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THE REASONABLE WOMAN: HAS SHE MADE A DIFFERENCE?

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LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY. By Ann Scales. New York: New York University Press. 2006. Pp. 217.

Abstract: It has been fifteen years since the Ninth Circuit decided to utilize the reasonable woman standard in sexual harassment cases, and the Supreme Court has yet to comment on its legitimacy or the split in federal circuits. In *Legal Feminism*, Ann Scales promotes a feminist way of understanding law that takes history, suffering, and context seriously. Among other things, she identifies philosophical liberalism as a limiting rhetoric that hides structures of privilege behind a pretense of neutrality. Consequently, Scales prescribes eschewing neutrality to overcome the historic equation of rationality with maleness, and to expose the colossal privilege that allows those in power to believe they are acting neutrally. Neutrality and its pretense are at the heart of the ongoing debate over the use of the "reasonable woman" instead of the "reasonable person" to satisfy the objective prong of Title VII hostile work environment claims. This Book Review examines the evolution of the reasonable woman and explores her successes and failures in fifteen years of jurisprudence.

Introduction

One of the primary topics Ann Scales discusses in *Legal Feminism* is how the illusion of neutrality in the law has presented special obstacles to women and other historically disempowered groups.[1] These special obstacles, she explains, exist for two reasons: (1) rationality has historically been equated with maleness, and (2) those in power also have the colossal privilege that allows them to believe that they are

* Staff Writer, Boston College Third World Law Journal (2006–2007).

[1] Ann Scales, Legal Feminism: Activism, Lawyering, and Legal Theory 103 (Deborah Gershenowitz ed., 2006). Some of these special obstacles include that "human" is defined by maleness, that perception is not just given but is directed by socially constructed power relations, and that equality is guaranteed only when the sexes are already equal. *See id.* at 84, 86, 93. For further discussion on radical feminism's attack on liberalism's central principle of neutrality, see Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 Fla. L. Rev. 133, 139–40 & n.29 (2005) (explaining the belief that the liberal state is at its worst when it is most neutral).

acting neutrally.[2] Consequently, the illusion of neutrality converts the comfortable version of experience of those in power into an "objective" fact.[3] The bottom line is that legal analysis that describes existing social imbalances as the neutral background of experience only serves those already in power by maintaining the status quo.[4]

Thirty years ago, the first American court recognized sexual harassment as discriminatory conduct that violates Title VII of the Civil Rights Act of 1964.[5] Today, sexual harassment is widely accepted as a form of sex discrimination in violation of Title VII.[6] After three decades of increasing public awareness, it is somewhat difficult to remember that before 1976, federal courts refused to recognize sexual harassment as a form of discrimination.[7] Although sexual harassment law is said to

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[2] SCALES, *supra* note 1, at 103. She claims, "[A]ll of law is already an affirmative action plan for somebody (usually, for whoever got to write the law)." *Id.* at 77.

[3] *Id.* at 103.

[4] *See id.* at 86.

[5] Title VII of The Civil Rights Act of 1964 provides the following:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a)(1) (1994); Williams v. Saxbe, 413 F. Supp. 654, 663 (D.D.C 1976), *rev'd in part, vacated in part*, 587 F.2d 1240 (D.C. Cir. 1978) (holding retaliatory actions of male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII of the Civil Rights Act of 1964); *see* Jeffrey A. Gettle, *Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?*, 31 DUQ. L. REV. 841, 843 & n.9 (1993) (explaining the origins of sexual harassment in *Williams*). Sexual harassment has gained a majority of its attention over the past thirty years when male political figures have been accused of harassment. *See* Noelle C. Brennan, *Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom*, 44 DEPAUL L. REV. 545, 545 (1995) (noting heightened awareness of sexual harassment after the Clarence Thomas and Anita Hill debacle); Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357, 357 (1998) (noting the wake of the dismissal of Paula Jones's sexual harassment suit against President Bill Clinton as a catalyst for addressing the status of the law). For example, in the three months following the Clarence Thomas confirmation hearings, the Equal Employment Opportunity Commission (EEOC) reported a seventy percent increase in the reports of sexual harassment, as compared to the previous year. Brennan, *supra* at 545 n.3.

[6] 42 U.S.C. § 2000e–2; *see* Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 640 (2002).

