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The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace

Bonnie B. Westman

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THE REASONABLE WOMAN STANDARD: PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE

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I. INTRODUCTION

Women are entering the workplace in ever increasing numbers.1 As a result of increased interaction among men and women in the workplace, the number of sexual harassment claims has risen dramatically.2 Women are most often the targets of sexual harassment.3 One primary reason for the pervasiveness of sexual harassment in the workplace is that men regard conduct, ranging from sexual innu-


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endo to sexual demands, differently than women.⁴ Conduct that many men view as ordinary and unobjectionable may offend a woman.⁵

The standard for evaluating the appropriateness of conduct in the workplace has been the "reasonable man standard," or more recently, the "reasonable person standard."⁶ The factfinder is asked to decide whether a reasonable person would consider the objectionable conduct sufficiently severe or pervasive to alter the condition of employment so as to create a hostile working environment.⁷

In 1991, the Ninth Circuit asserted that the reasonable woman standard should be applied in assessing conduct alleged in sexual harassment claims.⁸ A three-judge panel maintained that the court should focus on the perspective of the victim and evaluate the victim's perspective against a reasonable perspective of an individual of the same gender.⁹ The court's reasoning in support of the reasonable woman standard centered on the fundamental differences in

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Id. at 3.
3. Id. at 6.
5. See generally Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) [hereinafter MacKinnon, Sexual Harassment]; Jim Kennedy, *American Workplace Is Changed Forever*, S.F. CHRON., Oct. 21, 1991, at IB (reporting results of a California survey where "75 percent of men found sexual advances in the workplace to be flattering, while 75 percent of women found such advances offensive").

6. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 21 (1988). The standard was first articulated as a reasonable man standard, or a man of "ordinary prudence" in tort law. Courts recognized the original standard's overt sexism; therefore, generally courts now use the reasonable person standard. See also Paul, supra note 1, at 362 n.116. The reasonable person standard is nothing more than the reasonable man standard converted to nonsexist language.

7. EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1991); see also Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).

8. Ellison, 924 F.2d at 879.
9. Id. at 878. The court stated, "courts should consider the victim's perspective and not stereotyped notions of acceptable behavior." Id. (citing EEOC Compl. Man. (CCH) § 615, at 3242 (1988)). 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." Id. at 880.
perspectives of women and men.\textsuperscript{10}

This Note first examines the historical development of sexual harassment as a cause of action.\textsuperscript{11} Second, this Note discusses the concept of the reasonable woman and surveys recent cases expressly adopting the reasonable woman standard as a method of evaluating conduct in sexual harassment cases. Finally, this Note illustrates why adopting the reasonable woman standard will reduce sexual harassment and create greater equality in the workplace.

II. HISTORICAL PERSPECTIVE

A. Sexual Harassment as a Cause of Action

1. Title VII

Title VII of the Civil Rights Act of 1964\textsuperscript{12} was enacted in order to provide equal opportunity through the removal of artificial barriers to employment.\textsuperscript{13} In part, Title VII makes it unlawful 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 [her or] 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 [her or] his employees


\textsuperscript{11} The term sexual harassment was not commonly used until 1975 or 1976. MacKinnon, Sexual Harassment, supra note 5, at 27-28, 259 n.13. MacKinnon, a well-known feminist writer and activist, has been credited with popularizing the term, increasing the awareness of the problem, and inspiring changes in sexual discrimination law.


\textsuperscript{13} Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971); see also Abrams, supra note 4, at 1186 ("In the struggle to gain access to broader job opportunities, the primary litigation tool was Title VII . . . .").
... in any way which would deprive ... any individual of employment opportunities or otherwise adversely affect [her or] his status as an employee, because of such individual's race, color, religion, sex, or national origin.\textsuperscript{14} Congress added the word "sex" to Title VII as a last minute amendment on the floor of the House of Representatives.\textsuperscript{15} Therefore, there is virtually no legislative history to provide guidance to courts in interpreting the prohibition of sexual discrimination.\textsuperscript{16} Courts, however, have tended to interpret Title VII rather broadly.\textsuperscript{17}

2. Creation of the Equal Employment Opportunity Commission

Congress created the Equal Employment Opportunity Commission (EEOC) as the administrative body governing Title VII. The EEOC administers and enforces all federal laws prohibiting discrimination in the workplace.\textsuperscript{18} This authority includes investigating complaints of discrimination and then attempting conciliation. The EEOC has published \textit{Guidelines on Discrimination Because of Sex},\textsuperscript{19} which is considered an administrative interpretation 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 to guidance."\textsuperscript{20}

In 1980, the EEOC amended its \textit{Guidelines on Discrimination Because


\textsuperscript{15} The word "sex" was added by a floor amendment by Rep. Smith, an opponent of Title VII, on February 8, 1964. 110 CONG. REC. 2577-82, 2851 (1964).

\textsuperscript{16} See \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 64 (1986); \textit{Ellison v. Brady}, 924 F.2d 872, 875 (9th Cir. 1991); \textit{Rogers v. EEOC}, 454 F.2d 234, 238 (5th Cir. 1971) (stating that Congress chose not to enumerate specific discriminatory practices and, as such, its intention was to define discrimination as broadly as possible), \textit{cert. denied}, 406 U.S. 957 (1972). Judicial interpretation of the prohibition against sex discrimination has been largely a self-guided process, with almost no legislative history available to assist the courts. \textit{CONTE}, \textit{supra} note 2, at 12.

\textsuperscript{17} See \textit{Sprogis v. United Airlines, Inc.}, 444 F.2d 1194, 1198 (7th Cir. 1971) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

\textsuperscript{18} Paul, \textit{supra} note 1, at 334 n.6. The EEOC may bring a civil suit against an employer when it cannot otherwise resolve the issue. As an alternative, the EEOC may issue a "right to sue" letter to the complainant, who may then, in turn, pursue his or her complaint in the courts. See \textit{CONTE}, \textit{supra} note 2, at 13-14. The EEOC was created as a bipartisan commission with primary responsibility for the administration and enforcement of all federal laws prohibiting discrimination in employment.


These guidelines provide the following definition of sexual harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The amended guidelines helped solidify judicial acceptance of this cause of action. As a result, many more victims were encouraged to submit claims of sexual harassment. Today, sexual harassment
is a rapidly expanding area of the law.  

The EEOC has recognized two different forms of sexual harassment. In quid pro quo harassment cases, employers or direct supervisors condition tangible employment benefits on sexual favors. In hostile environment cases, tangible, economic benefits are unaffected, yet employees work in offensive or abusive environments.

Courts recognized quid pro quo cases as involving a loss of a tangible economic benefit. For example, a tangible benefit may include termination, transfer, delay or denial of job benefits, or adverse performance appraisals. In a typical quid pro quo case, a supervisor relies on his or her apparent or actual authority to extort some sort of sexual consideration from an employee.

Hostile environment cases are often called “absolute,” “intangible” or “non-economic” sexual harassment cases. Both the language of Title VII and the EEOC Guidelines fully support the idea that sexual harassment leading to non-economic injury may violate Title VII. In deciding that hostile environment harassment violates Title VII, the EEOC relied on a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.
The two forms of sexual harassment, quid pro quo and hostile environment, often occur simultaneously. For example, the failure to comply with sexual demands of an employer or co-worker may lead to the creation of a hostile or abusive environment in addition to a quid pro quo claim. As a result, most complaints allege both quid pro quo and hostile environment harassment.

