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Harmless Amusement or Sexual Harassment: The Reasonableness of the Reasonable Woman Standard

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Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard

Slick advertising campaigns are staples of the beverage industry, especially the beer manufacturers. Breweries are notorious for using attractive, scantily clad women to sell their products to their target consumers: men.

But what effects do the commercials have upon women viewers? One might venture that women simply tune out the commercials, have no opinion whatsoever of the commercials' content, or object to the commercials' depiction of women as mindless sex objects.[1] In fact, women's responses to such advertisements appear to run far deeper: one brewery's ad campaign so offended its female employees that they took their employer to court.

The suit filed by a group of female Stroh Brewery employees charged that Stroh's ad campaigns represent an integral component of the company's hostile and sexually harassing work environment.[2] The case is unique because the plaintiffs claim that their employer's advertising content materially aided in creating the hostile work environment.[3] Generally speaking, however, nothing is unique about these women's grievances. Their complaints exemplify occurrences all too common in the arena of sexual harassment in the workplace: obscene and sexist comments; slaps on the rear end; the display of pornographic magazines and pictures (including the advertising materials), and male employees following them home.[4]

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1. *Contra News of the Weird*, L.A. READER, Dec. 6, 1991, at 58. Models working for a British tabloid protested outside European Community headquarters in Brussels because they objected to the proposed E.C. Code on sexual harassment in employment. *Id.* The models believed that the code, which bans nude pinup photos in workplaces, would cost them jobs. *Id.*

2. *See* Henry J. Reske, *Stroh's Ads Targeted*, A.B.A. J., Feb. 1992, at 20.

3. *Id.*

4. *Id.* For other cases involving the same or similar behavior as the basis for hostile work environment sexual harassment cases, see Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986); Arnold v. City of Seminole, Okla., 614 F. Supp. 853 (E.D. Okla. 1985); Matter of Discipline of Peters, 428 N.W.2d 375 (Minn. 1988); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842

Some might claim the women are overly sensitive to the harmless antics of their male counterparts; as the saying goes, boys will be boys. Others would contend that the women are reacting as other women would, if exposed to the same or similar work environment. Are the women's reactions reasonable or unreasonable? This question is difficult to answer. Nonetheless, the debate prompted the Ninth Circuit to adopt, in *Ellison v. Brady*,[5] the reasonable woman or the reasonable person of the same sex as the victim standard in hostile work environment sexual harassment cases.[6] The court employed the new standard to determine whether a hostile work environment existed in violation of Title VII of the Civil Rights Act of 1964.

I. HISTORY OF HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT UNDER TITLE VII

A. *The Passage of the Civil Rights Act of 1964*

Congress passed Title VII of the Civil Rights Act in 1964 (the Act).[7] The Act's purpose was to abolish discriminatory employment based on membership in five protected classes: race, color, religion, national origin and sex.[8] Ironically, opponents of the Act added sex to the list of protected classes at the last moment. They believed the addition of "sex" would defeat the bill.[9] However, Congress adopted sex as a protected class with virtually no discussion or debate.[10] Thus, legislative

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(Cal. Ct. App. 1989).

5. 924 F.2d 872 (9th Cir. 1991).

6. *Id.* at 879, 880-81.

7. 42 U.S.C. §§ 2000e *et seq.* (1988) [hereinafter Title VII]. Title VII provides in pertinent part:

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

Id.

8. 42 U.S.C. § 2000e-2(a) (1988).

9. *See* 110 CONG. REC. 2577-84, 2718-21 (1964). Representative Smith, who proposed the addition of "sex" to Title VII stated, "I do not think it can do any harm to this legislation; maybe it can do some good." *Id.* at 2577. He introduced the amendment with the hope of defeating the entire Title VII package. For a more in-depth account of the original enforcement and opinions regarding the first federal laws addressing sex-based discrimination in employment, see Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-13 (1968).

10. 110 CONG. REC. 2582, 2584 (1964). *See also* CHARLES WHALEN & BARBARA

history fails to adequately discuss the adoption of regarding sex as a protected class. Not until 1972, with passage of additional amendments to Title VII, did any meaningful legislative history addressing the intended scope of sex as a protected class become available.[11]

The Equal Employment Opportunity Commission (EEOC), created by the Civil Rights Act of 1964,[12] is the regulatory agency responsible for investigating Title VII violations, as well as promulgating regulatory guidelines.[13] The EEOC's guidance has been critical because Title VII, though prohibiting discrimination based on sex, never concretely defined "sex discrimination."[14] Thus, the courts give great deference to the EEOC's *Guidelines on Discrimination Because of Sex*[15] (Guidelines) since the Guidelines interpret Title VII's establishment of sexual discrimination as a cause of action. The Guidelines reinforce that sexual harassment is sex discrimination under Title VII.[16] Therefore, courts recognize sexual harassment as an actionable form of sex discrimination prohibited by Title VII.[17]

WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 238 (1985) (dubbing women "accidental beneficiar[ies]" of Title VII).

11. "[D]iscrimination against women is no less serious than other prohibited forms of discrimination, . . . [and] it is to be accorded the same degree of concern given to any type of similarly unlawful conduct." S. REP. NO. 415, 92d Cong., 1st Sess. 7 (1971).

12. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e (1988).

13. *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.1-.11 (1991) [hereinafter *Guidelines*].

14. *See* 42 U.S.C. § 2000e, quoted in pertinent part *supra* note 7.

15. *See* 29 C.F.R. § 1604.11(a) (1991) ("Harassment on the basis of sex is a violation of Sec. 703 of Title VII.") The *Guidelines*, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see also* J. Clay Smith Jr., *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 CAP. U. L. REV. 471 (1981) (explaining the formation of the guidelines and their application). J. Clay Smith Jr. was the acting chairman of the EEOC at the time the article was written.

16. 29 C.F.R. § 1604.11(a) (1991). The *Guidelines* define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ." *Id.*

17. *See, e.g.*, Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), *remanded on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (holding for the first time that sexual harassment violates Title VII); Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981) (recognizing for the first time that sexual harassment is sex discrimination).

B. *Actionable Sexual Harassment: from Quid Pro Quo to Hostile Work Environment*

Historically, courts did not recognize hostile work environment sexual harassment as a viable cause of action under Title VII.[18] Originally, quid pro quo sexual harassment was the only actionable form of sexual harassment under Title VII.[19] Quid pro quo sexual harassment occurs when an employer makes requests and/or demands for sexual favors and then conditions continued employment upon acquiescence to those demands.[20] With quid pro quo sexual harassment, the victim suffers a tangible job detriment easily recognizable by the courts: job loss, demotion or wage reduction.[21]

Since *Meritor Savings Bank v. Vinson*,[22] in which the Supreme Court finally recognized hostile work environment sexual harassment, federal and state courts have uniformly recognized hostile work environment sexual harassment as a violation of Title VII.[23] Hostile work

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18. The *Guidelines*, however, include hostile work environment in the definition of sexual harassment. 29 C.F.R. § 1604.11(a)(3) (1991). *See generally id.* § 1604.11(a) ("[S]uch conduct [having] the purpose or effect of unreasonably interfering with an individual's work performance or creating an *intimidating, hostile, or offensive* environment.") The Supreme Court did not acknowledge hostile work environment sexual harassment until 1986. *See* Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

19. Professor Catherine MacKinnon first coined the phrase "quid pro quo sexual harassment." CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979). The courts could identify with quid pro quo harassment more readily due to its similarity to disparate treatment and because it raised barriers to employment. Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding that plaintiff must prove discriminatory reason for employment decision). *See also infra* note 35 for discussion of disparate treatment analysis.

For cases involving quid pro quo sexual harassment before *Meritor*, see Highlander v. K.F.C Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986); Benton v. Kroger Co., 640 F. Supp. 1317 (S.D. Tex 1986); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983).

20. The *Guidelines* recognize quid pro quo sexual harassment where "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or when] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. §§ 1604.11(a)(1)-(2) (1991).

21. *E.g.*, Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986) (involving the demotion of sexually harassed employee for failure to submit to sexual advances).

22. 477 U.S. 57 (1986).

23. *Id.* at 73. The first case to recognize hostile work environment sexual harassment was Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). Other federal courts soon followed suit. *See, e.g.*, Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); *see also* MACKINNON, *supra* note 19, at 40 (stating that sexual harassment

environment sexual harassment occurs when sexual harassment becomes so pervasive that it creates an "intimidating, hostile, or offensive working environment."[24] A situation involving a hostile work environment led to *Ellison v. Brady*.[25]

1. From Racial to Sexual Hostile Work Environment Harassment

Originally, courts recognized hostile environment harassment under Title VII only in situations involving harassment based upon race,[26] religion, or national origin.[27] Courts did not extend hostile work environment harassment to cover sexual harassment until *Bundy v. Jackson*[28] in 1981. The District of Columbia Circuit Court, analogizing *Rogers v. EEOC*,[29] which addressed racial discrimination, ruled that sexual ha-

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in the workplace constitutes sexual discrimination).

24. 29 C.F.R. § 1604.11(a)(3) (1991). For cases addressing hostile work environment sexual harassment prior to *Meritor*, see Studstill v. Borg Warner Leasing, 806 F.2d 1005 (11th Cir. 1986); Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986) (recognizing hostile work environment for the first time in the 8th Circuit); Loftin-Boggs v. City of Meridian, Miss., 633 F. Supp. 1323 (S.D. Miss. 1986); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983).

25. 924 F.2d 872 (9th Cir. 1991).

26. Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), was the first case to hold that a discriminatory work environment violated Title VII. In *Rogers*, the plaintiff successfully claimed that her employer's practice of providing discriminatory service to his Hispanic customers created an offensive work environment for Hispanic employees. *Id.* at 238. The *Rogers* court defined the phrase "term, conditions or privileges of employment," of 42 U.S.C. § 2000e-2(a)(1), as "an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination . . . ." *Rogers*, 545 F.2d at 238. For other racial hostile environment cases pre-dating *Meritor's* recognition of hostile work environment sexual harassment, see also Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981); Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978); Firefighters Inst. for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied sub nom.* Banta v. U.S., 434 U.S. 819 (1977); and St. Louis v. United States, 434 U.S. 819 (1977).

27. *See* Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985); Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) (involving national origin); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (involving religion and national origin).

28. 641 F.2d 934 (D.C. Cir. 1981); *see also supra* note 17. For a discussion of the implications of *Bundy's* holding, abandoning the need for tangible job detriment, see Terence J. Bouressa, Note, *Eliminating the Need to Prove Tangible Economic Job Loss in Sexual Harassment Claims Brought Under Title VII*, 9 PEPP. L. REV. 907 (1982).

29. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). For a discus-

rassment responsible for creating an offensive environment also violates Title VII.[30] The court believed that denying recovery would allow "employers to sexually harass a female employee with impunity by carefully stopping short of . . . taking any . . . tangible actions against her in response to her resistance."[31]

The Eleventh Circuit, in *Henson v. City of Dundee*,[32] followed *Bundy* and extended the hostile work environment cause of action.[33] *Henson* is critical since it recognized that "under certain circumstances the creation of an offensive or hostile working environment due to sexual harassment can violate Title VII irrespective of whether the plaintiff suffers tangible job detriment."[34] *Henson* modified the traditional Title VII discrimination analysis of quid pro quo sexual harassment[35] in order to confront the basic differences involved in hostile work environment discrimination, most notably the lack of job detriment.[36]

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sion of *Rogers* see *supra* note 26.

30. *Bundy*, 641 F.2d at 943-44.

