Redefining Objectivity: 'The Case for the Reasonable Woman Standard in Hostile Environment Claims

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I. INTRODUCTION: THE NATURE OF THE PROBLEM

When Kerry Ellison began receiving “love notes” from her co-worker, Sterling Gray, she was convinced she was the target of sexual harassment.1 Mr. Gray, on the other hand, likely had no idea his “romantic” gestures would be interpreted as harassment. Such inconsistency in interpretation is typical because women tend to perceive sexual or gender-based conduct in the workplace quite differently than men.2 What male workers consider harmless, females might consider frightening; conduct that some men see as flirtation or chivalry might be interpreted by some women as an intimidating precursor to bolder—possibly violent—overtures.3 In a Title VII sexual harassment case, the trier of fact must contend with this discrepancy when determining whether certain conduct does, indeed, constitute harassment. Courts must choose, therefore, whether to evaluate the conduct from the perspective of a reasonable male, a reasonable female, or a reasonable gender-neutral “person.”

The Equal Employment Opportunity Commission (EEOC) suggests that courts scrutinize the offending conduct through the eyes of an objective, reasonable person.4 The Ninth Circuit, however, recently concluded in Ellison v. Brady5 that the reasonable person standard “tends to be male-biased and [to] sys-

1. See Ellison v. Brady, 924 F.2d 872, 874 (9th Cir. 1991); see also infra notes 61-68 and accompanying text.
3. See Ellison, 924 F.2d at 880-82; see also Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1205 (1989).
5. 924 F.2d 872 (9th Cir. 1991).
tematically ignore the experiences of women." According to the court, the proper standard should be to view the conduct from the perspective of a reasonable person of the victim's gender.

This comment examines the judicial standards currently employed in determining whether workplace conduct constitutes "sexual harassment." Part II analyzes the history and background of Title VII sexual harassment claims. Part III examines the ineffectiveness of the gender-neutral "reasonable person" standard and the development and potential impact of the reasonable woman standard. Part IV concludes that adoption of the reasonable woman standard more fully achieves the purposes of Title VII by better protecting female employees, reducing sexual harassment, and ensuring an objective, fair standard upon which employers and employees can rely.

II. HISTORY AND DEVELOPMENT OF TITLE VII SEXUAL HARASSMENT CLAIMS

A. Title VII: Promulgation Without Guidance

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] 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." The word "sex" was not added to the statute

6. Id. at 879.
7. To set out a hostile environment claim under Ellison, a female plaintiff must establish that the alleged conduct would offend a reasonable woman. Id. Judges and writers have been stridently calling for this standard for some time. The most notable example is the dissent in Rabidue v. Osceola Ref. Co., 805 F.2d 611, 625 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part); see also Susan M. Mathews, Title VII and Sexual Harassment: Beyond Damages Control, 3 YALE J.L. & FEMINISM 299 (1991); Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449 (1984); Barbara L. Zalucki, Comment, Discrimination Law—Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII, 11 W. NEW ENG. L. REV. 143 (1989).
8. It is important to note that the reasonable woman standard does not slight male victims of sexual harassment. Rather, the Ellison court clarifies that if the victim were a male, the proper standard would be the perspective of a reasonable male. Ellison, 924 F.2d at 879. In other words, the reasonable woman standard, in a broader sense, is really the reasonable victim standard, and the Ellison court, as well as this comment, uses the terms interchangeably. See id. at 880; cf. infra text accompanying notes 112-113. Because most victims of sexual harassment are women, however, characterizing the standard as that of the "reasonable woman" seems more appropriate.
until the "last minute"; consequently, legislative direction is scant. The EEOC and the federal courts have been left to interpret exactly what Congress intended by including that word. Initially, courts found a violation of Title VII when an employer denied an individual some benefit of employment solely because of gender. However, the courts and the EEOC quickly broadened Title VII to also prohibit "sexual harassment" in the workplace.