[7] *See* Shoenfelt et al., *supra* note 6, at 645–46. In *Corne v. Bausch & Lomb, Inc.*, two female clerical workers alleged that they were repeatedly sexually propositioned and molested by a supervisor. 390 F. Supp. 161, 162 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). The court denied relief for the plaintiffs, stating that the supervisor's conduct was a "personal proclivity, peculiarity, or mannerism" that "had no relationship to the nature of employment." *Id.* at 163. Courts tended to relegate the problem of sexual harassment to

have subversive legislative origins, its evolution is now well documented among legal scholars.[8]

Title VII makes it unlawful for an employer to discriminate on the basis of sex.[9] Although sexual harassment encompasses many types of conduct, two broad categories are defined by the EEOC guidelines as actionable under Title VII.[10] The first is "quid pro quo" sexual harassment, which is harassment that involves the conditioning of employment or employment benefits on sexual favors.[11] The second, more

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the private sphere, attributing the conduct to "satisfying a personal urge" rather than "sex discrimination." *See* Brennan, *supra* note 5, at 552.

[8] Brennan, *supra* note 5, at 551 & nn.37–39. According to Brennan, when originally introduced, Title VII did not include a prohibition against sex discrimination. *Id.* at 551. At the last minute, it was added by Rep. Howard Smith from Virginia in an effort to make the bill so controversial that it would fail. *Id.* The amendment passed with a 168–133 margin. *Id.*; *see* Penny L. Cigoy, *Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 Pepp. L. Rev. 1071, 1072 & nn.9–10 (1993). For an in depth discussion of the evolution of sexual harassment law, see Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* Directions in Sexual Harassment 1 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Tran, *supra* note 5, at 359–69; Brennan, *supra* note 5, at 550–60; Cigoy, *supra* 8, at 1072–78; Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 Fordham L. Rev. 773, 777–98 (1993).

[9] 42 U.S.C. § 2000e–2(a)(1); *see* Deborah S. Brenneman, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. Cin. L. Rev. 1281, 1283 (1992). During the 1970s, the American judiciary had to be persuaded that sexual harassment is "discrimination on the basis of sex." Siegel, *supra* note 8, at 9. The refusal to acknowledge that sexual harassment had anything to do with employment discrimination on the basis of sex was grounded in the argument that it could happen to a man or woman or both; even if its harms were inflicted on women only, they were not inflicted on all women, only those who refused their supervisors' advances. *See id.* at 11; *see also* Adler & Pierce, *supra* note 8, at 788–92 (articulating the primary inquiry as whether "but for the fact of her sex, [the plaintiff] would not have been the object of harassment") (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[10] 42 U.S.C. § 2000e–2(a)(1); *see* Gettle, *supra* note 5, at 842; Shoenfelt et al., *supra* note 6, at 640. The Act only prohibits unwelcome sexual conduct that affects a term or condition of employment, not all conduct of a sexual nature in the workplace. Shoenfelt et al., *supra* note 6, at 640. In 1980, EEOC issued guidelines that established the criteria of determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined circumstances for employer liability, and suggested measures an employer should take to prevent sexual harassment. 29 C.F.R. § 1604.11(a) (1998); Shoenfelt et al., *supra* note 6, at 640. The guidelines describe sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" in certain circumstances. 29 C.F.R. § 1604.11(a).

[11] Brenneman, *supra* note 9, at 1283. Quid pro quo harassment is the traditional and most obvious form of sexual harassment. Gettle, *supra* note 5, at 842. The first successful quid pro quo case was *Williams v. Saxbe*, which found in favor of the plaintiff that retaliatory actions such as poor performance appraisals and underserved reprimands had been taken against an employee for refusing unwanted sexual advances. *See* 413 F. Supp. 654, 655–56, 657 (D.D.C 1976), *rev'd in part, vacated in part*, 587 F.2d 1240 (D.C. Cir. 1978).

subtle type of sexual harassment is "hostile work environment."[12] A hostile work environment arises when the unwelcome sexual conduct unreasonably interferes with the individual's job performance, or creates an intimidating, hostile, or offensive work environment.[13]

Fifteen years ago, the Ninth Circuit was the first court to unequivocally adopt the reasonable woman standard in hostile work environment sexual harassment claims to determine whether the unwelcome conduct was objectively offensive enough to trigger liability.[14] Today, the Third Circuit is the only court that has clearly followed the Ninth Circuit by employing the "reasonable person of the same sex in that position."[15] Meanwhile, the Fifth, Sixth, Eighth, and Eleventh Circuits have clearly rejected a gender-specific standard.[16] To date, the

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[12] *See* Shoenfelt et al., *supra* note 6, at 642.