31. *Id.* at 945. The court noted that unless they extended sexual harassment under Title VII to include hostile work environment, women would be forced to endure a "cruel trilemma." *Id.* at 946. With no recourse, a woman would either have to endure the harassment, attempt to oppose it (with little hope of success legally or realistically), making her job even less bearable, or quit her job and attempt to find a new one, which might expose her to further sexual harassment. *Id.*

32. 682 F.2d 897 (11th Cir. 1982). In *Henson*, male employees bombarded a female police dispatcher with crude and obscene language, sexual inquiries, and continual requests for sexual relations. *Id.* at 899.

33. *Id.* at 901.

34. *Id.*

35. Courts found quid pro quo sexual harassment, as a barrier to equality in employment, structurally easy to work with because they could compare it to other forms of discrimination violative of Title VII. Due to quid pro quo's similarity to the other forms of discrimination under Title VII, courts generally analyze quid quo pro under the disparate treatment framework established in McDonnell Douglas v. Green, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a prima facie case of disparate treatment requires: 1) membership in a protected class; 2) application for a job for which the individual is qualified and for which the employer was accepting applications; 3) a rejection; and 4) the position remains vacant and the employer continues to accept applications from other similarly qualified individuals. *Id.* at 802. Thus, in quid pro quo sexual harassment cases, the courts generally applied the following test: 1) employee belonged to a protected class; 2) employee was subject to unwelcome sexual harassment; 3) employee complained of harassment based upon sex; and 4) employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment. *Henson*, 682 F.2d at 909.

36. In instances of hostile work environment sexual harassment, tangible job detriment is usually lacking. Thus, in proving a claim under hostile work environment, the plaintiff must show that but for her sex, she would not have been the object of the harassment. *Henson*, 682 F.2d at 904. *See also* Bundy v. Jackson, 641 F.2d 934, 942-43 (D.C. Cir. 1981) (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

Courts recognizing hostile work environment as a form of sexual harassment require five common elements: (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment; (3) the employee complained of harassment based upon sex; (4) the harassment had the effect of unreasonably interfering with the plaintiff's work performance and created an intimidating, hostile, or offensive environment that seriously affected the psychological well-being of the plaintiff; and (5) respondeat superior liability.[37]

2. The United States Supreme Court's Recognition of Hostile Work Environment Sexual Harassment

In 1986, the Supreme Court, in *Meritor Savings Bank v. Vinson*,[38] recognized hostile work environment sexual harassment for the first time. In *Meritor*, the Court stated that not all sexual harassment will violate Title VII.[39] The Court set forth that hostile work environment sexual harassment occurs only when the conduct complained of "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[40] For a claim to be actionable, the Court stated, though not explicitly enough,[41] that the "conduct must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[42] Furthermore, courts must ex-

37. *See* Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (first Supreme Court case recognizing hostile work environment sexual harassment as a violation of Title VII); *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3rd Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

38. 477 U.S. 57 (1986). For a detailed analysis of *Meritor* and an illustrative discussion of the facts surrounding the case, see Victoria T. Bartels, Comment, Meritor Savings Bank v. Vinson: *The Supreme Court's Recognition of the Hostile Work Environment in Sexual Harassment Claims*, 20 AKRON L. REV. 575 (1987). For greater discussion about *Meritor* and its impact, see Marlisa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717 (1989); Katherine S. Anderson, Note, *Employer Liability under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987).

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

40. *Id.* at 65. *See also* 29 C.F.R. § 1604.11(a)(3) (1991); *supra* note 18.

41. *See infra* text accompanying note 45.

42. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). Other courts have interpreted the Supreme Court's definition to mean that isolated incidents that offend the victim may not be severe enough to alter the

amine the alleged hostile work environment under the totality of the circumstances[43] to determine whether the questioned behavior is sufficiently severe or pervasive to alter the conditions of employment.[44]

To the chagrin of the courts, attorneys, victims, and employers, the Court did not concretely define the degree of pervasiveness necessary under a Title VII action.[45] Due to this lack of specificity, district courts have not been in accord regarding whose perspective to use when judging the pervasiveness of the conduct. However, courts have widely recognized two standards to determine the severity of the offensive conduct: (1) the reasonable person,[46] and (2) the reasonable person and the particular plaintiff.[47] In deviating from the norm, *Ellison* has received both criticism and praise by advocating the reasonable woman standard or the "perspective of a victim of the same sex as the plaintiff" in determining whether the complained of conduct creates a hostile environment.[48]

With this background in mind, this Comment proposes that the reasonable woman standard is the appropriate perspective from which to determine whether a hostile work environment exists in violation of Title VII. In demonstrating that the reasonable woman's perspective is the preferable standard to view sexually harassing behavior, this Comment chronicles the case law which inspired the Ninth Circuit to adopt the reasonable woman standard in Part II. Part III focuses upon *Ellison* and illustrates why the reasonable woman standard is the appropriate standard in hostile work environment sexual harassment cases. Part IV

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workplace to such a degree as to violate Title VII. *Henson*, 682 F.2d at 902 (borrowing from Rogers V. EEOC, 454 F.2d at 238).

43. *Meritor*, 477 U.S. at 69; *see also* 29 C.F.R. § 1604.11(b) (1991). In determining whether alleged conduct constitutes sexual harassment, the EEOC will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. *Id.* The court will determine the legality of a particular action from the facts and on a case by case basis. *Id.*

Since the court must analyze the totality of the circumstances, the Court in *Meritor* asserted that it could consider testimony about the plaintiff's dress and personal fantasies in determining whether the conduct complained of was actually unwelcome. *Meritor*, 477 U.S. at 68-69. The Court did stress that the district court should carefully consider the ramifications of this type of evidence, while acknowledging that no *per se* rule existed against its admissibility. *Id.* at 69.

44. *Id.* at 67-69.

45. *Id.* at 67.

46. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

47. Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989); *accord* King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); *see also infra* notes 80-82 and accompanying text.

48. Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).

highlights the recent adoptions of the reasonable woman standard since *Ellison*. Part V discusses the implications of the reasonable woman standard upon employers.

II. THE ORIGINS OF THE REASONABLE WOMAN STANDARD

A. *From Law Review Article to "Law"*

Commentators generally credit Judge Damon Keith's biting dissent in *Rabidue v. Osceola Refining Co.*[49] as the origin of the reasonable woman standard.[50] However, the majority declared that in order to provide adequate protection to plaintiffs and defendants alike, when considering the totality of the circumstances, the trier of fact "must adopt the perspective of a reasonable person's reaction to a similar environment under essentially . . . similar circumstances."[51] Furthermore, the majority would not consider whether the victim had been seriously affected by the complained of behavior unless the aforementioned reasonable employee's work performance and psychological well-being were seriously affected.[52] To understand Judge Keith's rationale advocating the use of a reasonable woman standard, one must look at the facts of *Rabidue* and review the comments of the majority regarding sexual harassment.

Vivienne Rabidue brought a sexual harassment claim against her supervisor, Douglas Henry.[53] The findings of fact indicated that Henry

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49. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

50. In actuality, Judge Keith borrowed the idea from a law review article. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984). Judge Keith borrowed extensively from the author's reasoning to support his view 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." *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

51. *Rabidue*, 805 F.2d at 620.

52. *Id.*

53. *Id.* at 615. Henry, in fact, exercised no supervisory control over Rabidue, but Rabidue's job required her to work with him. *Id.* Also, management knew about Henry's vulgar propensities and failed to take any corrective action. *Id.* Osceola Refining Company's Vice President, Charles Muetzel, tried to justify the lack of reprimand because "Osceola needed Henry's computer expertise." *Id.* at 624 (Keith, J., dissenting). At a later date, in response to more complaints, another supervisor merely gave Henry some "fatherly advice" if he had hopes of becoming an executive. *Id.* The plaintiff, as well as other women at the facility, also were offended by the behavior of their male coworkers. *Id.* at 615; *see also infra* note 53 and accompanying text.

was an extremely vulgar man who made explicit comments about Rabidue and about women generally.[54] Referring to Rabidue, Henry remarked, "All that bitch needs is a good lay," and called her a "fat ass."[55] Also, other male employees displayed pictures of nude women in their offices and in the common work areas,[56] which Rabidue and other female employees could see.[57] The majority proclaimed that while Henry's obscenities were annoying, they were not so outrageous so as to have seriously affected the "psyches of the plaintiff or other female employees."[58] Furthermore, the court stated that the sexually oriented posters only had a *de minimis*[59] effect on Rabidue's work environment when viewed in light of a society that sexually exploits women in film, television, radio, and other public places.[60]

Judge Keith stressed in his dissent that adoption of the reasonable woman standard would recognize the "wide divergence between most women's views of appropriate sexual conduct and those of men."[61] The

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54. The general derogatory comments Henry made about women included terms such as whores, cunts, and pussies. *Rabidue*, 805 F.2d at 615 (citing Rabidue v. Osceola, 584 F. Supp. 419, 423 (E.D. Mich. 1984)).

55. *Id.*

56. The plaintiff and other female employees were exposed daily to sexually explicit posters and sexual innuendo in the common work areas. One such poster, on the wall for eight years, showed a naked woman lying supine with a golf ball between her breasts and a man standing over her, golf club poised, yelling "Fore!" *Id.* at 624 (Keith, J., dissenting).

57. The plaintiff, as the sole female in management, was the only one to formally file any complaints, though the other women in the workplace were offended by the conduct of Henry and other male employees. She was the sole complainant because the other women feared losing their jobs. *Id.*

58. *Id.* at 622. The court proceeded to contend that the incidents of harassment were not sufficiently compelling to justify finding a violation of Title VII. *See id.* at 622 n.7.

Furthermore, the majority believed Rabidue assumed the risk of working in a hostile environment. *Id.* at 626 (Keith, J. dissenting). The majority reasoned that because the plaintiff voluntarily entered the workplace she should have reasonably expected to endure offensive remarks. *Id.* at 620. This was especially pertinent, deemed the majority, since the obscenity permeated the workplace before, during, and after the plaintiff's employment. *Id.*

59. *Id.* at 622.

60. *Id.* Judge Keith would not agree with the majority's rationalization about the perception of women in society. *Id.* at 627 (Keith, J., dissenting). If society condones the exploitation of women in the media, Judge Keith asserted, then "'society' in this scenario must primarily refer to the unenlightened . . . ." *Id.* (Keith, J., dissenting). Thus, Keith aptly stated, "[T]he relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery." *Id.* (Keith, J., dissenting).

61. *Id.* at 626 (Keith, J., dissenting); *see supra* note 51 and accompanying text. For a more detailed look at the differing perspectives of men and women, see *infra* text accompanying notes 138-39, 152-59, 163.

reasonable woman standard, he stated, allows courts to consider the "salient sociological differences"[62] between the genders, while still protecting employers from the "neurotic complainant."[63] Furthermore, as Judge Keith emphasized, unless courts employ the viewpoint of the reasonable woman, defendants and courts will continue to perpetuate entrenched notions of acceptable behavior defined by the offenders—in most cases, men.[64]

B. A Different Application of the Reasonable Woman Standard: Constructive Discharge

The next case adopting the reasonable woman standard, *Yates v. Avco Corp.*,[65] did so in the context of a constructive discharge cause of action, involving sexual harassment by a supervisor.[66] In *Yates*, two female employees endured unwelcome and lewd advances by their supervisor, Sanders.[67] Sanders commented on their appearances, propositioned them, talked of putting them on his mistress list, made sexual grunts and groans, and described sexual fantasies he had about them.[68] One of the women, Mathis, had to be hospitalized due to

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62. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting); *see infra* notes 157-59, 164 and accompanying text; Part II(C)(2)(c) *infra*; *see also* Note, *supra* note 50, at 1459.

