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## Reasonable Person versus Reasonable Woman: Does It Matter?

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# REASONABLE PERSON VERSUS REASONABLE WOMAN: DOES IT MATTER?

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## I. INTRODUCTION

In sexual harassment cases when determining whether a hostile work environment existed, traditionally a juror was instructed to evaluate the situation from the viewpoint of a reasonable person.<sup>1</sup> Due to the fact that this standard has been deemed, by some, to be harmful to women in its failure to fully incorporate experiences that are unique to women, the Circuit Court of Appeals for the Ninth Circuit instituted a new standard in the 1991 case *Ellison v. Brady*.<sup>2</sup>

In *Ellison*, for the first time a court evaluated the situation presented from the viewpoint of a reasonable woman.<sup>3</sup> The court adopted the reasonable woman standard over the reasonable person standard because if the court “only examined whether a reasonable person would engage in allegedly harassing conduct [it] would run the risk of reinforcing the prevailing level of discrimination.”<sup>4</sup> The court further explained that it preferred an analysis of harassment from the victim’s perspective, and that a comprehensive understanding of the woman’s view required an examination of the varying perspectives of men and women, because “[c]onduct that many men consider unobjectionable may offend many women.”<sup>5</sup> The court acknowledged the wide range of viewpoints among women as a group, but noted that women share common concerns that men

1. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993) (stating that Title VII bars conduct that would seriously affect a reasonable person).

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

3. *Id.* at 878.

4. *Id.*

5. *Id.*

do not similarly share.<sup>6</sup>

Although one author believes that the reasonable woman standard has been “snaking its way through our courts, legislatures, and administrative agencies” and will eventually be applied nationwide,<sup>7</sup> the U.S. Supreme Court has not resolved the debate over which standard is more appropriate. The petitioner in *Harris v. Forklift Systems*<sup>8</sup> rigorously argued that the appropriate standard to determine whether the harasser’s conduct is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment must be that of a “reasonable victim in the position of the plaintiff.”<sup>9</sup> In arguing against the reasonable person standard, the petitioner said:

[The reasonable person standard] requires employees to develop a high threshold tolerance for sexual abuse as a condition of employment because conduct of a sexual nature in the workplace is to be analyzed within the context of a larger society that “condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema, and in other public places.”<sup>10</sup>

In the petitioner’s view, when the Circuit Court of Appeals for the Sixth Circuit used the reasonable person standard in hostile work environment cases, the court accepted existing offensive sexual stereotypes as the norm.<sup>11</sup> The reasonable person standard does not account for the divergence between most women’s views of appropriate sexual conduct and the views of men.<sup>12</sup>

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6. *Id.* at 879.

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

7. Tamara Starr, *A Reasonable Woman*, 25 REASON 48, 48 (1994).

8. 510 U.S. 17 (1993).

9. Brief for Petitioner at 14, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168).

10. *Id.* at 17 (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986)).

11. *Id.*

12. *Id.*

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The petitioner in *Harris v. Forklift* proffered that a standard that considered objective factors of workplace behavior from the perspective of a “reasonable person in the position of the plaintiff” would also suffice.<sup>13</sup> The standard would accommodate both the interests of the employee who wants to work in a hostile-free environment, and the interests of the employer who does not want to be liable to a particular employee.<sup>14</sup> Again, the petitioner argued that the gender-neutral reasonable person standard “tends to systematically ignore the experience of women.”<sup>15</sup>

Despite the petitioner’s arguments, the Supreme Court failed to specifically address the standards offered.<sup>16</sup> Justice O’Connor, in writing for the majority, used the words “reasonable person” throughout the opinion.

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive—is beyond Title VII’s purview.

....

Certainly Title VII bars conduct that would seriously affect a *reasonable person’s* psychological well-being, but the statute is not limited to such conduct.

....

It suffices to prove that a *reasonable person* subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.<sup>17</sup>

To date, the U.S. Supreme Court has not commented on the legitimacy of the reasonable woman standard.

In *Oncala v. Sundowner Offshore Services*,<sup>18</sup> the Supreme Court ruled that sexual harassment “should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”<sup>19</sup> But this formulation leaves the issue unresolved

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13. *Id.* at 18.

14. Brief for Petitioner at 18, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168).

15. *Id.* at 19.

16. The Supreme Court’s opinion focused primarily on the District Court’s incorrect finding that unless a plaintiff proves psychological injury, a cause of action does not lie under Title VII. *Harris*, 510 U.S. at 21-22.

17. *Id.* at 21, 22, 25 (internal citation omitted) (emphasis added).

18. 523 U.S. 75, 82 (1998) (holding that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII”).

19. *Id.* at 81 (quoting *Harris*, 510 U.S. at 22).

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because “plaintiff’s position” could mean one of two things: (1) only the circumstances to which the plaintiff was exposed, or (2) those circumstances plus the plaintiff’s own gender. In fact, despite the espousal of the reasonable person standard, the Court called for “careful consideration of the social context in which particular behavior occurs and is experienced by its target.”<sup>20</sup> This directive implies a reasonable woman standard. Circuit Courts have rendered divergent responses as to the appropriateness of this standard.<sup>21</sup> Researchers have noted that the “current[ ] . . . debate about whether to use a reasonable person or a reasonable woman standard has not been resolved.”<sup>22</sup>

Since *Ellison*, the Third Circuit has followed the lead of the Ninth Circuit in adopting the reasonable woman standard. The Third Circuit has stated that “[a juror] must look at the evidence from the perspective of a reasonable woman’s reaction to a similar environment under similar circumstances.”<sup>23</sup> The Ninth Circuit has reaffirmed its holding that “the objective portion of the claim is evaluated from the perspective of whether a reasonable woman would find the work environment hostile or abusive.”<sup>24</sup> The remaining circuit courts use either the reasonable person<sup>25</sup> standard or the

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20. *Id.*

21. See *infra* notes 24-26 and accompanying text.

22. Carol L. Baird et al., *Gender Influence on Perceptions of Hostile Environment Sexual Harassment*, 77 PSYCHOL. REP. 79, 82 (1995).

23. *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 115-16 (3d Cir. 1999).

24. *Marconi v. Eldorado Resorts, LLC*, No. 99-15073, 2000 U.S. App. LEXIS 21701, at \*4 (9th Cir. Aug. 17, 2000). See also *Brooks v. City of San Mateo*, 229 F.3d 917, 926 (9th Cir. 2000) (“[W]e cannot say that a reasonable woman in [plaintiff’s] position would consider the terms and conditions of her employment altered by [her co-worker’s] actions.”).

25. *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (stating that that sexually objectionable conduct must be “both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive”); *Conner v. Schrader-Bridgeport Int’l, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) (determining that “the conduct must be so severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive”); *Shepherd v. Comptroller of Pub. Accounts of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999) (remarking that “the challenged conduct must be . . . objectively offensive, meaning that a reasonable person would find it hostile and abusive”); *Curry v. Nestle USA, Inc.*, No. 99-3877, 2000 U.S. App. LEXIS 18743, at \*16-17 (6th Cir. July 27, 2000) (holding that “all of the circumstances taken together [were] not sufficient to permit a rational trier of fact to conclude that a reasonable person would [have found] the harassment was sufficiently severe or pervasive to . . . create a hostile or abusive working environment”). In a case decided early this year, the Tenth Circuit stated that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” *Deflon v. Danka Corp. Inc.*, No. 99-2239, 2001 U.S. App. LEXIS 123, at \*18-19 (10th Cir. Jan. 5, 2001) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993)). The D.C. Circuit Court of Appeals,

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reasonable person/victim<sup>26</sup> standard.

The difference of opinion among the U.S. Circuit Courts of Appeal as to which standard is more appropriate—reasonable person or reasonable woman—is found in the academic literature. As recently as last year,<sup>27</sup> scholars have argued from both sides that one standard is better than the other.<sup>28</sup>

It is important to note that while the argument for a reasonable victim standard exists in both the social science and legal arenas, the authors have determined that reasonable victim is often used interchangeably with reasonable woman. Sometimes, a single opinion will use both terms to denote the same concept.<sup>29</sup> At other times, a single court will use the word “victim” in one opinion and

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in holding for the defendant, stated that “no reasonable person would have been affected by [the co-worker’s] intimidation tactics.” *Curry v. District of Columbia*, 195 F.3d 654, 666 (D.C. Cir. 1999).

26. *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73 (2d Cir. 2000) (holding that “[w]orking conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign”). The Seventh and Eighth Circuits have cited the U.S. Supreme Court: “a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Mosher v. Dollar Trees Stores, Inc.*, 240 F.3d 662, 668 (7th Cir. 2001) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)); *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1128 (8th Cir. 2000) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)). Per the Eleventh Circuit, “harassment is objectively severe and pervasive if a reasonable person in the plaintiff’s position would adjudge the harassment severe and pervasive.” *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000).

27. Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195 (2001).

28. See, e.g., B. W. WOLKINSON & R. N. BLOCK, *EMPLOYMENT LAW: THE WORKPLACE RIGHTS OF EMPLOYEES AND EMPLOYERS* 56 (1996); Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 773 (1993); Patricia J. Almony, *Ellison v. Brady: A Legal Compromise with Reality in Cases of Sexual Harassment*, 37 VILL. L. REV. 195, 198 (1992); Angela Baker, *The “Reasonable Woman” Standard Under Ellison v. Brady: Implications for Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. CORP. L. 691, 704 (1992); David I. Gedrose, *Workplace Sexual Harassment: The Ninth Circuit’s Reasonable Woman Standard and Employer Remedial Actions in Hostile Environment Claims Following Ellison v. Brady*, 28 WILLAMETTE L. REV. 151, 169-70 (1991); Susan Lain Haag, *The Reasonable Woman Standard: Perpetuating Sex Discrimination in the Workplace*, 5 U. FLA. J.L. & PUB. POL’Y, 329, 341 (1993); Melanie A. Meads, *Applying the Reasonable Woman Standard in Evaluating Sexual Harassment Claims: Is It Justified?*, 17 LAW & PSYCHOL. REV. 209, 221 (1993); Kathleen Nordin, *Ellison v. Brady: Is the Reasonable Woman Test the Solution to the Problem of How Best to Evaluate Hostile Environment Sexual Harassment Claims?*, 19 W. ST. U. L. REV. 607, 622 (1992); Starr, *supra* note 7, at 48.