B. Further Clarification: The EEOC and the Courts

In 1971, the Fifth Circuit stated, "We must be acutely conscious of the fact that Title VII . . . should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of . . . discrimination." This advice prompted other courts to "liberally interpret" Title VII to prohibit sexual harassment in the workplace because such conduct is inherently discriminatory.

As currently interpreted, Title VII prohibits two types of sexual harassment: quid pro quo and hostile environment. The former occurs when an employer conditions employment benefits on the granting of sexual favors. The latter, which is the focus of this paper, occurs when an employee is subjected to an "offensive or abusive" working environment. In 1980, the EEOC promulgated its Guidelines on Discrimination Because of Sex, which offered definitions of sexual harassment to help courts and employers know what types of conduct would violate Title VII. The Guidelines point out that al-

10. See Ellison, 924 F.2d at 875 (citing 110 CONG. REC. 2577-84 (1964)).
15. Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991). This definition will be further refined within this comment. The reasonable woman standard sprang up amidst the confusion generated by the question of what, exactly, constitutes a "hostile environment."
17. The Guidelines state:

Unwelcome sexual advances, requests for sexual favors, and other verbal
though not all gender-based conduct at work is proscribed by Title VII, it "crosses the line" into harassment if it is "unwelcome sexual... conduct [that has become]... a term or condition of... employment." Others have suggested alternative definitions, but generally conduct must be unwelcome to qualify as harassing. The Guidelines further define a hostile environment as a workplace where such unwelcome sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." For example, unwelcome touching, joking, gestures, and comments, as well as offensive pictures, literature, or graffiti, can create a hostile environment. The plaintiff need not suffer economic harm to sustain a claim against the employer for creating or allowing such an environment.

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

Id. § 1604.11(a).
18. Id. (emphasis added); see also Policy Guide, supra note 14, § 421:452.
19. For example, Catharine MacKinnon suggested that sexual harassment... refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another... When one is sexual, the other material, the cumulative sanction is particularly potent.

CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979) (emphasis added). The Working Women's Institute defines harassment as "any repeated or unwanted verbal or physical sexual advances; sexually explicit derogatory statements; or sexually discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient, or cause the recipient discomfort or humiliation, or interfere with the recipient's job performance." DAIL A. NEUGARTEN & JAY M. SHAFRITZ, SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK 3 (1980) (citation omitted).

These definitions seem fairly clear: unwanted or unwelcome gender-based conduct that disturbs the receiver in some way is harassment. The problem is that the conduct, while offensive to the recipient, may seem entirely innocuous to the offender. See id.

22. EEOC Policy Guidance, supra note 4, § 405:6682; see also Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).
The Guidelines instruct courts to examine the "totality of the circumstances" to determine hostility or "unwelcome-ness." Factors include the following: (1) whether the conduct was verbal, physical, or both; (2) whether the conduct was a one-time occurrence or repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual. According to the Guidelines, courts should interpret the conduct "from the objective standpoint of a 'reasonable person.'"

In 1983, the Eleventh Circuit followed the Guidelines and held that an employer violates Title VII by creating a "hostile environment":

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Other circuits also began to follow the Guidelines, defining the types of conduct that would rise to the level of "hostile environment" sexual harassment. For example, in Katz v. Dole, the Fourth Circuit held that an abundance of sexual slurs, insults, epithets, and innuendo created a hostile workplace. The plaintiff recovered even though she was not economically...

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23. Guidelines, supra note 16, § 1604.11(b). The investigators must determine whether the victim's conduct was consistent with her claim that the offending conduct was not desired. A claimant's occasional use of sexually explicit language does not indicate that subsequent sexual advances by others are welcome, and her "general character or past behavior toward others has limited, if any, probative value." EEOC Policy Guidance, supra note 4, § 405:6687. But cf. Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) (holding that a woman's sexually explicit conversation barred her from claiming that male co-workers' comments and conduct were unwelcome).

24. EEOC Policy Guidance, supra note 4, § 405:6689.

25. Id. The conduct must "substantially affect the work environment of a reasonable person" in order to be considered "hostile." Thus, Title VII is not a "vehicle for vindicating the petty slights suffered by the hypersensitive." Id. (quoting Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984)).

26. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

harmed. In Bundy v. Jackson, the D.C. Circuit deemed “hostile” a workplace in which sexual propositions and sexual intimidation by supervisors was “standard operating procedure.” In Kinney v. Dole, a male supervisor forcefully grabbed, twisted, and injured the arm of a female employee. Although the act was not sexual in any romantic or traditional sense, it was gender-based—an act of aggression by a male against a female. As such, the D.C. Circuit held that it was discriminatory and created an offensive, abusive workplace.

C. The Supreme Court’s Interpretation: Meritor Savings Bank v. Vinson

In 1986, the first Title VII hostile environment case reached the United States Supreme Court. In Meritor Savings Bank v. Vinson, the plaintiff alleged that her male supervisor “fondled her in front of other employees, ... exposed himself to her, and even forcibly raped her on several occasions.” The Court, after carefully analyzing the EEOC Guidelines, held that an employee can state a hostile environment claim if she is subject to (1) “sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature” that is (2) “unwelcome” and (3) “hostile,” i.e., “sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment.’” Under this test, the Court had no difficulty finding Ms. Vinson to be a victim of hostile environment sexual harassment. Significantly, in determining whether the conduct was sexual harassment, the Court followed the EEOC’s guidance and scrutinized the conduct from the perspective of a reasonable person.

Meritor has become the touchstone in this area, but its...
application has been problematic. Although its “test” is fairly straightforward, it has not completely resolved the issue for lower courts. Because the conduct in Meritor was so blatant, the Court could establish a fairly elevated threshold and still provide relief to Ms. Vinson. Consequently, conduct that is somewhat less egregious, yet still offensive, may not qualify as “hostile.”

The real problem lies much deeper. In applying the Meritor reasonable person standard, federal courts have moved further and further from considering the victim’s perspective of the incidents. Instead, as the following section will analyze, by neglecting the victim’s perspective, courts have furthered stereotypical notions of acceptable male behavior.38

III. ANALYSIS

A. Meritor and its Progeny

1. The problems with the Meritor test

Although the Meritor Court announced its intention to adhere to the EEOC Guidelines, its test is arguably more rigid than the Guidelines.39 For example, the Meritor test requires that conduct be “pervasive” or “severe” to constitute a violation.40 The EEOC standard, on the other hand, merely requires that the conduct be “unwelcome” and “have the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”41 The range of conduct which might be deemed offensive under the EEOC Guidelines is potentially much broader than that which would be actionable under Meritor.42

Additionally, the Court’s use of the word “pervasive” denotes that the conduct must be “diffused throughout every part of” the workplace or be “prevalent or dominant.”43 One in-
stance of "unwelcome" conduct would arguably not be action-
able under Meritor. In one light, it may seem unreasonable to
impose liability for one remark or action. But if that one in-
stance offends and intimidates nonetheless, it also seems un-
reasonable to not attach liability. As the Ninth Circuit ex-
plains, a single offense can be just as "intimidating or hostile"
as a continuing offense, especially because our culture and
media have taught women to read such events as precursors to
more violent actions. Even one incident of harassment is
"unacceptable since it . . . require[s] women to act as subordi-
nate[s]," a clear example of Title VII-prohibited discrimina-
tion. On balance, the pervasiveness of the conduct should
affect only the type or amount of the remedy, not the finding of ha-
rassment.

2. The results: The wreck in the wake of Meritor

Subsequent decisions, purporting to follow Meritor, demon-
strate that the reasonable person standard—as articulated by
the EEOC and interpreted by the courts—is not as objective,
helpful, or even gender-neutral as it claims to be.

a. The cases. In Chamberlin v. 101 Realty, the claim-
ant was faced with five overt instances of sexual conduct. The
first occurred while Mrs. Chamberlin was in her supervisor’s
car. He turned to her and said, "with a little half smile and
very lustily," that she had "good body." Two weeks later,
the plaintiff testified that the defendant

"stepped up real close to me, like within a foot, almost to
where we were touching shoulders, and he looked at me,
started at my head and he looked all the way down to my
toes and back up again, and then he said, almost in a whis-
per, he said, 'You look good in tight jeans. It shows off your
butt.'"