63. *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting) (citing Note, *supra* note 49, at 1459).

64. *Id.* The majority further epitomized the erroneous notion that the complained of behavior was acceptable and not violative of Title VII. *Id.* The majority agreed that

> "[i]ndeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers . . . . But [it] is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers."

Id. at 620 (quoting *Rabidue*, 548 F. Supp. 419, 430 (E.D. Mich. 1984)). Archaic comments such as the above further illustrate the appropriateness of the reasonable woman/victim standard. *See also infra* text accompanying notes 139-40.

65. 819 F.2d 630 (6th Cir. 1987).

66. *Id.* at 637. To establish a finding of constructive discharge, the court must determine if the "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* at 636-37 (citations omitted).

67. *Id.* at 632-33.

68. *Id.* at 632. When the women rejected Sanders, he made their jobs even more

Sanders' behavior.[69] The harassment not only tormented the women, but it also created tension among other members of the staff who felt the plaintiffs were receiving special attention from the boss.[70]

Managers spoke to both women and asked them not to contact the EEOC.[71] As a further demonstration of an unbearable situation, Avco would not correct the plaintiffs' personnel files regarding sick leave[72] or give them transcripts of the tape recorded statements they had made during the company's investigation.[73]

The issue on appeal was whether Avco had constructively discharged Street.[74] The court utilized the reasonable woman standard in this determination.[75] Relying upon Judge Keith's dissent,[76] the court announced that

> [i]n a sexual harassment case involving a male supervisor's harassment of . . . female subordinate[s], it seems only reasonable that the person standing in the shoes of the employee should be "the reasonable woman" since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.[77]

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difficult by becoming angry and spiteful. *Id.*

69. Mathis began working for Sanders in 1982. By June of 1983, the harassment affected her so detrimentally that she began to experience fits of shaking and crying. She was hospitalized in June and once again in July of the same summer. *Id.* The other plaintiff involved, Street, began working for Sanders in 1983, when Mathis was on sick leave. *Id.*

70. *Id.* For other examples of the detrimental effects of sexual harassment in the workplace, see *infra* note 163.

71. *Id.* at 633. Avco promised the women that if they did not report the harassment to the EEOC, Avco would represent them fully in eradicating the harassment. As a result of Avco's internal investigation, Sanders was found "guilty," demoted, and sanctioned with a cut in salary. *Id.*

72. The women merely wanted the files to reflect that the unbearable workplace environment caused their absences. *Id.*

73. *Id.*

74. *Id.* at 633-34, 636-37. The issue on appeal regarding Mathis was whether she had been retaliated against for her actions against Sanders. *Id.* at 634, 637-38.

75. *Id.* at 637. In order to find constructive discharge, the court's inquiry must focus upon the objective feelings of the employee, as well as the employer's intent. *Yates*, 819 F.2d at 636; *see also supra* text accompanying note 66.

76. *See supra* notes 50-65 and accompanying text.

77. *Yates*, 819 F.2d at 637 (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987)). On appeal, the court determined that no constructive discharge of Street occurred. *Id.*

The controversial event resulting in Street's resignation occurred on January 5, when she came to work after calling in sick. Sanders, though relocated out of Street's department, was cleaning out a desk of a recently deceased co-worker of Street's. When Street came unexpectedly to the office she saw Sanders, asked him why he was there, and he replied he had been reassigned there permanently. With that, Street stormed out, did not contact any Avco officials for an explanation, and refused to listen to the apology of an Avco official. She resigned on January 9. *Id.*

Yates is significant not only for adopting the reasonable woman standard, but also for broadening its meaning. Though Judge Keith considered relevant the sociological and societal differences between men and women,[78] he never addressed the standard a court should use in the case of a male victim.[79] One might assume Judge Keith would apply a reasonable man standard in that situation. *Yates* addressed that situation.

The *Yates* majority set forth that "were this a sexual harassment case involving a male subordinate, the reasonable man standard should be applied."[80] Following the reasoning of Judge Keith's dissenting opinion in *Rabidue*, the majority recognized that men and women are "vulnerable in different ways and offended by different behavior."[81] By interpreting the standard to apply to the sex of the victim involved, *Yates* further paved the way for the holding and rationale of *Ellison*.

C. Hybrid Tests: Midway to Reasonableness

1. Reasonable Person and the Particular Plaintiff

Prior to the Ninth Circuit's express adoption of the reasonable woman standard in hostile work environment cases, other courts had implemented a dual standard: looking at the harassment from the viewpoint of a reasonable person and from the particular plaintiff.[82] This standard, forwarded by the Seventh Circuit in *Brooms v. Regal Tube Co.*,[83] though similar to *Rabidue*, differs in a crucial way.[84] In *Rabidue*, the majority

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Applying the reasonable women standard, the court determined Street was not reasonable since she did not seek any outside explanation and refused to listen to the Avco official. *Id.* Thus, the court found no constructive discharge. *Id.*

78. *See supra* notes 62-65 and accompanying text.

79. *Rabidue*, 805 F.2d at 623-28 (Keith, J., dissenting).

80. *Yates*, 819 F.2d at 637 n.2.

81. *Id.*; *see also infra* notes 138-39, 157-69 and accompanying text.

82. *See infra* notes 82-84.

83. 881 F.2d 412 (7th Cir. 1989). *Brooms* relied upon an earlier decision in the 7th Circuit, Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986), which called for the courts to consider whether "the demeaning conduct and sexual stereotyping cause[d] such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII." *Scott*, 798 F.2d at 213. *Scott*, however, never discussed from which perspective, either objective or subjective, the court should view the hostile environment. In *Brooms*, the court realized that the *Scott* holding implied that it should consider both the objective and subjective tests. *Brooms*, 881 F.2d at 418.

84. Relying upon *Scott* and *Rabidue*, the *Brooms* court determined that the dual objective/subjective standard is the correct standard to employ when dealing with a

treated the victim with disdain.[85] *Rabidue* emphasized that the conduct, under similar circumstances, would have to interfere with the hypothetical reasonable person's work performance and significantly disturb the psychological well-being of that reasonable person.[86] If the plaintiff could not meet that standard, then she could not successfully assert charges of hostile work environment sexual harassment, regardless of whether that plaintiff was seriously affected by the conduct.[87]

The *Brooms* dual standard, adopting in part the reasonable person perspective,[88] is more victim-oriented. In *Brooms*, the effect on the victim does not receive secondary treatment. The court will consider the particular plaintiff's subjective response to the harassment in tandem with the viewpoint of the reasonable victim.[89] Thus, under this dual standard, the court determines whether the conduct was sufficiently severe or pervasive to alter the victim's working environment from two perspectives: (1) whether the conduct adversely affected this particular plaintiff; and (2) whether the conduct would adversely affect a reasonable person.[90]

Title VII sexual harassment claim. *Id.* at 419. Unlike *Rabidue*, *see supra* notes 49-51, the *Brooms* court did not require that the objective reasonable person determination be made before the subjective plaintiff's responses could be considered. *Id.*

85. *See supra* notes 54-60, 65.

86. *See supra* note 51 and accompanying text.

87. *See supra* note 52 and accompanying text.

88. Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989); *see infra* text accompanying note 90.

89. *Id.* at 418-19. Regal Tube Company hired Helen Brooms as an industrial nurse. During Brooms' 16-month employment, Charles Gustafson, the Human Resource Manager and Brooms' supervisor, harassed Brooms with racial slurs and sexual innuendo, usually at the office or at office related activities. Brooms rejected Gustafson's advances and also notified the proper internal authorities. *Id.* at 416. One of Gustafson's most egregious acts occurred when he showed Brooms a pornographic picture of a white man and black woman engaged in sodomy. Gustafson said that the picture illustrated the talents of black women, and told Brooms she had been hired for just that purpose. *Id.* at 417.

The *Brooms* court concluded that the sexual harassment Helen Brooms encountered could have interfered with a "reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee." *Id.* at 420 (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)). In addition, the court concluded that although the district court did not explicitly address how a reasonable person would have reacted to the conduct, they did sufficiently determine the objective portion of the test. Therefore, even though the district court did not conduct the inquiry adopted by the appellate court, the appellate court stated that an objective inquiry may have been "implicit in the district court's holding although never explicitly stated." *Id.* at 419.

90. In adopting this dual standard, the *Brooms* court asserted that a district court, when evaluating a Title VII claim, must focus upon the "likely effect of a defendant's conduct upon a *reasonable person's* ability to perform his or her work and upon his or her well-being, *as well as* the actual effect upon the particular plaintiff bringing

2. Particular Plaintiff and a Reasonable Person of the Same Sex as the Plaintiff

In response to *Rabidue*,[91] the Third Circuit, in *Andrews v. City of Philadelphia*,[92] utilized a test even more victim-oriented than the *Brooms* test.[93] Under this test, the basic five elements necessary to establish a prima facie case of hostile work environment sexual harassment are required.[94] However, *Andrews* varies these elements,[95] thereby making the determination more empathetic to the victim. Hence, under *Andrews*, bringing a successful hostile work environment claim requires that the discrimination detrimentally affect the plaintiff while also detrimentally affecting a *reasonable person of the same sex* in that position.[96]

The court distinctly noted that both the objective and subjective prongs of the test are critical in determining whether a hostile work environment existed in violation of Title VII.[97] Emphasizing the purpose of Title VII, the court stressed that Congress intended Title VII to remove the "'artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial, [sexual] or other impermissible classification[s].'"[98] In *Andrews*, the

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the claim." *Id.* (emphasis added). The court must answer both parts of the test in the affirmative before they can find that a Title VII violation occurred. *Id.*

Furthermore, the finding of a hostile work environment is a question of law. *Id.* at 420. Since the district court determined the facts, the *Brooms* court, as the reviewing court, had to consider that question of law *de novo*. Utilizing the dual standard, the court had no problem upholding the district court's finding that Gustafson's conduct violated Title VII. *Id.*

91. *See supra* notes 49-64 and accompanying text.

92. 895 F.2d 1469 (3rd Cir. 1990). As is customary, the *Andrews* court employed a five-part test. *Id.*

93. *Id.* at 1482.

94. *See supra* note 38 and accompanying text.

95. *Andrews*, 895 F.2d at 1482.

96. *Id.* (emphasis added). For a recent case relying upon *Ellison* to adopt the *Andrews* two-part test, see Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991).

97. *Andrews*, 895 F.2d at 1483. The court emphasized its adoption of the subjective and objective standard. *Id.* The court propounded that the subjective component is necessary since it establishes that the plaintiff was in fact injured by the complained of behavior. *Id.* The court expressed that the objective factor, as modified from *Rabidue*, was more crucial. The court stated that "it is here that the finder of fact must determine whether the work environment is sexually hostile." *Id.*

98. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

court had no difficulty determining that the harassment had a detrimental effect upon the plaintiff.[99]

The *Andrews* court had a much more difficult time determining whether the objective component, that of a reasonable person *of the same sex* as the victim, had been met.[100] The court needed to determine objectively whether sexual innuendo pervaded the workplace.[101] In overturning the district court's decision that the environment was not sexually hostile,[102] the Third Circuit disapproved of the district court's overly restric-

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99. In *Andrews*, Priscilla Andrews and Debra Conn, employed by the City of Philadelphia Police Department, were victims of sexual harassment by their supervisors and co-workers. *Id.* at 1471. In addition to filing a Title VII action, the women also filed a section 1983 action against the city and individual officers. Harassment experienced by Andrews included destruction of her work, obscene phone calls at home, and vandalism to her car and other personal property. *Id.* at 1473-74. The most severe incident occurred when someone put a lime substance inside a shirt she kept in a locker in the women's locker room. *Id.* at 1474.