The EEOC Guidelines also describe situations constituting sexual harassment in the workplace. Under the guidelines' broad definition of sexual harassment, a determination is made as to whether a type of conduct constitutes sexual harassment. Generally, the "Commission will look at the . . . totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." Several courts have recognized that not all conduct in the workplace may be described as sexual harassment within the meaning of Title VII, however, conduct which is sufficiently severe may be actionable. Today, most courts recognize that the EEOC Guidelines are an effective tool in analyzing sexual harassment claims and therefore accord them deference.

complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its clientele. Rogers was the seminal case on hostile work environment claims because the court recognized that Title VII protects both an employee's psychological and economic well-being from discrimination. Id. at 238-39.

34. See Conte, supra note 2, at 15.
35. See id.
36. See id. at 15-16 & n.29.
38. The EEOC Guidelines state:
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harrassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

41. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a degree to constitute sexual harassment within the meaning of Title VII); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).
43. See Conte, supra note 2, at 41-46.
3. Elements of a Sexual Harassment Claim

To prevail in a sexual harassment claim, either quid pro quo or hostile environment, a plaintiff must show that

(1) she [or he] belongs to a protected group, (2) she [or he] was subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a "term, condition, or privilege" of employment, and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.44

The element most often in dispute is whether the activities complained of are unwelcome or affect a term, condition or privilege of employment.45 The plaintiff must demonstrate that the unwelcome actions were "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."46 Conduct must be "unwelcome" in the sense that the employee did not invite or solicit it.47

Evidence provided by other employees that helps to establish a pattern or practice of sexual harassment is relevant to show a hostile work environment.48 Clearly, evidence of repeated abuse will help to bolster a plaintiff's claim;49 however, under certain circumstances, a finding of sexual harassment could result from "isolated, sporadic,

44. Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 n.3 (5th Cir. 1987); see also Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987); Jones v. Flagship Int'l, 793 F.2d 714, 721 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).
45. Moylan, 792 F.2d at 749.
46. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (holding that a female worker who received several "bizarre" love letters from male co-worker sufficiently demonstrated that the co-worker's conduct altered her work environment); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1988) (holding that verbal abuse and offensive touching by co-workers was sufficiently severe to alter conditions of employment within the meaning of Title VII); Katz v. Dole, 709 F.2d 251, 253-54 (4th Cir. 1983) (holding that repeated sexual slurs, insults, and propositions by male co-workers was sufficient to support the female air traffic controller's claim).
47. Moylan, 792 F.2d at 749.
48. See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415-16 (10th Cir. 1987); see also Jones, 793 F.2d at 721 n.7 (holding that incidents of sexual harassment reported by other females bear on plaintiff's claim only if there was evidence that incidents affected plaintiff's psychological well-being), cert. denied, 479 U.S. 1065 (1987).
49. "Although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident." King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (citation omitted); accord Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990); Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir. 1989).
or insulting incidents."\(^{50}\) Courts have also held that the requisite acts underlying sexual harassment claims need not be clearly sexual in nature.\(^{51}\) For example, "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."\(^{52}\)

The question of whether the employer knew or should have known of the alleged harassment and failed to take proper remedial action\(^ {53}\) is an issue often discussed by courts. In *Meritor Savings Bank v. Vinson*, however, the Supreme Court declined to announce a specific rule concerning employer liability under Title VII but suggested that courts look to agency principles for guidance.\(^ {54}\)

In situations of harassment by co-workers, the EEOC Guidelines impose a "constructive knowledge" standard on the employer.\(^ {55}\) When the allegations involve conduct of an agent or supervisor, however, the EEOC Guidelines recommend a standard of strict liability, irrespective of employee knowledge.\(^ {56}\)

Under the EEOC Guidelines, employer liability remains unclear and must be analyzed on a case by case basis.\(^ {57}\) Generally, an employer will not be held liable for sexual harassment by coworkers if reasonable actions are taken to end the harassment.\(^ {58}\) An important factor to consider is whether the employer had an effective internal complaint procedure.\(^ {59}\) Such grievance procedures to investigate and remedy difficult situations may lessen the hostility of the work environment.

\(^{50}\) Merriman, *supra* note 32, at 95.

\(^{51}\) See, e.g., *Hicks*, 833 F.2d at 1415 (holding that evidence of threats of physical violence and incidents of verbal abuse were properly considered).

\(^{52}\) *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).


\(^{54}\) *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). In determining an employer's liability for sexual harassment by an employee, the Supreme Court stated:

> While such common-law principals may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include "agent" of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

*Id.* (citing 42 U.S.C. § 2000e (b) (1988)).

\(^{55}\) EEOC Guidelines, 29 C.F.R. § 1604.11(d), (e) (1991).

\(^{56}\) *Id.* § 1604.11(c).

\(^{57}\) *Id.* § 1604.11(c). The EEOC agreed that employers should always be responsible for acts of quid pro quo sexual harassment. However, hostile environment claims must be evaluated on a case by case basis to determine if the employer knew, or should have known, about the conduct and was thus directly responsible. *Id.; see also Conte, supra* note 2, at 68.

\(^{58}\) See *Ellison v. Brady*, 924 F.2d 872, 881-82 (9th Cir. 1991).


In *Meritor Savings Bank v. Vinson*, the United States Supreme Court expressly recognized that sexual harassment constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The Court unanimously held that a hostile environment, as well as quid pro quo harassment, violates Title VII. The decision is important because the Court legitimized this area of the law for complainants and, for the first time, put employers on notice that unwelcome sexual conduct will not be tolerated in the workplace.

In *Meritor*, Mechelle Vinson brought an action against the bank and her supervisor, Sidney Taylor, alleging that, during her four years at the bank, she had been constantly harassed by Taylor in violation of Title VII. Vinson alleged that, shortly after she began working at the bank, Taylor began making repeated sexual advances toward her. After refusing initially, she submitted to Taylor's sexual advances because she feared dismissal. Vinson did not report the harassment to Taylor's supervisors because she was afraid of him. He had repeatedly threatened her life and forcibly raped her several times.

The Court concluded that Vinson's allegations contained not only excessive harassment but "criminal conduct of the most serious na-

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60. 477 U.S. 57 (1986).
61. Id. at 73. In 1985, Justice Clarence Thomas, then chairman of the EEOC, played a key role in urging the Reagan Administration to take a strong stand against sexual harassment in the workplace when the issue came before the United States Supreme Court. While federal law made clear that sexist behavior was illegal if it caused a victim to lose his or her job or a promotion, the Supreme Court had not ruled on whether sexual harassment alone violated antidiscrimination laws. Thomas compared forcing a woman to work in a hostile environment to "forcing a Jewish employee to work in an office covered with Nazi memorabilia." David G. Savage, *Thomas Urged Reagan Administration to Toughen Stand Against Harassment*, MPLS. STAR TRIB., Oct. 10, 1991, at 6A.
62. *Meritor*, 477 U.S. at 63-69. Justice Rehnquist wrote the opinion and was joined by Chief Justice Burger, Justices White, Powell, and O'Connor, with concurring opinions by Stevens and Marshall. Justice Marshall agreed with the majority concerning the legitimacy of a hostile environment claim but disagreed with the standard of liability applied to the employer. Id. at 74-78.
63. *Conde*, supra note 2, at 52.
65. Id. at 38. In addition to 40 to 50 instances of sexual intercourse, Vinson testified that Taylor fondled her breasts and buttocks in front of other employees, followed her into the women's room when she was there alone, exposed himself to her, and raped her several times. Id.
66. Id. at 38. Vinson also testified that Taylor touched and fondled other employees. Neither Vinson nor any other employees filed an internal complaint against Taylor. Id. at 38-39.
67. Id. at 38.
Mechelle Vinson’s allegations were “plainly sufficient” to state a claim for hostile environment harassment. The Court thoroughly discussed hostile environment sexual harassment claims, stating that the language of Title VII is not limited to “economic” or “tangible” forms of discrimination such as benefits and privileges. In doing so, the Court supported the EEOC guidelines which condemn offensive sexual conduct in the workplace regardless of whether a tangible job benefit is at issue.

