ARTICLE

THE REASONABLE WOMAN IN SEXUAL HARASSMENT LAW AND THE CASE FOR SUBJECTIVITY

Eileen M. Blackwood*

INTRODUCTION

In a recent case, a Vermont superior court joined a handful of progressive courts struggling to address the nature of an objective standard for liability in sexual harassment cases. Judge Frank Mahady, in the case of *State v. Town of Milton*,[1] charged the jury that they must determine whether any on-the-job sexual conduct found would have "unreasonably interfer[ed] with the work performance of a reasonable woman,"[2] as opposed to a reasonable man or person or victim. Judge Mahady's choice of this standard follows a short, but distinguished line of cases[3] recognizing that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[4] Part I of this article explores these cases and the rationales behind them.

Part II of this article moves beyond the analyses of these courts. Although the reasonable woman standard is an admirable attempt to broaden legal awareness to encompass women's experiences, it cannot accomplish its goal. By continuing to rely on the necessity of an "objective" standard and the principle of "reasonableness" in connection with male/female relationships, courts employing the standard continue to support the status quo, albeit

---

* Associate, Paul, Frank & Collins, Inc., Burlington, Vermont; J.D. 1986, *cum laude*, Cornell Law School; A.B. 1980, Dartmouth College.

1. State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County filed Nov. 4, 1987).

2. Charge to the Jury at 14, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County Feb. 26, 1991).

3. *See infra* part I.

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

under a guise of understanding and awareness. To truly alter the existing relationships, the law must venture forth from existing structures and address the "subjective" nature of the harm involved in sexual harassment.

I. The Courts Adopt the Reasonable Woman Standard

A. The Roots of Sexual Harassment Law

Although the Equal Employment Opportunity Commission (EEOC) had first issued final regulations defining sexual harassment as a form of sex discrimination in 1980,[5] sexual harassment law did not fully come of age until the United States Supreme Court decided *Meritor Savings Bank, FSB v. Vinson*[6] in 1986. The Supreme Court decisively held, in an opinion authored by Justice Rehnquist, that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"[7] in violation of Title VII of the Civil Rights Act of 1964.[8] The conservative Justice Rehnquist, with the four more liberal Justices concurring, established sexual harassment law firmly in American jurisprudence. The Court's formulation did not, however, address all the questions lower courts would encounter.

Meritor involved one of the two types of sexual harassment currently recognized by courts: the hostile environment or environmental harassment theory.[9] This theory has two elements. Under the first element, the behavior must consist of *unwelcome* sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.[10] The law presumes that it is not always harmful to make requests of a sexual nature because different individuals in different environments may tolerate varying levels of

---

5. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964 as Amended; Adoption of Final Interpretative Guidelines, 45 Fed. Reg. 74,676 (1980) (codified at 29 C.F.R. § 1604.11 (1991)). *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986)(discussing the EEOC guidelines).

6. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

7. *Id.* at 64.

8. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

9. *Meritor*, 477 U.S. at 65. The other recognized type of sexual harassment is known as quid pro quo: "harassment that involves the conditioning of concrete employment benefits on sexual favors . . . ." *Id.* at 62. This type of harassment has received more unequivocal condemnation than hostile working environment, involving as it does a threat to fire or not promote the subordinate who will not comply.

10. *Id.* at 68.

sexual conduct.[11] Therefore, the law requires victims to indicate by words or action that the conduct is unwelcome before making it actionable. Whether or not conduct is unwelcome is a subjective analysis based on the victim's own feelings and actions.[12] Voluntary participation in sexual conduct, by itself, does not bar recovery if the victim indicated by words or actions that the harasser's advances were unwelcome. In *Meritor*, the plaintiff had sex with the defendant more than forty times,[13] but the Court ruled that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense . . . ."[14] The correct inquiry was whether she showed that the advances were unwelcome.[15] This "unwelcomeness" analysis presumes that conduct unwelcome to one employee may not be unwelcome to another and is, therefore, entirely based on the reaction of the victim. In other words, the analysis is subjective.[16]

The second element of the hostile environment theory is that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[17] The *Meritor* Court did not explore this element any further because it concluded that the plaintiff's allegations met this standard.[18] As a result, lower courts were left to determine whether this element was intended to require a subjective or an objective analysis—that is, whether it was enough that *this* employee found the harassment sufficiently severe or pervasive or whether the conduct was to be judged by a third party.[19] The lower courts have interpreted the

---

11. Studies show that "[s]exist speech in the workplace abounds." Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 1 (1990). The issue of whether nonsexual harassment because of sex is actionable has not yet been answered with any consistency. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (conduct other than sexual advances, innuendo, or contact can be the basis for sexual harassment). It would, however, make sense that such actions would constitute sex discrimination.

12. *Meritor*, 477 U.S. at 68-69.

13. *Id.* at 56.

14. *Id.* at 68.

15. *Id.*

16. *Id.* at 67.

17. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

18. *Id.* at 67. Vinson alleged that she was afraid of losing her job when her supervisor repeatedly demanded sexual favors. She testified that he "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.*

19. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Trier of fact, to protect both plaintiff and defendant, must consider objective reaction.).

second element to require an objective review. It is within this objective review that the reasonable woman standard has developed.

B. The Initial Development

A few months after the *Meritor* opinion was issued, the United States Court of Appeals for the Sixth Circuit decided *Rabidue v. Osceola Refining Co.*[20] The case involved, in the court's own words, "an extremely vulgar and crude [supervisor] who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."[21] Other male employees posted pictures of "nude or scantily clad women" in their work areas.[22] The court, however, refused to find that the plaintiff had been sexually harassed. The two male members of the majority concluded that the vulgarity and sexually oriented posters would not interfere with a reasonable person's work performance or psychological well-being.[23]

In dissent, Judge Keith pointed out the absurdity of the majority's holding:

> The majority suggests . . . that a woman assumes the risk of working in an abusive, anti-female environment. Moreover, the majority contends that such work environments somehow have an innate right to perpetuation and are not to be addressed under Title VII . . . .

---

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

21. *Id.* at 615. The dissent describes the conduct more vividly: "Henry routinely referred to women as 'whores,' 'cunt,' 'pussy' and 'tits.' Of plaintiff, Henry specifically remarked 'All that bitch needs is a good lay' and called her 'fat ass.' " *Id.* at 624 (Keith, J., dissenting) (citation omitted).

22. *Id.* at 615. Again, the dissent elaborates: "One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.' " *Id.* at 624.

23. *Id.* at 622. The majority's "reasoning" is particularly disturbing:

> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.

Id. This analysis implies that the media, and not the law, is setting the standards of legal behavior in the workplace.

> In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment . . . .[24]

Judge Keith concluded that evaluation of the severity or pervasiveness of the conduct by adopting the perspective of a reasonable *person* begs the question because, as the majority accurately recognized, prevailing attitudes do not universally condemn sexually harassing behavior. It leads, as the majority held, to the tautology that if society allows the behavior, it is not actionable. The purpose of sexual harassment law, however, is not to perpetuate existing mores that permit harassment of and discrimination against women but to establish new modes of conduct. As Judge Keith noted:

> In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. . . . Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.[25]

Judge Keith challenged the majority's conclusions by stating: "I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture."[26] He asserted that what reasonable women would find offensive is the relevant inquiry, and not what a society that once condoned slavery would find offensive. Utilizing that perspective, Judge Keith reached the opposite result from the majority. He concluded "that sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job."[27] His opinion reaches the underlying issue that the majority ignored: that in American society men and women experience sexual conduct differently because of their sex and those different experiences have led to sex discrimination in employment.

---

24. *Id.* at 626 (Keith, J., dissenting).
25. *Id.* (citations omitted).
26. *Id.* at 627.
27. *Id.*

C. Other Courts Learn from the Rabidue *Dissent*

Less than a year after *Rabidue*, a different panel of the Sixth Circuit adopted the reasonable woman standard in *Yates v. Avco Corp.*:[28]

> A constructive discharge exists if "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be "the reasonable woman" since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.[29]

The court claimed to "acknowledge that men and women are vulnerable in different ways and offended by different behavior."[30] These statements are, however, the only indication that the court applied anything other than a reasonable "person" standard. It reversed the lower court's finding that the plaintiff was constructively discharged, holding that her behavior was unreasonable.[31] The circuit court failed to examine whether a *woman* (as opposed to a man) would have found the working conditions unpleasant enough to compel resignation.[32] Although they nominally adopted their colleague's formulation, the Sixth Circuit's lack of analysis is disappointing.

The United States Court of Appeals for the First Circuit also considered the woman's point of view in *Lipsett v. University of*

---

28. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

29. *Id.* at 636-37 (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982))(footnote and citations omitted).

30. *Id.* at 637 n.2.

31. *Id.* at 637.

32. *Id.* The plaintiff was a secretary for Avco. Her boss continually harassed her for several months until she complained to Avco. After investigating, the company demoted the boss but refused to restore benefits the plaintiff had lost during the process. While out on a sick leave, she returned unexpectedly to find the harasser working at the desk next to her for what he claimed was an indefinite period. She resigned. The company claimed he was only there because they had understood she was not coming in to work that day, and they called her and apologized. *Id.* at 632-33, 637.

The court failed to explore whether a reasonable *woman* would have found the company's decision to have the harasser work next to her, combined with the harasser's claim that the posting was indefinite, *so* offensive as to make resignation her only viable option, particularly in light of the company's prior refusals to treat her fairly.

Puerto Rico.[33] Although the reasonable woman standard is not mentioned by name, the court recognized the different perspectives of men and women in matters of sexual conduct: "A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive."[34] The court also quoted Judge Keith's warning that the status quo will be maintained if the different perspectives are not acknowledged.[35] Thus, the First Circuit seemed to accept the reasonable woman standard without explicitly adopting it.

