Court expressly rejected the rationale used by many federal courts for adopting a RWS.[138] Courts adopting a RWS have acknowledged the validity of sociological research that demonstrates that males and females interpret sexual behavior differently.[139] Therefore

131. *Id.*
132. *Radtke*, 501 N.W.2d at 166.
133. *Id.* at 167.
134. *Id.*
135. *Id.*
136. *Radtke*, 501 N.W.2d at 167.
137. *Id.*; *see* Dragel, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted?*, 11 J. L. & COM. 237, 254 (1992) (suggesting that the reasonable woman standard may reinforce the notion that women are "different" from men and therefore need special treatment — a notion that has disenfranchised women in the workplace).
138. Radtke v. Everett, 501 N.W.2d 155, 165 (1993); *see supra* note 4.
139. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (11th Cir. 1991); Yates v. Avco Corp.,

those courts have extended the protective ambit of Title VII to behavior which offends a reasonable woman, but may not necessarily offend a reasonable man.[140] This section will critique the *Radtke* court's reasoning to show that while the RPS is, in the abstract, sufficiently flexible to incorporate gender as a factor, the RWS provides a more accurate reflection of society's evolving recognition that males and females interpret sexual behavior differently.

When the Michigan Supreme Court held that a RWS was neither workable nor even necessary, it asserted that a RPS is both an objective and effective standard for determining actionable conduct under Title VII.[141] The majority opinion implies that sexual behavior is actionable under Title VII only when a reasonable woman and a reasonable man would find that such behavior adversely affected the work environment.[142] The thirty year history of sexual harassment jurisprudence, however, illustrates how our society has gradually and necessarily expanded its interpretation of sexual harassment to include be-

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819 F.2d 630, 637 (6th Cir. 1987).

140. *See, e.g.*, Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989). The author states:

> While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate.

Id.

141. *See* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1234 (1990) (stating "the prevailing ideology systematically ignores differences among the citizenry as a whole, promoting a homogeneous vision of American society that both excludes those groups who do not fit the accepted American model and elevates a small but powerful elite to the status of universal 'type').

142. *Radtke*, 501 N.W.2d at 167; *see* Dragel, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted?*, 11 J. L. & COM. 237, 254 (1992) (stating that "[w]omen's experiences should be encompassed under a 'reasonable person' and not merely a 'reasonable woman' standard. Under an expanded notion of reasonable personhood, a victim's gender would be but one factor the court considers.").

havior that degrades and offends women even if men would not be similarly affected.[143] The *Radtke* decision, by rejecting such an expansion, fosters and maintains a body of law which recognizes only the most egregious forms of sexual harassment.

This section will draw upon feminist theory in presenting a counter argument to the *Radtke* court's rationale for rejecting both the validity and the necessity of a RWS. The author will demonstrate that the decision of whether or not to adopt a RWS is much more complex than the *Radtke* court represents. To end gender discrimination in the workplace, our legal standards must consider the perspective of the harassment victim, not merely the perspective of those who engage in harassment.[144]

Although the *Radtke* court lists five reasons for rejecting a RWS in favor of adopting the reasonable person standard, the court's rationale is based on only two premises. The first premise is that a RPS is objective, capable of accounting for differences within any given community. The *Radtke* opinion's first three reasons for rejecting the RWS (i.e., the plain meaning of the Act dictates the use of RPS, stare decisis requires use of a RPS, and the RPS is sufficiently flexible to account for gender differences) are based on the first premise. The second premise is that a RWS is patently subjective, harmful not only to the uniformity of the judicial system, but to the status of women in society. The *Radtke* court's last two reasons for rejecting the RWS (i.e., the RWS is unworkable, and the RWS harms women's position in society) are based on the second premise.

A. THE OBJECTIVITY OF THE REASONABLE PERSON STANDARD IS QUESTIONABLE

The Radtke court's first three arguments advocating the RPS are based upon the premise that the RPS is an objective standard, a standard that reflects the acceptable social norms

143. *See supra* part II.

144. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The court stated "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.* at 878. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

for workplace conduct. Unfortunately, the plain meaning argument and the stare decisis argument simply assume, without discussion or textual support, that the RPS is indeed objective.[145] This assumption is disturbing in light of recent scholarship challenging the objectivity of judicial definitions of reasonableness.[146] Furthermore, this assumption of objectivity is further suspect when one considers the holding of *Rabidue v. Osceola Refining Co.* in which the court, applying a RPS, held that a co-worker's misogynist obscenities combined with an abundance of nude pictorials of women posted around the office did not constitute a hostile environment for the plaintiff.[147] If the *Radtke* court has determined that the RPS is indeed sufficiently objective to further the goals of Title VII, then its reasoning should more comprehensively address the valid questions and concerns raised by critics of the RPS.[148]

Regarding the third argument, the flexibility argument, the court states that the RPS is "sufficiently flexible" to incorporate gender differences.[149] The court reasoned that the RPS has been carefully formulated in order to provide one standard of conduct for society.[150] This is one of the court's stronger arguments advocating the objectivity of the RPS, for some commentators have suggested that the RPS is capable of synthesizing community standards.[151] The court's advocacy of the

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145. *See supra* part IV.

146. *See* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990) (stating that "judicial definitions of reasonableness often reflect the values and assumptions of a narrow elite"); Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) ("reasonable resistance" necessary to establish rape is often defined as requiring physical resistance more typical of a man than a woman); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L.L. REV. 623, 631-32 (1980) (reasonableness standard in self-defense law restricting the use of deadly weapons to situations in which the attacker is armed ignores the fact that many women are unable to defend themselves from men without the advantage of a weapon).

147. *See supra* part II.

148. *See supra* note 146.

149. *Id.*

150. PROSSER AND KEETON, TORTS (5th ed.), § 32, 173-75. The commentators state: "The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites." *Id.*

151. RESTATEMENT (SECOND) OF TORTS, § 283, cmt. c, 13. The commentators

RPS, however, remains suspect in light of legal and sociological scholarship.[152]

Feminist theorists have challenged the objectivity of the RPS, reasoning that judicial definitions of reasonableness often reflect the beliefs and values of a narrow elite.[153] Some commentators have asserted that the RPS is nothing more than a politically correct version of the reasonable man standard.[154] Furthermore, feminist critics have even challenged the objectivity of the term "reasonable."[155] Indeed, in our male-dominated society, it is certainly possible that our conception of reasonableness is gendered, reflecting our culture's emphasis on rationality, as opposed to another criterion such as emotion or morality.[156] Such hidden biases inhibit the progress of sexual harassment jurisprudence because they favor a male perspective under the guise of neutrality.[157] Feminists have attempted to expose this illusion of neutrality so that our legal standards can be modified to correspond with women's lives as well as men's.

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state: "The standard provides sufficient flexibility and leeway to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonable affect the conduct required, and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained." *Id.*

152. *See supra* note 145.

153. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990); *see also* Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 462-67 (1981) (legal abstractions like the reasonable man standard both hide and perpetuate existing social inequalities).

154. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1405 (1992) (stating that the reasonable person standard is merely a cosmetic improvement to a reasonable man standard). *See,* Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 59 (1989) (stating that despite use of "reasonable person" language, court are evaluating a woman's conduct according to a male standard).

155. Cahn, *supra* note 154, at 1405; *see* Ehrenreich, *supra* note 149, at 1192 (stating that the reasonable person standard in operation merely contains and suppresses the contradiction between diversity and conformity, rather than overcoming it).

156. *See,* Bender, *From Gender Differences to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 22 (1990) (rationality is not a neutral standard, and includes its own versions of emotion and morality).

157. *See supra* note 153, at 1178.