Defendant repeated this comment two weeks later. During two
subsequent lunch appointments, the supervisor took
Chamberlin’s hands and said, "I like my women with good

44. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).
45. Pollack, supra note 39, at 61.
46. Id.
47. 915 F.2d 777 (1st Cir. 1990).
48. Id. at 780.
49. Id.
looks and brains,'" and "'My women are special. I like to put them on a pedestal.'" Mrs. Chamberlin testified that she physically resisted each of these advances. Although she had received excellent work reviews to that point, she was soon fired.

Although the supervisor's actions constituted quid pro quo harassment, the First Circuit held that they did not create a hostile environment. In fact, under the Meritor test, the court "consider[ed] it highly doubtful . . . that the sexual advances made to Chamberlin in [those] circumstances, without more, could be considered sufficiently 'severe or pervasive' to support a sexual discrimination claim of the hostile environment variety." In Scott v. Sears, Roebuck & Co., the plaintiff was repeatedly propositioned by her supervisor, slapped on the buttocks by co-workers, and subjected to vulgar and demeaning sexual comments. In holding that the conduct did not constitute sexual harassment, the Seventh Circuit noted that the central issue was whether "the demeaning conduct and sexual stereotyping cause[d] such anxiety and debilitation to the plaintiff that the working conditions were 'poisoned' within the meaning of Title VII." The court held that the actions in this case did not create such anxiety and debilitation.

In Rabidue v. Osceola Refining Co., the plaintiff worked in an environment littered with pornography and polluted with crude and demeaning sexual epithets. Some male co-workers referred to her, not by her given name, but rather by slang references to the female anatomy. Surprisingly, the Sixth Circuit held that the offensive posters and the vulgar comments "were not so startling to have affected seriously the psyches of the plaintiff or other female employees."
b. The results. Title VII adjudication seems to have taken a wrong turn. These cases present facts that arguably dictate findings of hostile environment sexual harassment. Yet the plaintiffs were denied recovery on their claims, and new judicial “tests” were created that are more stringent than the Meritor test. The Scott test (“anxiety and debilitation sufficient to poison the workplace”), the Rabidue test (“seriously affect the psychological well being”), and the Chamberlin test (“pervasiveness”) are errant departures from the EEOC’s guiding language.60

The circuit courts did follow the EEOC instructions to the extent that they viewed the “totality of the circumstances” through the eyes of a “reasonable person,” but they generally failed to “consider the victim’s perspective”—the perspective of a reasonable woman. By neglecting the victim’s perspective and choosing not to look through a woman’s eyes, the courts unknowingly furthered stereotypes of acceptable male behavior. Had the courts attempted to see the circumstances through the eyes of a reasonable woman, instead of a gender-neutral “person,” the judicial tests might have been less rigorous, the thresholds lower, and the outcomes more equitable.

B. The Adoption of the Reasonable Woman Standard

In Ellison v. Brady, the Ninth Circuit applied the reasonable woman standard in a sexual harassment hostile environment case. The offending conduct in Ellison was less overtly “hostile” than that in other cases; yet even in its subtlety, the conduct was offensive to its victim. The offensive behavior began two years after Kerry Ellison and Sterling Gray began working for the Internal Revenue Service in 1984. In 1986, Gray began paying a great deal of attention to Ellison, “hanging around” her desk and extending frequent lunch invitations. Ellison accepted one such invitation but declined two subsequent offers.61 Shortly after her refusals, Gray wrote her a note, stating, “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

60. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).
61. Id. at 873-74.
hatred for another day." When she read the note, Ellison became "shocked and frightened and left the room." Gray followed her, demanding that she talk to him. Ellison left the building and went home.

The next week, Ellison began a four-week training program in St. Louis. From California, Gray mailed her a three-page, single-spaced, typed letter which she described as much "weirder" than the previous note. In reaction to this letter, she explained: "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened." Ellison eventually filed a sexual harassment claim in 1987. After several administrative hearings, a district court granted the employer's motion for summary judgment on the grounds that Gray's conduct was neither severe nor pervasive enough to create a hostile environment.