B. Development of the Reasonable Woman Standard

The concept of a reasonable woman standard is not entirely new. In 1955, author A.P. Herbert wrote humorously on the subject of the reasonable woman. Herbert’s court of appeals in the fictional case of Fardell v. Potts announced that at common law, a reasonable woman does not exist. Others have since disagreed. The differences in male and female perspectives are often discussed in feminist jurisprudence literature. Feminist theory begins with the concept of patriarchy. Generally, feminists believe that men have had the bulk of power and have used that power to subordinate women.

Feminist writers have divided feminist legal literature into three approaches. The first approach focuses on formal equality for women. The goal of “first-phase feminism” is “the removal of legal

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69. Id.
70. Id. at 63-69.
71. Id. at 62-67.
72. See United States v. Sudden Change, 409 F.2d 734, 741 (2d Cir. 1969) (discussing district court’s use of reasonable woman standard in a suit against manufacturer of cosmetic product).
73. See A.P. Herbert, Uncommon Law 1-6 (1955). The judge in Fardell v. Potts found it difficult to apply the reasonable man standard to women. [M]y own researches incline me to agree, that in all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman. It was ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by law; that legally at least there is no reasonable woman, and that therefore in this case the learned judge should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman . . . .
74. See Bender, supra note 6, at 5.
75. For example, men created the American political system, under which women were unable to vote until 1920. Id. at 6 (citing U.S. Const. amend. XIX).
constraints on women and the acquisition of equal civil rights
designed to allow women to compete freely with men in the
marketplace."\textsuperscript{77}

Second-phase feminists attack the law’s claim of impartiality and
justice for all as “high-minded principles which legal men have em-
ployed as protective cover.”\textsuperscript{78} This approach defines the legal sys-
tem as a male view of society “which ignores and devalues the
priorities of women—those of human interdependence, human com-
passion and human need.”\textsuperscript{79}

Third-phase feminists believe that the law is male-dominated and
sex-biased.\textsuperscript{80} The male dominance, according to third-phase femi-
nists, is not uniform. The ideals which the law aspires to—namely
rational, logical, coherent, and autonomous rules—are largely
unachieved. The law is neither all pro-male nor anti-female, but,
rather, possesses irrationality, rationality, subjectiveness and objec-
tiveness in equal doses. “Vital dimensions of human existence, con-
ventionally associated with women, are missing from the law’s
depiction of itself.”\textsuperscript{81}

Also, third-phase feminists believe that the legal system reflects
the patriarchal social order, which is not entirely coherent. This so-
cial order classifies women as a subordinate sex.\textsuperscript{82}

According to Catherine MacKinnon, there are two paths to sexual
equality for women. The first path is for women to be the same as
men. This is termed “gender neutrality.”\textsuperscript{83} This path results in one
single, uniform standard, which completely discounts differences in
gender.

The second path is for women to be different from men. MacKin-
non calls this path the “special benefit rule” and suggests that it cre-
ates a second standard.\textsuperscript{84} The second path, namely the
“differences” path, “exists to value or compensate women for what
they are or have become distinctively as women.”\textsuperscript{85} MacKinnon ar-
gues that under the sameness path, men have essentially become the
measure of all things and women are evaluated according to their
correspondence with men. Under the differences path, women’s
perspectives are taken into account and, as a result, women are eval-
uated more fairly.\textsuperscript{86} To achieve equality between women and men in

\begin{itemize}
  \item \textsuperscript{77} Id. at 3.
  \item \textsuperscript{78} Id. at 7.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. at 12.
  \item \textsuperscript{81} Id. at 13.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} MacKinnon, Feminist Theory, supra note 10, at 221.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Feminists agree that, not only are there differences in perspectives between
\end{itemize}
the court system, courts must recognize that current standards are biased against women.\textsuperscript{87} Adopting a reasonable woman standard would effectively deal with this bias.

The reasonable woman standard is different from a reasonable person standard.\textsuperscript{88} Most courts today use a reasonable person standard,\textsuperscript{89} which evolved from the reasonable man standard.\textsuperscript{90} The change was an attempt to erase the sexism inherent in the term, but feminist scholars find that “changing the word without changing the underlying model” forces those who are different to conform to a male model of reasonableness.\textsuperscript{91} Thus, the reasonable woman standard approaches the law from the perspective of a woman, while the reasonable person standard largely accommodates only a man’s perspective.\textsuperscript{92}

An underlying assumption of the reasonable woman standard, and of feminism itself, is that women and men perceive actions differently. What may not be sexual harassment from the perspective of a man may be highly offensive and constitute sexual harassment from the perspective of a woman.\textsuperscript{93} The reasonable person standard considers men and women, but the perspectives of both sexes must be represented “in the very conception of what society is.”\textsuperscript{94} E. Wolgast, \textit{Equality and the Rights of Women} 158 (1980). In other words, true equality among the sexes will exist only when female perspectives “influence the operation and structure of all social, political and economic institutions.” Seidenfeld, \textit{supra} note 10, at 283; see also Abrams, \textit{supra} note 4, at 1181. Abrams argues that even successful attacks on the exclusion of women’s concerns have failed to enlighten society about the differences between men and women. The next step is to challenge the pervasive influence of male-centered norms by adopting new analytical tools.

\textsuperscript{87} See MacKinnon, \textit{Sexual Harassment}, \textit{supra} note 5, at 101-41. MacKinnon argues that equality efforts should focus on challenging male-biased standards. Other feminist writers agree. See Finley, \textit{supra} note 10, at 1143-63; Scales, \textit{Essay}, \textit{supra} note 10, at 1374-76, 1395-99. Scales argues that sexual equality concerns neither similarities nor differences between men and women but instead the relative power and social status of the sexes. Similarities and differences are only relevant insofar as they are used as vehicles to perpetuate the hierarchy. \textit{Id.} at 1390.

\textsuperscript{88} See Bender, \textit{supra} note 6, at 20-25.

\textsuperscript{89} See 57A Am. \textit{JUR. 2D Negligence} § 145 (1989).

\textsuperscript{90} In tort law, the standard was the reasonable man or man of ordinary prudence. See Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (C.P. 1837).

\textsuperscript{91} See Bender, \textit{supra} note 6, at 23-25. Although the language of tort law was “neutered, made ‘politically correct,’ and sensitized,” the content and character of the standard remained the same, and “encourages conformism and the suppression of different voices.” \textit{Id.} at 22-23.

\textsuperscript{92} Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).

\textsuperscript{93} Men and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them. For example, research reveals a near flip-flop of attitudes when both men and women were asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For women the proportions are reversed.
tains male-biased ideas of fairness. Cloaked in objectivity and rationality, the law purports to apply equally. Some feminists argue that objectivity in the law is not a reality.\textsuperscript{94} Rather, rationality and objectivity are methods of reasoning reflecting the male influence in the law.\textsuperscript{95} Author Ann Scales termed the male-biased standards "the tyranny of objectivity."\textsuperscript{96} As a result, where women differ from men, women cannot be judged by a standard containing male-biased notions of fairness.