[13] Adler & Pierce, *supra* note 8, at 780. The Court first recognized a hostile work environment claim in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Because hostile environment sexual harassment is the less detectible form of harassment, it is not surprising that it was not recognized for a full ten years after quid pro quo claims had been adopted. *See id.*; Gettle, *supra* note 5, at 842.

[14] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). Although prior cases adopted similar standards, *Ellison* was the first to affirmatively hold 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." *Id.* at 879 (emphasis added) (citation omitted); *see* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that discrimination would detrimentally affect a reasonable person of the same sex in that position); Yates v. Avco Corp., 819 F.2d 630, 636–37 (6th Cir. 1987) (adopting the reasonable woman standard in constructive discharge actions involving sexual harassment by a male supervisor); Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) (disagreeing with the majority's use of the reasonable person perspective instead of reasonable woman); Cigoy, *supra* note 8, at 1079–88 (detailing the origins of the reasonable woman standard through case law).

[15] *Andrews*, 895 F.2d at 1492; Shoenfelt et al., *supra* note 6, at 637–38 & nn.25–26.

[16] Watkins v. Bowden, 105 F.3d 1344, 1356 (11th Cir. 1997) (holding no reversible error in "reasonable person" standard after *Harris*); Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (finding the "reasonable person" standard appropriate after the Supreme Court's use in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); Hartleip v. McNeilab, Inc., 83 F.3d 767, 776 (6th Cir. 1996) (adopting *Radtke v. Everett*, 501 N.W.2d 155, 165 (Mich. 1993), and concluding "that a gender-conscious standard must be rejected"); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a 'reasonable woman.'"), *cert denied*, 516 U.S. 974 (1995).

The remaining circuits, the First, Second, Fourth, Seventh, and Tenth apply the reasonable person standard in the great majority of cases, but have never actually rejected the use of the reasonable woman standard. *See, e.g.*, Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (applying the reasonable person standard); Jennings v. Univ. of N.C., 444 F.3d 255, 269 (4th Cir. 2006) (applying the reasonable person standard); Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005) (holding that hostile work environment requires both subjective and objective severity or pervasiveness);

U.S. Supreme Court has failed to answer the question at the heart of the debate: whose perspective objectively determines whether the plaintiff should have been offended by the alleged harassment?[17]

In light of Scales's warning against the illusion of neutrality, this Book Review examines the value of a measure taken by some jurisdictions to eschew a gender-neutral standard because it "tends to be male-biased and tends to systematically ignore the experiences of women."[18] Part I of this Book Review briefly summarizes sexual harassment law, addresses the leading cases that define it as a cause of action, and accounts for the origins of the split in the federal circuits over the reasonableness standard.[19] Part II maps out the heated debate over the advantages and disadvantages of using the reasonable woman instead of the reasonable person as the objective perspective in hostile environment cases. Part III surveys the federal circuits to provide a glimpse of the different rates at which plaintiffs have established, in the least, that the harassing conduct created an objectively hostile work environment.[20] By analyzing these varying success rates over the past fifteen years, this Book Review will conclude that this highly debated difference in reasonableness standards has had little practical effect.[21]

Petrosino v. Bell Atl., 385 F.3d 210, 221–22 (2d Cir. 2004) (considering reasonable woman, but applying the reasonable person standard); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1219 (10th Cir. 2003) (applying the reasonable person standard).

[17] Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 204 (2001); Shoenfelt et al., *supra* note 6, at 636.

[18] *Ellison*, 924 F.2d at 879.

[19] Considering the wealth of detailed documentation of the origins and evolution of sexual harassment law under Title VII, Part I seeks only to provide a brief overview of the pertinent history and current status of the law. *See infra* Part I.

[20] *See Harris*, 510 U.S. at 21.