On appeal, the Ninth Circuit reversed the lower court's decision, holding that a "female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." The court then concluded that a reasonable woman in Ellison's situation would have considered Gray's conduct sufficiently severe and pervasive to create a hostile environment.

C. Why the Reasonable Woman Standard

The Ninth Circuit responded to the confusion and judicial inconsistency in this arena by adopting the reasonable woman standard. The following analysis demonstrates why the reason-

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62. Id. at 874.
63. Id.
64. Id. Parts of the letter read:
   "I have enjoyed you so much over these past few months. Watching you.
   Experiencing you from O so far away."
   "I am obligated to you so much that if you want me to leave you alone I
   will . . . . If you want me to forget you entirely, I can not [sic] do that."
65. Id. at 874 & n.1.
66. Id. at 874.
67. Id. at 879 (emphasis added).
68. Id. at 880.
able woman standard is a fairer, more logical, more consistent approach than the reasonable person standard.

1. The EEOC's reasonable person is really a reasonable woman

The EEOC has clarified the reasonable person standard, stating that courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior." At no point do the regulations or Guidelines indicate that the "person" part of the standard requires a strictly gender-neutral perspective. In cases in which the victim is a woman, the "reasonable" perspective should also be that of a woman.

The Guidelines focus more on the concept of objectivity than on gender neutrality. An objective standard maintains some semblance of conformity to social norms and deters abuse of the system by either unstable plaintiffs or those seeking an unjust windfall. Courts have found that "Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive." Consequently, the "reasonableness" or objective part of the standard allows both plaintiffs and employers to begin on a common ground.

The EEOC instructs courts to consider both the "victim's perspective" and the "context in which the alleged harassment took place," arguably guiding courts to use a gender-oriented perspective. For example, the EEOC "believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant." In several cases, both women and men have been subjected to such environments. The men, however, considered it harmless, while the women were offended. Thus, the EEOC anticipated that courts would look beyond "male," or even gen-

69. EEOC Policy Guidance, supra note 4, § 405:6690.
70. See Abrams, supra note 3, at 1210.
71. One woman stated her opinion that many working women use sexual ploys to move ahead politically in the workplace. If their designs go awry, they quickly claim sexual harassment. Interview with former employee (anonymous) of First Interstate Bank of California, in Provo, Utah (Nov. 20, 1992).
73. EEOC Policy Guidance, supra note 4, § 405:6690.
74. Id. (emphasis added).
der-neutral, labels of "harmless or insignificant" and focus instead on how the environment affects the victim. If the victim is a woman, the court should scrutinize the working environment through her eyes. To maintain the fairness contemplated by the word "reasonable," that scrutiny should be tempered by an objective notion of how other "reasonable" women would react to the environment.

2. Differing perspectives

Women see sexual conduct in the workplace differently than men, and the Ninth Circuit found this argument to be persuasive in adopting the reasonable woman standard. The Ellison court opined that Sterling Gray could have seen his conduct as that of a modern-day Cyrano de Bergerac, wooing his lady through desperate, unrequited letters. Many "reasonable" men might consider Gray's actions to be merely harmless flirtation and Ellison's resistance to be merely a typical reaction in the courtship ritual. Ms. Ellison, however, was not so inclined. To her, Gray's actions were neither harmless nor trivial; in fact, she testified that the correspondence frightened her and made her concerned for her safety.

Empirical data and scholarly commentary support the conclusion that Ellison's reaction was perfectly rational for a reasonable woman. In fact, even seemingly minor sexual overtures can generate tremendous fear of greater harm. Women's "physical and social vulnerability to sexual coercion can make them wary of sexual encounters." Upon receipt of Gray's "love notes," Ellison could have easily conjured up images—readily supplied by modern media—of stalkers and imbal-

76. Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991); see also Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987) ("We acknowledge that men and women are vulnerable in different ways and offended by different behavior."); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part).