The reasonable person standard tends to be descriptive. In other words, the standard reflects how people generally behave under particular circumstances. The reasonable person standard attempts to establish a universally applicable measure for conduct.\textsuperscript{97} The reasonable woman standard, on the other hand, appears prescriptive. However, it is actually descriptive. The reasonable woman standard reflects how reasonable women behave in the workplace. The reasonable woman standard is an attempt to reflect the feminine viewpoint as a basis for measuring conduct.\textsuperscript{98} For example, whether sexual harassment exists should depend on whether a reasonable woman would interpret the actions as sexual harassment. The standard may be slightly more discretionary, yet in cases of sexual harassment, the standard would yield a fairer result by taking into account concerns relevant to a woman that previously would not have been considered.

Arguably, some judges may be threatened by a standard which

\textsuperscript{94} NAFFINE, \textit{supra} note 76, at 12-19.
\textsuperscript{95} Scales, \textit{Essay, supra} note 10, at 1376-80.
\textsuperscript{96} Id. at 1376.
\textsuperscript{97} Id. at 20.
\textsuperscript{98} \textit{See Gilligan, supra} note 10, at 170. Gilligan states:

\begin{quote}
[Men] and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships. Because these languages share an overlapping moral vocabulary, they contain a propensity for systematic mistranslation, creating misunderstandings which impede communication and limit the potential for cooperation and care in relationships. . . .

As we have listened for centuries to the voices of men and theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak. Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection. The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation. By positing instead two different modes, we arrive at a more complex rendition of human experience which sees the truth of separation and attachment in the lives of women and men and recognizes how these truths are carried by different modes of language and thought.
\end{quote}

\textit{Id.} at 173-74.
could potentially be biased toward women.\footnote{99} These judges, however, must recognize that the law is presently biased toward men.\footnote{100} Today, the man’s norm still applies in most areas of the law.\footnote{101} This male norm contains attitudes of how women ought to act,\footnote{102} and is particularly inadequate in sexual harassment cases. Judicial wisdom has been described as a combination of a sense of current social values and healthy pragmatism.\footnote{103} Applying the reasonable woman standard in sexual harassment cases affords judges an opportunity to constructively utilize judicial wisdom and create a proper balance.

Today, women make up a significant percentage of the workforce. Yet little has been done to reduce discrimination in the workplace. Title VII and various state human rights acts have only just begun to help to provide relief from unfair, discriminatory practices. More tools are needed to help women achieve equal pay, equal consideration for advancement, and equal respect in the workplace. A primary reason for pervasive discrimination in the workplace is that many employers continue to play by the old rules. If courts provide new rules that reflect the reality of the workplace today, the goal of equality in the workplace will be furthered.

C. Applications of the Reasonable Woman Standard in Sexual Harassment Actions

Courts have applied the reasonable woman standard in several areas of law. The reasonable woman standard has been discussed in criminal law cases as it applies to the accused,\footnote{104} rather than to the victim, as in a sexual harassment case. For instance, a jury could take the sex of the accused into account in assessing what might reasonably cause her to lose her self-control.\footnote{105} The reasonable woman

\footnote{99} Id.
\footnote{100} See Martha T. McCluskey, Rethinking Equality and Difference: Disability Discrimination in Public Transportation, 97 Yale L.J. 863, 868-69 (1988). McCluskey writes that feminists have exposed many problems of prejudice against women that the legal system has largely ignored or condoned as completely natural, such as gender-bias in the courts and sexual harassment in the workplace. Judges need to recognize that norms are biased before changes can be made. Id.
\footnote{102} Id. at 12.
\footnote{103} Naffine, supra note 76, at 39-40 (discussing the myth of judicial neutrality).
\footnote{104} See State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977). In Wanrow, the court held that a female defendant’s right to equal protection of the laws was violated when, at the conclusion of her trial for homicide, the judge instructed the jury to evaluate her claim of self-defense in light of a reasonable man standard rather than a reasonable woman standard. Id. at 558-59.
\footnote{105} See M.J. Willoughby, Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?, 38 Kan. L. Rev. 169, 176 n.30 (1989) (discussing a reasonable woman’s perception of a threat and how her percep-
The reasonable woman standard has also been discussed as pertaining specifically to the element of force in rape cases.106

The reasonable woman standard has also been discussed in the area of torts.107 For example, in a medical malpractice case, a federal district court in Pennsylvania applied an objective reasonable woman standard.108 The court instructed the jury as to whether a reasonable woman, aware of all the possible risks and complications, would have consented to a hysterectomy.109 The reasonable woman standard also has been adopted by several circuits as the appropriate standard for judging gender-related conduct.110

1. Rabidue v. Osceola Refining Co.

In 1986, Judge Keith of the Sixth Circuit first discussed the reasonable woman standard as it pertains to sexual harassment in his vigorous dissent in Rabidue v. Osceola Refining Co.111 Vivienne Rabidue was discharged for job-related problems including her “irrascible and opinionated personality and her inability to work harmoniously with co-workers and customers.”112 The court found, however, that Rabidue’s supervisor was an extremely vulgar individual who “routinely referred to women as ‘cunt,’ ‘whores,’ ‘pussy,’ and ‘tits,’ ” and, on occasion, directed such obscenities to Rabidue.113 Despite these factual findings, the Sixth Circuit affirmed the district court’s conclu-
sion that the plaintiff had failed to prove that she had been the victim of hostile environment sexual harassment.\textsuperscript{114}

The majority in \textit{Rabidue} applied a reasonable person standard.\textsuperscript{115} The court stated that the supervisor's obscenities "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."\textsuperscript{116} Quoting the district court, the majority stated,

Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to... change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.\textsuperscript{117}

In dissent, Judge Keith argued that the reasonable person standard "fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."\textsuperscript{118} Judge Keith maintained that the court should adopt a reasonable woman standard which would allow courts to consider important sociological differences.\textsuperscript{119} Judge Keith further explained that, unless the reasonable woman standard is adopted, the defendants and the courts will be "permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."\textsuperscript{120} Judge Keith admitted that the plaintiff possessed undesirable personality traits, but that they were clearly no worse than those of her supervisor:

Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act. As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent.\textsuperscript{121}

2. Yates v. Avco Corp.

In 1987, a different panel of the Sixth Circuit expressly adopted one of the main arguments in Judge Keith’s dissent, “that sexual har-

\begin{thebibliography}{99}
\bibitem{114} Id. at 622, aff’d, 584 F. Supp. 419 (E.D. Mich. 1984).
\bibitem{115} Id. at 627.
\bibitem{116} Id. at 622.
\bibitem{117} Id. at 620-21 (quoting \textit{Rabidue}, 584 F. Supp. at 430).
\bibitem{118} Id. at 626 (Keith, J., dissenting) (citing Comment, \textit{Sexual Harassment Claims of Abusive Work Environment Under Title VII}, 97 \textsc{Harv. L. Rev.} 1449, 1451 (1984)).
\bibitem{119} Id. Judge Keith also noted that a reasonable woman standard would shield employers from the neurotic complainant. \textit{Id}.
\bibitem{120} Id. (citation omitted).
\bibitem{121} Id. at 626-27.
\end{thebibliography}
assent actions should be viewed from the victim's perspective."\(^{122}\)

In *Yates v. Avco Corp.*, two female plaintiffs were "bombarded" with unwelcome invitations for drinks and meals from the same supervisor, Sanders.\(^{123}\) Sanders discussed numerous personal matters, such as the lack of a sexual relationship with his wife, and made obscene references to parts of one plaintiff's body.\(^{124}\) The continued harassment not only tormented the two plaintiffs, Street and Mathis, but it created hostility between them and the other members of the department who resented the plaintiffs' familiarity with Sanders.\(^{125}\)

Under the circumstances in *Yates*, the Sixth Circuit found that a hostile and abusive environment existed, thus violating Title VII. The harassing conduct complained of in *Yates* was similar to the conduct alleged in *Rabidue*. Unlike the majority in *Rabidue*, however, the *Yates* court applied the reasonable woman standard in assessing the seriousness of the alleged conduct.\(^{126}\)

The *Yates* court found that, in a sexual harassment case involving a male supervisor's harassment of a female subordinate, the person standing in the shoes of the employee should be a reasonable woman.\(^{127}\) The court also acknowledged the fact that when a sexual harassment suit involves a male subordinate allegedly being harassed by a female supervisor, a "reasonable man" standard should apply. The court underscored the necessity of a gender-related standard stating, "men and women are vulnerable in different ways and offended by different behavior."\(^{128}\)

Since *Yates*, a number of other courts have discussed the reasonable woman standard briefly in evaluating the conduct of an alleged harasser.\(^{129}\)

3. Ellison v. Brady

In January, 1991, the Ninth Circuit focused on the reasonable wo-

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\(^{122}\) *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

\(^{123}\) *Id.* at 632.