[21] For the purposes of this Book Review, the "success rates" refer to any favorable outcome for the plaintiff regarding the objectively hostile element of the claim. For example, successes would include both *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 387, 400–01 (1st Cir. 2002), where the court affirmed the jury verdict against employer for all elements of plaintiff's hostile work environment claim, and *Chavez v. New Mexico*, 397 F.3d 826, 837, 838 n.2 (10th Cir. 2005), where the court overturned the district court grant of summary judgment against plaintiff hostile work environment claim, but noted that employer liability remained an issue for remand. However, plaintiff success would not include *Whittaker*, where the court found the offensive conduct was neither severe nor pervasive enough to create objectively hostile work environment. *See* 424 F.3d at 646.

Although each jurisdiction has developed somewhat different elements required to establish a prima facie case for hostile work environment, they all include requirements of sufficient objective severity or pervasiveness and some basis of employer liability. *See, e.g.*, O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (noting that, to establish a hostile work environment, plaintiff must show: "(1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the

I. Vague Supreme Court Decisions Split the Circuits

A. *Judicial Recognition of the Reasonable Woman*

In *Meritor Savings Bank v. Vinson*, the Court set the standards for hostile work environment claims under Title VII.[22] Vinson filed a claim of sexual harassment against her supervisor and the bank.[23] She alleged that the supervisor fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, and even forcibly raped her on several occasions.[24]

Ruling in favor of Vinson, the Supreme Court found that a hostile work environment theory existed under Title VII, which meant that the tangible or economic injuries needed to show quid pro quo harassment were no longer the only means of stating a claim.[25] In addition, the Court articulated that a valid Title VII sexual harassment claim "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[26] The Court successfully established a sexual harassment violation based on a hostile work environment, but it failed to specify the reasonableness standard by which the harassment should be viewed.[27] Following the Supreme Court's decision in *Meritor*, the circuit courts split over whether the conduct involved in a sexual harassment claim should be

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harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established").

[22] 42 U.S.C. § 2000e–2(a)(1) (1994); *see Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986); Adler & Pierce, *supra* note 8, at 781.

[23] *Meritor*, 477 U.S. at 60.

[24] *Id.* Vinson estimated that over the course of four years, he had coerced her into having intercourse approximately forty or fifty times. *Id.*

[25] 42 U.S.C. § 2000e–2(a)(1); *Meritor*, 477 U.S. at 68. The Court found that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64. The Court also recognized that the district court had erred by focusing on the "voluntariness" of the victim's participation as opposed to the victim's conduct as an indication that the advances were unwelcome. *Id.* at 68.

[26] 42 U.S.C. § 2000e–2(a)(1); *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).

[27] *See* Hill, *supra* note 1, at 172; Shoenfelt et al., *supra* note 6, at 642.

judged from the viewpoint of the reasonable person or the reasonable woman.[28]

When the Sixth Circuit decided *Rabidue v. Osceola Refining Co.* in 1986, it held that to prevail in a hostile environment claim a plaintiff must show that the harassment unreasonably interfered with her work and created a hostile work environment that affected her psychological well-being.[29] Among other complaints, Rabidue claimed that, on a daily basis, male employees displayed pictures of nude and semi-nude women on calendars, on desks, and on posters.[30]

To determine whether Rabidue had satisfied her burden of proof, meaning that the harassment had created a hostile work environment and had affected her psychological well-being, the majority opinion asked how a *reasonable person* in similar circumstances would have perceived the conduct.[31] Furthermore, through the perspective of a reasonable person, the court stated that the sexual posters only had a de minimus effect on Rabidue's work environment considering the common exploitation of women in film, television, radio, and other public places.[32]

Judge Damon Keith's dissent in *Rabidue* is generally credited as the origin of the reasonable woman standard in hostile work environment claims.[33] Stressing a wide divergence between most women's views of appropriate sexual conduct and those of men, Judge Keith advocated

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[28] *Compare* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993) (adopting the reasonable woman standard), Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the reasonable woman standard), Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (employing a reasonable person of the same sex standard), Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988) (noting the importance of the woman's perspective), *and* Yates v. Avco Corp., 819 F.2d 630, 636–37 (6th Cir. 1987) (adopting the reasonable woman standard), *with* Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (applying the reasonable person standard), *and* Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989) (applying the reasonable person standard).

