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The Reasonable Woman Standard: Perpetuating Sex Discrimination in the Workplace (Ellison v. Brady, 924 F.2d 872 (9th Cir. 1990))

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CASE COMMENTS

THE REASONABLE WOMAN STANDARD: PERPETUATING SEX DISCRIMINATION IN THE WORKPLACE*

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1990).

Plaintiff-Appellant Kerry Ellison (Ellison)[1] brought a sexual harassment claim under Title VII of the Civil Rights Act of 1964[2] for actions by her co-worker Sterling Gray[3] during her employment at the Internal Revenue Service (IRS).[4] Ellison filed a formal complaint with the IRS alleging a hostile work environment.[5] The IRS rejected Ellison's complaint, finding that her allegations were not covered by the Equal Employment Opportunity Commission (EEOC)[6] regulations.[7] Ellison appealed to the EEOC which upheld the IRS's decision.[8] Ellison then

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* *Editor's Note*: This comment received the *Huber Hurst Award* for the outstanding case comment submitted in the Spring 1991 semester.

1. Ellison v. Brady, 924 F.2d 872, 873 (9th Cir. 1990).

2. 42 U.S.C. §§ 2000e to 2000e-17 (West Supp. 1982). Title VII states in part: "it is illegal for employers to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1).

3. *Ellison*, 924 F.2d at 873.

4. *Id.*

5. *Id.* The case makes no distinction as to whether the fact that Ellison's employer is a pubic agency affects her claim.

6. The EEOC is the administrative body charged with enforcing Title VII and other civil rights statutes in the employment context. In 1980, the EEOC released guidelines addressing sexual harassment in employment. 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(a) (1989)).

7. *Ellison*, 924 F.2d at 875. The EEOC Guidelines on Discrimination Because of Sex define sexual harassment as:

> (a) Harassment on the basis of sex is a violation of § 703 of Title VII. 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 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.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1988).

8. *Ellison*, 924 F.2d at 875. The EEOC affirmed the Treasury Department's decision on the issue that the agency took adequate action to prevent the repetition of Gray's conduct. *Id.*

filed a complaint in Federal District Court.[9] The Federal District Court granted the IRS's motion for summary judgement, holding that Ellison failed to state a prima facie case of sexual harassment due to a hostile work environment.[10] Ellison appealed that decision.[11] The Ninth Circuit Court of Appeals, using de novo review,[12] reversed and remanded the District Court's decision[13] and HELD, based on a reasonable woman standard, Ellison alleged a prima facie case of sexual harassment due to a hostile work environment.[14]

Prior to 1976, courts treated sexual harassment in the workplace as neither a work-related nor sex-related matter, but as a personal matter.[15] While courts generally refused actions based solely on verbal harassment, they often regarded verbal harassment as an aggravating factor that supported compensation for non-physical harms and awards of punitive damages in cases involving traditional tort theories.[16] However, under Title VII of the Civil Rights Act of 1964,[17] victims of sexual harassment finally had a legal cause of action,[18] although the

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9. *Id.* Ellison became frantic after her employer notified her that Gray would be allowed back in her office after a six-month trial separation. *Id.* at 874.

10. *Id.* at 875.

11. *Id.*

12. *Id.* at 873 (citing Sierra Club v. Penfold, 857 F.2d. 1307, 1320 (9th Cir. 1988)).

13. *Id.* at 883.

14. *Id.* The court also examined the issue of what remedial actions by employers shield them from liability. *Id.* at 881.

15. Many early courts stated that sexual harassment has little to do with gender lines — that sexual expressions are the result of personal forces presumably inherent in one's biological, chemical, or psychological nature. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEXUAL DISCRIMINATION 27-28 n.13 (1979). Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d. 55 (9th Cir. 1977) held that sexual harassment is not actionable because acts complained of appeared only as a personal proclivity, peculiarity or mannerism. The court inferred that Congress had not intended to redress sexual harassment through discrimination laws. *Id.* at 163-64.