\(^{124}\) *Id.* at 632. One plaintiff testified that Sanders "incessantly asked her to lunch, dinner and drinks, mentioned sleeping together on more than one occasion, tried to discuss his and her personal relationships and made frequent sexually suggestive comments." *Id.*

\(^{125}\) *Id.* *Both plaintiffs, Street and Mathis, took extended periods of sick leave in attempts to avoid the harassment. *Id.* at 632-33.*

\(^{126}\) *Id.* at 637.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 637 n.2.

man standard as the primary issue on appeal. In *Ellison v. Brady*, the Ninth Circuit discussed what test should be applied in determining whether conduct is sufficiently severe or pervasive to create a hostile working environment. The court, in effect, changed the standard in the Ninth Circuit from a reasonable person standard, with implied "stereotyped notions of acceptable behavior," to a reasonable woman standard.

Kerry Ellison worked as an agent for the Internal Revenue Service in San Mateo, California. A co-worker, Sterling Gray, repeatedly asked Ellison out and sent her several strange letters. Ellison, frightened and upset by Gray's advances, reported the incidents to her supervisor, Bonnie Miller. Miller discussed the situation with her supervisor and subsequently transferred Gray to the San Francisco office for a period of six months. Two months after Gray transferred to San Francisco, Miller wrote Ellison a letter stating that Gray would be returning to the San Mateo office. The letter stated that management decided to resolve Ellison's problem with a six-month separation, and that additional action would be taken if necessary.

When Gray returned, he sought joint counseling. He wrote Ellison another letter maintaining that he and Ellison had some type of

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130. 924 F.2d at 873.
131. *Id.* at 878 (citing EEOC Compl. Man. (CCH) § 615, ¶ 3112, C at 3242 (1988)).
132. *Id.* at 873-75. The first note Gray wrote to Ellison read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.* at 874. A few days later, Gray mailed Ellison a card and a typed, three-page letter which Ellison described as "twenty times, a hundred times weirder" than the prior note. *Id.* In part, Gray wrote:

I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O [sic] so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks. . . . I will [write] another letter in the near future. *Id.*

133. *Id.* Bonnie Miller was the supervisor to both Ellison and Gray. Ellison requested that Miller transfer either her or Gray to another location because she felt extremely uncomfortable working with him. *Id.*
134. *Id.* After discussing the problem with her supervisor, Miller had a counseling session with Gray. She told Gray that he was entitled to union representation, but stated that he must leave Ellison alone. Over the next few weeks Miller reminded Gray on several occasions not to make contact with Ellison in any way. *Id.*
135. Three weeks after being transferred, Gray filed union grievances requesting that he be returned to the San Mateo office. The IRS and the union agreed to his return, provided that he spend four more months in San Francisco and that he promise not to contact Ellison again. Miller wrote Ellison to inform her of the decision. *Id.*
After receiving Miller's letter, Ellison was "frantic" and filed a formal complaint with her employer alleging sexual harassment. The employer rejected Ellison's claim, finding that the complaint did not describe a pattern or practice of sexual harassment covered by EEOC regulations. Shortly thereafter, Ellison filed a complaint in federal district court alleging sexual harassment. The district court held that Kerry Ellison did not state a prima facie case of hostile environment sexual harassment. The Ninth Circuit reversed.

The opinion in Ellison suggested that a complete understanding of the victim's perspective required an evaluation of the different perspectives of men and women. Men tend to perceive certain forms of conduct to be perfectly legitimate, whereas a woman may find the same form of conduct objectionable. The court stated that a fairer outcome in these cases would be achieved if the trier of fact would assess the conduct of the alleged harasser against a reasonable woman standard.

The Ninth Circuit adopted the reasonable woman standard as a necessary step toward effective adjudication of sexual harassment claims under Title VII. The court adopted the perspective of a reasonable woman primarily because it believed "that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." The court's goal was to provide a gender-conscious examination of sexual harassment which would enable "women to participate in the workplace on equal footing with men."

In addition, the Ellison opinion cited prevention as the best way to

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136. Ellison, 924 F.2d at 874-75.
137. Id. at 874. The IRS employee investigating the complaint agreed with Bonnie Miller that Gray's conduct constituted sexual harassment. Id. at 875.
138. Id. After an appeal, the EEOC affirmed the Treasury Department's decision on another ground. The EEOC concluded that the agency had taken appropriate steps to prevent the repetition of Gray's conduct. Id.
139. Id.
140. Id. at 878.
141. Id.; see Schoenheider, supra note 39, at 1486. In the context of sexual harassment law, applying an objective standard of reasonableness would fail to account for the unequal relationship between the sexes, which gives rise to sexual harassment: Sex is peculiarly an area where a presumption of gender sameness, or judgments by men of woman, are not illuminating as standards for equal treatment, since to remind a man of his sexuality is to build his sense of potency, while for a man to remind a woman of hers is often experienced as intrusive, denigrating, and depotentiating.
142. Id. (quoting Mackinnon, Sexual Harassment, supra note 5, at 171).
143. Id. at 879.
144. Id. at 880.
145. Id. at 879.
eliminate sexual harassment in the workplace. The court urged employers to educate and sensitize their employees to reduce and eliminate conduct which a reasonable woman or victim would consider sexual harassment. The Ellison court stated, "When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged."


Lois Robinson, a female welder at Jacksonville Shipyards, sued her employers, alleging that they created and encouraged a sexually hostile and intimidating environment. Robinson claimed that pictures of women in various stages of undress, in addition to demeaning remarks from male employees and supervisors, constituted sexual harassment.

The district court held that Lois Robinson had supported her claim of a hostile work environment. The court found that Jacksonville Shipyard's management "condoned these displays and often had their own pictures." Several of the defendant managers testified that there was nothing wrong with pictures of naked or partially naked women posted in the workplace.

Robinson's testimony, on the other hand, illustrated how the pictures and comments created a "visual assault on the sensibilities of female workers at Jacksonville Shipyards that did not relent during working hours." The court focused on the different ways in which men and women perceive the same conduct and admitted expert testimony to prove the differences. The court held that the appropriate objective standard for judging gender-related conduct is the reasonable woman standard.

Several other federal district court cases have employed a reasonable woman standard to evaluate conduct in discrimination suits.

146. Id. at 880 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(f) (1991)).
147. Id.
148. Id. at 881.
150. Id.
151. Id. at 1491.
152. Id. at 1494. For example, one manager had been aware of the Playboy- and Penthouse-style pictures posted in the workplace which portrayed nude women for years, yet he refused to issue a policy prohibiting the display of such pictures. Id.
153. Id.
154. Id. at 1495.
155. Id. at 1502-09.
156. Id. at 1524. The court stated, "A reasonable woman would find that the working environment at [Jacksonville Shipyards, Inc.] was abusive." Id.
For example, in *Harris v. International Paper Co.*, a Maine federal district court stated, "the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment." The *Harris* court cited the reasonable woman standard as the appropriate standard in evaluating gender-related conduct.