Conn had a similar experience. She was subjected to numerous sexual propositions, had sexual devices and magazines placed around her work area, found her work missing, and experienced vandalism. *Id.* at 1474-75.

Both women reported the incidents to superiors. Though an investigation was conducted, the final results stated that no harassment or discrimination had occurred. *Id.* at 1476.

At the district court level, the jury awarded both women damages for their section 1983 causes of action against the city and some of the supervisors. *Id.* "Section 1983 and Title VII claims are complex actions with different elements. Proof of some of these elements, particularly discrimination based upon sex and subjective harm is identical, and thus the court should be bound by the jury's determination of these issues." *Id.* at 1483 n.4. The objective portion of Title VII does not apply to section 1983 actions, thus it was necessary for the *Andrews* court to determine that component. *Id.*

Section 1983 is a viable remedy for hostile work environment sexual harassment, as an alternative to or in conjunction with Title VII. To bring a section 1983 action for denial of equal protection, a plaintiff must prove purposeful or intentional discrimination. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). To prove discrimination based upon sex, a plaintiff must show that any disparate treatment occurred because of his or her sex. Bohen v. City of E. Chicago, 799 F.2d 1180, 1186-87 (7th Cir. 1986); *see also* King v. Board of Regents of Univ. of Wis., 898 F.2d 533 (7th Cir. 1990); Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988) (recognizing hostile work environment as actionable under section 1983 as a denial of equal protection upon a showing of discriminatory intent because of plaintiff's sex).

100. *Andrews*, 895 F.2d at 1484 (emphasis added). It was necessary for the court to determine the objective portion since the district court only needed to find discrimination for the section 1983 action. *See supra* text accompanying note 96. Therefore the *Andrews* court had to make the factual findings as to this matter. *Andrews*, 895 F.2d at 1484-85.

101. *Id.* at 1484.

102. *Andrews*, 898 F.2d at 1484-86. The *Andrew's* court also discussed what action is sufficient to create a hostile work environment. The court declared that the district

tive interpretation of a hostile environment.[103] The *Andrews* court criticized the lower court for examining the incidents of harassment singularly.[104] This type of analysis falls short of the totality of the circumstances analysis required.[105] In its remand, the court declared that a plaintiff could satisfy the test's objective prong—the reasonable person of the same sex as the victim—if all the incidents in sum would result in a hostile working environment "offensive to women of reasonable sensibilities."[106]

Unlike *Ellison*, the *Andrews* court did not explicitly define the reasonable person of the same sex as the victim as a reasonable woman or man *per se*.[107] However, a close examination of the court's reasoning shows that the court did have in mind the woman or man, as victim and plaintiff, as well as the protection of the employer from frivolous claims.[108]

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court's denial of hostile work environment sexual harassment on the sole basis that the behavior lacked sexual advances and contact was unfounded. *Id.* at 1485. Overt sexual harassment is not the only behavior that will give rise to actionable hostile work environment harassment. *Id.* As the Court said in *Meritor*, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

Furthermore, *Andrews* held that pornographic pictures in the work area, as well as derogatory and obscene language about women constitute sufficient evidence to show the creation of a hostile work environment. *Andrews*, 898 F.2d at 1485. Therefore, the absence of overt sexual behavior in and of itself would not defeat a claim of sexual harassment, if the aforementioned evidence was apparent. *Id.*

103. *See supra* note 102 and accompanying text.

104. Borrowing from the Eleventh Circuit, the court stated that the factfinder should not look at each incident in and of itself. A legitimate reason may exist for each incident, but taken as a pattern of harassing incidents, the explanations may appear pretextual. *Andrews*, 898 F.2d at 1484 (expounding upon Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

105. To illustrate a proper totality of the circumstances analysis, the court analogized the workplace to a play. *Id.* The court remarked that a play cannot be understood based on observations of some scenes; a play can only be comprehended based on its entirety. *Id.* Therefore, an examination of discrimination must concentrate on the entire drama and not particular incidents. *Id.*

106. *Id.* at 1486.

107. *See supra* text accompanying note 96.

108. *Andrews*, 898 F.2d at 1483. The court offered that the objective standard, in conjunction with the subjective standard, protects employers and the victimized employees. *Id.* The objective standard shields the employer from the baseless claims of a neurotic and reactionary employee while simultaneously protecting the victim and the goals of Title VII. *Id.* The objective plaintiff of same sex as the victim standard, "remov[es] the walls of discrimination that deprive women [and men] of self-respecting employment." *Id.*

These rationales also serve as a basis for the holding of *Ellison*.[109]

III. ELLISON V. BRADY: THE REASONABLE WOMAN DEFINED

A. Ellison: *First to Unequivocally Adopt the Reasonable Woman Standard*

The Ninth Circuit, in *Ellison v. Brady*,[110] was the first court to hold affirmatively that a female plaintiff states a prima facie case of hostile environment sexual harassment "when she alleges conduct which *a reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[111] To appease critics who would claim that women receive special treatment, it is essential to note that like *Yates*,[112] *Ellison* did not focus solely upon women as victims.[113] The court pointed out that the "reasonable woman standard does not establish a higher level of protection for women than men."[114] In fact, the court recognized that when male employees endure harassing conduct that creates a hostile environment, the court must consider the evidence from the perspective of a reasonable man.[115] Since the reasonable woman standard recognizes rather than belittles the consequences of sexual harassment, it enables courts to protect men and women from a spectrum of sexual abuse in the workplace.[116]

B. *Kerry Ellison and Sterling Gray*

Kerry Ellison worked with her harasser, Sterling Gray, at the San Mateo office of the Internal Revenue Service.[117] Ellison's and Gray's desks were approximately twenty feet from each other. They had worked

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109. *See infra* text accompanying notes 140-56.

110. 924 F.2d 872 (9th Cir. 1991). Justice Beezer, writing the opinion for the court, was joined by Justice Kozinski, while Judge Stephens, sitting by designation, dissented. *Id.* at 884-85.

111. *Id.* at 879.

112. *See supra* notes 66-81 and accompanying text.

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

114. *Id.*

115. *Id.* at 879 n.11.

116. *Id.* at 879-80 (citing Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)). The court emphasized that a standard recognizing gender differences would help to equalize women's participation in the workplace with men. *Id.* at 879. For a more in-depth explanation of the court's reasons for adopting the reasonable woman standard, see *infra* text accompanying notes 140-69.

117. *Id.* at 873. In 1984, Ellison and Gray participated in the same training class and upon completion were both assigned to the San Mateo office. *Id.* Although they knew each other from the outset, they never became friends. *Id.*

together for two years before any incidents of harassment occurred.[118]

Gray first expressed an interest in Ellison when he asked her to lunch.[119] After that first lunch, Ellison asserted that Gray began to hang around her desk, pester her, and repeatedly ask her out for dates.[120] In October, four months after the first lunch, Gray handed Ellison a note he wrote for her that stated in part: "I cried over you last night . . . . I have never been in such constant term oil [sic] . . . I could not stand to feel your hatred for another day."[121] Ellison became frightened and left the room. Gray followed her.[122] At this time, Ellis informed her supervisor about the note but stated she wanted to handle the situation on her own.[123]

The following week, Ellison left town for training. While away, Gray sent her another letter which Ellison described as "twenty times, a hundred times weirder" than the first.[124] In pertinent part, Gray wrote:

> I know you are worth knowing with or without sex . . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from O [sic] so far away. Admiring your style and elan . . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . .[125]

Ellison became very frightened and upset.[126] She asked her supervisor

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118. *Id.*

119. It was customary at the office for small groups of people to dine together at the noon hour. *Id.* This lunch date occurred in June of 1986. *Id.* On that day, since no one else was in the office, Ellison accepted Gray's invitation. *Id.* During the lunch, Gray took Ellison by his house, claiming he had left his son's lunch there, and gave her a tour of his house. *Id.*

120. *Id.* Gray also asked Ellison out for an after work drink. *Id.* To decline politely, she suggested they have lunch again the following week. *Id.* Not wanting to go, Ellison purposefully kept herself away from the office at noon. *Id.* The following week, Gray uncharacteristically dressed in a three-piece suit and asked Ellison out to lunch again. *Id.* at 873-74. She declined. *Id.*

121. *Id.* at 874.

122. *Id.* In the hallway, Gray demanded that Ellison talk to him. Ellison immediately left the building. *Id.*

123. Bonnie Miller supervised both Ellison and Gray. *Id.* Upon reading the note, Miller declared, "This is sexual harassment." *Id.* Ellison enlisted the aid of a male co-worker to inform Gray that Ellison was not interested and to leave her alone. *Id.*

124. *Id.*

125. *Id.* Gray did mention in the letter that his feelings for Ellison were such that if she wanted him to leave her alone he would. *Id.* at 874 n.1. However, Gray stated forgetting about her was not possible. *Id.*

126. Ellison did not know what Gray would do. *Id.* at 874. She thought he might be crazy. *Id.* Immediately, she telephoned Miller, her supervisor, and told her about

to transfer either herself or Gray.[127] Gray was transferred to another office for approximately five months.[128] Ellison learned of the union agreement between Gray and the IRS and requested that she receive a transfer upon Gray's return.[129] In the meantime, Gray sought "joint counseling" with Ellison and wrote her another letter emphasizing that he hoped they could maintain some sort of friendship.[130]

Ellison's supervisor, as well as the IRS employee investigating the complaint Ellison filed, agreed that Ellison was subjected to sexual harassment.[131] However, the Treasury Department rejected Ellison's complaint.[132] The EEOC affirmed the denial of Ellison's sexual harassment claim on a different ground.[133] The district court ruled that Ellison failed to establish a prima facie case of hostile working environment sexual harassment.[134]

C. *The Ninth Circuit's Adoption of the Reasonable Woman Standard*

Since the Ninth Circuit lacked specific guidelines defining the severity necessary for actionable conduct, the *Ellison* court addressed that issue first.[135] The court noted that Gray might resemble a "modern-day

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the letter. *Id.*

127. *Id.* At this time, Miller also contacted her superior and told him about the series of events. *Id.* Miller also had a counseling session with Gray and warned him to quit bothering Ellison. *Id.*

128. Gray went to San Francisco in November of 1986. *Id.* Three weeks after his transfer, Gray filed union grievances petitioning for his return to San Mateo. *Id.* Finding in his favor, the union would allow him to return in four months if he also promised to leave Ellison alone. *Id.*

129. *Id.* At this time, Ellison also filed a formal complaint alleging sexual harassment with the IRS. *Id.*

130. *Id.* at 874-75. It was never determined if Ellison ever received this final letter. *Id.* at 875 n.2. With this letter, Gray attempted to "maintain the idea that he and Ellison had some sort of relationship." *Id.* at 875.

131. *Id.*

132. *Id.* The Treasury Department's denial was based on its belief that Ellison's complaint "did not describe a pattern or practice of sexual harassment covered by the EEOC regulations." *Id.*

133. The EEOC felt the IRS had taken appropriate and sufficient action to curb any reoccurrences of Gray's behavior. Thus, they would not issue Ellison a right to sue letter. *Id.*

134. *Id.*

135. *Id.* at 876-81. The court also focused on the level of action that employers must take to shield them from liability under Title VII. *Id.* at 881-83. The court, applying a holding from another Ninth Circuit case, stated that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Id.* at 881 (following EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).