16. *See, e.g.*, Skousen v. Nidy, 367 P.2d 248 (Ariz. 1961) (punitive damages awarded for mental suffering, including "shame", appropriate for elderly woman harassed by employer); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (breach of contract action proven); Edmisten v. Dousette, 334 S.W.2d 746 (Mo. Ct. App. 1960) (court awarded damages for worsened nervous condition resulting from physical advance).

17. *See* 42 U.S.C. §§ 2000e to 2000e-17 (West Supp. 1982); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd in part on other grounds, vacated in part sub nom.* Williams v. Bell, 587 F.2d 1240 (first case finding sexual harassment to be treatment "based on sex" within the meaning of Title VII); Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

18. Gender was not included in the original draft of the statute and was added only as an attempt to block passage of the bill. 110 CONG. REC. 2577-84 (1964). It was not until the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42

courts initially hesitated to accept such a claim.[19] The courts feared that the overtly pervasive sexual behavior in the workplace would lead to an unmanageable amount of litigation.[20]

To aid the courts in managing sexual discrimination claims, the EEOC published current statutory interpretations of sexual harassment.[21] Due to the lack of legislative history,[22] the law of sex discrimination has developed through analogies to the law of race discrimination.[23] Although the EEOC guidelines do not have force of law, federal courts do rely on them when assessing sexual harassment claims.[24] The EEOC guidelines explicitly define sexual harassment in both quid pro quo and hostile work environment situations.[25]

In *Meritor v. Vinson*,[26] the Supreme Court unanimously accepted the hostile work environment theory as a basis for a sexual discrimi-

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U.S.C. §§ 2000e to 2000e-17 (West Supp. 1986)), that Congress expressly affirmed its opposition to sexual discrimination in the workplace.

19. Only the most egregious acts of sexual harassment were remedied. *See, e.g., Williams*, 413 F. Supp. at 654; Miller v. Bank of Am., 418 F. Supp. 233. (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979); *see also* Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D. N.J. 1976), *rev'd*, 568 F.2d 1044 (3rd Cir. 1977).

20. *See* Corne v. DeVane, 390 F. Supp. 161, 163-64 (D. Ariz. 1975); *Miller*, 418 F. Supp. at 236.

21. EEOC Guidelines, 29 C.F.R. § 1604.11(a).

22. *See* CAROLINE BIRD, BORN FEMALE 1-14 (1970) (discussing the addition of "sex" to Title VII at the last minute); 122 Cong. Rec. 2548-2616 (1964).

23. EEOC Guidelines, 29 C.F.R. § 1604.11 (1985). The following cases discuss the similarities between sexual harassment and other forms of Title VII discrimination. *See, e.g.*, Henson v. City of Dundee, 682 F.2d. 897, 909 (9th Cir. 1982) (concluding it necessarily follows from racial and ethnic disparate treatment cases that sexual harassment is similar); Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (comparing slavery to the historical treatment of women); *but cf.* Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring) (stating sexual harassment is not intrinsically offensive like acts of racial or ethnic discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) (concluding that the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share).

24. In Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) the court approved the use of the EEOC Guidelines. *Id.* at 65 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)). *Contra* Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 429 (E.D. Mich. 1984) (concluding that the EEOC Guidelines are interpretive, but not all courts are bound to follow them).

25. EEOC Guidelines, 29 C.F.R. § 1604.11. "Quid pro quo" is defined as women complying with sexual demands in exchange for employment. Hostile work environment is harassment which does not affect economic benefits, but creates a hostile or offensive working environment. *Id.*