Difference theories focus on the difference between men (as a group) and women (as a group).[158] Difference feminist theory has been applied to demonstrate that the RPS may not be sufficiently flexible to accommodate divergent perspectives regarding sexual behavior, and therefore, is a particularly effective theoretical underpinning for justifying the implementation of the RWS.[159]

Some courts have used difference theory to justify adopting the RWS. For example, in *Robinson v. Jacksonville Shipyards*[160], the United States District Court for the Eleventh Circuit heard expert testimony regarding the influence of pornography upon creating stereotyping in the workplace. In holding that a hostile work environment existed, the *Robinson* court accepted the premise that women view pornography in the workplace differently than men.[161]

The United States of Appeals for the Ninth Circuit in *Ellison v. Brady*[162] also applied difference theory to support its rationale for adopting a RWS. In *Ellison*, the court held a reasonable woman could consider the defendant's conduct, which included the defendant's act of sending a number of bizarre love letters to Kerry Ellison, "sufficiently severe and pervasive to alter the conditions of Ellison's employment and create an abusive working environment."[163] The *Ellison* court rejected a RPS stating "[i]f we only examined whether a rea-

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158. *See* Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 799, 807 (1989) (The author discusses how difference theory adopts positive attributes from traditional stereotypes while discarding negative ones).

159. Cahn, *supra* note 154, at 1401.

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

161. *Id.* at 1505. The court stated:

> Dr. Fiske's testimony provided a sound, credible theoretical framework from which to conclude that the presence of nude and partially nude women, sexual comments, sexual joking, and other behaviors previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provides an evidentiary basis for concluding that a sexualized working environment is abusive to women because of her sex.

Id.

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

163. *Id.* at 878.

sonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination."[164] The *Ellison* court explained that the differing perspectives of males and females regarding sexual behavior must be considered in order to make an accurate assessment of whether the victim's work environment was hostile.[165]

Both the *Jacksonville* and the *Ellison* courts found the RPS standard to be an ineffective standard by which to make hostile environment determinations, and the outcomes of these cases demonstrate the validity of this position.[166] In both cases, plaintiffs' recoveries depended upon the court's recognition that males and females interpret sexual behavior differently.[167] This principle suggests either that the RPS is not sufficiently flexible to achieve just results, or that the RPS does not address the factor of gender appropriately.[168] The fact that the standard chosen can be outcome determinative suggests that the flexibility of the RPS is suspect, challenging the foundation upon which the *Radtke* court bases its argument.[169]

Both the *Robinson* and *Jacksonville* holdings illustrate the obvious importance of acknowledging the existence and the

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164. *Id.*

165. *Id.* The court stated "Conduct that many men consider unobjectionable may offend many women.". *See, e.g.*, 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"); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (stating "men and women are vulnerable in different ways and offended by different behavior").

166. *See supra* part IIB.

167. *See, Robinson*, 760 F.Supp. at 1505. The court accepted testimony that "[m]en and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them." *Id. See also Ellison*, 924 F.2d *at* 876. The district court, using a reasonable person standard, characterized defendant's conduct as "isolated and genuinely trivial." The Court of Appeals for the Ninth Circuit disagreed and held that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim." *Id.* at 878.

168. *See Ellison*, 924 F.2d at 878. The Court of Appeals for the Ninth Circuit stated 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." *Id.*

169. *Id.*

validity of the female perspective when determining the existence of a hostile environment.[170] To ignore the differing cultural and physical factors that distinguish males and females seems antithetical to the purpose of Title VII, especially when it is those cultural and physical differences which form the bases for exploitation. Because the RPS fails to adequately account for a female perspective, the RPS can hardly be deemed an objective standard by which to evaluate the existence of a hostile work environment.

B. THE *RADTKE* COURT'S REJECTION OF THE REASONABLE WOMAN STANDARD AS SUBJECTIVE

The *Radtke* court attacked the validity of the RWS, claiming 1) that the RWS was patently subjective and therefore harmful to the uniformity of the judicial system, and 2) that the RWS was injurious to the status of women in society.[171] Regarding the first point, the Court was highly critical of the RWS as being detrimental to the uniformity of the Michigan adjudicatory process. The Court claimed that the RWS cannot be objectively implemented in a diverse society.[172] The Court reasoned that "the diversity of Michigan — a multitude of ethnic groups, national origins, religions, races, cultures, as well as divergences in wealth and education — would demand as many standards."[173] Moreover, the Court held that "one standard of conduct has always regulated this diverse population, and to hold otherwise would weave great discord and unnecessary confusion into the law."[174]

To justify its assertions, the *Radtke* court stated that courts adopting victim-based perspectives have already begun to fragment the reasonable person standard.[175] However, the

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170. *See supra* note 167.