C. Sexual Harassment Cases in the Eighth Circuit

1. Moylan v. Maries County

In 1986, the Eighth Circuit held, in *Moylan v. Maries County*, that a sexually hostile work environment violates Title VII. Prior to *Moylan v. Maries County*, the Eighth Circuit had not considered this issue. In the same opinion, the court relied on the five-part test for deciding hostile environment claims set forth in *Henson v. City of Dundee*. The court also relied heavily on the *Final Guidelines on Sexual Harassment in the Workplace*, issued by the EEOC in 1981.

The plaintiff, Charlotte Moylan, an ambulance dispatcher, filed an employment discrimination action against the sheriff and county.
Moylan testified that during her employment as a dispatcher in the Sheriff's office, Sheriff French made numerous sexual advances, which were neither solicited nor welcomed by her. The Eighth Circuit remanded the case to the district court for a determination of the plaintiff's hostile work environment claim, which had not been previously considered.

In Moylan, the Eighth Circuit stated that to violate Title VII, the alleged harassment must affect a "term, condition, or privilege of employment." Additionally, the court found that sexual harassment must be "sufficiently pervasive so as to alter the conditions of employment and create abusive working environment for a sexually hostile work environment" to violate Title VII. The Eighth Circuit stated that an employee who claims hostile environment sexual harassment must be able to show a practice or pattern of sustained and nontrivial harassing conduct. In evaluating the sexual harassment hostile environment claim in Moylan, the court stressed the importance of focusing on "the totality of the circumstances."


In 1988, the Eighth Circuit decided Hall v. Gus Construction Co. Gus Construction Co. and one of its foremen, John Mundorf, appealed a judgment imposing liability under Title VII and the Iowa Civil Rights Act. A group of female traffic controllers claimed that they were constructively discharged as a result of a hostile and abusive working environment and brought a civil rights claim against the road construction company and their supervisor.

In Hall, the Eighth Circuit held that verbal abuse and offensive touching by co-workers was "sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment" within the meaning of Title VII. The court applied the facts to the five-part test to make its determination. The court, for the first time, stated, "the predicate acts underlying a sexual har-

165. Id. at 747. Moylan alleged that the sheriff repeatedly came into her office during employee's hours and sexually harassed her by attempting to kiss her, to put his arms around her and to fondle her. Id. at 749.
166. Id. at 750.
167. Id. at 749.
168. Id. (quoting Henson v. City of Dundee, 682 F. 2d 897, 904 (11th Cir. 1982)).
169. Id. at 749-50. The court stated that single and isolated incidents of sexual harassment generally will not be sufficient to state a claim (citing Katz v. Dole, 709 F. 2d 251, 256 (4th Cir. 1983)).
170. 792 F.2d at 750 (citing Henson, 682 F.2d at 904).
171. 842 F.2d 1010 (8th Cir. 1988).
172. Id. at 1011.
173. Id. at 1012.
174. Id. at 1014-15.
The Eighth Circuit has continued to rely on the guidelines issued by the EEOC in more recent decisions. The Eighth Circuit has not specifically addressed the idea of a reasonable woman standard as it pertains to sexual harassment cases, however.


In 1991, a federal district court in Minnesota also adopted the reasonable woman standard. The court briefly discussed and then adopted the reasonable woman standard pursuant to an evaluation for class certification. Plaintiffs alleged discrimination on the basis of gender in violation of both Title VII and the Minnesota Human Rights Act. The court specifically rejected the defendant's argument that sexual harassment claims should not be addressed on a class-wide basis because reactions to profanity, pornography, or other potentially offensive material are highly individualized. The court found that the correct standard is whether a reasonable woman would find the work environment hostile. Jensen is the first federal district court case within the Eighth Circuit to adopt the reasonable woman standard.

III. THE EIGHTH CIRCUIT SHOULD ADOPT THE REASONABLE WOMAN STANDARD

Women are most often the victims of sexual harassment in the workplace. The Eighth Circuit should adopt the reasonable wo-

175. Id. at 1014 (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985)). The Eighth Circuit specifically adopted the rationale in McKinney, that "any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." McKinney, 765 F.2d at 1138.

The Hall court noted that the EEOC Guidelines define sexual harassment as explicit sexual behavior. The court also noted that the Guidelines do not rule out the consideration of other types of harassment. Hall, 842 F.2d at 1013-14.

176. See Bartunek v. Bubak, 941 F.2d 726 (8th Cir. 1991); Hawkins v. Hennepin Technical Ctr., 900 F.2d 153 (8th Cir. 1990); Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989); Jones v. Wesco Inv., Inc., 846 F.2d 1154 (8th Cir. 1988).


178. Id. at 662-63.


181. A survey of federal employees conducted in 1987 revealed that over 40% of female federal employees reported incidents of sexual harassment in 1987, about the same number as in 1980. In the same survey, only 14% of men surveyed reported incidents of harassment. Again, this is roughly the same number as in 1980. See Ellison v. Brady, 924 F.2d 872, 880 n.15 (9th Cir. 1991) (citing U.S. MERIT SYS. PRO-
man standard as a means of reducing sexual harassment and as an important step in creating greater equality in the workplace.

A. The Concept of the "Reasonable Woman"

One may ask, what is a reasonable woman? What are her expectations? Is the reasonable woman standard really necessary? When should the standard apply? Exactly how will a judge or jury apply the standard? Answers to some of these questions are addressed in the reasonable woman cases surveyed in this note. Yet, many of these questions deserve more attention to introduce the reasonable woman standard to lawyers and judges.

First, what is a reasonable woman, and what are her expectations? A reasonable woman could be described as a woman with reasonable expectations concerning what is appropriate and inappropriate, what is fair and unfair. The reasonable woman attempts to encompass that which is fair, proper, just, and suitable under the circumstances, while taking into consideration a backdrop of female life experiences. A reasonable woman has expectations of a tolerable, even pleasant work environment; equal pay for equal work; and opportunities for advancement based on merit.

The next question raised is whether the reasonable woman standard is really necessary? The answer to this question is yes, absolutely. If the Eighth Circuit adopts the reasonable woman standard as the appropriate standard, the court will evaluate the seriousness of the harasser's conduct by focusing on the female victim's perspective. This is likely to be more restrictive than a man's perspective. In doing so, the Eighth Circuit will be sending a message to employers that courts are taking an increasingly aggressive stance against sexual harassment in the workplace and that unwelcome sexual conduct will not be tolerated. Employers will be forced to listen to female victims and take their complaints seriously. As a result, the Eighth Circuit will further implement the promise of equal opportunity in the workplace as set forth in Title VII of the Civil Rights Act.182

Third, when should the reasonable woman standard apply? The reasonable woman standard should apply to all cases involving sexual harassment of women, regardless of circumstances concerning job type or salary level. One may argue that the reasonable woman standard is an "enlightened woman's standard" and should apply

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182. See Marlisa Vinciguerra, Note, The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment, 98 YALE L.J. 1717, 1737-38 (1989) (arguing that to fully implement the promise of Title VII, "the standards for assessing women's psychological harm due to harassment must begin to reflect women's sensitivity to behavior once condoned as acceptable").
only to cases involving well-educated female professionals. Reasoning in support of this argument suggests that women working in traditional, low-paying jobs have different expectations and more readily accept intolerable work conditions as a way of life. Such an argument fails to consider the fact that poorly educated, low-paid female workers are often the most vulnerable to various forms of discrimination on the job. Women who work in traditional low-paying jobs may have limited opportunities and may not be able to leave even the most intolerable work environment.