26. 477 U.S. 57 (1986); *see also* Lamb v. Drilco, 32 Fair Empl. Prac. Cas. (BNA) 105, 106-07 (S.D. Tex. 1983) (ruling that propositions, physical advances, and harassing telephone calls to plaintiff are sufficient to state a claim); Robson v. Eva's Super Mkt., 538 F. Supp. 857,

nation claim.[27] Vinson's supervisor allegedly forced Vinson to have intercourse with him numerous times and subjected her to varying egregious acts of sexual harassment, such as body fondling (sometimes in the presence of co-workers), following her into the restroom, and exposing himself to her.[28] Because she did not fear losing her job or suffering other economic losses, Vinson could not substantiate a quid pro quo claim.[29] She nonetheless suffered psychological harm.[30] The Court, relying solely upon non-economic losses, upheld a sexual harassment claim.[31] The Court specifically noted that the language of Title VII does not require economic or tangible losses to find the plaintiff under the Act's protection.[32] As long as the harassment was sufficiently severe or pervasive as to alter the conditions of employment and creates an abusive working environment, a hostile work environment claim was available.[33]

In *Scott v. Sears Roebuck Co.*,[34] the court found that Scott failed to maintain an action for sexual harassment because the allegedly harassing behavior was not psychologically debilitating or severe enough to affect Scott's working environment.[35] In holding that the demeaning conduct and sexual stereotyping must cause such anxiety

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859 (N.D. Ohio 1982) (finding a cause of action for harassment due to propositions, physical assault, and harm to plaintiff).

27. *Meritor Sav. Bank*, 477 U.S. at 60-61. However, the first hostile work environment claim was sustained in a discrimination claim based on national origin. *See* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *see also* Henson v. City of Dundee, 682 F.2d 897, 903-05 (listing the elements of what the court saw as the prima facie Title VII sexual harassment action as (1) plaintiff belongs to a protected group; (2) defendant subjected plaintiff to unwelcome sexual harassment; (3) defendant would not have harassed plaintiff but for the fact of plaintiff's sex; (4) defendant's harassment affected a term, condition, or privilege of plaintiff's employment; and (5) plaintiff's employer was responsible for defendant's act); Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied sub nom.* Jordan v. Hodel, 488 U.S. 1006 (1989) (hostile environment exists when employee can show (1) plaintiff is subject to sexual advances, etc., (2) the conduct is unwelcome, and (3) the conduct is sufficiently severe to alter the conditions of the victim's employment and create an abusive working environment).

28. *Meritor Sav. Bank*, 477 U.S. at 60.

29. *Id.* at 61. The District Court concluded that the relationship was voluntary and had nothing to do with Vinson's employment at the bank. *Id.*

30. *Id.* at 61.

31. *Id.*

32. *Id.* at 64 (citing Los Angeles Dept. of Water & Power v. Manhard, 435 U.S. 702, 707 n.13 (1978)).

33. *Id.* at 67.

34. 798 F.2d 210 (7th Cir. 1986).

35. *Id.* at 214 (citing *Henson*, 682 F.2d at 904).

and debilitation to the extent that working conditions are "poisoned"[36] within the meaning of Title VII, the court followed the reasoning found in the *Meritor* case.[37] The court, however, maintained the comments and conduct of the plaintiff's co-workers were too isolated and lacked the repetitive and debilitating effect necessary to sustain a hostile environment claim.[38]

Similarly, the court in *Rabidue v. Osceola Refining Co.*,[39] using *Meritor* language, rejected a claim of hostile work environment.[40] In *Rabidue*, the employer subjected the plaintiff to vulgar comments and pictures of nude and scantily clad women.[41] The court held the plaintiff must demonstrate that she would not have been the object of harassment but for her sex.[42] To protect both the plaintiff and defendant, the trier of fact must adopt the perspective of a reasonable person's reaction.[43] In defining this standard, the court utilized a two-prong measure, looking at both objective and subjective factors.[44] The mea-

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36. *Id.* at 213; *see* Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981); Wendy Pollack, *Sexual Harassment: Women's Experience v. Legal Definition*, 13 HARV. WOMEN'S L.J. 80 (1990) (citing Susan Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status, in* WOMEN: A FEMINIST PERSPECTIVE 66 (Jo Freeman, ed., 4th ed. 1989)) (concluding that courts can fail to perceive the long term effects women suffer in terms of quitting jobs, requesting transfers, taking sick days, refusing training programs and developing negative attitudes); LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WORKING WOMEN ON THE JOB 17, 21-27 (1978) (reporting a study in which women discussed anxiety, nausea, headaches, high blood pressure, sleeplessness, ulcers, feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction and diminished ambition caused by sexual harrassment).