The United States Court of Appeals for the Third Circuit, in *Andrews v. City of Philadelphia*, was the next court to adopt Judge Keith's formulation.[36] As in the previous cases, the *Andrews* court emphasized the necessity of both a subjective and an objective standard for a hostile work environment cause of action.[37] The objective analysis focused on whether (and how) the alleged conduct "would detrimentally affect a reasonable person of the same sex in that position . . . ."[38] The *Andrews* court found the objective prong more critical than the subjective because its role is "to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."[39] The analysis must be objective, according to the court, to protect "the employer from the 'hypersensitive' employee."[40]

Unlike the *Rabidue* majority, the *Andrews* court utilized Judge Keith's observation that men might find (or claim to find) behavior "harmless and innocent" that women would find offensive.[41] To address the different perceptions, the court instructed

---

33. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

34. *Id.* at 898.

35. *Id.* (quoting Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting).

36. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990).

37. *Id.* at 1483.

38. *Id.* at 1482 (citation omitted).

39. *Id.* at 1483 (citation omitted).

40. *Id.*

41. *Id.* at 1486. The court further stated:

> More specifically, we hold that the pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment. Similarly, so may the posting of pornographic pictures in common areas and in the plaintiffs' personal work spaces. Obscene language and pornography quite possibly could be regarded as "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the bar-

the trial judge on remand to "look at all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities."[42]

In *Drinkwater v. Union Carbide Corp.*,[43] decided a few months after *Andrews*, the United States Court of Appeals for the Third Circuit expanded on the experience of gender and sexuality. Citing Catharine MacKinnon's groundbreaking work,[44] the court addressed the theoretical basis for a hostile work environment: "the sexual relationship impresses the workplace with such a cast that the plaintiff is made to feel that she is judged only by her sexuality. . . . 'Women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.' "[45] In other words, women are the primary victims of sexual harassment because of the societal link between women and sexuality. Thus, the alleged harassment must be analyzed from the woman's perspective because she experiences the conduct as a woman.

D. Recent Opinions Expand the Doctrine

The most extensive discussion of the reasonable woman standard comes, not surprisingly, from the United States Court of Appeals for the Ninth Circuit in *Ellison v. Brady*.[46] The panel split two to one over adoption of the standard, with a vigorous dissent that squarely defines the debate.[47] The majority emphasized that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim."[48] The reasonable *person* standard, the court explained, would only reinforce the status quo and "the prevailing level of discrimination. Harassers could continue to harass merely because a particular discrimina-

---

rier of sexual differentiation and abuse." Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.

Id. at 1485-86 (quoting Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989)) (citations omitted).

42. *Id.*

43. Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990).

44. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

45. *Drinkwater*, 904 F.2d at 861 n.15 (quoting MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 44, at 174).

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

47. *Id.* at 884-85 (Stephens, J., dissenting).

48. *Id.* at 878 (citations omitted).

tory practice was common . . . ."[49] Further, the court acknowledged the different perspectives of men and women:

> Conduct that many men consider unobjectionable may offend many women.
>
> We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior.[50]

This analysis cuts to the heart of the problem. It focuses on the notion that women do experience their sexuality differently than men experience either their own or women's sexuality. Conduct that for a man is fun or expected or at least commonplace often is threatening to a woman. The reasonable woman standard at least acknowledges this difference. Thus, the court adopted a standard that evaluates whether a reasonable woman would consider the behavior severe or pervasive enough to alter working conditions "and create an abusive working environment."[51] The court concluded: "Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not 'sustain ingrained notions of reasonable behavior fashioned by the offenders.' "[52]

Despite the obviousness of these conclusions, the two members of the majority could not convince the one dissenting member that the standard was necessary. Judge Stephens' dissent maintained that a nominally gender-neutral standard, such as the traditional tort reasonable man standard, was adequate.[53] He was doubtful that men and women see things differently, commenting on the lack of evidence before the court on such differences. He took offense at "the assumption that men do not have the same sensibilities as women," and opined 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."[54]

---

49. *Id.*
50. *Id.* at 878-79 (citations and footnotes omitted).
51. *Id.* at 879 (footnote omitted).
52. *Id.* at 880-81 (citation and footnote omitted).
53. *Id.* at 884 (Stephens, J., dissenting).
54. *Id.*

Judge Stephens' arguments are not convincing. It may be true that a given man or even a *reasonable* man will agree that certain conduct is actionable. It may even be true that a man will understand a woman's reaction to a given situation. The majority's point, however, missed by Judge Stephens, is that the man may *have* to look at the situation from the woman's point of view in order to understand it. It is from that assumption that the standard arises.