Cyrano de Bergerac"[136] vainly attempting to secure the love of one he so admired. Examined in that light, the court could easily characterize Gray's conduct as sophomoric, isolated, and trivial.[137]

But Ellison was on the receiving end of Gray's overtures. In fact, Ellison found Gray's behavior neither flattering nor trivial; it shocked and frightened her.[138] Following therefrom, the court made its historical determination that a female plaintiff states a prima facie case of hostile environment sexual harassment if the conduct complained of would unreasonably affect a reasonable woman.[139]

D. The Reasonableness of the Reasonable Woman's Standard

1. Title VII's Purposes Are Advanced

The purposes of Title VII illustrate the need to adopt a reasonable woman/person of the same sex as the victim standard. This standard of reasonableness allows behavior to be classified as a violation of Title VII when the harassers do not even recognize that their behavior is sexually harassing.[140] Examine Gray's actions. He probably did not see his con-

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Still, the *Hacienda Hotel* standard did not address what remedies an employer must take to avoid liability. The court examined the EEOC Guidelines. *See* 29 C.F.R. § 1604.11(f) (1991) (stating that employers have a responsibility to express disapproval and establish penalties for sexual harassment). The court also examined what other circuit courts had done in addressing the same issue. *See* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (holding that the remedy must be "reasonably calculated to end the harassment"); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987) (stating that remedies should be "assessed proportionately to the seriousness of the offense"). Thus the *Ellison* court proffered that the court will determine the adequacy of an employer's remedy by its adequacy in deterring the harassing individual. *Ellison*, 924 F.2d at 882.

For a more detailed discussion of the responsibility of employers to deter workplace harassment, see *infra* notes 231-67 and accompanying text.

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

137. *Id.*

138. *Id.* at 874, 880.

139. *Id.* at 879-80.

140. *Id.* at 880; *see also* H.G. Reza, *New Study Indicates Wide Sex Harassment in Navy*, L.A. TIMES, Feb. 10, 1992, at A1. A disciplinary proceeding of a Navy pilot illustrates beautifully men's and women's differing perspectives of reasonable behavior, and also demonstrates the irrelevance of intent.

In that case, the pilot thought he would bring humor into a situation involving a subordinate female officer. *Id.* The lieutenant commander pulled his zipper down,

duct as threatening or offensive. Quite probably, some men and women might view Gray's acts as harmless, maybe even pathetic. But the purpose of Title VII does not concern the harasser's motives.[141]

Since legislators never intended Title VII to be a fault-based tort scheme,[142] requiring intent to harass as an element of the prima facie case would be contradictory.[143] "'Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation' of co-workers or employers."[144] Therefore, as *Ellison* advocated, when a "reasonable victim of the same sex as the plaintiff" would regard the behavior as sufficiently severe or pervasive, resulting in a hostile working environment that alters the conditions of employment, the intent of the harasser is irrelevant.[145]

Because Title VII is not fault-based, employers face an added responsibility.[146] Furthermore, Title VII requires respondeat superior liability. Hence, employers need to know that Title VII will hold an employer liable absent intent to harass.[147] Educating the workforce about what sexual harassment means and what it entails is becoming mandatory.[148] Employers must instill the different perceptions and life experiences of men and women into their training sessions. This added responsibility to educate the workforce will help eradicate behavior the "reasonable victim would consider unlawful sexual harassment."[149]

2. Reasonable Woman Standard Does Not Create Unreasonable Employer Liability

The reasonable woman standard will not result in unreasonable employer liability. This is because *Ellison* purposefully used the term "rea-

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pulled out his penis, turned around and said to the woman, "So what do you think of that?" *Id.* The pilot commented, "When a startled look crossed the woman's face, I then put my penis back in my pants, sensing that my attempts *at a joke* to lighten the situation had failed." *Id.* (emphasis added).

141. *See Reza*, *supra* note 140, at A3. The following account by a woman sailor epitomizes why Title VII does not require intent to harass. Whenever a woman looked nice, the supervisor would attempt to pay the woman a compliment. *Id.* His "compliment" was, "You look like you just got f[—]ed." *Id.*

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

143. *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

144. *Id.* (quoting Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

145. *Id.*; *see also supra* text accompanying notes 140-42.

146. *See infra* notes 218-67 and accompanying text.

147. *See supra* note 37 and accompanying text.

148. *Ellison*, 924 F.2d at 880; *see also* Meritor Savs. Bank v. Vinson, 477 U.S. 52, 72 (1986) (holding that a grievance policy by itself will not insulate employers from liability).

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

sonable" in the standard. Critics will claim the standard cannot be met.[150] However, the court explicitly addressed this criticism when stating that it would consider a *reasonable* woman's reaction rather than the particular plaintiff's reaction.[151] By promoting a standard of reasonableness, the court shielded employers from an onslaught of unfounded claims.[152]

Also, this standard does not expose employers to unlimited liability. Neither Title VII nor *Ellison's* holding requires employers to accommodate the "idiosyncratic concerns of [every] hypersensitive employee."[153] The standard of reasonableness protects against this. The court also recognized that the reasonableness standard is not intended to address all conduct some men or women find offensive.[154] Thus the standard, as one of reasonableness, will evolve as the views of the victim change.[155] As more women become integrated into the workforce and occupy jobs once predominantly held by men, and vice versa, the more the reasonable victim of tomorrow will differ from the reasonable victim of today. As long as the standard remains one of reasonableness, it will reflect the ever-changing views of society, determined by what those of the same sex as the victim view as reasonable for the time.[156]

3. Men and Women Have Differing Perspectives and the Reasonable Victim Standard Addresses Those Differences

A reasonable person standard fails to address the differing perspectives and vulnerabilities men and women retain as members of opposite genders.[157] Behavior that many men consider flattering is perceived as

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150. *See id.* at 884 (Stephens, J., dissenting).
151. *Id.* at 879-80.
152. *Id.*
153. *Id.*
154. *Id* at 879 n.12.
155. *Id.*
156. *Id.* (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).
157. Judge Stephens found fault with the reasonable woman standard in his interpretation of Title VII. *Id.* at 884 (Stephens, J., dissenting). He believed that Title VII requires a standard applicable to all people; thus, the reasonable woman or man standard, as individually tailored, is beyond Title VII's scope. *Id.* (Stephens, J., dissenting).

In criticizing the majority holding, Judge Stephens stated that he would compromise the rights of the victim. He wrote, "A man's response to circumstances faced by women and their effect upon women can be and in given circumstances *may be*

offensive by many women.[158] *Ellison* recognized that women as a group are not homogeneous in their outlooks.[159] However, *Ellison* also recognized that women generally share common concerns that men do not.[160]

First, women are victims of assault and rape in disproportionately higher numbers than men.[161] Also, most victims of sexual harassment in the workplace are women.[162] It naturally follows that women will be

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expected to be *understood by men.*" *Id.* (Stephens, J., dissenting) (emphasis added). This statement could as easily be applied to women's understanding of men's responses. Furthermore, Judge Stephens' statement leaves room for situations where men or women cannot or will not step into the shoes of the other sex. In contrast, the reasonable person standard, judged from the perspective of the same sex as the victim, more accurately attempts to understand, and thereby protect the victim from, sexual harassment.

158. Once again, Judge Stephens found fault with the majority's holding. *Id.* at 884 (Stephens, J., dissenting). He fails to see the benefits that the new standard provides because it does take into account that men and women do see things differently. *Id.* (Stephens, J., dissenting). Judge Stephens conveniently ignored the majority's reliance upon statistics indicating that women are more frequently victims of sex crimes than men. *See id.* (Stephens, J., dissenting); *see also id.* at 879 nn.9-10 (discussing the statistics). For an excellent example of men's and women's differing perspectives, see *supra* note 137.

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

160. *Id.* One author directly addressed the differences between men and women as follows:

> [Women's] 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 . . . . Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.

Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989).

161. For a current look at statistics regarding reports of sexual harassment in the workplace, see *infra* note 226. In 1990, an estimated 80 of every 100,000 females in the United States reported incidents of rape, an increase of about 8% from 1989. During 1990, the estimated number of forcible rapes against women was 102,555. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 16 (1990).

162. *See* Laurie Becklund & Chuck Phillips, *Sexual Harassment Claims Confront Music Industry*, L.A. TIMES, Nov. 3, 1991, at A1. During the past two years, three record companies have faced charges of sexual harassment: RCA, Island, and Geffen. *Id.* Sexual harassment in the music industry, according to inside sources, has been described as the rule, rather than the exception. *Id.* During interviews at the various companies, women protected each other by identifying "bimbo hounds" who demanded sex as a prerequisite to advancement. *Id.* at A18. Summing up women's place in the music industry, Rosemary Carroll an attorney with Codikow, Leventhal and Carroll, a Beverly Hills law firm, said, "The music business is basically a microcosm

more sensitive to conduct, sexual in nature, which occurs in the workplace. To women, any form of sexual conduct, whether harsh or mild, may instinctively cause concern that the conduct will lead to more serious types of bodily intrusion.[163] Thus, the reasonable victim standard effectively addresses the differing socialization and societal concerns of men and women.

Secondly, the court adopted the reasonable victim standard because "a sex-blind reasonable person standard tends to be male-biased and tends

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of society—it is controlled by white men, some of whom carry their power with dignity and honor, and others of whom use it to manipulate, exploit, and repress those less powerful." *Id.*

See also Reza, *supra* note 140, at A1, A3. Kay Krohne, a retired Navy Commander, recently concluded a study of sexual harassment of women Navy officers. *Id.* Krohne interviewed 61 women officers. *Id.* Forty, or 65.5%, claimed that they had encountered sexual harassment. *Id.*

Some may criticize Krohne's pool as too limited. However, her conclusions corresponded with a 1990 Defense Department report finding that 64% of women in the U.S. military suffered sexual harassment. *Id.* at A3.

163. *See* Marianne Junger, *Women's Experiences of Sexual Harassment*, 27 BRIT. J. CRIMINOLOGY 358 (1987). Junger conducted a study to determine the causes of women's fear of crime. *Id.* Two explanations were offered for women's high scores on fear and anticipation scales of crime: 1) women have experiences of sexual harassment, whereas men do not, and 2) women score higher on factors that influence people's ability to handle potentially dangerous situations. *Id.* at 381.

Junger also discussed other causes of women's enhanced fear of sexual harassment, including: beliefs about crime, assessments of risk of victimization, and perceived threat of crime. *Id.* at 360. "[B]eliefs about crime are opinions and beliefs about crime which constitute the cognitive aspect of perceptions of victimisation." *Id.* Assessment of risk, as the first element of fear, intimately relates to personal vulnerability, physical dominance, and the gravity of the harm associated with being a victim. *Id.* Women also perceive that they face a higher threat of crime due to other interrelated factors: their physical weakness, the perception that they are more often victims of crime and the debilitating repercussions of victimization. *Id.* at 361. Junger notes that some researchers attribute women's greater fear of crime to the effects of rape. Thus, fear of rape may justify women's differing perceptions to behavior in the workplace.

See also Mark Warr, *Fear of Victimization: Why Are Women and the Elderly More Afraid?* 65 SOC. SCI. Q. 681 (1984). Warr concludes that women have an increased fear of crime because of their greater sensitivity to risk. *Id.* at 698. Warr arrives at this conclusion because women are socialized to recognize signs of danger from an early age. *Id.* "Girls are almost universally warned about the danger of sexual molestation. Sometimes the warnings are vague—girls must avoid strange men, not to be out alone at night . . . ." *Id.* Warr goes on to hypothesize that rape, as the "master offense," is a prime source of terror for many women. *Id.* at 700.

to systematically ignore"[164] the disparate experiences of men and women.[165] The reasonable victim standard is gender-conscious. As such, it examines sexually harassing behavior from the perspective of the victim.[166] A gender-conscious examination allows women to participate "in the workplace on an equal footing with men."[167]

Lastly, by utilizing the reasonable victim standard, *Ellison* recognized that sexual harassment is a problem of significant import in the workplace.[168] This indicates that courts and society have begun to stop the perpetuation of stereotypes and barriers that historically have prevented women from achieving equal employment opportunities.