[29] 805 F.2d 611, 620, 623 (6th Cir. 1986) (holding that the plaintiff failed to sustain her burden of proving that she was victim of Title VII sexual harassment).

[30] *See id.* at 623–24 (Keith, J., dissenting). One of the posters, which had been on the wall for eight years, showed a naked woman lying supine with a golf ball between her breasts and a man standing over her, with a golf club raised, yelling "Fore!" *Id.* at 624. Rabidue also brought a claim against her supervisor, who made explicit and vulgar comments, including calling women whores, cunts, and pussies, and, when referring to Rabidue, saying, "All that bitch needs is a good lay," and calling her a "fat ass." *Id.*

[31] *Id.* at 620 (majority opinion).

[32] *See id.* at 622.

[33] *Id.* at 624 (Keith, J., dissenting). In drafting his dissent, Judge Keith relied heavily on a 1984 law review article, Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451, 1459 (1984) [hereinafter *Sexual Harassment Claims*].

the adoption of the new standard.[34] He reasoned that Title VII's precise purpose was to prevent discriminatory behavior and attitudes from poisoning the work environment of classes protected under the Act.[35] Furthermore, Judge Keith warned that unless the outlook of the reasonable woman was adopted, defendants and courts would continue to perpetuate ingrained notions of reasonable behavior defined by the offenders—in most cases, men.[36]

Although Judge Keith is credited with the introduction of the reasonable woman standard to hostile environment sexual harassment claims, the Ninth Circuit was the first court to explicitly adopt it, and did so in *Ellison v. Brady*.[37] In *Ellison*, the plaintiff filed a hostile work environment sexual harassment claim against her employer, charging that her co-worker sexually harassed her by repeatedly asking her out and sending her strange letters.[38] The Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment to the defendant and explicitly refused to follow the *Rabidue* standard.[39]

Instead, the Ninth Circuit adopted the perspective of a reasonable woman primarily because it found that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[40] The court asserted that the sexual experiences of women were different than those of men, and therefore, conduct that many men consider unobjectionable may offend many women.[41]

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[34] *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). For more detailed discussions of the differing perspectives of men and women, see Shoenfelt et al., *supra* note 6, at 667.

[35] 42 U.S.C. § 2000e–2(a)(1) (1994); *see Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). Judge Keith continues, "As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent." *See Rabidue*, 805 F.2d at 626–27 (Keith, J., dissenting).

[36] *See Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). Studies show that women face a twenty-five percent probability of being raped by a man, and a forty-six percent probability of being sexually assaulted in their lifetimes. Kerns, *supra* note 17, at 215–16.

[37] 924 F.2d 872, 879 (9th Cir. 1991); Cigoy, *supra* note 8, at 1079.

[38] *See* 924 F.2d at 873–74. The letters implied an intimacy that was imagined by her co-worker, and was frightening to Ellison. *Id.* at 874. Ellison testified that she "thought he was crazy," and she "didn't know what he would do next." *Id.*

[39] *Id.* at 877, 883.

[40] *Id.* at 879. Paralleling Judge Keith's warning, the *Ellison* court noted, "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy." *Id.* at 878; *see Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

[41] *Ellison*, 924 F.2d at 879. The Ninth Circuit Court of Appeals described these differing experiences in the opinion as the following:

B. *The Supreme Court's Silence*

The landmark *Ellison* decision initiated the development of the controversial reasonable woman standard, which some circuits have followed and others have not.[42] Since 1991, the Supreme Court has had multiple opportunities to comment on this divide, but it has instead opted to address other issues.[43] Some suggest that the Supreme Court's continued silence, in *Harris v. Forklift Systems, Inc.* and *Oncale v. Sundowner Offshore Services, Inc.*, implies that it has accepted and possibly endorsed the existence of the reasonable woman.[44]

However, the primary issue in the *Harris* abusive work environment claim was the same as that in *Rabidue*: whether the plaintiff must suffer psychological injury to have an actionable claim.[45] Harris was

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> [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Id.

[42] *See, e.g.*, Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (applying a reasonable person of same sex in that position standard); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) (rejecting the reasonable woman as the objective standard), *cert denied*, 516 U.S. 974 (1995).