37. *Scott*, 798 F.2d at 213.

38. *Id.* at 214.

39. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

40. *Rabidue*, 805 F.2d at 622.

41. *Id.* at 615.

42. *Id.* at 620.

43. *Id.*; *see also* Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (employing a dual standard which looked at the reasonable person's ability to perform a job and the actual effect on the plaintiff); Andrew v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (ruling that a reasonable woman was the proper standard).

44. *Rabidue*, 805 F.2d at 620. Plaintiffs must prove that the defendant's conduct would have interfered with a reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee. Plaintiff also must demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment. *Id. See also Brooms*, 881 F.2d at 420; *Rabidue*, 805 F.2d. at 622 (discussing EEOC Guidelines, *supra* note 7) (court noted that its approach was not inconsistent with the EEOC guidelines "which emphasize the individual nature of a probative inquiry" while considering the totality of all available facts and circumstances).

sure required the court to examine the plaintiff's reaction to the workplace,[45] as well as the conditions of the workplace before and after the plaintiff arrived.[46] The majority trivialized the harassing conduct and found that the displays of sexual misconduct in *Rabidue* had a "de minimus" effect upon the plaintiff's work environment[47] when considered in light of current societal mores.[48] Further, Rabidue voluntarily entered the work environment with a reasonable expectation that her workplace could be offensive.[49] Therefore, the court found that she had no remedy under Title VII.[50]

In a well-intended dissent, Judge Keith claimed that the reasonable woman standard should be adopted to adequately protect women in the work place.[51] He further alleged that, in its decision, the majority was allowing the behavior that Title VII was designed to prevent.[52] Recognizing that vast differences existed between men's and women's outlooks and socialization processes, Judge Keith believed that the reasonable person standard did not adequately protect the female in her sexual harassment claim because men judge harassing behavior by a male-biased standard.[53] Judge Keith preferred to adopt a reasonable victim standard that would allow courts to simultaneously protect victims — usually women — and employers.[54] Because Rabidue reasonably objected to her employer's conduct, Judge Keith believed she stated a prima facie case of sexual harassment under Title VII.

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45. Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990). The author believes that the formidable differences in the material conditions and socialization processes that women and men face will tend to produce broad commonalties of perspective within each sex. (Differences of class, race, sexual orientation, etc., as well as personality factors, will also cut across sex-based similarities). *Id.* at 1194.

46. *Id.*; *contra* Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 346 (1988). Such a version of a "reasonableness test" would essentially expose plaintiff to an assumption of the risk defense. *Id.* at 347.

47. *Rabidue*, 805 F.2d at 622.

48. *Id.*; *contra* Vhay, *supra* note 46 at 347. Title VII and other discrimination laws cannot help but transform our social mores, as they prohibit actions stemming from certain disfavored views of racial, ethnic, religious, and gender groups.

49. *Rabidue*, 584 F.2d at 622.

50. *Id.*

51. *Id.* at 626 (Keith, J., dissenting) (stating that the court's supposedly neutral analysis actually contained a hidden male perspective).