77. 924 F.2d at 880.
78. Id. at 873-74.
79. Abrams, supra note 3, at 1205; see also Ellison, 924 F.2d at 880-81.
80. Abrams, supra note 3, at 1205.
anced sociopaths whose nightmarish pursuits have begun with a "harmless" letter. Her fears were entirely reasonable from that perspective.

Most men, on the other hand, may not think that this type of conduct is offensive at all. In her research of sexual harassment and its effects, Barbara Gutek has concluded that men are not as sensitized as women to sexual conduct in the workplace. In one study, she presented males and females with a series of "positive comments of a sexual nature," such as compliments, social invitations, or expressions of admiration. Twenty-seven percent of the women respondents saw the comments as offensive, while only eleven percent of the men surveyed felt the comments were offensive. When presented with "negative comments of a sexual nature," such as slang terms, epithets, vulgarities, and direct sexual propositions or attacks, a larger percentage from both groups viewed the comments as offensive, but an alarming disparity still existed. Sixty-three percent of the women were offended by the conduct and comments, while only forty-eight percent of the men were so offended.

In another study, Gutek found that sixty-seven percent of the men questioned would actually be flattered by a sexual proposition from a female co-worker. Of the women, on the other hand, less than seventeen percent would feel flattered by such an invitation, while almost sixty-three percent would be insulted. The obvious conclusion of Gutek's research is that women are more likely than men to see sexual conduct as offensive, intimidating, threatening, or frightening—a phenomenon Gutek terms the "giant gender gap."

David Terpstra and Douglas Baker concur with Gutek's studies. They constructed a model that charts sexual harassment as a process, comparing "[b]ehaviors exhibited by harassers" to the "[b]ehaviors as perceived by harassees." The mod-

81. One well-known example is that of John Hinckley Jr.'s infatuation with actress Jodie Foster. What began with "harmless" love letters resulted in a presidential assassination attempt and Ms. Foster's fear for her life.
83. Id.
84. See Barbara A. Gutek, Sex and the Workplace 96-97 (1985).
85. Id.
86. Id.
87. Terpstra & Baker, supra note 2, at 179.
el allowed them to analyze the reactions of the victims and the long-term psychological effects of harassment. Based on their own studies, as well as those conducted by Gutek, the National Merit Systems Protection Board, and others, they concluded that "women perceive a wider range of socio-sexual behaviors to be sexual harassment than do men." Most participants agreed that behavior such as sexual assault, propositions, physical contact, and offensive remarks directed toward an individual constituted harassment. However, less than a consensus existed on whether behaviors such as compliments, coarse language, jokes, and "looks" were harassing. In answering whether a particular comment or episode of conduct was harassment, the respondent's gender proved to be the most influential variable; women were more likely than men to perceive certain conduct as harassing or offensive.

These studies demonstrate that women generally have a heightened awareness and reaction to sexual conduct directed towards them in the workplace. Perhaps a model will clarify:

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<table>
<thead>
<tr>
<th>Clearly Not Harassment</th>
<th>Point 1</th>
<th>Point 2</th>
<th>Clearly Harassment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable Woman</td>
<td>Reasonable Man</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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INCREASING HOSTILITY

This model represents a spectrum of gender-based conduct in the workplace. On the far left is conduct that theoretically no one would consider offensive, such as a completely professional handshake or greeting, void of any overtones. On the far right is conduct that theoretically everyone should consider offensive or hostile, such as rape. At Point 1, the conduct begins to offend the reasonable woman. The reasonable male statistically is not offended until Point 2, somewhere further along the scale.

88. Id.
89. Id. at 186.
90. Id. at 188.
91. Id. at 189.
92. Id. at 186.
93. Perhaps part of the problem is the fact that women tend to see their jobs as marginalized and precarious to begin with. See MACKINNON, supra note 19, at 15. Thus, any sort of sexual conduct from a man in "power" over her job is threatening and confusing. Id. at 1-7.
of hostility. Because the reasonable person standard only prohibits conduct that both sexes agree is hostile or offensive, the conduct falling between Point 1 and Point 2 will go unpunished, forcing reasonable women to endure conduct that offends them.