171. *Radtke*, 501 N.W.2d at 166-67.

172. *Radtke*, 505 N.W.2d at 166. The court stated "a gender-conscious standard eliminates community standards and replaces them with a standards formulated by a subset of the community. An acceptance of a gender-conscious standard and the logic undergirding it would inexorably lead to the fragmentation of legal standards to the detriment of society." *Id.*

173. *Id.* at 171.

174. *Id.*

175. *Id.* The court listed the following cases as examples of the fragmentation

Radtke opinion fails to provide any evidence either that the courts have had difficulty applying a victim-based standard or that the courts have encountered any uncertainty or confusion resulting from the practice of applying such a standard.[176]

The court's second argument against the implementation of the RWS asserts that a gender-conscious standard is antithetical to the purposes of the Michigan Civil Rights Act.[177] The *Radtke* court reasoned that "[s]uch paternalism degrades women and is repugnant to the very ideals of equality that the act is intended to protect."[178] To support its position, the court relies on amicus curiae opposing the reasonable woman standard on the grounds that it harms women's position in society.[179]

Indeed, even feminists have their own reservations regard-

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of the reasonable person standard: Harris v. International Paper Co., 765 F.Supp. 1509, 1516, n.12 (D. Me. 1991), vacated in part, 765 F.Supp. 1529 (D. Me. 1991) (utilizing the "reasonable person from the protected group of which the victim is a member" standard); Stingley v. Arizona, 796 F.Supp. 424, 429 (D. Ariz. 1992) (utilizing the "reasonable person of the same gender and race or color standard").

176. *Id.* The *Radtke* court cited to cases which adopted a "victim-based" standard to support its fragmentation argument. However, the court did not illustrate or discuss any adverse effects resulting from the decisions of the aforementioned courts to adopt a "victim-based" standard. *Id.*

177. *Radtke*, 501 N.W.2d at 167 (stating that "courts utilizing the reasonable woman standard pour into the standard stereotypical assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard").

178. *Id.* The court included the following: "Furthermore, the 'reasonable woman' standard may reinforce the notion that women are 'different' from men and therefore need special treatment — a notion that has disenfranchised women in the workplace. Viewed from this perspective, a 'reasonable' standard may create the perception that sexual harassment law allows special treatment for women." Dragel, n.2 *supra* note 137 at 254; *See also,* Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. LAWYER 203-204 (1992).

179. The amicus curiae University of Michigan Women and Law Clinic stated the following:

> There are disadvantages to tailoring the standard solely to women. Being a member of a long-time disadvantaged group puts some women in a position where they need institutional support in achieving equality. However, that support, in and of itself, can cause others to stigmatize women as a weaker, less able group in need of protection. In effect, distinguishing women for special protection puts them back in the disadvantaged position which led to the need for special protection in the first place.

Id. at 167.

ing the RWS and the possibility that it may entrench gender stereotypes.[180] Commentators have identified some of the problems that accompany the adoption of the RWS, including: 1) the RWS denies the needs and realities of women in order to create them as delicate, passive creatures;[181] 2) the RWS does not accommodate the experiences of all women;[182] and 3) the RWS evaluates and standardizes the behavior of the victim as opposed to the behavior of the harasser.[183] However, not all commentators have condemned a RWS due to such deficiencies.[184]

The fact that the *Radtke* court dedicated only one paragraph to support its holding that a RWS is harmful to the status of women undermines the idea that it legitimately intended to enter the debate over the efficacy and the necessity of the RWS. Furthermore, the "special treatment" argument ignores the possibility that the conduct required under the RWS may someday become the norm.[185] While the *Radtke* court's intention to avoid building upon stereotypes of women is laudable, it makes little sense to assert that the possibility of reinforcing gender stereotypes justifies a rejection of the RWS, for the very existence of sexual harassment is based on the fact that such stereotypical ideas regarding women are already held by those who harass women.[186] In other words,

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180. *See, e.g., Cahn, supra* note 154, at 1415-17 (stating "[w]hile the standard nonetheless has enabled women to win some cases, and it may also depict some valuable attributes that can contribute to new possibilities of lawyering on behalf of women, its problems ultimately overwhelm its utility").