Ellison did not advocate the reasonable victim standard to alienate and

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

165. *See supra* text accompanying notes 160-62; *see also* Warr, *supra* note 163, at 695. Warr provides insight as to why women have a greater perceived risk of victimization than men. *See id.* at 695-98. This also illustrates why the viewpoint of a reasonable victim of the same sex as the victim is the more correct standard. *See id.* As already stated, women fear rape at a proportionately higher rate than do men. Some argue that typical acts of sexual harassment such as sexual comments, pictures of naked women, and off-color jokes or "compliments" do not rise to such a level. They claim women are being overly sensitive.

Nonetheless, Warr explains, such conduct has a more severe effect upon women in the work place. *Id.* at 695. These offenses may generate fear because women associate the conduct with more serious offenses. *Id.* Warr describes these "other" offenses, the sexually harassing conduct, as "perceptually contemporaneous offenses: offenses that are viewed as accompanying or ensuing from any particular offense." *Id.* For example, if a woman perceives a likely threat of burglary, this may also result in extreme fear of assault, rape, or murder—likely contemporaneous offenses. But as Mr. Warr stresses, since men do not equally fear contemporaneous offenses, the same perceived risk may produce little fear among men. *Id.*

Thus, a workplace charged with the perceptually contemporaneous offenses of sexual innuendo and harassment could have the same effect upon women as a robbery situation. The natural contemporaneous offense arising from such conduct is rape or sexual assault. Because men do not share the same perceived risks of sex crimes as women, men and women will have differing views, and the reasonable person of the same sex as the victim reconciles those differences.

166. *Ellison*, 924 F.2d at 879. It does not, however, "establish a higher level of protection for women than men." *Id.*

167. *Id.*

168. *Ellison*, 924 F.2d at 880; *see also* Reza, *supra* note 140, at A3. Sexual harassment has other detrimental affects in the workplace. *Id.* It lowers women's productivity because they must spend time warding off unwanted advances. *Id.*

Also, sexual harassment costs employers millions of dollars. From May 1985 to May 1987, the federal government expended $267 million for costs of sick time, employee replacement, and decrease in productivity. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11 (1988); *see also* Eliot Brenner, *Final Report: U.S. Finds Sexual Harassment Costly*, L.A. DAILY J., April 29, 1991, at 7 (overall look at costs of sexual harassment); Sidney Kess, *The Consequences of Sexual Harassment*, N.Y.L.J., Oct. 21, 1991, at 3 (analyzing the tax consequences of sexual harassment).

further divide the sexes. By adopting the reasonable perspective of the victim, man or woman, *Ellison* attempted to fulfill the "hope that over time both men and women will learn what conduct offends reasonable members of the other sex."[169] Only "when employers and employees internalize the standard of workplace conduct [established by *Ellison*, will] the current gap in perception between the sexes [] be bridged."[170]

IV. THE REASONABLE WOMAN STANDARD AFTER *ELLISON*

A. *Hostile Work Environment and the Reasonable Woman Standard in Other Jurisdictions*

Close to the time *Ellison* was decided,[171] the United States District Court for the middle district of Florida ruled on a hostile work environment sexual harassment case. *Robinson v. Jacksonville Shipyards*[172] adopted a reasonable woman's standard in conjunction with a subjective reasonable person standard.[173] *Robinson* is unique because the court easily determined that a subjective reasonable person would have been offended by the conduct; yet the court found it necessary to determine whether a reasonable woman would find the working environment abusive.[174]

Plaintiff Robinson worked as a welder at a predominantly male shipyard. Robinson based her claim upon the plethora of pictures in the workplace showing women in varying states of undress. In addition to those pictures, male supervisors and employees made remarks that degraded women as a class.[175] Since the main issue in the case centered around the element of employer liability,[176] the court initially decided whether the conduct was sufficiently severe or pervasive to affect a

169. *Ellison*, 924 F.2d at 881; *see supra* notes 140-41, 162, 165 and accompanying text.

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

171. *Ellison* was decided on January 23, 1991. *Id.* at 872.

172. 760 F. Supp. 1486 (M.D. Fla. 1991). *Robinson* was decided on January 18th, but the final judgment was not entered until March 8, 1991. *Id.*

173. *Id.* at 1524.

174. *Id.* The issue on appeal was the objective evaluation—whether a reasonable person of the same sex as Robinson, a female, would perceive that a hostile environment existed. *Id.*

175. *Id.* at 1522.

176. *Id.* at 1490. The defendants conceded that even if the plaintiff could satisfy the burden of hostile work environment, the court could not impose *respondeat superior* liability. *Id.*

term, condition or privilege of employment. Recognizing that it must examine the totality of the circumstances,[177] the court also specified that it must use both an objective and subjective test to determine if the harassment was "sufficiently severe or persistent to affect seriously [the victim's] psychological well being."[178]

The court upheld the lower court's finding that Robinson had shown that the conduct affected her at least as much as it would affect a "reasonable person under like circumstances."[179] However, this alone was insufficient. The court required an examination to ascertain if a reasonable woman would agree that the pictures and remarks created a hostile environment.[180] In determining that Robinson satisfied the objective portion, the court stressed that the reasonable woman standard accounts for salient conditions in the workplace.[181]

Additionally, the objective portion/reasonable woman standard does not mandate that all women in the workplace complain of the behavior.[182] If courts required such complaints as a component of the reasonable woman standard, female plaintiffs would have a much harder time proving that similar conduct affected a reasonable woman. Such a stringent requirement would essentially nullify the reasonable woman standard altogether.[183]

In another recent case, *Radtke v. Everett*,[184] the Court of Appeals of Michigan declined to follow *Rabidue v. Osceola Refining Co.*,[185] and in-

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177. *Id.* at 1524.

178. To satisfy the subjective portion, the court announced that Robinson would need to demonstrate that she, at a minimum, was affected in a manner similar to a reasonable person under similar circumstances. *Id.* The court declared the objective standard "asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created." *Id.*

179. *Id.* The shipyard conceded this point, relying on its assertion that Robinson was hypersensitive and thus could not satisfy the objective portion. *Id.*

180. *Id.* Applying the familiar totality of the circumstances inquiry, the court stressed that it is also appropriate to consider the interaction between the severity and pervasiveness of the conduct. *Id.* As one increases, the other may decrease proportionately. *Id.* Thus a plaintiff may satisfy the legal definition of a hostile work environment even though single incidents would not necessarily rise to an actionable level. *Id.* (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990)).

181. An example of a salient condition is "the rarity of women in the relevant work areas." *Id.*

182. *Id.* at 1525 (citing Priest v. Rotary, 634 F. Supp. 571, 582 (N.D. Cal. 1986)).

183. *See supra* note 163.

184. 471 N.W.2d 660 (Mich. Ct. App. 1991), *review granted*, 487 N.W.2d 762 (Mich. 1992). This case was decided on May 20, 1991 and released for publication on July 29, 1991. *Id.*

185. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1982); *see supra* notes 49-64 and accompanying text.

stead adopted *Ellison's* reasonable woman standard.[186] The plaintiff based her hostile work environment cause of action upon the Michigan Civil Rights Act, which is modeled after Title VII.[187] On appeal, the court held that a single incident of offensive conduct could create a hostile work environment and remanded the case to the lower court.[188] In declining to follow *Rabidue*, the court became more plaintiff oriented.[189]

The plaintiff in *Radtke* worked for Clarke-Everett Dog and Cat Hospital for four and a half years before the harassing act occurred.[190] One hectic Sunday, when Radtke was working alone with Everett, Everett approached Radtke on the couch and put his arm around her shoulders.[191] Radtke tried to get up and Everett would not allow her to move. Finally, Radtke freed herself and indicated her displeasure to Everett. Nonetheless, Everett still proceeded to fondle Radtke and also attempted to kiss her.[192] Radtke immediately left the building and terminated her employment the next day.[193] The court explicitly declined to follow state case law[194] and *Rabidue*,[195] by holding that one act of sexual harassment can be sufficient to maintain a claim of hostile work environment.[196] The court adopted *Ellison's* reasonable woman standard over *Rabidue's* reasonable person standard. The court also stressed that regardless of gender, it would consider the reasonable victim of the same sex as the plaintiff standard.[197]

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186. *Radtke*, 471 N.W.2d at 664.

187. *Id.* at 663; *see* MICH. COMP. LAWS ANN. § 37.2103(h)(iii) (West 1985).

188. *Radtke*, 471 N.W.2d at 665-66.

189. The court explicitly stated that the "principles in *Rabidue* prevent the state Civil Rights Act from achieving its purpose of eliminating sexual harassment from the workplace and ensuring employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 664.

190. *Id.* at 661.

191. *Id.*

192. *Id.* Everett's actions involved massaging Radtke's back while attempting to fondle her breasts. *Id.*

193. *Id.* Radtke did notify her other employer, Dr. Clarke, about Everett's conduct. *Id.* at 661-62. Clarke did nothing to remedy the situation. *Id.* He also told Radtke women such as herself should know they would encounter such behavior because of their vivacious personalities. *Id.*

194. *See* Langlois v. McDonald's Restaurants of Mich., Inc., 385 N.W.2d 778, 780 (1986) (declaring that a single act of harassment cannot create a hostile work environment).

195. *Rabidue*, 805 F.2d 611.

196. *Radtke*, 471 N.W.2d at 665. The court went on to say that in some instances the mere presence of the harasser could create a hostile environment. *Id.*

197. *Id.* at 664 n.8.

The court emphasized that *Rabidue* did not advance the Elliot-Larsen Act's purposes.[198] Also, while examining the conduct under the totality of the circumstances, the court posited that the reasonable woman standard would allow for the severity of the conduct to vary inversely with the pervasiveness.[199] Furthermore, *Radtke's* reasoning followed *Ellison.* The court stressed that the reasonable woman standard will help curb the "trivializing . . . effects of sexual harassment that ha[ve] previously occurred under the gender-neutral 'reasonable person' standard."[200] Thus, examining the offensive behavior under the totality of the circumstances,[201] the court could not conclude that Radtke overreacted to the incident. The court determined that the lower court improperly dismissed Radtke's complaint; it thus reversed and remanded the case for proceedings consistent with the opinion.[202]

B. The Reasonable Woman in Other Contexts

Courts have not limited the reasonable woman standard to instances of hostile work environment sexual harassment. Since *Ellison,* other courts have referred to the reasonable woman standard in a variety of contexts.[203] *Harris v. International Paper*[204] exemplifies the standard's applicability in other scenarios.

Harris involved a claim of racial harassment.[205] Because the First Cir-

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198. *Id.* at 664.

199. *Id.* at 665.

200. *Id.* at 664 (citing Ellison v. Brady, 924 F.2d 872, 579-80 (9th Cir. 1991)).

201. *Id.* at 665.