52. *Id.*

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

54. *Id.* Judge Keith invokes the idea of neutrality in his statement that the reasonable woman standard simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. *Id.*

The court in *Robinson v. Jacksonville Shipyards*,[55] agreed with Judge Keith's dissent and specifically disagreed with *Rabidue*'s social context argument.[56] Although behavior belittling women might be permissible in some settings, the court maintained, such actions in the workplace are often abusive.[57] Such behavior has a clear disproportionate impact on women trying to succeed in a previously male-dominated workplace.[58] The *Robinson* court collapsed the subjective/objective standard, determining instead that courts should use the objective standard of a reasonable woman's view.[59] Looking at the totality of the circumstances, namely sexual remarks, sexual pictures of women and mistreatment of women by male co-workers,[60] the court easily found that Robinson suffered sexual harassment.[61]

In the instant case, the Ninth Circuit Court further entrenched the reasonable woman standard as the proper legal tool for assessing sexually harassing behavior.[62] The court openly admitted that recent court decisions rarely reach the merits of a hostile work environment claim.[63] The instant court specifically addressed the hostile work environment and questioned whether the defendant's conduct was egregious enough to satisfy the hostile environment claim.[64] Refusing to adopt either the *Scott*[65] or *Rabidue*[66] standards, the instant court declared that it is the harasser's conduct which must be pervasive and

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55. 760 F. Supp. 1486 (M.D. Fla. 1991).

56. *Id.* at 1525-27 (criticizing *Rabidue*, 805 F.2d. at 611).

57. *Id.* at 1525. (quoting Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1988); *see also* Holly B. Fechner, Note, *Toward an Expanded Conception of Law Reform: Sexual Harrassment Law and the Reconstruction of Facts*, 23 U. MICH. J.L. REF. 475, 483 (1990) (citing MacKinnon, *supra*, note 15 at 7). Sexual harassment undercuts women's potential for social equality in two interrelated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically. *Id.* at 4.

58. *Robinson*, 760 F. Supp. at 1526.

59. *Id.* at 1524. The contested issue is the objective evaluation of the work environment at the shipyard. "The objective standard asks whether a reasonable person of the employee's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created." *Id.*

60. *Id.* An employee noted that it was accepted at the shipyards for vendors to supply calendars of nude women, but had never known vendors to do the same with calendars of nude men. *Id.* at 1494.

61. *Id.* at 1527.

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

63. *Id.*

64. *Id.* at 878.

65. *Id* at 877.

66. *Id.*

severe, not the alteration in the conditions of plaintiff's employment.[67] In focusing on the element of harassment, the court declared that the reasonable woman standard must be adopted or else stereotypical notions of gender will flourish.[68] Noting that men and women view sexual comments and actions in distinctly different fashions, the court realized that to adequately protect the victim, the victim's perspective must be adopted.[69]

In defining the reasonable victim, the instant court utilized the reasonable woman standard because the "reasonable person" standard is male biased.[70] Historically, women's experiences in the workplace were systematically ignored.[71] Women entering the male-dominated workplace are more concerned with sexual behavior than are men. Because men often view their female co-workers as sexual objects, women are frequently victims of sexual misconduct.[72] As Congress designed Title VII to prevent the perpetuation of gender stereotypes,[73] the court believed the use of the reasonable woman standard would insure that both men and women perceived each other with more sensitivity to the innate differences between genders.[74]

In a forceful dissent, Judge Stephens disagreed with the use of a reasonable woman standard. Relying upon statutory language, Judge Stephens found that Title VII desires gender-neutral work treatment.[75] The term "reasonable person" is the correct vehicle to measure work-

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67. *Id.* at 878.

68. *Id.* (citing EEOC COMPLIANCE MANUAL § 615, at 3112 (1988)).

69. *Ellison*, 924 F.2d at 880; Pollack, *supra* note 35, at 53. The courts must acknowledge that these incidents are not individual, isolated, or private matters involving behavior in which a reasonable man would not engage, and that they are not best measured by a neutral norm of offensiveness (i.e. the "reasonable man" standard) that suggest that only an unreasonable woman can fall victim. *Id.*

70. *Ellison*, 924 F.2d at 879; *see Meritor Sav. Bank*, 477 U.S. at 57.

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

72. *See, e.g.*, Heelen v. Johns-Manville Corp, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (finding the stereotype of the sexually-accommodating secretary to be well documented); John B. Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 4 n.16 (1982).