A recent district court case, *Robinson v. Jacksonville Shipyards, Inc.*, citing *Meritor* and *Andrews*, has also adopted the reasonable woman standard.[55] Like some of the earlier cases, *Robinson* did not go into an extensive analysis of why the reasonable woman standard is necessary or how it differs from the reasonable person standard. The court cited the standard and then, based on expert testimony, concluded "that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions."[56] In addressing the defendants' contentions, however, the court analyzed the issues behind the standard more extensively. It addressed the role of pornography in the degradation of women and its contribution to the exclusion of women from the workforce, rejecting the "social context" of the *Rabidue* majority:[57]

> The "social context" argument cannot be squared with Title VII's promise to open the workplace to women. When the preexisting state of the work environment receives weight in evaluating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given workplace—a place that may have historically been all male or has historically excluded women intentionally—will apply and continue to work there. It is absurd to believe that Title VII opened the door to such places in form and closed them in substance.[58]

E. A Vermont Court Adopts the Reasonable Woman Standard

Most recently, Judge Frank Mahady, sitting in the Chittenden, Vermont, Superior Court, instructed the jury in a sexual

---

55. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991).
56. *Id.* at 1524-25.
57. *Id.* at 1525-27.
58. *Id.* at 1526.

harassment case to utilize the reasonable woman standard. In *State v. Town of Milton*,[59] two individual plaintiffs, Marlene Collins and Billie Gayle Messick, and the State of Vermont complained that the Town of Milton discriminated against the two individual plaintiffs and other women on the basis of sex "due to the severe and pervasive sexual harassment by their supervisor, Chief of Police James Lyons."[60] The complaint cited examples of the Chief's harassment:

> a. calling women employees "sluts" and "whores";
> b. making references to "blow jobs" and how often he got them;
> c. remarking on womens' [sic] "tits" and "asses";
> d. making derogatory sexual remarks about rape victims;
> e. asking intrusive questions and making comments about women employees' sex lives;
> f. directing graphic sexual comments to women employees[;]
> g. constantly attempting to touch or hug some women employees[.][61]

After ten days of trial, the jury returned a verdict in favor of the Town on plaintiff Collins' claim, and in favor of the plaintiffs State and Messick on the other claims.[62] The Town was ordered to pay the State a $10,100 civil penalty, investigating fees, costs, and attorneys' fees. Further, the Town was permanently enjoined from engaging in unlawful employment discrimination on the basis of sex, and required to revise its policy on sexual harassment. The Town also was ordered to pay Messick $60,000 in damages and $30,000 in attorneys' fees.[63]

During the trial, Judge Mahady delivered an unusual charge. He used only notes, and not a prepared, written charge, to instruct

---

59. *State v. Town of Milton*, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County filed Nov. 4, 1987).

60. Complaint at 2, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County filed Nov. 4, 1987).

61. *Id.* at 3-4.

62. Order of Judgment, Collins v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County entered Nov. 4, 1991); Order of Judgment, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County entered Mar. 12, 1991); Amended Order of Judgment, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County entered Oct. 21, 1991).

63. Judgment for the Plaintiff Billie Gayle Messick at 1, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County entered Mar. 12, 1991); Amended Judgment for the Plaintiff Billie Gayle (Bombard) Messick, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County entered Oct. 21, 1991).

the jury. Nevertheless, he made clear his view of the law:

> Under our law, an employer has an affirmative duty to provide a workplace which is in fact free from sexual intimidation, ridicule and incite.
>
> In short, no woman should be subjected to a work environment where sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative.[64]

The charge echoed the rationales behind the *Rabidue* dissent and the *Ellison* majority opinion. After explaining the background of the case, Judge Mahady instructed the jury to examine first the objective, then the subjective portions of the standard.[65] The judge charged the jury to apply the reasonable woman test as follows:

> Would such conduct have the affect [sic] of one, unreasonably interfering with the work performance of a reasonable woman, or, two, creating an intimidating, hostile or offensive work environment for a reasonable woman.
>
> Note here that the test is an objective one. The answer to this question in effect disregards these Plaintiffs. It does not ask whether such conduct would interfere with the work performance or create a hostile, intimidating or offensive work environment for the particular female employees of the town in general, or for Ms. Collins or for Ms. Messick. This is not a subjective test, but an objective test.
>
> Would a reasonable woman in today's society find the conduct such as to interfere with her work performance or create such a work environment?
>
> This test is designed so as not to punish a worldly Plaintiff on one hand, and to protect an employer who has a very fragile, overly sensitive employee on the other hand. It is not the effect of the conduct on these Plaintiffs, on you personally or on someone you know, but on a reasonable woman generally, in today's society.[66]

Although none of the rationale was described to the jury, for example, the differing experiences of men and women, and women's history of sexual exploitation, the emphasis was on sexual

---

64. Charge to the Jury at 9, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County Feb. 26, 1991).

65. *Id.* at 13-14.