202. *Id.* In its totality of the circumstances determination, the court heavily weighed Radtke's schedule requiring her to work with Everett the next day, and Clarke's failure to take any remedial action. *Id.* The court also found that Radtke had been constructively discharged. *Id.*

203. *See, e.g.,* Murray v. City of Austin, 947 F.2d 147, 165 (5th Cir. 1991) (recognizing standard's importance in thwarting claims by hypersensitive plaintiffs in an action involving an alleged violation of the establishment clause); Austen v. Hawaii, 759 F. Supp. 612, 628 (D. Haw. 1991) (applying the standard in determining whether a supervisor retaliated against a female faculty member in a discriminatory way for advancing women's issues on campus); Carrillo v. Ward, 770 F. Supp. 815, 822 (S.D.N.Y. 1991) (noting standard is appropriate to apply in a section 1983 cause of action); *cf.* Hansel v. Public Serv. Co. of Colo., 778 F. Supp. 1126 (D. Colo. 1991) (utilizing *Ellison*'s treatment regarding appropriate remedial action to be taken by employers). *Contra* Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 1350 (S.D.N.Y. 1992) (applying a reasonable person, rather than a reasonable victim, standard to determine if a hostile work environment had been created).

204. 765 F. Supp. 1509 (D. Me. 1991).

205. Harris and Pugh, another plaintiff, were paper mill employees who suffered other employees' racial slurs and hatred. *Id.* at 1517, 1519-20. Harris and Pugh were called "lazy n[——]," "black son-of-a-bitch," and "Buckwheat," among many other racist epithets. *Id.* Harris endured a Ku Klux Klan-like incident. *Id.* at 1518. In addition,

cuit was split on the applicable standard in racial harassment cases,[206] the *Harris* court took the opportunity to adopt a standard it felt was appropriate. Analogizing the effects and incidents of racial harassment in the workplace to occasions of sexual harassment, the court felt compelled to adopt the "reasonable black person standard" in cases of hostile environment racial harassment.[207] Likewise, if the victim were of Asian or Hispanic descent, the Court would apply the standard of a reasonable person of that protected group.[208]

Harris' policy for the adoption of the standard mirrored the policy advocated by *Ellison*.[209] The reasonable woman standard is necessitated by women's extraordinary concerns evolving from their socialization and history in society.[210] Likewise, the *Harris* court emphasized that black Americans, like women, had experienced special social experiences.[211] Thus, the reasonable black person standard would address those differences, while not exposing employers to unreasonable liability because the standard still requires reasonableness.

Similarly, the reasonable black person standard helps to place black Americans on a more equal footing in the workplace with white Americans.[212] Also, like the *Ellison* court, the *Harris* court recognized that all black Americans will not view conduct in the same way. Thus, the reasonable black person standard does not require all members of the class to find the conduct offensive. This protects the employer from overly sensitive plaintiffs.[213] The *Harris* court also stressed how the standard would advance the purposes of Title VII.[214] Like *Radtke*,[215] *Harris* did

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there was racist graffiti on the mill walls. *Id.*

206. Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) applied a standard involving two different perspectives: the harasser's and the victim's. *Id.* at 898. *Lipsett* followed Judge Keith's dissent and advocated that the court should consider men's and women's points of view individually. *Id.* Morgan v. Massachusetts General Hospi-206.12tal, 901 F.2d 186 (1st Cir. 1990), applied the reasonable person test to determine if the conduct was unwelcome and pervasive. *Id.* at 192-93. Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) applied yet another standard. *Id.* at 784. *Chamberlin* used the perspective of the employee. *Id.*

207. *Harris*, 765 F.2d at 1516.

208. *Id.* at 1516 n.12.

209. *Id.* at 1515-16.

210. *See supra* text accompanying notes 157-58, 160, 162.

211. *See supra* note 205.

212. *Harris*, 765 F. Supp. at 1516 n.11.

213. *See supra* note 207.

214. *Harris*, 765 F. Supp. at 1516. Noting that Title VII redresses the effects of racial discrimination, the court declared that in order to comprehend those effects, the

not follow any standards previously enunciated by the First Circuit,[216] and adopted the more plaintiff-oriented standard advocated by the Ninth Circuit in *Ellison*.[217]

V. AVOIDING LIABILITY: AN EMPLOYER'S STRATEGY

A. *Consequences of Respondeat Superior Liability*

A required element for a successful Title VII cause of action based upon hostile work environment is establishing respondeat superior liability.[218] However, no concrete standard defines employer liability in hostile work environment cases.[219] Though *Vinson* did not adopt strict liability,[220] courts should apply general agency principles in determining employer liability.[221] Under this theory, once a court finds an agency relationship, the court can hold the employer liable for an employee's harassing behavior.

Title VII does not promote a fault-based tort scheme; rather, it addresses the effects of adverse employment practices and not the motivation of co-workers or employers.[222] Because Title VII does not look at fault or intent,[223] employers need to implement reporting procedures as well as provide educational programs communicating to their employees that the employer will not tolerate harassment. Furthermore, since the Thomas-Hill hearings[224] and the Tailhook scandal,[225] public awareness of sexual

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fact finder must "walk a mile in the victim's shoes." *Id.*; *see also supra* notes 140-50 and accompanying text.

215. *See supra* notes 184-202 and accompanying text.

216. *See supra* notes 206 and accompanying text.

217. *See supra* notes 136-49 and accompanying text.

218. *See supra* note 37 and accompanying text.

219. The Supreme Court failed to adopt a bright-line standard regarding employer liability. *See* Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986). The Court stated, however, that it will not hold employers automatically liable for sexual harassment by supervisors and implied that it will determine employers' responsibility by agency principles. *Id.*; *e.g.*, Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987) (discussing principles determining employer liability and advocating a vicarious liability standard for *quid pro quo* harassment and harassment by supervisors and a traditional knowledge standard for harassment by co-employees).

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

221. The Court narrowly defeated strict liability. *Id.* Justices Brennan, Marshall, Blackmun and Stevens joined in the concurring opinion calling for strict liability on the part of employers. *Id.*

222. Ellison v. Brady, 942 F.2d 872, 880 (9th Cir. 1991) (citing Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 408 U.S. 957 (1972)); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (advocating that the absence of discriminatory intent does not redeem an otherwise unlawful employment practice).

223. *See supra* text accompanying notes 142-45.

224. For a discussion of the Thomas-Hill hearings, see Gloria Borger et al., *The Un-*

harassment is high.[226] This public awareness, coupled with the more plaintiff-friendly reasonable woman standard, necessitates that employers implement plans that address sexual harassment in the workplace.

The EEOC Guidelines provide a useful starting point with respect to prevention.[227] Utilizing the EEOC Guidelines, careful employers should adopt protective measures to insulate themselves from liability. Proper corrective action by employers will help avert liability for acts of supervisors,[228] co-employees[229] and non-employees.[230] Thus, an employer can minimize exposure to liability by making it clear that the employer will not tolerate sexual harassment and by taking effective measures to

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told Story, U.S. NEWS & WORLD REP., Oct. 12, 1992, at 28.

225. *See generally* Eloise Salholz, *Deepening Shame*, NEWSWEEK, Aug. 10, 1992, at 30; Eloise Salholz and Douglas Waller, *Tailhook: Scandal Time*, NEWSWEEK, July 6, 1992, at 40.

226. Since the Hill-Thomas hearings, complaints of sexual harassment have risen 45%. Claudia MacLachlan, *Harassment Charges Up One Year After Hill*, NAT'L L.J., Oct. 26, 1992, at 7. The EEOC was inundated with 9953 complaints in the year ending Oct. 1, an increase from 7407 in the previous year. *Id.* In the period between Oct. 1, 1991 and March 31, 1991, the EEOC received 2542 complaints, exactly 1000 more than the same six-month period the previous year. Randall Samson, *Bias Law Booms Huge Verdicts, New Laws Rock the Employment Litigation Base*, NAT'L L.J., July 27, 1992, at 1.

227. The Guidelines provides:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1991).

228. *Id.* § 1604.11(c). The *Guidelines* recommend strict liability for acts involving supervisors. *Id.* Under the Guidelines, an employer faces liability for any supervisory harassment regardless of policies forbidding such conduct, and regardless of whether the employer did know or should have known of the conduct. *Id.*

229. *Id.* § 1604.11(d). The EEOC does not recommend strict liability for non-supervisory employees. *See id.* Employer liability for harassing acts by co-workers results only when the plaintiff can show the employer knew or should have known of the alleged conduct and failed to take prompt and appropriate action. *Id.*

230. *Id.* § 1604.11(e). The employer may be held liable for sexual harassment by non-employees when the employer, as supervisor or other agent, knew or should have known of the conduct and failed to take immediate action. *Id.* The EEOC stresses consideration of the employers' control over the non-employee and other responsibility "the employer may have with respect to the conduct of such non-employee." *Id.*

remedy the situation. The following guidelines will help insulate employers from liability, as well as assist in the prevention of sexual harassment in the workplace.

B. An Employer's Guide to Preventing Sexual Harassment in the Workplace

1. Prepare and Circulate A Policy Condemning Sexual Harassment in the Workplace

The EEOC Guidelines contain pertinent, yet general, advice.[231] Accordingly, employers should formulate a thorough policy that specifically condemns sexual harassment. While the form need not be complex, the content should specifically address sexual harassment.[232] Furthermore, the employer must adequately circulate the policy.[233] For instance, the employer may post the policy in an area frequented by all employees, such as on a kitchen or break room refrigerator.[234] Employers could also publish the policy in employee manuals, handbooks, and newsletters.[235]

In addition to circulating the written policy, employers should conduct sexual harassment training seminars for supervisors and support staff.[236] Employee meetings or company retreats may serve as appropriate forums.[237] Employers can also effectively utilize union meetings and oth-

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231. *See id.*

232. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 72 (1986). The court indicated that defendant's nondiscriminatory guidelines were inadequate because they "did not address sexual harassment in particular." *Id.* at 72-73; *see also* David S. Machlowitz & Marilyn M. Machlowitz, *Preventing Sexual Harassment*, ABA JOURNAL, Oct. 1, 1987, at 78-80.

233. *See Meritor*, 477 U.S. at 72-73 (stating that because the employer failed to address sexual harassment with sufficient emphasis, the employer did not "alert" its employees to its "interest in correcting that form of discrimination").

234. A statement alerting employees that courts have consistently declared Title VII as prohibiting racial, ethnic, religious, or sexual harassment should suffice as adequate notice. Marvin F. Hill, Jr. & Curtiss K. Behrens, *Love in the Office: A Guide for Dealing with Sexual Harassment Under Title VII of the Civil Rights Act of 1964*, 30 DEPAUL L. REV. 581, 618 (1981).

235. *See generally* Lisa A. Blanchard, Note, *Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment*, 66 WASH. U. L.Q. 91, 108 (1988).

236. *Id. See also* Machlowitz & Machlowitz, *supra* note 230, at 80 (stressing that all employees, whether those in orientation or those attending a senior management retreat, should be made familiar with the company's stance on sexual harassment).

237. At staff meetings, the employer should inform the supervisory personnel that refraining from and preventing sexual harassment reduces the employer's risk of liability. Jay W. Waks & Michael G. Starr, *Sexual Harassment in the Workplace: Scope of Employer Liability*, 7 EMPLOYEE REL. L.J. 369, 384-85 (1981).

er unconventional avenues.[238]

2. Institute an Accessible Grievance Procedure

Along with educating the work force, the employer must institute a procedure allowing victimized employees to file complaints. Preferably, the procedure would allow someone other than an employee's direct supervisor to act as the employer liaison.[239] Ideally, a variety of individuals could receive complaints: an ombudsman, a member of the personnel office,[240] a female employee,[241] or any other neutral individual "not directly related to the complaining party's day-to-day employment."[242]

3. Investigate Complaints Promptly and Vigorously

When an employee lodges a complaint, the employer must conduct a thorough investigation. An apathetic response does not communicate a company's sincerity in eradicating sexual harassment.[243] The quicker the action, the greater the deterrence.[244] A three-step investigative approach is widely used and easy to follow.[245]

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238. For a broad discussion on ways employers can avoid liability, including a discussion of union involvement, see Paula A. Barran, *Sexual Harassment in the Workplace: Eliminating the Offensive Working Environment*, 7 L.E.R.C. MONOGRAPH SERIES 69 (University of Or. 1988); William L. Kandel, *Sexual Harassment: Persistent, Prevalent, but Preventable*, 14 EMPLOYEE REL. L.J. 439 (1988).