29. See, e.g., *Ellison*, 924 F.2d at 879, 880. “The reasonable woman standard does not establish a higher level of protection for women than men.” *Id.* at 879 (emphasis added). “We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.” *Id.* at 880 (emphasis added).

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the word “woman” in another.<sup>30</sup> The authors of this Article accept the view that the terms are indeed interchangeable since in an overwhelming majority of these cases the victim is a woman. Therefore, the reader must be aware that the term “reasonable woman” as used in this paper incorporates the concept of the “reasonable victim” as well.

This Article attempts to determine whether the on-going debate is necessary. That is, does changing the standard even make a difference in a juror’s determination of hostile work environment sexual harassment? Does a mere semantic modification alter an individual’s perceptions so much as to affect whether s/he makes a finding of sexual harassment? If one’s perceptions are not apt to change because of the standard used, the on-going debate is moot. Part II of this Article provides background to sexual harassment law, including incident rates and the ramifications of sexually harassing behavior. Part III compares and contrasts the two standards used in determining hostile work environment sexual harassment: reasonable person versus reasonable woman. Part IV empirically analyzes individuals’ abilities to change perceptions of sexual harassment based on the standard used. Part V discusses the research results and suggests directions for future research.

## II. BACKGROUND OF SEXUAL HARASSMENT LAW

In the late 1990s, public attention was focused on the issue of sexual harassment because of allegations of harassment against prominent government figures, including the President of the United States. The media frenzy surrounding this issue<sup>31</sup> caused heightened

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30. Compare *Specht v. Dalton*, No. 97-56744, 1999 U.S. App. LEXIS 29795, at \*10 (9th Cir. Nov. 10, 1999) (stating that “[u]nder the reasonable victim standard, these circumstances taken together are more than sufficient to show a severe and pervasive hostile work environment in violation of Title VII”), with *Zelaya v. E. & W. Hotel Corp.*, No. 99-16179, 2001 U.S. App. LEXIS 3492, at \*3 (9th Cir. Mar. 5, 2001) (finding that “[t]he evidence presented by [plaintiff] was sufficient to establish a prima facie case of a hostile work environment because Asuncion’s repeated propositions were uninvited, unwelcome, and offensive to a reasonable woman”).

31. See, e.g., *CNN Today* (CNN television broadcast, Apr. 2, 1998) (during which Senator Arlen Specter stated: “The front pages today had all the stories [regarding President Clinton and Paula Jones] . . . I watched CNN last night. I couldn’t find out what was happening in the rest of the world. I don’t think there’s any way to stop the media frenzy over this.”); Jonathan Eaton, *Boss’s Insults Form of Sex Harassment*, *TORONTO STAR*, Jan. 20, 1997, at D2 (“A media frenzy developed in the United States last week as the Supreme Court heard arguments on whether former Arkansas state employee Paula Jones should be able to pursue a sexual harassment complaint against Bill Clinton while the President remains in office.”); Sarah M. Vargas, *Politics and Morality*, *ATLANTA J. & CONST.*, Jan. 26, 1998, at 10A (stating that the Supreme Court had made a mistake when it allowed the Paula Jones sexual harassment case to go forth while President Clinton was in office because, among many distractions, it

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public awareness of sexual harassment. As a result, sexual harassment is an increasingly legitimate and serious concern for corporations throughout the country, and is considered one of the most sensitive workplace issues.

#### A. Title VII

Sexual harassment is viewed as a form of sex discrimination which is a violation of Section 703 of Title VII of the Civil Rights Act of 1964.<sup>32</sup> Title VII provides: "It shall be an unlawful employment practice for an employer . . . 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."<sup>33</sup>

Although sexual harassment protection was recognized under Title VII in the mid-1970s, it was not until 1980 when the Equal Employment Opportunity Commission ("EEOC") issued its guidelines that the courts became more willing to recognize claims of sexual harassment.<sup>34</sup> The guidelines establish the criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment.<sup>35</sup> The guidelines also define circumstances under which an employer may be held liable, and suggest affirmative steps an employer should take to prevent sexual harassment.<sup>36</sup> "While not controlling upon the courts by reason of their authority, [the guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>37</sup>

Title VII does not proscribe all conduct of a sexual nature in the workplace. Only unwelcome sexual conduct that affects a term or condition of employment is prohibited.<sup>38</sup> Specifically, two types of sexual harassment are defined by the EEOC guidelines as being actionable under Section 703 of Title VII as forms of sex discrimination.<sup>39</sup> The first is quid pro quo harassment:<sup>40</sup>

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caused a media frenzy).

32. 42 U.S.C. § 2000e-2.

33. *Id.*

34. 29 C.F.R. § 1604.11(a) (1998).

35. *Id.*

36. *Id.*

37. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

38. 29 C.F.R. § 1604.11(a) (1998).

39. *Id.*

40. *Id.*

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Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.<sup>41</sup>

The first successful quid pro quo case was *Williams v. Saxbe*,<sup>42</sup> which, in holding for the plaintiff, found that retaliatory actions such as poor performance appraisals and undeserved reprimands had been taken against an employee for refusing unwanted sexual advances.<sup>43</sup> This was the first opinion holding sexual harassment to be a form of sex discrimination under Title VII.

The Court adopted the EEOC's guidelines in the 1986 case, *Meritor Savings Bank, FSB v. Vinson*.<sup>44</sup> In *Meritor*, a female bank employee, Vinson, was subjected to sexual harassment by a male supervisor.<sup>45</sup> Vinson described the following scenario: while out to dinner at her supervisor's invitation, he suggested they have sexual relations at a motel.<sup>46</sup> Initially, Vinson refused; however, she eventually agreed to his proposals for fear of losing her job.<sup>47</sup> Thereafter, Vinson's supervisor continually demanded sexual favors, usually while at the bank branch office.<sup>48</sup> She claimed that her supervisor followed her to the ladies' room and exposed himself, fondled her in front of other employees, and forcibly raped her on more than one occasion.<sup>49</sup> Vinson stated that she had sexual intercourse with her supervisor approximately forty or fifty times over the next several years.<sup>50</sup>

Respondent argued that because Vinson suffered no tangible loss of an "economic character," she was not protected under Title VII.<sup>51</sup> The Supreme Court rejected this argument and stated "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate

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41. *Id.* § 1604.11(a)(3) (1998).

42. 413 F. Supp. 654 (D.D.C. 1976).

43. *Id.* at 656.

44. 477 U.S. 57 (1986) (holding that hostile work environment can constitute a valid Title VII claim).

45. *Id.* at 60.

46. *Id.*

47. *Id.*

48. *Id.*

49. 477 U.S. at 60.

50. *Id.*

51. *Id.* at 64.

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treatment of men and women' in employment."<sup>52</sup> The Court concluded that a plaintiff may establish a sexual harassment violation based not only on an economic quid pro quo, but also a hostile or abusive working environment.<sup>53</sup> Therefore the second, and more subtle, form of sexual harassment protected under Title VII is hostile work environment harassment.<sup>54</sup>

The distinction between the two forms of sexual harassment is not always clear and the two forms can occur together.<sup>55</sup> Quid pro quo sexual harassment is easier to determine because it occurs when "sexual conduct is a condition of tangible employment benefits, including salary, promotion, and continued employment."<sup>56</sup> However, hostile work environment tends to be more controversial because it is based on one individual's perception of another's behavior.<sup>57</sup> The unique nature of hostile work environment sexual harassment may be attributed to the following: (a) "unlike other discriminatory behavior [hostile work environment sexual harassment] may be nearly indistinguishable from 'normal' social relations between men and women;" (b) the victim may not suffer any adverse employment or economic consequences; (c) "sexual and other discriminatory harassment frequently is practiced in violation of, rather than in compliance with, company policy;" and (d) harassers are acting in their own interest, not that of their employers.<sup>58</sup>

Several factors should be taken into consideration when evaluating whether behavior is pervasive enough to constitute a hostile environment. These factors include: (a) whether the conduct was verbal, physical, or both, (b) how frequently the conduct was repeated, (c) whether the conduct was hostile and patently offensive, (d) whether the alleged harasser was a co-worker or a supervisor, (e) whether others joined in perpetrating the harassment, and (f) whether the harassment was directed at more than one individual.<sup>59</sup>

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52. *Id.* (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 703, 707 n.13 (1978)).

53. *Id.* at 66.

54. 29 C.F.R. § 1604.11(a) (1998).

55. See, e.g., *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501 (11th Cir. 2000); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000).

56. See generally MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (5th ed. 2000).

57. Paula M. Popovich et al., *Perceptions of Sexual Harassment as a Function of Sex of Rater and Incident Form and Consequence*, 27 *SEX ROLES* 609, 609-10 (1992).

58. ZIMMER, *supra* note 56, at 549.

59. *Id.*

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No one factor controls the outcome of a sexual harassment case.<sup>60</sup> An assessment should be made based upon the totality of the circumstances.<sup>61</sup>

### B. Examining the Numbers

Statistics demonstrate the prevalence of sexual harassment in the workplace. The 1994 U.S. Merit Systems Protection Board study<sup>62</sup> found that 44% of women responding to its survey reported that they had experienced some form of unwelcome sexual attention during the previous two years.<sup>63</sup> Thirty-seven percent of women indicated that they had experienced unwanted sexual jokes, remarks, teasing, or questions; 4% of the female respondents reported actual or attempted rape or assault.<sup>64</sup> The primary targets of sexual harassment are coworkers rather than workers in a supervisory capacity.<sup>65</sup>

According to U.S. Equal Employment Opportunity Commission ("EEOC") statistics, the number of administrative charges made alleging sexual harassment under Title VII rose from 10,532 complaints in 1992 to 15,222 complaints in 1999.<sup>66</sup> Of the complainants in 1992, 90.9% were women; in 1999, 87.9% were women.<sup>67</sup> A survey conducted by the Society for Human Resource Management (SHRM), released on March 15, 1999, found that sexual harassment complaints are on the rise.<sup>68</sup> The survey, faxed to 2500 randomly selected SHRM members in October 1998, asked how many sexual harassment complaints their organizations received from employees, managers, vendors, and customers each year between January 1995 and September 1998.<sup>69</sup> The 469 respondents

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60. 29 C.F.R. § 1604.11(b) (1998).