The bottom line is that explicit, degrading, objectionable, sexist behavior does not belong in any workplace, regardless of job type and salary level. The reasonable woman standard centers on the need to include a woman's perspective when evaluating whether particular workplace behavior amounts to harassment. The type of job or level of salary is irrelevant.

Finally, how will a judge or jury apply the standard? A judge or jury will ask the following question: would the actions of the defendant have affected the reasonable woman?\(^{183}\) The totality of the circumstances, as well as the perspective of the victim, must be taken into consideration. The plaintiff must establish that an objective standard of harm is satisfied.\(^{184}\) Because the reasonable woman standard is an objective one, employers should be protected from hypersensitive complainants.

**B. The Reasonable Person Standard Is No Longer Adequate**

The Eighth Circuit currently applies the EEOC reasonable person standard when determining whether harassment is sufficiently severe or pervasive to create a hostile environment. The EEOC states, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.\(^{185}\) Consideration should be given to the context in which the alleged harassment took place.

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The following example was given:

Charging Party alleges that her co-worker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The co-worker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.
The Guidelines also briefly mention Judge Keith’s dissent in *Rabidue v. Osceola Refining Co.*, stating that the reasonable person standard should consider the victim’s perspective and not stereotyped notions of acceptable behavior.186

The theoretically gender-neutral reasonable person standard adopted by the EEOC and the Eighth Circuit is no longer adequate.187 The reasonable person standard typifies a traditional, male-dominated workplace and is a product of a white, male judiciary.188 The surveyed cases demonstrate that traditional male standards, when applied to a set of facts involving a woman can potentially yield unfair, even ridiculous results.

Most courts apply the reasonable person standard rather than the reasonable man standard, yet the very concept of reasonableness rarely includes points of view other than male.189 Several commentators have argued that much of legal history has ignored “other” points of view in formulating a unitary standard of reasonableness, and that many “others” believe that there cannot be any one concept of reasonableness.190 Susan Estrich, Leslie Bender, and other commentators have expanded the idea of more than one standard of reasonableness into other areas of the law such as rape, negligence, and self-defense.191 Certainly, the same type of approach applies to sexual harassment cases.

One may argue that application of a reasonable woman standard could be difficult because acceptable workplace behaviors are not well defined. Arguably, a judge or jury could have some difficulty deciding whether or not a reasonable woman would be justified in viewing certain conduct as sexual harassment. Courts should focus on an objective woman’s perspective.

First, consider the workplace of today. In most offices, women work for men.192 Because men have historically dominated the labor market, the workplace overwhelmingly reflects values consistent with

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186. *Id.*


188. See Abrams, *supra* note 4, at 1203. “In evaluating [sexual harassment] claims, courts often must choose between the conflicting views of the alleged harassment. Because most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to accept the perspective of the employer.” *Id.*


190. *Id.*

191. *Id.* at 862; see generally Estrich, *supra* note 106; Bender, *supra* note 6.

192. Certainly many women work for women; however, men continue to dominate most upper-level management positions.
male roles and rewards masculine choices while ignoring and penalizing choices consistent with female roles. As one commentator suggests, a complex set of societal norms has "systematically devalued the choices, values, and behaviors of women that tend to be different from those of men." As a result of male control over most workplaces, male views of appropriate sexual behavior in the workplace remain the norm. A woman's complaint of sexual harassment is often not taken seriously and internal remedial procedures fail.

Second, when internal remedial measures fail to improve the work environment, a woman is forced to choose between tolerating a difficult and abusive situation or risking losing her job, salary, and future opportunities on the outcome of an unpredictable lawsuit. If a woman chooses to bring suit, the critical legal issue is whether the alleged conduct is sufficiently severe or pervasive to create "an intimidating, hostile, or offensive working environment." The Ninth Circuit has determined that a victim's perspective is paramount when deciding the issue. Thus, if the victim is a woman, the reasonable woman standard should be used. The primary thrust of the reasonable woman standard is to reduce, and not to reinforce the prevailing stereotypes and discriminatory practices which exist in the workplace.

The standard should be refined to reflect situations and viewpoints based on mutual experiences and common points of view. The reasonable woman standard shields women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct. Women generally hold more restrictive views of both the situation and the type of relationship in which sexual

194. Abrams, supra note 4, at 1185.
195. Abrams, supra note 4, at 1202-03.
conduct is appropriate. Although many women have positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make some women cautious of such encounters. Arguably, what may be sexual harassment to one woman may be innocent flirtation to another. However, the idea is to focus on what an objective, reasonable woman would believe under the circumstances. The standard is not intended to be descriptive of all women.

Cases which have employed the reasonable woman standard have, in effect, "expanded the interpretation of sexual harassment, which should make it easier for victims to prove prima facie claims." Arguably, by making it easier to bring a claim, the courts may be flooded with lawsuits alleging sexual harassment. However, the reasonable woman standard is not meant to protect or accommodate the "idiosyncratic concerns of the rare hyper-sensitive employee." Courts and commentators generally agree that Title VII should not be used as a vehicle to vindicate the petty slights of the oversensitive. Instead, the trier of fact should focus on what is reasonable under the circumstances, while at the same time, taking into account the perspective of the victim.

In addition, the EEOC guidelines may help to reduce or circumvent the potential for more sexual harassment lawsuits. The guidelines state that, in order to be actionable, sexual advances, requests for sexual favors, and other verbal or physical conduct must be severe enough to alter the conditions of the victim's employment and

199. See Ellison v. Brady, 924 F.2d 872, 879 n.9 (9th Cir. 1991) (citing Abrams, supra note 4, at 1205).
200. Abrams, supra note 4, at 1205. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels. . . . 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 . . . can be an anguishing experience.

Id.
202. Winterbauer, supra note 199, at 817-18. In discussing Ellison, Winterbauer points out that the district court applied the reasonable person standard and granted summary judgment to the employer. Id. The district court held that no reasonable juror could conclude that the alleged harassment would be sufficiently offensive to a reasonable person in the same circumstances. The Ninth Circuit, however, adopted the reasonable woman standard and reversed, concluding that the claim should not be dismissed. Id.
204. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); accord Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) (arguing for adoption of the reasonable woman standard).
create a hostile working environment. Courts are urged to consider the "totality of the circumstances, including the nature of the advances and the context in which the alleged incidents occurred."\(^{205}\) If these guidelines are followed, ultra-sensitive plaintiff cases will be dismissed early in the proceedings, and innocent defendants will not be penalized.

Opponents of the reasonable woman standard might argue that by creating a gender-specific standard, courts will be encouraging the creation of race-specific standards, religious-specific standards, and so on. Although this proposition may have some merit, the effect of creating race- or religion-based standards may be positive. For example, one court argued that to give full force to the differing perspectives which exist in society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment, and of white Americans and black Americans in the case of racial harassment.\(^{206}\)

The purpose in adopting the reasonable woman standard is to change and eliminate prevailing stereotypes in the workplace. Certainly the same type of analysis applies to race-related or religious-related conduct as well. As two commentators wrote: "there are many other points of view which have been invisible to most people because society treats today's norms as if they are the only norms."\(^{207}\)

**C. The Reasonable Woman Standard Would Create Greater Equality in the Workplace**

The principal litigation tool for broader job opportunities is Title VII of the Civil Rights Act. Title VII provides equal opportunity through the removal of artificial barriers to employment.\(^{208}\) As one court explained, the purpose of Title VII is to prevent the "perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."\(^{209}\) If courts continue to endorse a reasonable person standard in the assessment of alleged sexual harassment, courts risk the further entrenchment of stereotypical views of harassment in the workplace.\(^{210}\)

\(^{205}\) EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1991).
\(^{207}\) Linzer & Tidwell, supra note 189, at 861.
\(^{209}\) Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (holding that derogatory language directed at women and pornographic pictures of women serve as evidence of a hostile working environment).
\(^{210}\) Abrams, supra note 4, at 1202.
tion because of sex will remain largely unchecked and artificial boundaries preventing women from job promotions and better pay will remain unbroken. Title VII could be a useful tool in combatting sexual harassment, and would, in effect, make the workplace a more tolerable place for both men and women, but courts must change the way in which they evaluate the alleged conduct.211

Title VII presents an opportunity to redress the imbalance of control in the workplace, but its potential in the area of hostile environment sexual harassment law has been hampered by the lack of judicial enforcement.212 By defining sexual harassment as any conduct which a reasonable woman finds hostile or offensive, a woman’s opinion will carry equal weight. The reasonable woman standard does not establish a higher standard. Instead, it allows women to participate in the workplace on an equal footing with men.