3. The judicial reasonable person has really been a reasonable man

Because men and women see sexual conduct differently, a gender-neutral standard that allows a trier of fact to see both sides of the issue at once is impossible to achieve. Applying Gutek's research, a reasonable woman would likely view Gray's conduct in Ellison as harassment, while a "reasonable man" probably would not.94 When courts use the reasonable person standard, they attempt to "step into the shoes" of a completely objective, gender-neutral person, without giving weight to the biases of either sex. Although this approach may arguably be possible in theory, it is not possible in practice; if no gender-neutral person exists, its viewpoint cannot exist either. Each trier of fact is inevitably forced to decide if the reasonable person's perspective is that of a reasonable man or a reasonable woman. It is disingenuous to assume the trier of fact can somehow find the "middle of the road."

Some commentators argue that triers of fact, when applying the reasonable person standard, will choose the male perspective by default. For example, Kathryn Abrams asserts that because our society is based on a gender hierarchy, male views dominate the reasonable person standard.95 Similarly, Nancy Ehrenreich argues that the reasonable person standard neutralizes the search for diversity and pluralism and makes all experience conform to the dominant male experience.96 Catharine MacKinnon also posits that the "core of the legal prohibition" of sexual harassment is based on a "male vision" of women's experiences.97

The Ninth Circuit asserts in Ellison that the reasonable

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94. See GUTEK, supra note 84, at 95-105.
95. Abrams, supra note 3, at 1206 n.103.
97. MACKINNON, supra note 19, at 26.
"person" standard has ignored the experiences and perceptions of women and instead has ratified "male-biased" stereotypes. In his dissent in *Rabidue*, Judge Keith argues that the reasonable person standard fails to account for differences between the views of most women and men regarding appropriate sexual conduct. In *Harris v. International Paper Co.*, the court asserts that the reasonable person standard is contrary to the directives of the EEOC Guidelines because it supports traditional notions of reasonable behavior established by the offenders. The inevitable conclusion is that a purely gender-neutral perspective is a dangerous and unfair legal fiction. Such a standard, unfortunately, has only been a proxy for the male point of view.

D. The Arguments Against the Reasonable Woman Standard

In his dissent in *Ellison v. Brady*, Judge Stephens...
summarizes several arguments against the new standard. He states that the reasonable woman standard is "ambiguous and therefore inadequate." Consequently, he argues, the "gender neutral standard would greatly contribute to the clarity of this and future cases in the same area." 

Judge Stephens also argues that "[a] man's response to circumstances faced by women and their effect upon women can be and in given circumstances may be expected to be understood by men." He criticizes the majority's "assumption" that "men's eyes do not see what a woman sees through her eyes." However, Judge Stephens's "assumption" that men and women see sexual conduct in the workplace in the same light is directly contradicted by empirical data. The Gutek and Terpstra/Baker studies show that men and women do not see sexual conduct in the workplace in the same way. What may be highly offensive to a woman might be considered harmless by a male co-worker.

The studies indicate that more of a consensus exists on the major offenses; men and women are more likely to agree that certain egregious types of sexual conduct, such as assault, rape, and violence, constitute harassment. However, Title VII jurisprudence is not merely concerned with the most egregious offenses; it is equally concerned with eliminating all traces of discrimination. If sexually oriented jokes, comments, gestures, and "scenery" are offensive to the average female worker, a hostile environment exists. Even if men would generally consider the conduct harmless, the court should defer to the reasonable woman's view.