61. *Id.*

62. U.S. MERIT SYSTEMS PROTECTION BOARD, REPORT ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, TRENDS, PROGRESS, CONTINUING CHALLENGES (1994). In the 1980s, Congress first asked the U.S. Merit Systems Protection Board ("MSPB") to study sexual harassment in the workplace. Two studies found that sexual harassment in federal offices was widely perceived to be a problem. The MSPB conducted a follow-up survey in April 1994. A questionnaire was sent to almost 13,200 federal employees; over 61% (8000 people) responded voluntarily and anonymously. *Id.* at 1-2.

63. *Id.* at viii.

64. *Id.*

65. *Id.* Seventy-seven percent of female respondents said they were sexually harassed by coworkers or other employees; 28% said they were sexually harassed by an immediate or higher level supervisor. *Id.*

66. SEXUAL HARASSMENT CHARGES, EEOC & FEPAs COMBINED: FY 1992–FY 1999.

67. *Id.*

68. EEOC COMPLIANCE MANUAL 1 (Apr. 29, 1999).

69. *Id.*

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(a 20% response rate) reported 1214 complaints of sexual harassment during the two-year, nine-month period.<sup>70</sup> Significantly, the reported incidences doubled between 1995 and 1998.<sup>71</sup> After investigation of the sexual harassment complaints, 65% were substantiated.<sup>72</sup>

### C. Ramifications of Sexual Harassment

Although sexual harassment is a troublesome issue because of its vague and ambiguous nature, it is a widespread problem with important consequences. For example, the U.S. Merit Systems Protection Board (MSPB) found that during a two-year period, the federal government incurred an estimated \$327 million in costs related to sexual harassment.<sup>73</sup> The \$327 million figure included the cost of "sick leave, job turnover, and productivity losses."<sup>74</sup>

Interference with an organization's efficient functioning has ramifications that can be detrimental to workers, their careers, and the organization itself.<sup>75</sup> A study conducted by Schneider, Swan, and Fitzgerald indicated that women who were sexually harassed, even to a small extent, were negatively impacted in their "psychological well-being, job attitudes, and work behaviors."<sup>76</sup> The researchers emphasized that low-levels of sexual harassment consisted primarily of sexist put-downs and offensive remarks.<sup>77</sup> The study also found that sexual harassment produced "higher levels of absenteeism, stronger turnover intentions . . . and more time thinking about leaving."<sup>78</sup> More pointedly, a 1991 report indicated that 90% of those who experience sexual harassment never report the incidents for fear of retaliation and loss of privacy.<sup>79</sup>

Aside from the federal government, sexual harassment lawsuits cost

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70. *Id.*

71. *Id.* Fifteen percent of the 1214 sexual harassment complaints were filed in 1995; 23% in 1996; 32% in 1997; and 30% in the first nine months of 1998. *Id.*

72. EEOC COMPLIANCE MANUAL 1 (Apr. 29, 1999).

73. U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 62, at viii.

74. *Id.*

75. Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 83 J. APPLIED PSYCHOL. 578, 586 (1997).

76. Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 412 (1997).

77. Fitzgerald et al., *supra* note 75, at 586.

78. *Id.*

79. 139 CONG. REC. E1941 (daily ed. Aug. 2, 1993) (statement of Hon. George Miller).

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public and private companies millions of dollars in damage awards and legal expenses. In August 1997, an American company paid \$9.5 million to settle a sexual harassment lawsuit filed by twenty-seven female employees.<sup>80</sup> A more recent case resulted in a jury award of \$21 million for one individual.<sup>81</sup> The plaintiff, whose co-workers urinated on her chair and left pornographic pictures in her workspace, filed five separate complaints with her supervisor.<sup>82</sup> Her complaints were never investigated and the employer allowed the harassment to continue even after she identified the harassers.<sup>83</sup> As a result, she received the largest sexual harassment award in the history of the state of Michigan.<sup>84</sup> In addition, under state law, interest accrues from the date a suit is filed and as a result the \$21 million decision actually resulted in a total of \$45 million in damages.<sup>85</sup>

Class action suits have also resulted in large damage awards for victims of sexual harassment. A suit brought on behalf of 138 current and former employees of the D.C. Department of Corrections resulted in an \$8.5 million settlement.<sup>86</sup> The defendant was also required to pay attorneys' fees, rehire employees who were fired in retaliation for their complaints, promote deserving employees, and establish a special inspector's office within the Corrections Department to investigate sexual harassment claims.<sup>87</sup> Clearly, at least from an economic standpoint, employers must realize that sexual harassment is a form of workplace discrimination requiring immediate attention.

#### D. Courts' Initial Responses

Before 1976, federal courts refused to recognize sexual harassment

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80. Amy Goldstein & Barbara Vobejda, *Companies, Courts Differ in Defining Harassment*, WASH. POST, Apr. 5, 1998, at A16; see also Shelia M. Poole, *Raft of Lawsuits Casts a Cloud over Waffle House Management; Culture of Denial? Owners of Chain Founded in Metro Atlanta Dispute Racial Bias, Sexual Harassment Claims*, ATLANTA J. & CONST., Apr. 23, 2000, at F1 ("In 1997, a federal judge in Dallas awarded \$8.1 million to a Waffle House personnel recruiter who sued for sexual harassment" after being subjected to lewd references to her breast size, a camera between her legs, and a supervisor who told recruits that their bonus would be a weekend in a hotel with her.).

81. Sheri Hall, *DCX Worker Wins \$21M in Lawsuit; Female Millwright at Plant Says Carmaker Ignored Complaints of Sexual Harassment*, DETROIT NEWS, July 20, 1999, at C1.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Bill Miller, *D.C. Sexual Harassment Lawsuit Settled*, WASH. POST, June 29, 1999, at B05.

87. *Id.*

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as a form of discrimination. For example, in *Corne v. Bausch and Lomb*,<sup>88</sup> two female clerical workers alleged that they were repeatedly sexually propositioned and molested by a supervisor.<sup>89</sup> The court denied relief for the plaintiffs, stating that the supervisor's conduct was "a proclivity, peculiarity, or mannerism" that "had no relationship to the nature of employment."<sup>90</sup> For fear of receiving a multitude of frivolous lawsuits, courts viewed sexual harassment as a personal matter.<sup>91</sup> Prior to 1976, alleged harassment was viewed by the courts as personality disputes between individuals, not as a social problem or form of employment discrimination.<sup>92</sup> However, in 1976, sexual harassment was finally identified as a cause of action under Title VII of the Civil Rights Act of 1964 in the case *Williams v. Saxbe*.<sup>93</sup> The court found that a supervisor's sexual advances toward a female employee were made because of her sex and therefore fell under the jurisdiction of Title VII.<sup>94</sup>

### III. REASONABLE PERSON VERSUS REASONABLE WOMAN

#### A. *The Reasonable Person*

Before the landmark case of *Ellison v. Brady*,<sup>95</sup> a hostile work environment sexual harassment case was typically evaluated from the objective standpoint of a reasonable person.<sup>96</sup> This standard was

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88. 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

89. *Id.* at 163 (interpreting Title VII and concluding that it did not encompass a remedy for sexual harassment).

90. *Id.* at 161.

91. Baker, *supra* note 28, at 693.

92. *Id.*

93. 413 F. Supp. 654 (D.D.C. 1976).

94. *Id.* at 656

95. 924 F.2d 872 (9th Cir. 1991).

96. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that "[t]o accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, . . . must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances."). Although one might think that the majority was advocating a reasonable victim standard, the dissent made it clear that this was not the majority's intent. Per the dissent, "[T]he reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men." *Id.* at 626 (Keith, J., dissenting). Emphasizing his point, Judge Keith further argued: "I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant." *Id.* Several post-*Rabidue* Sixth Circuit hostile environment cases relied on the reasonable victim perspective adopted by Judge Keith. See, e.g., *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (holding that sexual harassment should be viewed from the victim's perspective); *Davis v.*

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utilized to prevent hypersensitive employees from barraging the workplace and the courts with complaints.<sup>97</sup> The EEOC provides an example of the hypersensitive plaintiff:

Charging Party [sic] 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.<sup>98</sup>

A reasonable person would not consider the co-worker's invitations sexual in nature. Thus, per proponents of the reasonable person, the need for an objective standard is demonstrated.

### B. *The Reasonable Woman*

#### 1. *Social Science Research*

Because "women are disproportionately victims of . . . sexual assault," they may be more concerned about displays of sexual behavior at work.<sup>99</sup> The likelihood that a woman will be victimized during her lifetime is a one-fifth to one-eighth chance.<sup>100</sup> Often women face sexual violence in society in a way that men do not.<sup>101</sup> "As a result, even milder forms of harassment might be viewed by them as threatening because they could be seen as a prelude to sexual assault."<sup>102</sup> Since a sex-blind reasonable person standard might ignore the experiences of women, some courts have upheld the reasonable woman standard in order to evaluate hostile work environment harassment.<sup>103</sup> The traditionally employed reasonable

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Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1989) (ruling that a reasonable victim standard applies in racial harassment cases).

97. *Radtke v. Everett*, 501 N.W.2d 155, 165 (Mich. 1993) (noting a concern for what the court called the "hypersensitive plaintiff").

98. EEOC, NOTICE 915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT 14 (1990).

99. *Baker*, *supra* note 28, at 702.

100. MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 34-37 (noting that the reported statistics underestimate the problem of sexual violence against women). Estimates of the true rate of rape range from twice the official rate to twenty times as high. *Id.* at 32-33.

101. *Ellison*, 924 F.2d at 879 (reporting that a higher frequency of rape and sexual assault of women compared with men leads women to be more perceptive of threats of violence).