The law is slowly catching up to the evolving social norms concerning women’s rights in the workplace, yet more work must be done. Many crucial changes still need to be made in order to reduce the pervasiveness of sexual harassment in the workplace and create greater equality for women. “Women who fought for access to jobs, property, and the political arena have discovered that increased access alone does not create conditions in which equality is possible.”213 Courts and society have only recently come to the realization that the white, male-dominated view of appropriate conduct in the workplace is not the only view.214

211. Id. at 1203 n.86.
212. Id.
213. Id. at 1184-85.
214. During the Clarence Thomas confirmation hearings, the public took a grim view of the way in which the all-male Senate Judiciary Committee handled Professor Anita Hill’s allegations of sexual harassment. “Hill’s allegations, and accusations that the [Senate] Judiciary Committee failed properly to investigate them, have brought to a boil anger about sexual harassment—and the silence that reinforces it.” Leslie Dreyfous, Women Coming Forward After Thomas Allegations, MPLS. STAR TRIB., Oct. 10, 1991, at 8A; see also Ellen Goodman, Her Word Deserves a Hearing, MPLS. STAR TRIB., Oct. 10, 1991, at 18A. “[L]ike businessmen running a private corporation, [the Senate Judiciary Committee] handled this ‘delicate matter’ discreetly, among their own kind. . . . It was her word versus his. They took his without hearing hers. They didn’t tell the rest of us.” Goodman, supra, at 18A.

Helen Norton, an attorney at the Women’s Legal Defense Fund in Washington, said that by initially downplaying Hill’s charges, senators were “furthering and legitimizing the all-too-common societal response of blaming the victim.” Beth Frerknig, Anita Hill Touches a Nerve, MPLS. STAR TRIB., Oct. 9, 1991, at 12A. Anna Quindlen, syndicated columnist for the New York Times, wrote:

One of the most difficult things about bringing sexual harassment charges is that it is usually one woman against the corporate power structure, against the boss who says she’s imagining things and a bulwark of male authority that surrounds him. David against the Goliaths. . . . Listen to us. To trivialize the allegations of [Anita Hill] by moving ahead without painstaking in-
The development and adoption of the reasonable woman standard is one small but important step toward reducing sexual harassment in the workplace and creating equality for women. Judge Keith's dissent in Rabidue, and Judge Breezer's majority opinion in Ellison, are excellent examples of an updated and enlightened approach to dealing with the issue of sexual harassment. These opinions reflect a growing trend among courts.

An analysis of the facts in any one of the cases surveyed suggests that the differences in perceptions among the alleged harassers and the female victim are dramatic. For example, if one were to analyze the facts in Ellison from the perspective of the alleged harasser's viewpoint, Sterling Gray could be characterized as a desperate man in love. By focusing on a male perspective, rather than the perspective of the victim, it is understandable that the district court characterized Gray's conduct as isolated and trivial. But to Kerry

vestigation sends a message: that no matter what we accomplish, we are still seen as oversensitive schoolgirls or duplicitous scorned women. Anna Quindlen, Lest It Trivialize Women, Senate Must Listen, MPLS. STAR TRIB., Oct. 10, 1991, at 19A.

215. For a specific commentary on the court's movement away from traditional, male-oriented philosophy, see Earnest Calderon, Two More Nails in the Coffin of Paternalism, ARIZ. ATT'Y, Sept. 28, 1991 at 14. Calderon suggests that the Ninth Circuit's decision in Ellison is a step in the direction towards equality in what has been a male-dominated business world. Id.


217. See Ellison, 924 F.2d at 880 ("Gray could be portrayed as a modern day Cyrano de Bergerac wishing no more than to woo Ellison with his words."); see also Suzanne Fields, When Suitors Lust for Suers, WASH. TIMES, Feb. 26, 1991, at 3G:

Pity poor Sterling Gray. If only he'd been born with a golden tongue, or a poet's soul, or the sensitive hands to wield a quill quivering with passion. . . . But Sterling Gray was merely a man of his times who had the misfortune to fall in love. He lacked the gift to rhapsodize with quick wit or savage charm. He was lost without a Cyrano de Bergerac to do the wooing for him. . . . Sterling Gray's sparks struck only wood in the heart of Miss Ellison, and the wood was wet. She went not to Cupid to complain, but, being a woman of her time, to a lawyer. With her fuses dormant, responding not at all to the electric pulses from the desk next to hers, she sued, charging sexual harassment.

Id. Fields' portrayal of Sterling Gray as a modern version of Cyrano de Bergerac may be comical to some, but not to all.

218. Ellison, 924 F.2d at 880.
Ellison, Gray's behavior was both disruptive and frightening, seriously affecting her ability to be productive on the job.

As a result of adopting the reasonable woman standard as the standard in assessing the pervasiveness of the conduct in a sexual harassment suit, working women will benefit. Victims of sexual harassment, like Kerry Ellison, will have recourse before productivity is affected. Employers will be encouraged to develop and implement effective methods of investigating claims. Judge Breezer, who wrote the majority opinion in *Ellison v. Brady*, stated that prevention is the best way to avoid sexual harassment in the workplace. Judge Breezer urged employers to “educate and sensitize their workforce” to eliminate conduct which a reasonable woman would consider offensive and discriminatory. Adopting a reasonable woman standard would send a message to employers to strengthen internal grievance procedures by making them more sensitive to women, more “women-friendly.” As a result, employers might take adequate action sooner and prevent the filing of a lawsuit.

Employers will be encouraged to include women as part of internal grievance procedures. On-the-job training programs can be implemented to inform and sensitize employees. Harassment, when it does occur, will be treated severely, with suspension, demotion or firing. Women, in turn, may be more willing to confront difficult behavior before it becomes intolerable. In instances where workplace behavior becomes intolerable, and a lawsuit must be filed, courts will adopt the perspective of the victim and thus make an informed decision. The purpose of Title VII, to knock down artificial barriers to employment opportunities such as promotions and better pay, will be furthered.

IV. Conclusion

A standard that supposedly treats men and women the same begs a question: The same as whom? The Eighth Circuit should adopt the reasonable woman standard as a means of reducing sexual harassment and as a small, but important, step in creating greater equality in the workplace. As a result of adopting the standard, the defense attorney will have to focus on the victim’s perspective and show that the plaintiff is not reasonable in her assessment of the situation in order to be successful. The defense attorney’s job will be more

219. *Id.*
220. *Id.* at 880.

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difficult. In an attempt to circumvent this problem, employers will more readily develop and adopt preventive programs to deal with the subtleties of sexual harassment. In turn, the workplace will become a more tolerant place for both men and women.

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