73. *Ellison*, 924 F.2d at 881; *see also* Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971). The court held the practice of requiring stewardesses to be single constituted unlawful sexual discrimination. *Id.*

74. *See* Kathryn Abrams, *The State of the Union: Civil Rights: Gender Discrimination and the Transformation of the Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

75. *Ellison*, 924 F.2d at 884; *see also* Ehrenreich, *supra* note 45, at 1209-10. The author claims that the majority opinion "seems sympathetic to women while actually perpetuating sexist attitudes and reducing women's power in the workplace." *Id.*

place harassment because it presupposes gender neutrality[76] which Title VII seeks to achieve. Further, as no trial took place, this particular case was rather weak to establish a new legal precedent.[77]

In a relatively new area of law, the holding in the instant case moves further away from the standards put forth in previous cases that were considered cutting edge. The instant court places immediate emphasis on the woman's perspective and experience, and deemphasizes a legal standard that is process-oriented rather than result-oriented.[78] *Meritor* recognized a need to protect the employee's psychological condition, rather than stressing only the economic effects of sexual harassment.[79] However, *Meritor* stressed the effect of the harassment on the working conditions, while the instant court examined its impact on the victim, usually a woman.[80]

The *Scott* decision showed the court's progression towards a greater emphasis on the victim's perspective. The *Scott* court held that only when the instances of harassment alleged by the plaintiff rose to a level of hostility offensive enough to be considered actionable could a plaintiff make a claim for sexual harassment.[81] The court searched for an objective analysis of harassing behavior by stressing the defendant's behavior and not the plaintiff's actual response.[82] However, in order for the plaintiff to survive a motion for summary judgement, the plaintiff must show that the conduct complained of was so intimidating, offensive or hostile that it affected the terms of her employment.[83] In emphasizing the effect on the plaintiff's environment as evidence of a hostile environment claim, the court abandoned a strictly objective, and hence employer/male, view of harassment. This shift set the stage for the instant court's decision.

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76. *Ellison*, 924 F.2d at 884.

77. *Id.*; Ehrenreich, *supra* note 45, at 1206 n.105. It is arguable that a "jury, composed of non-elite citizens, would be a better identifier of societal consensus than a judge." *Id.*

78. *Ellison*, 924 F.2d at 884.

79. *Id.* at 877.

80. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1452 (1984). In light of the divergent perceptions of both men and women about proper standards of conduct in the workplace, concern for the dignity of women should require the courts to determine the wrongfulness of the conduct from the standpoint of the victim.

81. *Scott*, 798 F.2d at 213.

82. *Id.*; *see also* Fechner, *supra* note 57, at 482 (citing MacKinnon, *supra* note 15, at 102). "Men's and women's roles are not only different; men's roles are socially dominant, women's roles are subordinate to them." *Id.*

83. *Scott*, 798 F.2d at 213.

With the instant court's treatment of *Rabidue*, this new attitude of valuing the woman's perspective is quickly becoming the standard. Nonetheless, the *Rabidue* court failed to find sexual harassment.[84] Gender stereotyping explains why the court found no sexual harassment.[85] With sexual dynamics at work, the court and experts accede to inequality in the workplace.[86] In power struggles between men and women, women are often channeled into jobs that afford them little respect and few opportunities for advancement.[87] Women are simply victims of irrational prejudice.[88] Allowing for these social constructs of men as powerful in the masculine workplace, Judge Keith's dissent asserted the special need for a reasonable woman standard, and did not dismiss the plaintiff's perceptions as the majority easily did.[89] However, as the majority strove to objectively view the harassment

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84. *Rabidue*, 584 F. Supp. at 433.

85. *Id.* By affirming the status quo in this way, the court legitimized sexual harassment. This conclusion erases the woman's experience and disregards the gender hierarchy. Unwanted sexual advances, made simply because she has a woman's body, can be a daily part of a woman's work life. *See* MacKinnon, *supra* note 15, at 40.