66. *Id.* at 14-15.

dignity and reasonable sensibilities. These values were to be applied even in a nontraditional environment such as police work.[67]

Perhaps Chief Lyons' behavior was so extreme that the jury could have found liability without using a reasonable woman standard. The jury's verdict with respect to plaintiff Collins, however, suggests that the other plaintiffs' status and behavior as women was important to the finding of liability. The verdict revealed that Collins did not play the appropriate female role but instead "invited" the sexual conduct, thus precluding her recovery.[68] Although this result may seem deplorable to many, the jury still looked at and evaluated the facts from a woman's perspective, and at least that portion of the charge achieved its objective.[69]

II. The Reasonable Woman Standard Does Not Go Far Enough

Catharine MacKinnon, one of the first proponents of a law against sexual harassment in the workplace, maintains that "[t]he legal claim for sexual harassment marks the first time in history . . . that women have defined women's injuries in a law."[70] As the law moves toward recognition of date rape (despite the recent setback of the highly publicized William Kennedy Smith trial)[71] and permits the battered woman syndrome defense, sexual harassment may no longer be the only legal claim by and for women. MacKinnon's words, however, are well remembered. The adoption of the reasonable woman standard is one manifestation of the attempt to center sexual harassment law on its true purpose—to prevent

---

67. *Id.*

68. The problem for Collins stems from the court's emphasis on her *inviting* the sexual behavior. It seems questionable whether that language truly parallels the unwelcome standard created by *Meritor*. In the record, however, there appears to be no objection to the language. Charge to the Jury at 22-27, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County Feb. 26, 1991).

69. Collins has appealed the verdict against her to the Vermont Supreme Court. Notice of Appeal, State v. Town of Milton, No. S1149-87 CnC (Vt. Super. Ct. Chittenden County filed Nov. 26, 1991).

70. Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life & Law 105 (1987) [hereinafter MacKinnon, Feminism Unmodified].

71. On December 11, 1991, William Kennedy Smith was acquitted of charges that he raped a woman at the Kennedy family home in Florida. Testimony that he had attacked three other women was ruled inadmissible by the female judge. *See* Paul Vitello, *What the Jury Won't Hear*, Newsday, Dec. 3, 1991, at 5. Some observers commented that it appeared as though the woman prosecutor, was also on trial. *See, e.g.*, Jack Thomas, *Moira Lasch; Prosecutor on the Defensive*, Boston Globe, Dec. 13, 1991, at 55.

"[s]exual pressure [from being] imposed on someone who is not in an economic position to refuse it . . . ."[72] Although it is an admirable attempt, adopting this standard does not accomplish what it sets out to do. This section explores the reasons for this failure.

A. The Gender Difference in Sexuality

As feminist psychologists, sociologists, and commentators have long pointed out—and in fact as popular notions of men and women confirm—men and women experience sexuality in our culture differently. We use sexuality in advertisements to sell material goods, and women are overwhelmingly the objects of these sexual displays. Pornography abounds, catering primarily to men and consisting primarily of women's bodies and body parts.[73] Popular morality still indulgently tolerates and even admires the man who has many sexual partners, but disgraces any woman who would do the same.[74] Even more important to this analysis, women have overwhelmingly been the victims of sexual assault and rape—at home, on the streets, and in the workplace.[75] In the context of this cultural perspective, women necessarily view their sexuality and men's sexual conduct differently than men do.[76]

---

72. MACKINNON, FEMINISM UNMODIFIED, *supra* note 70, at 103.

73. Catharine MacKinnon has defined pornography generally as "the graphic sexually explicit subordination of women." *Id.* at 146 n.1.

74. The public reaction to the recent announcement by NBA basketball player Earvin "Magic" Johnson that he has contracted the HIV virus exemplifies this morality. Johnson said he believes he contracted the virus " 'from messing around with too many women.' " Lawrence K. Altman, *Drug Therapy Planned as Johnson Is Treated*, N.Y. TIMES, Nov. 9, 1991, at L33; Eugene Kennedy, *Magic Johnson's Lifestyle Cannot Be Overlooked*, L.A. TIMES, Nov. 16, 1991, at F15. Rather than condemning him for his promiscuity, fans have wept for his ill-fortune. What woman would receive societal sympathy if she admitted to the same indiscretions? She would be branded a prostitute, a "whore," or a "slut." *See, e.g.*, Sally Jenkins, *Salvos at the Garden; Both Monica Seles and Martina Navratilova Fired Away in New York*, SPORTS ILLUSTRATED, Dec. 2, 1991, at 58 (Navratilova commented on the double standard at a press conference); Judy Mann, *Reading Between the Lines*, WASH. POST, Nov. 27, 1991, (Metro Edition), at 58.

75. MacKinnon cites a study that found "that only 7.8 percent of women in the United States are *not* sexually assaulted or harassed in their lifetimes." CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127 (1989) (footnote omitted) (emphasis added).

76. Professor Kathryn Abrams describes some of the differences, citing a 1985 study by Barbara Gutek entitled SEX AND THE WORKPLACE:

> [W]omen are more likely to regard a sexual encounter, verbal or physical, as coercive. They are less likely to view such encounters as flattering or even directed to them as individuals . . . . In contrast, men are less likely to regard such conduct as harassing, and more likely to view it as a flattering reflection on their physical or personal attributes.

Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*,

The *Ellison* court tried to acknowledge these different perspectives by noting that "[c]onduct that many men consider unobjectionable may offend many women."[77] This is, indeed, the popular, social view—that some women are offended by some male sexual conduct. Offensiveness is not, however, the issue with sexual harassment. In *Rabidue*, the plaintiffs did not deserve to recover simply because they were offended by the supervisor's language.[78] They were entitled to recover because his use of sexual language, derogatory slang, and consistent reference to female body parts reduced the women from employees to sexual objects. They were put down and intimidated in the same way as if they had been denied promotions or job benefits just because of their sex. Sexual harassment law focuses on the discrimination against a woman, the objectification of her, and the resulting inhibition of her ability to succeed in the workplace, not just the offensiveness of the conduct.[79]

Meritor is a good example of this point. There, the Supreme Court said, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[80] The Court went on to state that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[81] This is not the case just because the sexual harassment offends an individual, but because it " 'is every bit the arbitrary barrier to sexual equality at the workplace' " and it demeans and disconcerts an employee who must " 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.' "[82] Thus, a woman centered analysis is needed not just because men find certain conduct "fun" while women find it offensive. It is needed because sexually harassing conduct intimidates and degrades women, and therefore,

---

42 VAND. L. REV. 1183, 1206 (1989) (citing BARBARA A. GUTEK, SEX AND THE WORKPLACE 47-54 (1985)).

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

78. The supervisor in *Rabidue* "routinely referred to women as 'whores,' 'cunt,' 'pussy' and 'tits.' " Rabidue v. Osceola Refining Co., 805 F.2d 611, 624 (6th Cir. 1986). *See supra* notes 20-27 and accompanying text.

79. Professor Abrams asserts that sexual behavior in the workplace contributes to the subordination of women by provoking two responses: one, a fear of sexual coercion, and two, a reminder that women are not equal colleagues. Abrams, *supra* note 76, at 1207-08.

80. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

81. *Id.* at 65 (citations omitted).

82. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (citations omitted).

prevents women from fully participating in the workplace.[83]

Sexual objectification also falls more heavily on women than on men because of the prevalence of pornography and the relative power imbalance between men and women in the economic marketplace.[84] Women still make less money than men and often continue to be economically dependent on them.[85] Sexual harassment is one manifestation of the barriers women encounter in the workplace. Its existence exacerbates the economic insecurity of all women.[86]

B. The Reasonable Woman

By adopting the reasonable woman standard, the courts discussed in this article presumed that they were adopting a different standard from the reasonable man or the reasonable person. From its beginning the reasonable man standard was purportedly gender-neutral.[87] It was, however, never so.[88] The male legal scholars who invented the concept described the "reasonable man" as the " 'man who takes the magazines at home and in the evening pushes the lawnmower in his shirtsleeves.' "[89] This vision does not describe a typical woman in our culture, not to mention its exclusion

---

83. For a more complete discussion of the discriminatory nature of sexual harassment, see Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1463-67 (1986).

84. Lin Farley describes sexual harassment as "man's need to maintain his control of female labor. . . . It ensures that female wages stay low, weakens women's employment position by undermining female seniority, and keeps women divided so they are incapable of organizing to change their situation." Lin Farley, *Dealing with Sexual Harassment*, *in* FEMINIST FRAMEWORKS 233, 233 (Alison M. Jaggar et al. eds., 1984).

85. "By the latest figures, women still earn 65 cents for every dollar that a man earns in the same occupation." Roxanne B. Conlin, *Women, Power, and the Law*, TRIAL, Feb. 1990, at 22, 26.

86. Professor Kathryn Abrams discusses the role of sexual harassment law in expanding the struggle for women's equality from access to jobs to equal valuing of male and female norms: "[s]exual harassment is a potent reminder that the entry of women into the workplace is the beginning, not the end, of a social transformation. Fifty-three percent of working women report having experienced behavior that they describe as sexual harassment." Abrams, *supra* note 76, at 1197-98 (footnotes omitted).

87. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22 (1988).

88. "[L]egal language is a male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women." Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893 (1989).

89. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1210 (1990) (footnote omitted).

of other cultural norms—male and female.[90] Converting the reasonable man to a reasonable person so that women are nominally included does not change the model.[91] It still means the white, middle-class male model generated by judges and lawyers. Notably, there has not been a flood of law review articles or other publicity heralding a new substantive standard in tort law because the reasonable man became a reasonable person. The new reasonable *person* is still the same middle-class man in his shirtsleeves pushing (or perhaps now, riding) his lawnmower.