102. WOLKINSON & BLOCK, *supra* note 28, at 73.

103. Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual*

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person standard has been criticized as being prejudicial to women.<sup>104</sup>

“When applying this standard, courts may adopt societal norms which reflect sexual behavior that is acceptable to men but offensive to women.”<sup>105</sup> Utilizing a reasonable person standard in circumstances where harassment is the prevailing norm would perpetuate the discrimination because the background level of offensive conduct would be considered acceptable.<sup>106</sup>

There is an abundance of research investigating gender differences in interpreting sexual harassment. Some findings indicate that females exhibit lower thresholds for perceptions of sexual misconduct in the workplace.<sup>107</sup> That is, females are more likely than males to view a given behavior as sexual harassment.<sup>108</sup> Murrell and Dietz-Uhler extended this finding to discover that gender group identity also predicts attitudes toward sexual harassment.<sup>109</sup> Gowan and Zimmerman’s study suggests that women’s tendencies to perceive behaviors as more offensive than men carries over to

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*Harassment Law*, 42 DISSENT 48, 50 (1995) (recognizing that behavior that might not offend men may strongly offend women).

104. WOLKINSON & BLOCK, *supra* note 28, at 72.

105. *Id.*

106. Almony, *supra* note 28, at 198 (stating that a reasonable person in such an environment may not recognize an actionable claim for harassment because of the prevailing laws).

107. Carol A. Ford & Francisco J. Donis, *The Relationship Between Age and Gender in Workers’ Attitudes Toward Sexual Harassment*, 130 J. PSYCHOL. 627, 630 (1996) (suggesting that results correlate to the tendency that men are more likely to perpetrate the sexual harassment, with women in the role as victim of sexual harassment); see also Rick Garlick, *Male and Female Responses to Ambiguous Instructor Behaviors*, 30 SEX ROLES 135, 135 (1994) (suggesting that much behavior perceived by students to be harassing by professors resembles behavior that many professors apply to relate to students, with male students reporting significantly greater comfort with the behaviors than female students); Mary A. Gowan & Raymond A. Zimmerman, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL. 596, 613 (1996) (finding that females perceive ambiguous sexual behavior as more offensive than males); Frank E. Saal et al., *Friendly or Sexy? It May Depend on Whom You Ask*, 13 PSYCHOL. WOMEN Q. 263, 265 (1989) (referring to research demonstrating that women are more likely than men to view social interactions, jokes, gestures and the like as sexual harassment); Aron Saperstein et al., *Ideology or Experience: A Study of Sexual Harassment*, 32 SEX ROLES 835, 841 (1995) (suggesting that men become more, and women less, tolerant of sexual harassment after personally experiencing sexual harassment); R.A. Thacker & S.F. Gohmann, *Male/Female Differences in Perceptions and Effects of Hostile Environment Sexual Harassment: “Reasonable” Assumptions?*, 22 PUB. PERSONNEL MGMT., 461, 470 (1993) (reporting that use of a reasonable person standard would ignore the true effects of harassment within a hostile work environment).

108. WOLKINSON & BLOCK, *supra* note 28, at 73; see also Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 SEX ROLES 9, 10 (1986).

109. Audrey J. Murrell & Beth L. Dietz-Uhler, *Gender Identity and Adversarial Beliefs as Predictors of Attitudes Toward Sexual Harassment*, 17 PSYCHOL. WOMEN Q. 169, 174 (1993) (reporting that female students presented “more negative attitudes” about sexually harassing behaviors).

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influence whether individual jurors would vote for the plaintiff or for the defendant.<sup>110</sup> Thus, there are important implications for juries. Results in a classic study by Abbey indicated that men were more likely than women to perceive the world in sexual terms and to make more sexual judgments.<sup>111</sup> In 1997, Burgess and Borgida found differences in perceptions of men and women for hostile work environment sexual harassment, but not for sexual coercion or quid pro quo.<sup>112</sup> This finding was further substantiated in a 2001 meta-analysis.<sup>113</sup> In a study conducted by Baird et al. it was found that, on the whole, women rated hostile environment scenarios as more harassing than men.<sup>114</sup> The study used a seven-point scale for every scenario and found that on each of the thirty-four scenarios presented, the full range of the scale was used.<sup>115</sup> This implies that there is a definite lack of agreement between men and women regarding what constitutes sexual harassment, and also highlights the debate concerning the standard. Popovich et al. found that females perceived scenarios as “more negative, more likely to be considered . . . sexual harassment, and more likely to have an effect on the victim.”<sup>116</sup> According to one author, the differences found between the sexes is the most salient characteristic in determining what constitutes sexual harassment.<sup>117</sup>

While most research indicates a gender difference in perceptions of sexual harassment,<sup>118</sup> some researchers have found that there are

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110. Gowan & Zimmerman, *supra* note 107, at 613 (finding that female jurors who experienced sexual harassment are more likely to believe a plaintiff over a defendant when the case involves ambiguous sexual behavior).

111. Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 J. PERSONALITY & SOC. PSYCHOL. 830, 836 (1982) (suggesting that men “misperceive” friendly behavior as seduction).

112. Diana Burgess & Eugene Borgida, *Sexual Harassment: An Experimental Test of Sex-Role Spillover Theory*, 23 J. PERSONALITY & SOC. PSYCHOL. BULL. 63, 73 (1997) (stating that both sexes equally view sexual coercion as harassment).

113. M. Rotundo et al., *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED SOC. 914, 915 (2001) (suggesting that ambiguous behavior produces the greatest gender differences in perception).

114. Baird, *supra* note 22, at 73 (surveying 100 females and 98 male undergraduate students).

115. *Id.* at 82.

116. Popovich, *supra* note 57, at 622.

117. John B. Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 SEX ROLES 273, 276 (1985) (citing research that concludes men are less likely than women to see certain social behaviors as sexual harassment, further believe that workplace harassment is “greatly exaggerated, and are less likely to report when men are sexually harassed”).

118. Rotundo et al., *supra* note 113, at 915 (suggesting that the degree of gender difference depends upon the harassing behavior being considered).

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little or no gender differences.<sup>119</sup> For example, one study demonstrated that there are actually more similarities than differences between men and women in their definitions of harassment,<sup>120</sup> and that differences in perceptions between groups of men and women are sometimes smaller than differences within groups.<sup>121</sup> Gutek noted that “although many studies reported significant differences in the way men and women define sexual harassment, the finding is not by any means universal.”<sup>122</sup> The gender of an individual *does* affect a person’s definition of sexual harassment, but the effect is usually small and may occur only when the harassment scenario is ambiguous due to scant or conflicting information.<sup>123</sup> In sum, Gutek argues that gender does not account for much of the variance when perceiving sexual harassment. Both characteristics of the behavior and characteristics of the situation often account for more of the variance.<sup>124</sup>

Similarly, Katz, Hannon, and Whitten’s results indicated no gender differences in sexual harassment perceptions when a man was the perpetrator and a woman was the victim.<sup>125</sup> However, “when a woman was the perpetrator and a man was the victim,” gender differences were found.<sup>126</sup> “[M]en rated harassment by a wom[a]n less negatively.”<sup>127</sup> In contrast, in a study utilizing high school students as participants, there was little perceived difference in harassing

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119. See, e.g., Thomas W. Dougherty et al., *Factors Affecting Perceptions of Workplace Harassment*, 17 J. ORG. BEH. 489, 489 (1996) (finding no male-female differences in evaluations of potentially sexually harassing behavior); Margaret S. Stockdale & Alan Vaux, *What Sexual Harassment Experiences Lead Respondents to Being Sexually Harassed? A Secondary Analysis of a University Survey*, 42 J. VOCATIONAL BEHAV. 221, 232 (1993) (finding that contrary to predictions, the probability of acknowledging harassment was unrelated to gender).

120. Patricia A. Frazier et al., *Social Science Research Lay Definitions of Sexual Harassment*, 51 J. SOC. ISSUES 21, 34 (1995) (calling for a “meta-analysis” of the research in this area to quantify actual differences).

121. Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151, 155 (1995) (finding that when sexual harassment is mild or ambiguous, the “within-sex variation” is sometimes greater than the “between-sex variation”).

122. Barbara A. Gutek, *How Subjective is Sexual Harassment? An Examination on Rater Effects*, 17 BASIC & APPLIED SOC. PSYCHOL. 447, 457 (1995).

123. *Id.* at 459.

124. *Id.* at 454.

125. Roger C. Katz et al., *Effects of Gender and Situation on the Perception of Sexual Harassment*, 34 SEX ROLES 35, 40 (1996) (contradicting studies that show women to be less tolerant of sexual harassment than men when men are the perpetrators).

126. *Id.* at 41 (suggesting that men view harassment simply as flirtation).

127. *Id.* (reporting that men may not think it possible for a woman to sexually harass a man, possibly due to the lack of publicity about female harassers as opposed to male harassers).

behavior committed by a male toward a female from that of a female toward a male.<sup>128</sup> On a parallel note, it has been argued that simple biology does not determine “modes of knowing.”<sup>129</sup>

Just as being female does not guarantee transformative perceptions of sexual conduct in the workplace, being male does not exclude the possibility of having, or developing, them. If perceptions of sexual harassment do not depend solely on biology, life experience, or gender-specific modes of knowing, but rather on varied sources of information regarding women’s inequality . . . then they can be cultivated in a range of women and men.<sup>130</sup>

Thus, simply being a man does not limit one to thinking only like a man. Within-sex variation in interpreting sexual harassment is as likely, if not more likely, to be greater than between-sex variation. However, when gender differences occur they are most likely to surface in ambiguous cases, the very cases that are most likely to go before a jury. If the harassment is clearly trivial, the case is not likely to be pursued in court; if the harassment is severe, the case is likely to be settled before reaching trial.

## 2. Case Law

In the landmark case, *Ellison v. Brady*,<sup>131</sup> the Ninth Circuit was the first to utilize the reasonable woman standard. The dissent in *Rabidue v. Osceola Refining*<sup>132</sup> is partially responsible for the switch in standards.<sup>133</sup> In *Rabidue*, the plaintiff was subjected to regular verbal harassment by a male co-worker.<sup>134</sup> He called her a “fat-ass” and made statements such as: “all that bitch needs is a good lay.”<sup>135</sup> Posters of naked women (at least one with violent imagery) were displayed in the workplace.<sup>136</sup> The majority opined that the

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128. Carren Loreda et al., *Judgments and Definitions of Sexual Harassment by High School Students*, 32 *SEX ROLES* 29, 44 (1995) (suggesting that high school students are more sensitive to sexual harassment issues, possibly because of extensive media coverage of the harms caused by harassment).