86. Pollack, *supra* note 35, at 65. The fact that such behavior is common does not mean that the conduct is welcome, wanted, or acceptable or a woman is not negatively affected by it.

87. There needs to be an understanding in the courts of the vulnerability of women who pioneer in nontraditional jobs and the incredible opposition they face at work and in society. *See generally* MacKinnon, *supra* note 15, at 40.

88. *See generally* Pollack, *supra* note 36, at 65 (concluding that "the court in *Rabidue* perpetuates the notion that sexual harassment is a woman's personal problem and that she must bear the responsibility to protect herself"); Christopher B. Barton, *Between the Boss and a Hard Place: A Consideration of* Meritor Sav. Bank, FSB v. Vinson *and the Law of Sexual Harassment*, 67 B.U. L. REV. 445 (1987):

> Protectionism is double-edged: it protects women from the most extreme forms of inequality in the workplace, yet legitimates the inequality in our society and economy by putting the blame for discrimination on individuals who deviate from acceptable practice rather than allowing everyone to recognize and change the pervasive and insidious nature of sexual inequality.

Id. at 448.

> The problem with such a paternalistic notion is that it consists of drawing a line between two conflicting yet equally valid claims: the security of women in the workplace versus the freedom of women to engage in consensual sexual activity. A legal standard that is overly protective of women necessarily inhibits their sexual freedom, while sexual freedom comes only at the cost of the protection of women.

Id. at 470.

89. *Rabidue*, 805 F.2d at 627 (Keith, J., concurring in part and dissenting in part). "I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Id.*

and its effect on the plaintiff, it acknowledged that the plaintiff's views are a necessary element of a sexual harassment claim.[90]

The *Robinson* court made the next step by testing the hostile environment by both an objective and subjective standard.[91] Analyzing the objective aspect by a reasonable woman standard, the court went further to acknowledge that men and women are different.[92] In remedying the behavior that harms the victim, the court emphasized the victim's perceptions, a method which benefits the woman.[93]

The *Robinson* court opened the doors for the instant court to clearly and vehemently state that the new standard is the reasonable woman.[94] By focusing on the perspective of the reasonable victim, rather than on the stereotypical notions of society, women can participate in the workplace on a more equal footing with men.[95] Whereas earlier cases allowed the harassment to continue until the employee's psychological well-being was seriously affected,[96] victim's now have a more stringent standard on which to base their claims.

The instant court, struggling to define the line between acceptable workplace behavior and harmless flirtation, declared that the reasonable woman should be the determinant.[97] Because sexual attraction in the workplace may often play a role in day-to-day social interaction between employees, the distinction between invited and uninvited sex-

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90. *Id.* at 620. By adopting the woman's point of view, the courts heighten male sensitivity of the effects of sexually offensive conduct in the workplace. Men might be liable for conduct they neither intended to be nor realized was offensive. This theory of near strict liability is feasible since Title VII does not prohibit only intentional discrimination. *Id.*

91. *Robinson*, 760 F. Supp. at 1524. The objective factor asks whether a reasonable person of the employee's sex, usually a reasonable woman, would perceive that an abusive working environment has been crated. The objective evaluation must account for the salient conditions of the work environment, such as the rarity of women in the relevant work areas. *Id.*

92. *Id.*; *see also* Fechner, *supra* note 57, at 484. Men determine and enforce cultural norms. To the extent men's insights and experiences are different from those of women, women's perceptions are excluded and minimized. *Id.*

93. *Robinson*, 760 F. Supp. at 1523. Behavior that clearly has a disproportionate impact on women conveys a message to those women that they do not belong; that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. Title VII assures women that this is not acceptable. *Id.*

94. *Id.* at 1524.