181. *Id.* at 1416; *see* Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1581-84 (1991) (the author discusses the effects of domesticity on women).

182. *Id.* The author states "[s]ome women accept as normal operating behavior actions that other women would equate with harassment." *Id.*

183. *Id.* at 1417.

184. *Id.*

185. *See* Ellison v. Brady, 924 F.2d 872, 879 n.12 (9th Cir. 1991). The court stated:

> We realize that the reasonable woman standard will not address conduct which some women find offensive. Conduct considered harmless by many today may be regarded as discriminatory in the future. Fortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior.

Id.

186. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 18-23, 32

it is disingenuous to assert that the best way to eliminate sexual harassment is to ignore the existence of stereotypes that promote sexual harassment in the first place.[187]

V. CONCLUSION

Sexual harassment is an invidious problem in the work environment,[188] and our present methodology for handling this problem is inhibited by our failure to recognize that men and women perceive differently the acceptable level of sexual conduct in the workplace.[189] In order to eliminate the effects of gender prejudice, we must recognize how preconceived ideas regarding gender operate within the dynamics of male/female interactions.[190] Sexual harassment jurisprudence will become a more effective deterrent to sexual harassment once the law recognizes that males and females view sexual behavior differently.[191] The RWS would require courts to recognize these sociological differences, and to consider such differences when

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(1979) (asserting that sexual harassment is "a logical extension of the gender defined work role").

187. *See* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1226 (1990). The author states:

> If men are socialized to think that women should project an image of sexual availability on the job, then it is not that unusual to find that women feel compelled to do so. Nor is it unusual to find men responding to that image, and then blaming women as having "asked for it" when they subsequently complain that they were sexually harassed.

Id.

188. Forty percent of female federal employees reported incidents of sexual harassment in 1987, roughly the same as in 1980. U.S. SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11 (1988). Victims of sexual harassment "pay all the intangible emotional costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life," as well as medical expenses, litigation expenses, job search expenses, and the loss of valuable sick leave and annual leave. *Id.* at 42. Sexual harassment cost the federal government $267 million from May 1985 to May 1987 for losses in productivity, sick leave costs, and employee replacement costs. *Id.* at 39.

189. *See supra* note 165.

190. *See supra* note 187, at 1226.

191. *See, e.g.*, Pauline Bart, et al., The Different Worlds of Men and Women, in BEYOND METHODOLOGY 171 (Mary Freeman & Judith Wok eds. 1991). Pauline Bart's research on women's and men's attitudes towards pornography shows that they respond differently. For example, she found that 61% of men moderately or strongly agreed that pornography has its place, compared to 29% of women.

determining whether sexually related conduct has adversely affected another's working environment. As long as we ignore these differences, women will continue to live the effects of gender discrimination under the guise of being treated equally. As the Supreme Court observed in *Jenness v. Fortson*, "sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike."[192]

Paul P. Dumont[*]

192. 403 U.S. 431, 442 (1971).

* Golden Gate University School of Law, Class of 1998; B.A., Liberal Studies, Sonoma State University, 1992; M.A., English, San Francisco State University, 1994. I would like to thank my editors, Batya Smernoff and Laura Zeigler, for their patience and support. Also, I would like to thank Professors Roberta Simon and Maria Ontiveros for their guidance. I would also like to thank my friends Mike Calcutti and Amy Maeder for their massive technical and emotional support. Finally, I would like to thank my family for encouraging me to be a life-long learner. I dedicate this work to my mother, Lois Brooks, and to my mentors, Lory Tichelaar and J.J. Wilson.