129. Abrams, *supra* note 103, at 52; *see also* Starr, *supra* note 7, at 49 (arguing that “[s]ince the only characteristic that absolutely distinguishes a woman from a genderless ‘person’ is the fact of her sex, we have to infer that a woman’s reasonableness is fused to her physiology.”).

130. Abrams, *supra* note 103, at 52.

131. 924 F.2d 872 (9th Cir. 1991).

132. 805 F.2d 611 (6th Cir. 1986).

133. *Ellison*, 924 F.2d at 879 (implementing the reasonable woman standard as set out in *Rabidue* by Judge Keith in his dissent); *see also Rabidue*, 805 F.2d at 626.

134. *Rabidue*, 805 F.2d at 615.

135. *Id.* at 624.

136. *Id.* at 615.

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obscenities did not seriously affect the psyches of either the plaintiff or her female co-workers and that the pornography had only a minimal effect on the work environment.<sup>137</sup> According to the court, prevalence of pornography in society undercut the plaintiff's claim that pornographic displays could interfere with a comfortable work environment.<sup>138</sup> Additionally, the plaintiff voluntarily chose to work in an environment "replete with humor."<sup>139</sup> Osceola was not found liable.<sup>140</sup>

The dissent in *Rabidue* was vigorous. Judge Keith found "anti-female animus" on the above facts,<sup>141</sup> and called for a better standard which he named the "reasonable victim."<sup>142</sup> This "simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant."<sup>143</sup> He felt that the reasonable person standard forced the "sustain[ing of] ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."<sup>144</sup>

Based on the dissent in *Rabidue* and the social science research that has found gender differences in interpretations of sexual harassment, the court in *Ellison vs. Brady* recast the objective test used to determine the existence of a hostile work environment. Co-workers Kerry Ellison and Sterling Gray, who were not friends and did not work closely with each other, worked as revenue agents for the Internal Revenue Service (IRS) in San Mateo, California.<sup>145</sup> Although revenue agents usually went to lunch together in groups, Gray asked Ellison to lunch one day when nobody else was in the office,<sup>146</sup> and she accepted.<sup>147</sup> Gray soon began to bother Ellison by asking unnecessary questions and annoying her at her desk.<sup>148</sup> Gray asked her to go out for a drink after work, but she declined.<sup>149</sup> Although she suggested to Gray that they might have lunch the following week,

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137. *Id.* at 622.

138. *Id.*

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

140. *Id.* at 622.

141. *Id.* at 623 (Keith, J., dissenting).

142. *Id.* at 626 (quoting Keith, J., dissenting).

143. *Id.*

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

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

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

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Ellison took steps to avoid being in the office during lunch hours.<sup>150</sup> Ellison received a note from Gray, that 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."<sup>151</sup> Realizing that Gray wrote the note, Ellison left the room but Gray followed her into the hallway. He demanded that she speak to him, but she fled the building.<sup>152</sup> Ellison showed the note to their supervisor who said that the note was "sexual harassment."<sup>153</sup> However, Ellison told the supervisor, that she would handle the situation herself.<sup>154</sup> She asked a male co-worker to tell Gray that she was not interested in him.<sup>155</sup>

Ellison went to St. Louis for a four-week training program.<sup>156</sup> While she was away, she received a three-page letter from Gray which she described as "twenty times, a hundred times weirder" than his prior note.<sup>157</sup> The letter stated: "I know that you are worth knowing with or without sex . . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from so far away."<sup>158</sup> Gray said that he would write again "in the near future."<sup>159</sup> Ellison thought Gray was "crazy."<sup>160</sup> She spoke with their supervisor once again and requested to be transferred, or that Gray be transferred.<sup>161</sup> The supervisor responded by ordering Gray to leave Ellison alone.<sup>162</sup> Ellison returned to San Mateo, while the IRS transferred Gray to another office in San Francisco.<sup>163</sup> Ellison received word that management had resolved the problem; she and Gray were to be separated for six months.<sup>164</sup> Management assured her that additional measures would be taken if the need arose.<sup>165</sup>

Gray soon filed a union grievance and asked to return to San

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

151. *Id.* at 874.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Ellison*, 924 F.2d at 874.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Ellison*, 924 F.2d at 874.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Ellison*, 924 F.2d at 874.

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Mateo.<sup>166</sup> He was transferred back to San Mateo after spending four more months in San Francisco.<sup>167</sup> Ellison was “frantic” upon learning of Gray’s return to San Mateo.<sup>168</sup> She filed a complaint of sexual harassment with her employer and received permission to transfer temporarily when Gray arrived back from San Francisco.<sup>169</sup>

The IRS ultimately rejected Ellison’s complaint,<sup>170</sup> since the Service did not perceive Gray’s conduct to be a “pattern or practice” as defined by EEOC guidelines.<sup>171</sup> The EEOC affirmed this decision on the ground that Ellison’s employer had taken adequate measures to prevent the conduct from recurring.<sup>172</sup> Ellison filed suit against the IRS for sexual harassment,<sup>173</sup> and the IRS moved for summary judgment on the ground that Ellison had failed to state a prima facie case.<sup>174</sup> The district court granted the motion and Ellison appealed.<sup>175</sup>

The ninth circuit ultimately ruled in favor of Ellison<sup>176</sup> by judging the circumstances from the perspective of the victim using the “reasonable woman standard.”<sup>177</sup> Ellison’s reaction was compared with that of a “reasonable woman” in Ellison’s same situation. The court ordered that this standard be used in place of the reasonable person standard because the reasonable person tends to be male-biased and may ignore the experiences of women.<sup>178</sup> With its use of the reasonable woman standard, the court attempted to ensure that all jurors, male and female, were using the same standard in evaluating alleged potential sexual harassment.<sup>179</sup> Ideally, the reasonable woman standard would ensure that men and women will evaluate the same facts from the same perspective.

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Ellison*, 924 F.2d at 874.

171. *Id.* at 875.

172. *Id.*

173. *Id.*

174. *Id.* A prima facie case has been made where a party is able to produce enough evidence to allow the fact-trier to infer the fact at issue and to rule in the party’s favor. See BLACK’S LAW DICTIONARY (7<sup>th</sup> ed. 1999).

175. *Ellison*, 924 F.2d at 875.

176. *Id.* at 884.

177. *Id.* at 878.

178. *Id.*

179. Gutek, *supra* note 122, at 450.

*C. The Two Sides of the Reasonable Woman Argument*

The reasonable woman standard is said to be more appropriate for two reasons: (i) the EEOC states that courts should adopt a victim's perspective, and (ii) using a reasonable person standard may run the risk of reinforcing the prevailing levels of discrimination.<sup>180</sup> "Gender is a factor in one's experiences and one's perceptions. Therefore, testing the severity or offensiveness of alleged behavior by asking whether a genderless reasonable person would find them so will systematically lead to error in this context, error that will disadvantage female victims."<sup>181</sup> According to Abrams, the purpose of using the reasonable woman standard is two-fold: (a) to reiterate the gender element of sexual harassment and prevent resorting to common sense that often leads to a maintenance of the status quo; and (b) to allow women to participate on equal footing in the workplace by acknowledging their unique perspective.<sup>182</sup> According to Almony, "[T]he standard recognizes the different perspectives of men and women and attempts to reconcile them with legal reality."<sup>183</sup>

Some courts are reluctant to adopt the reasonable woman standard for various reasons. One reason is that it may cause problems for the traditional jury system in that male judges and jurors may not have the ability to apply a reasonable woman standard.<sup>184</sup> Male jurors and judges may have difficulty in determining harassing behavior from a woman's point of view. If this is the case, Gedrose asks: "[S]hould male judges and jurors be excluded from evaluating sexual harassment cases because of their 'male bias'? In the alternative, should they have internalized the standards of the *Ellison* majority?"<sup>185</sup> Other researchers question whether it is fair to hold men—as perpetrators—to a standard of conduct that, because they are men, they might not be able to fully comprehend or appreciate.<sup>186</sup> Also, it is difficult to determine what evidence should be presented to jurors

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180. EEOC: POLICY GUIDANCE ON SEXUAL HARASSMENT, 8 FAIR EMPL. PRAC. MAN. (BNA) 405:6681, 6690 (Mar. 19, 1990). See also Kerns, *supra* note 27, at 215 (reiterating that the reasonable person standard fails to recognize gender differences for perceiving sexual harassment and further stating that "the reasonable person cannot properly determine when unwelcome conduct is 'severe or pervasive' enough to constitute sexual harassment because it [sic] fails to consider that, to date, men and women are not on a level economic or professional playing field.").

181. Baker, *supra* note 28, at 704.

182. Abrams, *supra* note 103, at 51.

183. Almony, *supra* note 28, at 221.

184. *Id.* at 219-20. See also Gedrose, *supra* note 28, at 169.

185. Gedrose, *supra* note 28, at 169.

186. Adler & Pierce, *supra* note 28, at 773.

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to enlighten them as to what a reasonable woman might experience.<sup>187</sup> According to Gedrose and Almony, this concern is more problematic than utilizing the gender neutral objective.<sup>188</sup>

Gedrose proposed another argument. Although the court in *Ellison v. Brady* provided a justification for adopting a reasonable woman test, the court did not indicate why female plaintiffs in sexual harassment cases should be treated differently than other distinct groups whose cases are judged under the reasonable person standard.<sup>189</sup> Opponents have argued that there could be an infinite number or “reasonable” standards, including distinctions for race and religion.<sup>190</sup> Given the notion that a “reasonable black person” could exist, Meads explained:

Any white individual should be offended by the proposition that he or she is incapable of determining when racial harassment has occurred, simply because he or she happens to be white and the victim happens to be black . . . . Similarly, any male should be offended that some women and judges do not think that he is capable of deciding the merits of a sexual harassment claim objectively and fairly, simply because the victim in most sexual harassment claims is a woman . . . . People are different from one another. Some are utterly ignorant of sexism and racism. Nevertheless, these truths do not justify the creation and application of different standards of “reasonableness.”<sup>191</sup>

Others have recognized that the utilization of the reasonable woman standard may perpetuate, rather than diminish, discrimination.<sup>192</sup> The new standard may, in fact, do more harm than

187. Starr, *supra* note 7, at 49.

188. Almony, *supra* note 28, at 221 (questioning whether asking male jurors to adopt the reasonable woman standard will work as a practical matter because they may not be able to view the harassment through the eyes of a woman; thus, the cost of litigation since experts would be needed to establish what a reasonable woman would think in a given situation). The additional cost could potentially result in a reduction in the number of women who seek relief from sexual harassment. *See also* Gedrose, *supra* note 28, at 169-70 (questioning whether male judges and jurors should be excluded from evaluating sexual harassment claims because of their inherent male bias).