At least some of the decisions cited in this article, although not all,[92] presume that adopting the "reasonable woman" standard is going to change the substantive outcome of these cases. Yet the same judges, juries and lawyers who created—and perpetuated—the "reasonable man in his shirtsleeves" will be trying and deciding these cases. Because, as the *Ellison* court opines, men will sometimes find harassing conduct unobjectionable, male judges and juries could similarly find such conduct appropriate. Given that men and women experience sexuality differently, how then can decision makers determine how a reasonable woman would have reacted without resorting to male defined culturally biased perspectives? They will have to draw on their own experiences and views of what conduct is reasonable for a woman. The current need for sexual harassment law demonstrates that men and women do not agree on what is reasonable. It seems naive to assume that the legal decision makers will be different. When decision makers see conduct in which they themselves would engage, they will find it to be reasonable, irrespective of whether they are told to analyze it from a male or female perspective. This is true not because the decision makers are bad judges or bad people, but because of the nature of reasonableness as a concept.

C. *Reasonableness as a Gendered Concept*

In Western society, reasonableness is a male concept.[93] Historically, men have been considered rational and reasonable, while

---

90. *Id.* at 1213.

91. "Even under such a victim oriented standard behavior that is customary may be viewed as tolerable . . . ." Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 808 (1988) (footnote omitted).

92. *See supra* part I.

93. Bender, *supra* note 87, at 23; Mary E. Griffith, *Sexism, Language, and the Law*, 91 W. VA. L. REV. 125, 142 (1988).

women are emotional and intuitive.[94] Forms of reasoning other than the male model have been omitted from law.[95] The work of Carol Gilligan and other feminists affirm that women in American society grow up with a different moral sense, "a different voice."[96] Although modern Western society seems to have accepted the notion that women can be reasonable, the acceptance is qualified in that women are only considered reasonable when they act like men.[97] In other words, if women put aside emotion and care, and instead focus on justice and prudence, they are being reasonable. Law is committed to reason, rather than emotion—that is, to the male rather than the female.[98]

Reasonableness also arises out of a concept of societal consensus.[99] We have no black-letter law or moral code defining what conduct is reasonable, and what is not. Nor is reasonableness a set concept regardless of situation. In fact, the legal standards for summary judgment and directed verdict assume that reasonable minds may differ. Instead, reasonable conduct means conduct that most people, the average person, the "man in his shirtsleeves," would agree with. In other words, reasonableness means the prevailing consensus in America.

Because sexual harassment law is directed at changing prevailing attitudes toward women in the workplace, requiring it to meet a prevailing consensus negates its purpose. For example, the majority in *Rabidue* decided that the defendant's conduct and the display of sexually explicit posters at work were not offensive be-

---

94. Bender, *supra* note 87, at 23-25. Law and history have created a system in which male things are more valuable than female ones. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1280 (1987). Thus, reason is valued over emotion.

95. Finley, *supra* note 88, at 892.

96. *See, e.g.*, Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). *See also* Bender, *supra* note 87, at 28; Littleton, *supra* note 94, at 1281; *Feminist Discourse, Moral Values, and the Law—A Conversation?*, 34 BUFF. L. REV. 11, 36-63 (1985) (transcript of panel discussion). Gilligan has recently expanded her work with adolescent girls. MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL (Carol Gilligan, et al. eds., 1990); Carol Gilligan, *Women, Girls, and Psychotherapy: Reframing Resistance*, 11 WOMEN & THERAPY 3-4 (1991). Leslie Bender lists many of the legal works that cite Gilligan's work in her article, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 1 n.2 (1990).

97. Bender, *supra* note 87, at 25; Ehrenreich, *supra* note 89, at 1218.

98. Finley, *supra* note 88, at 903. Notably, Black's Law Dictionary has an entry only for man, not for woman. BLACK'S LAW DICTIONARY 960 (6th ed. 1990). *See* Griffith, *supra* note 93, at 127.

99. Ehrenreich, *supra* note 89, at 1203-05.

cause of the prevailing American tolerance for "erotica" in advertisements and other public arenas.[100] Thus, as the majority concluded, women should not be affected by those same public displays entering the workplace. This attitude of course, would mean that only sexual conduct so extreme that it violates male societal norms—the ones that create those public displays—would be actionable. The law would merely reinforce the status quo.

The reasonable woman standard proposed by the courts does not address this problem because it creates no new societal consensus. The reasonable woman is just the wife of "the man in his shirtsleeves," who tolerates and lives with the male status quo on a daily basis. The man considers her reasonable only for as long as she tolerates the status quo, while showing appropriate feminine sensibilities.

A good example of this expectation is the experience of Julie Croteau, the first woman to play college baseball.[101] She quit her team after three seasons because she was miserable from "fighting and being emotionally destroyed."[102] Her coach responded that the team's reading *Penthouse* aloud " 'was just guys being guys . . . . [S]he was so highly accepted that they forgot she was a female.' "[103] The highest compliment the male athletes could give her was that they forgot she was a woman. Once she reminded them, she could no longer play the game.