95. *Id.*

96. For examples of such behavior, see Barton, *supra* note 88, at 470.

97. *Ellison*, 924 F.2d at 880; *see* Note, *supra* note 80, at 1459. "The burden imposed on men by altering conduct norms in the workplace is justified by the need to prevent both the stigmatization of working women and the systemic inequities that such stigmatization creates. Social norms must be changed if the rights of women are to be protected." *Id.* (citations omitted).

ual advances must be made clear.[98] Since women are historically viewed as sex objects,[99] they are more likely to be sensitive to such advances.[100] The instant court used the reasonable woman standard to assess such conduct.[101] Further, by using a reasonable woman standard, employers are protected against "unreasonable" women who may be too easily offended.[102]

Judge Stephens' strong dissent alerts the majority that they are falling prey to what Title VII was enacted to eradicate.[103] He argues that by using a gender-biased standard (from a woman's point of view), the court allows gender bias to creep into the workplace equation.[104] Judge Stephens arduously opposes the dissent in *Rabidue*.[105] He firmly cautions that the reasonable woman is ambiguous and inadequate, and he favored instead words that would be gender neutral, such as "vic-

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98. *Ellison*, 924 F.2d. at 880; *see also* Note, *Shifting the Communications Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 145 (1983). The gap between male and female perceptions indicates a lack of social consensus on appropriate standards of behavior and reflects the ambiguity of existing social norms.*Id.*

99. *See* MacKinnon, *supra* note 15, at 18. The author describes the "sexualization" of the woman worker as a part of the job. *Id.*

100. *Ellison*, 924 F.2d at 879; *see* Barton, *supra* note 88, at 471. "Men in almost every working context contribute sexual desire to women workers based on their mere presence as workers in that particular environment." This assumption is equally viable in situations where women are seen as anomalies on the job. *Id.* (citing MacKinnon, *supra* note 15, at 50).

101. *Contra* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 63-64 (1989). Because the reasonable woman standard merely replaces one stereotype with another, it is still unfair to any woman who fails to conform to traditionally female standards of conduct, as is the reasonable person standard to untraditional men. *Id.*

102. *Ellison*, 924 F.2d at 879; *see* Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988). The court recognized that the behavior was problematic because from a woman's perspective the conduct might be offensive, but also that she might have "misconstrued or overreacted" to what were from the man's perspective "innocent or invited overtures." The court warned that the fact finder must keep both the man's and the woman's perspective in mind, otherwise old notions of behavior between men and women will be reinforced. *Id.* (citing *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting)).

103. *Ellison*, 924 F.2d at 884; *see also Rabidue*, 805 F.2d at 620-21 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)). By making the male the standard against which deviations are judged, the differences approach obscures inequality and "rationaliz[es] the social subordination of women to men." *MacKinnon, supra* note 15, at 119.

104. Pollack advocates that it is not simply a matter of trading the man's perspective for the woman's perspective or finding a balance between the two. She feels that the court must recognize that sexual assertion is a power issue whereby men control and subordinate women. Pollack, *supra* note 35, at 83.

105. *Ellison*, 924 F.2d at 884.

tim," "target," or "person."[106] A gender-neutral reasonable victim standard does not promulgate a court-supported gender stereotypical standard to determine which actions constitute sexual harassment in the workplace.

The concept of sexual harassment has developed slowly over time. Regarding hostile work environment claims, the instant case illustrates the farthest point the courts have dared to reach. By holding employers, usually men, to the reasonable woman standard, the courts force men to be responsive to women's needs. However, in using that same standard, the courts allow gender stereotyping to continue. Instead of utilizing a gender-neutral reasonable victim standard, the courts are encouraging the paternalistic notion of protecting the woman in the workplace, with repercussions in other arenas. Although sexual harassment reflects both personal and societal difficulties, by allowing women's differences to define a legal standard, courts further stress and maintain the stereotypical differences between men and women. The reasonable woman standard illuminates the notion that the women's responses are strictly female, rather than normal, human experiences. Thus the reasonable woman standard perpetuates the gender stereotypes Title VII strives to end. A gender-neutral, reasonable victim standard Judge Stephens proposed might better serve Title VII's purpose.

Susan Lain Haag

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106. *Id.* (Stephens, J., dissenting).