189. Gedrose, *supra* note 28, at 170.

190. Meads, *supra* note 28, at 220.

191. *Id.* at 221.

192. Haag, *supra* note 28, at 341 (postulating that the reasonable woman standard may illuminate the notion that women’s responses are strictly female, rather than normal, human experience); Meads, *supra* note 28, at 219 (arguing that “the reasonable woman standard does imply that women are so different from men that they need special standards of ‘reasonableness’ which give them heightened protection in the workplace.”); Nordin, *supra* note 28, at 622 (cautioning that inherent in the reasonable woman standard is the assumption that there is a “particular bundle of traits called femininity and many theorists would question the wisdom of accepting that assumption without further analysis”).

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good to the female gender's pursuit of equal and decent treatment. Wolkinson lists four ways in which this may occur.<sup>193</sup> First, judges and jurors may impart their own personal biases concerning the types of women who work in traditionally male-dominated jobs.<sup>194</sup> Second, the standard may limit certain occupational opportunities for females because the separate standard may suggest that women are delicate, and therefore less capable than men.<sup>195</sup> Third, the standard may be used to reinforce stereotypes of the intuitive or irrational woman.<sup>196</sup> This is often the feminist argument against the standard. Those who argue against the standard because of the possibility of increased discrimination want to eliminate sex-based generalizations by getting rid of the reasonable woman standard, which establishes a higher level of protection for women than men.<sup>197</sup> Finally, the perspective taken when employing the reasonable woman standard will be that of the privileged, white, middle-class woman, thereby ignoring the experiences of other classes and ethnicities.<sup>198</sup> It is problematic to assume that all races, ethnicities, and religions, will respond similarly to issues of sexual harassment.<sup>199</sup>

#### D. Current Status on the Standard Argument

In the future, courts should consult social science research for help in determining whether perceptions of sexual harassment vary significantly from males to females. However, to date, social science research has significant deficiencies. These deficiencies include a number of methodological limitations, such as: insufficient descriptions of items (respondents are unable to properly make interpretations), the sacrificing of external validity for attention to internal validity,<sup>200</sup> non-representative sampling,<sup>201</sup> indecisive

193. WOLKINSON & BLOCK, *supra* note 28, at 127.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. WOLKINSON & BLOCK, *supra* note 28, at 127.

199. Russell Eisenman, *Dubious Value of the "Reasonable Woman" Standard in Understanding Sexual Harassment*, 77 PSYCHOL. REP. 1145, 1146 (1995) (recognizing a problem in defining a "reasonable woman" because definitions will differ between cultures, social classes, etc.); Tracy L. Treger, *The Reasonable Woman? Unreasonable!!!*, 14 WHITTIER L. REV. 675, 676 (1993) (noting the danger in assuming that all women perceive similar instances of sexual harassment because of differences in race, culture, and sexual orientation).

200. Gutek & O'Connor, *supra* note 121, at 160.

201. Gutek, *supra* note 122, at 452; John B. Pryor & Kathleen McKinney, *Research on Sexual Harassment: Lingering Issues and Future Directions*, 17 BASIC & APPLIED SOC. PSYCHOL. 605, 609 (1995).

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operationalization of sexual harassment,<sup>202</sup> over-reliance on self-administered questionnaires or pencil-and-paper/vignette experiments,<sup>203</sup> and failure to employ sufficient control variables.<sup>204</sup> According to Wilson, one of the major downfalls of social science research concerning perceptions of sexual harassment is that it has not been conducted with the intention of assisting the legal system.<sup>205</sup>

#### E. *The Debate May Be Moot*

Do people actually change their perspectives when given different standards? Is a juror actually capable of changing his or her perspective? Kerns suggests that judges and jurors should be “trusted” to apply the reasonable woman standard.<sup>206</sup> Kerns, in fact, raises the question of whether the reasonable woman standard will cause male judges and jurors to change their perspective to that of a woman.<sup>207</sup> While she provides feminist logic to conclude “yes” to her own question,<sup>208</sup> Kerns cites no empirical basis on which to conclude male judges and jurors are capable of changing perspectives. The standard debate is moot if individuals are incapable of changing their perspectives. For example, a study conducted by Davis investigated the construct of perspective-taking and found that males were less able to adopt another’s point of view.<sup>209</sup> More pointedly, the existing literature to date fails to address the appropriate research questions to determine the practical utility of the reasonable person versus the reasonable woman debate. That is, when men are faced with the task

202. Frazier et al., *supra* note 120, at 26.

203. Pryor & McKinney, *supra* note 201, at 609.

204. *Id.*

205. D.L. Wilson, *Perceptual Differences Between Males and Females Concerning Sexually Harassing Behavior: Fact or Fiction?* (1996) (unpublished Ph.D. dissertation from DISSERTATION ABSTRACTS INT’L 57-05A, 2211).

206. Kerns, *supra* note 27, at 226 (explaining that because judges and jurors are trusted each day to make legal determinations based on the facts at hand, they are also capable of applying the reasonable woman standard to their decision making process).

207. *Id.* at 227 (concluding that because of the male bias inherent in the law, male judges and jurors can only make objective decisions about issues such as sexual harassment by considering the situation from the woman’s perspective).

208. *Id.* at 226-27 (indicating that because male judges and jurors apply the perspective of the reasonable male to sexual harassment cases, it can be inferred that they can also apply the reasonable woman standard to such cases).

209. Mark H. Davis, *A Multidimensional Approach to Individual Differences in Empathy 4* (1980) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with authors). Davis’s research tested male and female perspective-taking ability, assessing spontaneous attempts to adopt perspectives of other people and see things from their point of view. *Id.* Results indicated significantly higher scores for women in their ability to view things from another’s perspective. *Id.*

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of applying the reasonable woman standard, they are confronted with the problem of “reconciling their view of reality with that of a reasonable woman.”<sup>210</sup> The feasibility of this occurring is questionable because if it is not possible for males to reconcile their views, the reasonable woman standard would not be expected to change juror decisions.

In a study conducted by Wiener, the researchers attempted to determine if the particular standard adopted (person vs. woman) would have any influence on judgments of harassment.<sup>211</sup> There were some cases in which the standard impacted the process by which jurors made decisions, but there was no evidence that final judgments were different as a function of the standard adopted.<sup>212</sup> As Wiener noted, these results provide interesting legal implications: it is unlikely that jurors will actually change their perceptions of sexual harassment as the result of a court invoking a particular standard.<sup>213</sup>

#### IV. EMPIRICAL RESEARCH

While research has suggested gender differences in perceptions of a “hostile” environment, that is, women are more likely than men to find a hostile work environment,<sup>214</sup> the literature to date has not examined an individual’s ability to change his or her perception of sexual harassment simply because of the standard invoked. Our research extends the Wiener study,<sup>215</sup> which explained the differences in perceptions of sexual harassment by examining information between groups.<sup>216</sup> A within-subjects study addressing this issue has

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210. Almony, *supra* note 28, at 219-20.

211. Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 LAW & HUM. BEHAV. 263, 266-67 (1995).

212. *Id.* at 276.

213. *Id.* (determining that the decision making process differed based on the standard used, but that the ultimate determinations and perceptions of the participants, and presumably of jurors, with respect to sexual harassment were not influenced by the standard employed).

214. Baird, *supra* note 22, at 80 (noting that women perceive harassment more often than men and also judge the harassment to be more severe); Burgess & Borgida, *supra* note 112, at 73 (finding that although responses to sexual harassment did not vary between men and women, when the harassment was at the level of sexual coercion, men and women did differ in their perceptions when the situation was one of unwanted sexual attention); Gowan & Zimmerman, *supra* note 107, at 613 (using questionnaires representing various degrees of sexually-oriented behaviors to test perceptions of sexual harassment and determining that females perceived behaviors as more offensive than males).

215. Wiener, *supra* note 211, at 266-67 (evaluating the differences in perceptions of sexual harassment by examining information between groups).

216. *Id.* at 267.

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yet to be conducted.<sup>217</sup> Research to date has not answered the question of whether a particular individual can change his or her perspective from that of a reasonable person to a reasonable woman. This Article asks a question similar to the question presented by Wiener, but the question is posed from a within-subjects perspective. This Article addresses the practical question of whether an individual juror, when presented with a standard instructing him or her to assume a different perspective, can in fact change perspectives. The following hypotheses were tested.

#### A. Hypotheses Tested

Hypothesis 1a: Male participants will be less likely than female participants to change their perceptions of a hostile work environment under the different standards of reasonable person and reasonable woman. Much social science research supports the proposition that women have a lower threshold than men for perceiving a situation as constituting sexual harassment.<sup>218</sup>

Hypothesis 1b: Women will be more likely than men to find sexual harassment under both standards. The present study attempted to isolate the cognitive mechanism which enables an individual to change his/her perception.

In an earlier study, John Pryor noted the importance of understanding the underlying cognitive processes involved in interpreting potential sexually harassing behavior.<sup>219</sup> Mark Davis's study acknowledges that individuals adept at perspective-taking have a corresponding keen ability to anticipate the behavior and reactions of others.<sup>220</sup> Davis's research indicates that females score significantly higher than men on his scale of perspective-taking.<sup>221</sup> Consistent with Davis's results, the authors believe the reason females are more inclined to perceive sexual harassment is that females have better perspective-taking skills.

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217. PAUL M. MUCHINSKY, *PSYCHOLOGY APPLIED TO WORK* 341 (1997) (explaining that a between-subjects design or an across-subjects design is one in which research is conducted to assess an effect or result between groups of people, where each group experienced a different treatment or intervention; a within-subjects design assumes that each person experienced each treatment or intervention and assesses the effect or result of the different treatments on each individual).

218. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 *LAW & HUM. BEHAV.* 33, 49 (1998) (noting that women are more likely than men to perceive sexual harassment).

219. Pryor, *supra* note 117, at 277.

220. Davis, *supra* note 209.

221. *Id.* at 14.

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Hypothesis 2a: Females' scores on Davis's Perspective-Taking sub-scale of the Interpersonal Reactivity Index will be significantly higher than that of males.

Hypothesis 2b: Individuals who score high on Davis's Perspective-Taking sub-scale of the Interpersonal Reactivity Index will be more likely to change perceptions of hostile environment under the different standards of reasonable person and reasonable woman than will individuals who score low, regardless of gender.

## B. Method

### 1. Participants

Participants were 162 undergraduate students at a mid-sized southeastern university who received extra credit toward a course requirement for taking part in the study. Data from five participants was dropped because of incomplete responses. Ninety-nine respondents were female (63%) and 58 (37%) were male. The mean age of participants was 21.26 ( $SD = 3.71$ ) years, with a range from 18 to 46.

### 2. Materials

#### Perspective-Taking Scale of Interpersonal Reactivity Index (IRI).<sup>222</sup>

Participants completed Davis's Interpersonal Reactivity Index.<sup>222</sup> Participants' scores on the Perspective-Taking scale of the instrument are of specific interest. These scores assess the participant's ability to adopt another's perspective and see things from his or her point of view.<sup>223</sup> The Perspective-Taking scale<sup>224</sup> consists of seven five-point Likert-scale items.<sup>225</sup>

### 3. Scenarios<sup>226</sup>

To select the specific scenarios to use in the study, the authors identified seven cases from the hostile work environment literature. To ensure the scenarios were realistic, they were based on federal court cases. The outcome of each scenario was difficult to determine,

222. *Id.*

223. *Id.* at 1.

224. On file with the authors.

225. Reported internal reliability coefficient alphas were .75 and .78 for males and females, respectively, indicating high internal reliability for the perspective-taking scale. Reported test-retest reliabilities were also high: .61 and .62 for males and females, respectively. No validity coefficients were reported.

226. On file with the authors.

but participants had sufficient information to evaluate the case, much as would an actual jury. Scenarios were matched according to characteristics relevant to the perceptions of sexual harassment: ambiguity, severity, and frequency of occurrence. All scenarios were approximately equal in length.

The authors formed a five-member committee to evaluate the scenarios. Each member of the committee read each case and made three ratings, each on a five-point graphic rating scale, judging: (a) ambiguity of the occurrence of sexual harassment (i.e., clarity), (b) severity of the behavior, and (c) frequency of the potentially sexually harassing behavior. The literature suggests ambiguity is the most critical factor in revealing individual differences in judgments of hostile environment sexual harassment, since cases that clearly are or are not sexual harassment produce little variability in judgments.<sup>227</sup> Therefore, clarity was used as the criterion for selecting cases. Three cases were eliminated because all committee members agreed on the determination of sexual harassment in those cases. The remaining four cases, *Andrews*,<sup>228</sup> *Meritor*,<sup>229</sup> *Ellison*,<sup>230</sup> and *Rabidue*,<sup>231</sup> were ranked on clarity. Means and standard deviations for the ratings for each scenario are found in Table 1. *Andrews* and *Meritor* were selected for use in the study because they were the most ambiguous of the remaining four cases.

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227. Thacker & Gohmann, *supra* note 107, at 468.

228. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1471, 1488 (3d Cir. 1990) (finding that the supervisors participated in or facilitated the sexual harassment of two females whose work product and personal property items were damaged or destroyed and who were subject to abusive language, physical injury, and anonymous phone calls by male co-workers).

229. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60, 62, 69 (1986) (involving allegations that a supervisor sexually harassed a female bank employee at work for several years, thereby creating a hostile work environment). In its decision, the Supreme Court found that in determining the welcomeness of sexual advances, evidence of a "complainant's sexually provocative speech or dress . . . is obviously relevant." *Id.* at 69.

230. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (determining that an employee's conduct of sending notes to a female co-worker created an abusive environment and holding that in making such a determination, the focus should be on the victim's perspective).

231. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (failing to find a hostile work environment in a workplace that contained posters of naked women and where expletives were frequently used in referring to women). The court determined that in evaluating sexual harassment cases in the workplace, "the perspective of a reasonable person's reaction to a similar environment" should be applied by the court. *Id.*

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**Table 1. Rating Means and Standard Deviations for Scenarios**

	Clarity	Severity	Frequency
Andrews	2.0 (0.71)	2.4 (1.34)	2.3 (1.20)
Meritor	2.1 (0.74)	4.6 (0.89)	3.7 (0.84)
Ellison	3.2 (1.10)	4.2 (0.45)	3.2 (0.84)
Rabidue	3.4 (1.34)	2.8 (1.48)	2.0 (0.82)

#### 4. Procedure

All participants read and responded to both scenarios. One scenario was read under each standard (i.e., *Andrews* was read under the reasonable person standard and *Meritor* was read under the reasonable woman standard or vice versa). The order in which the standards were presented, as well as the scenario responded to under each standard, were counter-balanced. That is, out of the 157 individuals, approximately 78 were asked to evaluate a scenario under the reasonable person standard first and the reasonable woman standard second. The remaining 77 participants were asked to evaluate the scenarios under the reasonable woman standard first and the reasonable person standard second. The first 78 individuals were further divided so that 39 evaluated *Andrews* first and *Meritor* second, while the other 39 evaluated *Meritor* first and *Andrews* second. The second group of 77 individuals was also divided so that 39 evaluated *Andrews* first and *Meritor* second, while 38 evaluated *Meritor* first and *Andrews* second. Counterbalancing the order of presentation eliminates any effects due to sequencing.

The authors presented the participants with a clear definition of sexual harassment and guidance about the standard to use to determine hostile environment sexual harassment.<sup>232</sup> They were then asked to read the scenario and determine whether a hostile work environment sexual harassment infraction had occurred according to the given standard. After completing this section, the authors reiterated the definition of sexual harassment and presented information concerning the other standard. Participants read the other scenario to determine if the behavior constituted hostile environment sexual harassment according to the second standard. After responding to the two cases, participants completed Davis's Interpersonal Reactivity Index.<sup>233</sup>

232. Script on file with the authors.

233. Davis, *supra* note 209.

### C. Results

The responses of 157 participants when asked whether the particular case constituted hostile environment sexual harassment are found in Table 2.

**Table 2. Frequency of Responses for Hostile Work Environment Sexual Harassment**

	Yes	No
Andrews	107 (68.2%)	50 (31.8%)
Meritor	85 (54.1%)	71 (45.5%)

To address the hypotheses, the authors conducted three sets of analyses. The first analyses addressed gender differences in changing perceptions of hostile environment sexual harassment. The second analyses addressed determinations of sexual harassment under the different standards of the reasonable person and reasonable woman. The third set of analyses investigated the role of perspective-taking in determinations of sexual harassment under the two standards.

#### 1. Gender Differences in Changing Perceptions of Sexual Harassment

First, the authors compared the gender differences on each gender's propensity to change perceptions of whether sexual harassment had occurred. Overall, males were more likely than females to change perceptions of sexual harassment. Although males and females were equally likely to change their perceptions from *not finding* sexual harassment to *finding* sexual harassment (28.1% of males; 25.3% of females), males were more likely than females to change perceptions from *finding* sexual harassment to *not finding* sexual harassment (29.8% of males; 14.1% of females).<sup>234</sup>

It should be noted that this gender difference in rate of change may be an artifact of gender differences in the threshold for perceptions of sexual harassment. Slightly more than 25% of males came to a different conclusion from their original determination regardless of their original position. The rate of change was similar for females who originally found no sexual harassment. However, females who originally made a determination of sexual harassment were more likely than males to maintain that perception, indicating

234. A trichotomous variable was created to indicate, without regard to the standard utilized, whether a change in perceptions occurred and, if it did occur, the direction of the change (i.e., "yes-to-no" or "no-to-yes"). A significant difference between genders was found [ $\chi^2(2, N = 156) = .03, p < .05$ ].

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that, overall, females are more likely than males to perceive a sexually harassing situation.

The standard (reasonable person or reasonable woman) under which the determination was made did not impact whether a change in determination occurred.<sup>235</sup> Men were slightly more likely than women to change perceptions under the reasonable woman standard. However, this difference did not reach statistical significance, precluding a reliable conclusion of a gender difference.

The results of the first set of analyses failed to support Hypothesis 1a. Male participants were not less likely than female participants to change their perceptions of hostile environment under the different standards of reasonable person and reasonable woman.

## 2. Determinations of Hostile Work Environment Under the Different Standards

The second set of analyses focused on determinations of hostile work environment under the reasonable person standard and the reasonable woman standard.<sup>236</sup> Under the person standard, females were more likely than males to perceive the scenario as constituting a hostile environment and therefore sexual harassment.<sup>237</sup> These results are presented graphically in Figure 1.<sup>238</sup>

Under the woman standard, females again were more likely than males to perceive a hostile environment and sexual harassment.<sup>239</sup> Under the woman standard, females were more confident in their conclusion of sexual harassment when they had previously experienced the person standard than when they had initially encountered the woman standard. These results are presented

235.  $\chi^2$  (2,  $N$  = 76),  $p$  = .34 for Person Standard;  $\chi^2$  (2,  $N$  = 80),  $p$  = .07 for Woman Standard.

236. The two dependent variables were computed by multiplying the "yes"/"no" (i.e., 1/-1) response by the confidence rating for that response (i.e., 0 to 4), creating two variables whose values ranged from -4 to 4. The correlation between the two dependent variables was not significant ( $r$  = .086, (ns)), indicating the appropriateness of separate univariate analyses of variance.

237. A 2 (condition: woman standard first vs. person standard first)  $\times$  2 (gender) analyses of covariance (ANCOVA) with perspective-taking as the covariate and perceptions under the person standard as a dependent variable revealed a significant effect only for gender ( $F$  [1, 155] = 6.73,  $p$  = .01). There were no significant effects for condition, the condition  $\times$  gender interaction, or the covariate.