The solution, therefore, to the male bias in the reasonable person standard is not simply to make the "person" a "woman," and let her play the same game.[104] In fact, to truly counteract the inherent bias, one would have to look at a reasonable woman of similar age, race, economic class, religion, and so on. The challenge is to discard the myth of neutrality or objectivity and explore a subjective standard.

---

100. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986); Ehrenreich, *supra* note 89, at 1202.

101. Mariah Burton Nelson, *Field of Nightmares*, 3 WOMEN'S SPORTS PAGES, Sept.-Oct. 1991, at 4.

102. *Id.*

103. *Id.*

104. "Reasonableness in legal ideology is simply too closely tied to the idea of objectivity—to the notion that the law can resolve legal conflicts without reflecting or reinforcing any personal perspective—to allow for such a transformation." Ehrenreich, *supra* note 89, at 1232.

D. The Myth of Objectivity

Law has always held itself out to be objective—that is, "expressing or involving the use of facts without distortion by personal feelings or prejudices."[105] Nevertheless, objective thinking historically has been male centered because men have had the power to ignore other perspectives and define their views as the realistic, normal, and objective ones.[106] Other experiences and other perspectives that deviate from male norms have been considered biased.[107] Hence, the subjective view—"whatever in experience or knowledge is conditioned by merely personal characteristics of mind or by particular states of mind as opposed to what is determined only by the universal conditions of human experience and knowledge"[108]—has been disfavored in the law.

This bias is particularly evident in examining sexual behavior in the workplace. Men have had control of the workplace for so long that male norms for sexual conduct have become the status quo.[109] Thus, construction workers whistle at women walking past the work site. Factory workers post pictures of nude women beside their stations. Lawyers thank their female secretaries, calling them "honey" and "dear." Suggestive tones of voice, expectations of revealing dress, and sexual language are even more prevalent. Women's experiences of these behaviors encompass personal feelings and would not necessarily constitute a universal condition of human experience.

To truly recognize women's experiences as women (as well as people of color, ethnic minorities, etc.), the law must look at their experiences and perspectives—what traditionally have been considered subjective matters. If a woman suffers insult, indignity, and job discrimination because of her supervisor's or co-worker's harassment of her as a woman, she should be compensated and the behavior should be stopped. It does not matter whether she is particularly sensitive or insensitive. She has been discriminated against, and the law should protect her.

Although the courts recognize that the effect of sexual harass-

---

105. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1556 (1986).
106. Finley, *supra* note 88, at 893.
107. *Id.* at 897.
108. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1986).
109. Abrams, *supra* note 76, at 1203.

ment on an individual woman is an essential element for a legal claim, they fear that the "idiosyncratic concerns of the rare hypersensitive employee,"[110] will hold employers hostage unless there is also an objective review. This concern is ridiculous. Sexual harassment law does not automatically make an employer liable the first time a sexual advance is made or sexual conduct occurs. It requires that the woman indicate in some way that the behavior is unwelcome.[111] If, after receiving notice that sexual behavior is unwelcome, an employer fails to address her concerns, the woman does and should have a claim against her employer. It does not really matter whether her concerns are reasonable or not. The *subjective* effect upon her is the key consideration.

The subjective concept is not unheard of in tort law.[112] Tortfeasors take their plaintiffs as they find them. If the plaintiff has an eggshell skull, the tortfeasor who negligently kills that plaintiff, is liable for the death, although anyone else would only have suffered a bump on the head. The law does not fear for tortfeasors and neither should it fear for discrimination by employers. If the woman's job or health suffers because of sexual harassment, the discrimination should be redressed.

Eliminating the purportedly objective aspect of the law still requires the factfinder to determine whether the behavior was harassment based on sex, whether it was unwelcome and whether any harm resulted. It still allows the factfinder to decide whether this plaintiff really suffered any harm. In addition, however, it permits a woman harmed by harassing sexual behavior to recover, whether or not society as a whole has advanced far enough to recognize her position as reasonable.

Conclusion

Recently, a number of courts, including a Vermont superior court, have attempted to recognize the different experiences of men and women relating to sexual harassment by asking whether

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

111. This article does not address the problems with the unwelcomeness requirement. For an introductory discussion, see Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. Chi. L. Rev. 328, 344 (1988). Vhay discusses how "unwelcomeness" arises out of the status quo discriminatory standard. He also takes the contrary stance to this article, arguing that the subjective standard should be replaced with an objective one. *Id.* at 346-48.

112. Schoenheider, *supra* note 83, at 1486.

the allegedly harassing conduct would unreasonably interfere with the work performance of a reasonable woman. The emphasis of these courts is to remind factfinders to focus on the victim, the woman, to decide whether conduct is harassing, rather than to reinforce the status quo through the eyes of the harasser. Because the notion of reasonableness is inextricably tied to maleness, however, this standard fails to alter the status quo. To fully address the concerns of women (and racial and cultural minorities) courts must abandon the notion that law embodies an objective, neutral viewpoint and explore a subjective standard of harm.