239. *See* Meritor Savs. Bank v. Vinson, 477 U.S. 57, 72-73 (1986) (noting that policy requiring employee to report harassing behavior to direct supervisor is ineffective since the supervisor is quite often the harasser); Kandel, *supra* note 237, at 445.

240. Jane L. Dolkart & E. Lynn Malchow, *Sexual Harassment in the Workplace: Expanding Remedies*, Fall 1987 TORT INS. L.J. 181, 192-93.

241. Blanchard, *supra* note 234, at 108. Having a female employee receive complaints would cater to the female employee, the most frequent victim of sexual harassment. *Id.*

242. Kandel, *supra* note 237, at 445-46. A neutral individual will not be as intimidating to the victim. *Id.* Also, the victim will fear repercussion less if the individual to whom the victim complains wields no such power. *Id.*

243. Machlowitz & Machlowitz, *supra* note 231, at 80.

244. *Id.*

245. Most lawyers specializing in the area of employment law advocate a similar method for an employer to use in investigating claims of sexual harassment. *E.g.*, Dolkart & Malchow, *supra* note 239, at 192-93; Fred W. Suggs, Jr., *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAW. 176 (1985); Machlowitz & Machlowitz, *supra* note 231, at 80.

a. Interview the complainant

The first step should be to interview the complaining employee and record the allegations in a signed writing.[246] The writing might include details of the alleged conduct, dates the conduct occurred, and the names of any witnesses who could corroborate the story. The EEOC neither advocates nor prohibits this signing requirement.[247] Nevertheless, it is useful because it narrows and delineates the investigation before any in-person investigations occur. The signing also "protects the [company] in the event of a defamation suit by the accused, and establishes . . . the seriousness of the procedure itself."[248]

Once the interviewing process begins, the employer should handle it delicately. An employer who shows concern to the harassed employee may find they can resolve the internal problems without intervention by third parties like the EEOC or California's Fair Employment and Housing Commission.[249] Also, because some employees may feel embarrassed to recount the events verbally, it may prove useful to have them write down a narrative describing the incident or have a member of the same sex interview the victimized employees.[250]

b. Interview witnesses

The next step of the process should include interviews with employees who may or may not have witnessed the alleged behavior. One problem of sexual harassment concerns the unavailability of witnesses.[251] Interviewing other employees enables the employer to gauge the credibility of the complainant and the complainee. This is important because claims for sexual harassment are ripe for abuse.[252] For example, a jilted lover

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246. Kandel, *supra* note 237, at 446. *See generally* Andrea B. Wapner, *Sexual Harassment in the Law Firm*, 16 LAW. PRACTICE MGMT. Sept. 16, 1990 at 42, 44 (forwarding an overall preventive plan employers should follow to avoid liability).

247. Kandel, *supra* note 237, at 446.

248. *Id.* An argument against a signing requirment is that it may hinder early reporting. *Id.* The requirement to sign or give an oath would have a "chilling effect" upon employees who already feel intimidated and afraid to come forward. *Id.*

249. Sheila J. Kuehl & Abby J. Leibman, *Sexual Harassment in the Workplace*, L.A. LAWYER, December 1990, at 25, 28, 43-4 (setting forth the similarities and differences between state and federal remedies for sexual harassment).

250. Blanchard, *supra* note 234, at 108.

251. Investigations will prove difficult because sexual harassment is not likely to occur in a group setting, but tends to take place in a closed office or deserted store room. Suggs, *supra* note 244, at 180.

252. *See generally id.* at 181 (providing a brief discussion regarding ripeness for abuse in the sexual harassment context and how allowing flirtations to continue is an invitation for lawsuits); Machlowitz & Machlowitz, *supra* note 231, at 78-79 (noting

might file a complaint as a means of revenge.[253] Potential witnesses and other members of the work force also can provide useful insight when determining the pervasiveness of the alleged harassment.[254]

c. Interview the alleged harasser

Finally, the employer should interview the alleged harasser. The rights of these individuals must not be overlooked. The employer should never mete out discipline before giving the accused an opportunity to be heard.[255] If the accused harasser belongs to a union, a representative of the union should be present.[256]

3. Confidentiality in the Investigation Process

Confidentiality represents a concern for all parties involved: the harassed, the witnesses, other employees, and the accused. The employer must keep confidential files of the investigation. The investigation should proceed discreetly.[257] Furthermore, the employer should clearly prohibit retaliation for participating in the company's grievance process.To alleviate any misgivings employees or witnesses may have regarding their anonymity in the reporting process, employers should assure them that "the interview is being conducted in order to comply with the employer's responsibility under Title VII and related [state] statutes and that the

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that because "employers are so squeamish about [bad] publicity . . . an unscrupulous plaintiff can [prey upon this weakness], achieve a quick settlement and destroy another employee's career").

253. *E.g.*, Keppler v. Hinsdale Township High Sch., Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989) (illustrating an unfounded sexual harassment claim brought on account of a failed interpersonal relationship). To alleviate the possibility of a *Keppler* suit, the law firm of Paul, Hastings, Janofsky & Walker considered adopting a no-dating policy that would prohibit attorney's from dating one another or other employees. Deborah Squiers, *Firm's Pact Sheds Light on Harassment Policies*, 204 N.Y.L.J. 1 (1990). The firm declined to adopt the policy, finding it too difficult to enforce and overly intrusive of people's personal affairs. *Id.*

254. Suggs, *supra* note 244, at 180. Usually it is difficult to find witnesses to corroborate the alleged incidents. *Id.* When they are available and willing to come forward, their testimony is invaluable. *Id.*

255. *Id.*

256. Machlowitz & Machlowitz, *supra* note 231, at 80.

257. The likelihood of expensive litigation, bad publicity and lowered morale and productivity due to distractions caused by sexual harassment claims constitute reasons to advise companies to take a hard stance against sexual harassment. Suggs, *supra* note 244, at 181.

employer will, if at all possible, keep the employee's identity confidential."[258] Problems regarding confidentiality usually surface when an employer defends a suit brought by the terminated employee.[259]

4. Determine the Complaint's Validity

At the completion of the investigation process, the employer must determine the complaint's validity. Employers must carefully avoid premature conclusions. Usually the employer will have to make a veracity determination because cases will be replete with conflicting testimony. When this occurs, employers should follow the procedures normally employed in a typical disciplinary proceeding.[260]

If the employer believes the complaint is valid, the employer must then choose the appropriate sanction, as discussed below. If the complaint is not valid or otherwise inconclusive, some action may be appropriate depending on the type of personnel dispute involved. Where the investigation proves inconclusive on all grounds, the employer should notify separately the complainant and the accused that the employer conducted an investigation and did not reach any determinative holdings.[261] Additionally, the employers should reiterate the policy against sexual harassment to any employees involved in the proceeding. Employers should also communicate to the accused that the employer will not use the incident against them.[262] In appropriate circumstances, it may serve as future evidence if a later complaint is lodged.

5. Take Appropriate Remedial Action

Discharging the harasser might not be appropriate in all situations. The employer should "temper" the sanction in all but the most egregious of

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258. Barran, *supra* note 237, at 73; *see also* Kandel, *supra* note 237, at 446.

259. When employees are terminated for sexual harassment, the basis of the termination often becomes the subject of an unemployment compensation hearing, wrongful discharge lawsuit, or defamation actions. *Id.*; *see also* Miller v. Servicemaster by Rees, 1992 WL 282059 (Ariz. Ct. App.) (holding that "absent malice in fact or improper interference, workers can report alleged workplace sexual harassment without fear of liability" based on defamation or interference with a business relationship). *See generally* Richard A. DuRose, *Sexual harassment Turned on its Head: Dealing with Claims by the Accused Aggressor*, 32 FOR THE DEFENSE 2 (1990).

260. Sources of proof that an employer will use to determine a complaint's validity include credibility determinations based upon demeanor and past reputation, similarity in stories, and witnesses or other employees' observations. Kandel, *supra* note 237, at 449.

261. Barran, *supra* note 237, at 74.

262. Kandel, *supra* note 237, at 450.

cases.[263] Therefore, employers might have to use creativity to alleviate a hostile environment when correlating the sanction to the crime.

If an employee handbook or manual sets forth a disciplinary process to follow when addressing sexual harassment claims, the employer should heed the written direction. If the employer deviates from the proposed guidelines, the employer might invite breach of contract lawsuits.[264]

The employer may rectify less serious offenses with verbal or written reprimands or placement of the accused on probationary-type status. More serious conduct may require demotion or suspension. Certain offenders may deserve the most serious sanction of all, termination. In other circumstances, employers should not hesitate to institute creative solutions. The employer may simply transfer the offending employee. The offender may seek mandatory counseling as a practical solution. The employer may require the offender to attend training seminars, or even to organize such seminars for the company. In the appropriate cases, the guilty party also may contribute to the victim's monetary losses.[265]

6. Conduct an Exit Interview with the Complainant

Once they have exhausted the entire procedure, including sanctions, employers should confer with the complainant regarding the outcome of the process. The explanation need not be in full detail; informing the complainant that the employer investigated and remedied the situation will suffice.[266] Additionally, as part of this meeting, the employer should assure the employee that retaliation will not be tolerated.[267] Thus, if the employee encounters any adverse reactions from the disciplined employee or other co-workers, the employer should encourage the complainant to report the behavior to the proper individual.

VI. CONCLUSION

The women from Stroh Brewery have a long road ahead of them in pursuit of their Title VII claim of hostile work environment sexual ha-

263. Wapner, *supra* note 245, at 44.
264. Kandel, *supra* note 237, at 442; *see also* Suggs, *supra* note 244, at 180 (providing viable alternatives an employer can utilize when termination is not appropriate).
265. Wapner, *supra* note 245, at 44.
266. Kandel, *supra* note 237, at 450.
267. *Id.*

rassment. As of this writing, it has not been decided whether their grievances are reasonable. That is for the trier of fact to decide. One thing is certain: the adoption of the reasonable woman standard did not evolve overnight. The standard's very existence demonstrates that courts finally will recognize that women should participate on an equal footing with men in the workplace.

Does the reasonable woman/reasonable victim of the same sex as the plaintiff standard really change anything? Under the new standard, Title VII plaintiffs, like the women from Stroh Brewery, still will have to demonstrate that the conduct was sufficiently severe or pervasive to alter their conditions of employment. That much has not changed.

The new standard, though, unlike the reasonable person standard, unequivocally communicates that the particular victim is the main focus, whether male or female. This is the major change and precisely the point of the victim-/gender-conscious standard. Society must look at sexual harassment from the victim's eyes, not from the perpetrator's or society's. Therefore, neither men nor women will receive special treatment: they will receive equal treatment, in accordance with standards of reasonableness as defined by a woman as victim or a man as victim, respectively. Hopefully, application of this new standard, combined with employers' and society's greater awareness of sexual harassment, will help to finally eradicate sexual harassment of both women and men in the workplace.

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