238. See *infra* Appendix A.

239. A 2 (condition: woman standard first vs. person standard first)  $\times$  2 (gender) analyses of covariance (ANCOVA) with perspective-taking as the covariate and perceptions under the woman standard as a dependent variable revealed a significant effect for gender ( $F$  [1, 155] = 5.17,  $p$  = .018) and a marginally significant effect for the condition  $\times$  gender interaction ( $F$  [1, 155] = 3.78,  $p$  = .054). There were no significant effects for condition or the covariate.

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graphically in Figure 2.<sup>240</sup>

Under both standards, males were less likely than females to make a determination of hostile environment sexual harassment. The frequencies of responses for both standards are presented in Table 3. Regardless of the standard, females made a determination of sexual harassment more frequently than males, thus supporting Hypothesis 1b that women would be more likely than men to make determinations of sexual harassment.<sup>241</sup>

**Table 3. Frequency of Responses for Hostile Work Environment by Condition and Sex for Both Cases**

Group	Meritor		Andrews		Combined		% Yes
	Yes	No	Yes	No	Yes	No	
<b>Person Standard First</b>							
Males	14	17	17	15	31	32	49.2
Females	26	15	37	8	63	27	70.0
Overall							61.4
<b>Woman Standard First</b>							
Males	14	12	14	12	28	24	53.8
Females	31	23	39	15	70	38	64.8
Overall							61.2

### 3. The Role of Perspective-Taking in Determinations of Sexual Harassment

The authors conducted a third set of analyses addressing the relationship between perspective-taking and determinations of sexual harassment, in order to test Hypothesis 2. Females scored significantly higher than males on Davis's Perspective-Taking sub-scale of the Interpersonal Reactivity Index, supporting Hypothesis 2a.<sup>242</sup> However, there was no relationship between perspective-taking and changing determination ("yes"/"no") of whether or not hostile environment sexual harassment occurred across the two scenarios, thus failing to support Hypothesis 2a.<sup>243</sup>

240. See *infra* Appendix B.

241. A chi squared analysis produced significant differences between the sexes for the person standard [ $\chi^2(2, N = 153), p = .02$ ] and for the woman standard [ $\chi^2(2, N = 152), p = .05$ ].

242. A t-test indicated a significant difference between gender ( $t = -2.12, p < .05$ ) scores on Davis's Perspective-Taking sub-scale of the Interpersonal Reactivity Index. Females had significantly higher perspective-taking scores ( $M = 18.61, SD = 4.3$ ) than did males ( $M = 17.12, SD = 4.17$ ).

243. A variable was created to indicate if an individual changed determination

*D. Discussion*

The results of our study provide mixed support for our hypotheses. Male participants were more likely than female participants to change their perceptions of sexual harassment regardless of the standard used to make the determination. Thus, the results failed to support Hypothesis 1a, which stated that males would be less likely than females to change their perceptions of sexual harassment. Social science research suggests that gender influences perceptions of what constitutes sexual harassment.<sup>244</sup> In a given situation, males are less likely than females to perceive sexual harassment. This gender difference may also account for our results. In our study, females were more likely than males to find sexual harassment regardless of the standard. Consequently, females changed perceptions less frequently than males because females were more likely to maintain an original perception that sexual harassment was present. Significantly more males than females changed from finding sexual harassment in the first case to finding no sexual harassment in the second case, regardless of the standard for determining sexual harassment. Males and females were equally likely to change perceptions to finding sexual harassment when they initially did not find evidence for sexual harassment. The particular standard under which an individual was asked to evaluate the case did not have an impact on whether or not a change in perceptions occurred.

The present research attempted to demonstrate that it is not only gender, but the cognitive capability of perspective-taking that determines perceptions of sexual harassment. In his original research, Davis found that females scored significantly higher than males on the Perspective-Taking sub-scale of the Interpersonal Reactivity Index.<sup>245</sup> Consistent with this, and in support of Hypothesis 2a, women in our study scored higher in perspective-taking than men. However, perspective-taking was not related to changes in perceptions under the different standards, counter to our expectations in Hypothesis 2b.

Much social science research has found that females are more likely than males to perceive sexual harassment.<sup>246</sup> This result

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(“yes”/“no”) of whether or not hostile environment sexual harassment occurred across the two scenarios. This variable was not significantly correlated with scores on Davis’s Perspective-Taking sub-scale ( $r = .08$ , *ns*).

244. Blumenthal, *supra* note 218, at 49 (noting that women are more likely than men to perceive sexual harassment); *see also* Rotundo et al., *supra* note 113 (explaining the methodology used to arrive at this conclusion).

245. Davis, *supra* note 209.

246. Powell, *supra* note 108, at 17 (reporting results of a sex role identity study:

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seemingly supports those who call for a reasonable woman standard to thereby increase men's awareness of the female perspective. However, in the current study, the reasonable woman standard had no effect on the determination of hostile environment for men. Women were more likely than men to find sexual harassment, regardless of the standard. For those women participants who initially encountered the reasonable person standard, the reasonable woman standard increased their confidence in a finding of sexual harassment.

### E. Limitations

The present study attempted to identify potential differences in the way jurors might perceive and assess evidence. The authors acknowledge potential limitations of the research. It was the researchers' intent to maintain the external validity of the findings. The authors asked the participants to play the role of a juror in a sexual harassment case. University students served as research participants. Although some research indicates the possibility of age differences in attitudes toward sexual harassment, the student participants were all at least eighteen years of age and likely to be eligible candidates for jury duty.<sup>247</sup>

The information given to the study participants was not identical to that a true jury would receive. All participants were provided with actual court cases but were asked to evaluate these cases under two different standards of sexual harassment. In an actual trial, jury members are not likely to be exposed to both standards; rather, a single standard is presented to the jury. The presentation of both standards in this study may have confounded the findings. The participants may have focused more on the changed standard than on the facts of the case. Upon receiving the second standard, participants may have felt compelled to change their finding of sexual harassment simply because they thought this was the expected or desired outcome. However, a review of the data indicates this was not likely the case.<sup>248</sup>

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"[W]hile sex role identity had a small effect on definitions through its femininity component, . . . the effect of sex remained as strong as ever.").

247. Blumenthal, *supra* note 218, at 49 (noting that younger individuals are more likely to perceive sexual harassment); *see also* Rotundo et al., *supra* note 113, at 915 (expressing additionally that the type of behavior itself may affect an individual's attitude toward the issue).

248. The rate of change for males was equivalent under the first and second standard, regardless of the standard. Fewer females than males changed under the second standard (regardless of which standard), a result that is in the opposite direction from what would be expected if perceived pressure to change perceptions

## V. SUMMARY &amp; CONCLUSION

Consistent with the majority of research to date, our study found that women are more likely than men to perceive behaviors as harassing. The reasonable woman standard was introduced by the courts as a potential remedy for the effects on jury decisions of this gender difference in perceptions of hostile environment sexual harassment. However, there has been debate as to which standard, reasonable person or reasonable woman, optimally assists jurors in making fair decisions. Social scientists may aid the legal system in determining the fate of the “reasonable debate” by addressing one simple question: “Does the standard really make a difference?” The results of our study indicate the answer is “No,” supporting our tenet that the argument over standards is moot.

The implications of our results should not be understated. Social scientists have made, and can continue to make, important contributions to the courts by conducting sound research and conveying important scientific information.<sup>249</sup> The courts should not be misled into believing that potential problems in determining sexual harassment cases may be solved by a simple semantic choice. If the particular standard used has no influence on determinations of sexual harassment, the legal system would be ill-advised to continue the debate over which standard to use.

Although the reasonable person standard and reasonable woman standard do not affect perceptions of sexual harassment, it may be advisable for social scientists to continue to attempt to isolate other mechanisms underlying apparent gender differences in sexual harassment determinations. Some researchers have cautioned that, based on their findings, differences in perceptions between the sexes may be smaller than differences within the sexes.<sup>250</sup> Accordingly, in addition to investigating gender as a moderator of perceptions of sexual harassment, the present researchers examined the construct of perspective-taking. Even though perspective-taking was not related to the tendency to change perceptions of sexual harassment, exploring constructs such as this may aid the courts in understanding and obviating gender differences. Furthermore, knowledge of such

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was present.

249. James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae*, 14 LAW & HUM. BEHAV. 25, 42 (1990) (“If more social scientists, and the organizations to which they belong, would communicate their scientific expertise about specific social fact issues to the Court through amicus curiae briefs, they ultimately would be contributing to the development of more informed legal policy through the adjudicative process.”).

250. Gutek & O’Connor, *supra* note 121, at 155.

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constructs may assist lawyers during jury selection. For example, during selection the plaintiff's lawyer might seek those who score high on femininity if this construct is found to correlate with sexual harassment perceptions. Further social science research is needed to delineate constructs related to perceptions of sexual harassment.

It is admirable that the legal system attempted to incorporate a standard that considered the woman's point of view. It is unfortunate that the route taken proved controversial with apparently fruitless results. The intentions behind the reasonable woman standard should not be abandoned; other avenues should be explored. For example, male jurors may benefit from being informed about unique experiences women encounter that may influence perceptions of sexual harassment. Guidelines have been proposed regarding the type of information that should be provided to jurors to gain an understanding of women's experiences.<sup>251</sup> The guidelines include recognizing factors such as the barriers that women face in the workplace, the sexualized treatment of women on a daily basis, and the differential results of well-intentioned remarks or gestures.<sup>252</sup> Such training may produce the desirable outcomes targeted by the proponents of the reasonable woman standard.

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251. Abrams, *supra* note 103, at 52 (stating that guidelines would reflect the experience of diverse groups of women in and out of the workplace).

252. *Id.* at 52, 53 (emphasizing the social and legal implications of sexual harassment).

2002] REASONABLE PERSON VERSUS REASONABLE WOMAN 671

APPENDIX A: FIGURE 1. MEAN DETERMINATION OF HOSTILE  
ENVIRONMENT USING PERSON STANDARD

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APPENDIX B: FIGURE 2. MEAN DETERMINATION OF HOSTILE WORK  
ENVIRONMENT USING WOMAN STANDARD