E. Alternatives to the Reasonable Woman Standard

1. The gender-neutral approach

Judge Stephens argues that the reasonable person standard affords better protection to everyone because of its gender neutrality. The judge is concerned that if a male were to bring a hostile environment claim, the reasonable woman standard

104. Id.
105. Id.
106. Id.
107. Id.
108. See supra notes 76-93 and accompanying text.
109. See supra text accompanying note 90.
110. Cf. supra note 12 and accompanying text.
may not "meet [his] needs."\footnote{Ellison v. Brady, 924 F.2d 872, 884 (9th Cir. 1991) (Stephens, J., dissenting).} However, the \textit{Ellison} majority addressed that issue: "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man."\footnote{924 F.2d at 879 n.11.} Thus, the perspective is really that of a reasonable person of the victim's gender.\footnote{See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part).} Because \textit{Ellison} and the vast majority of cases involve women, the court chose simply to emphasize a woman's perspective.

2. \textit{The subjective "prima facie" approach}

Some commentators argue that although the reasonable woman standard is a good step, the ideal approach is a completely subjective standard.\footnote{See, e.g., Abrams, \textit{supra} note 3, at 1209 & n.110.} Under such a rubric, each claim of harassment would create a rebuttable presumption of a Title VII violation. First, the claimant states a prima facie hostile environment case simply by pleading that the conduct was unwelcome and offended \textit{her}. To rebut the presumption of a Title VII violation, the defendant then has the burden to prove that the plaintiff was idiosyncratic. The plaintiff can then counter by proving either that she is not idiosyncratic or that the defendant "exploited" her idiosyncracy.

Although this subjective standard focuses on the victim's perspective and would provide an initial advantage to claimants, such an approach arguably places an onerous economic burden on employers. To demonstrate, a woman employee could allege she was offended by a male co-worker's smile, and that allegation alone would establish a prima facie case. The employer would then have the difficult task of proving that the claimant's idiosyncrasy revolves around her paranoid belief that each smile is actually a perverted and lecherous sneer, that each look is one of lust. If the defendant were unsuccessful, or if the claimant could prove that the defendant knew of her uniqueness and "exploited" it by smiling at her, then she would win. Under such an approach, the litigation costs of Title VII would become too extreme. The inevitable economic consequences would be lost profits and fewer employees. Balance,
therefore, is crucial: though the aim of Title VII is to protect victimized employees, it is also important to protect employers from potentially meritless litigation.

Analytically, the subjective standard does not provide women with any greater consideration or protection than does the reasonable woman standard. In fact, the reasonable woman standard will arguably produce the same positive results for reasonable claimants without placing an undue burden on employers to defend frivolous litigation. Under the subjective approach, a court would engage in a comparison very similar to the objective standard; in order to evaluate the claimant's "idiosyncracy," the court would have to judge her against an objective, reasonable woman standard. Why not begin the analysis at that point? Proving the claimant is "reasonable" is no different than proving she is "not idiosyncratic." In fact, proving a positive may be even less burdensome on the claimant. As the Ellison court points out, the reasonable woman standard is designed to safeguard against the "idiosyncratic concerns of the rare hyper-sensitive employee," while still providing heightened sensitivity to women's concerns. Thus, an objective standard satisfies the concerns expressed by the commentators, while providing an economic balance for all parties.

IV. CONCLUSION

Analyzing hostile environment claims through the eyes of a reasonable woman accurately reflects and fulfills the antidiscrimination designs of Title VII. That standard, as opposed to a gender-neutral reasonable person standard or an individualized subjective standard, will arguably provide better judicial protection for those who have suffered the humiliation of sexual harassment in the workplace.

Adoption of the reasonable woman standard is the most effective way for courts to gain a clearer understanding of what conduct offends the victims of sexual harassment, and it will significantly enhance courts' ability to eradicate sexually harassing conduct. Courts have already begun to follow Ellison. In Harris v. International Paper Co., for example,

115. Ellison, 924 F.2d at 879.
116. Employers have a vested interest in eliminating sexual harassment from their work environments. In addition to saving the costs of defending lawsuits, studies have demonstrated that reduction of sexual harassment increases morale, productivity, and profits. See Mathews, supra note 7, at 308.
the theoretical underpinnings of the standard were aptly summarized: “Since the concern of Title VII is to redress effects on victims, the fact-finder must 'walk a mile in the victim's shoes' to understand those effects . . . .”118

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118. Harris, 765 F. Supp. at 1516.