[43] *See* Pa. State Police v. Suders, 542 U.S. 129, 148 (2004) (allowing an affirmative defense in a sexual harassment constructive discharge claim); Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848 (2001) (holding that front pay is not an element of compensatory damages in a hostile work environment claim under Civil Rights Act of 1991); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 766 (1998) (subjecting employer to vicarious liability for certain hostile environment claims); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (extending sexual harassment claims to male on male harassment); Faragher v. City of Boca Raton, 524 U.S. 775, 810 (1998) (adopting vicarious liability of employer under Title VII, affirmative defenses); Landgraf v. USI Film Prods., 511 U.S. 244, 247 (1994) (establishing a right to recover under the provisions of Civil Rights Act of 1991 for a case pending on appeal during enactment); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (invalidating a psychological injury requirement).

[44] *Oncale*, 523 U.S. at 79; *Harris*, 510 U.S. at 22; Hill, *supra* note 1, at 172.

[45] *See Harris*, 510 U.S. at 22. Because the *Meritor* decision initiated the circuit court split over whether to apply the reasonable person standard or reasonable woman standard, it seemed likely that in 1993, the Supreme Court would comment on the debate in *Harris*. *See Harris*, 510 U.S. at 22; *Meritor*, 447 U.S. at 68; Kerns, *supra* note 17, at 206–07; Brennan, *supra* note 5, at 547. In fact, the trial court in *Harris* applied the reasonable woman standard, but the plaintiff did not specifically ask the Supreme Court to consider the propriety of the standard. 976 F.2d at 733, 733 (6th Cir. 1992), *cert. granted*, 510 U.S. 17; *see* Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 668 (1993).

often insulted because of her gender and made the target of unwanted sexual innuendos.[46] The Supreme Court held that so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.[47] The Court set a totality of circumstances test to determine whether an environment would be considered hostile or abusive.[48]

Describing the limits of an actionable claim, Justice O'Connor wrote, "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[49] Despite the Court's use of the term "reasonable person," it never explicitly rejected the "reasonable woman" test, leaving both feminists and courts confused over which legal standard is the more appropriate for sexual harassment claims.[50] Following *Harris*, the lower courts continued to split on the question of the appropriate objective standard.[51]

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[46] *Harris*, 510 U.S. at 19. On several occasions in front of others, the president said to Harris, "'You're a woman, what do you know' and 'We need a man as the rental manager'; at least once, he told her she was 'a dumb ass woman.'" *Id.* He suggested that the two of them "go to the Holiday Inn to negotiate [Harris's] raise." *Id.* He occasionally asked Harris and other female employees to get coins from his front pants pocket; he threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. *Id.* After Harris complained to him about his conduct, he apologized, only to start up again a month later. *Id.* Despite all this, the district court found in favor of the defendant, reasoning that the president's comments were not so severe as to seriously affect Harris' psychological well-being. *Id.* at 20.

[47] *Id.* at 22.

[48] *Id.* at 23. These circumstances include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. *Id.*

[49] 42 U.S.C. § 2000e–2(a)(1) (1994); *Harris*, 510 U.S. at 21. Both the objective and the subjective prongs must be satisfied, otherwise the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. *Harris*, 510 U.S. at 21. The subjective prong is satisfied when the victim actually perceives the environment to be hostile or abusive. *Id.*

[50] *Harris*, 510 U.S. at 21; Kerns, *supra* note 17, at 208. Some interpreted the Court's opinion as favoring the reasonable person standard because it used the term "reasonable person" throughout the opinion. Kerns, *supra* note 17, at 208. Others point out the Court's emphasis on answering only the limited question on psychological injury, not all of the potential questions raised by the decision. *See Harris*, 510 U.S. at 22–23; Hill, *supra* note 1, at 174–75; Kerns, *supra* note 17, at 208.

[51] *See, e.g.*, Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (applying the standard of a reasonable person of same sex in that position); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) (rejecting the reasonable woman as the objective standard), *cert denied*, 516 U.S. 974 (1995).

Almost five years later, the Court broadened the extent of actionable hostile work environment sexual harassment, providing a claim for same-sex harassment in *Oncale*.[52] In applying the *Meritor* and *Harris* decisions, the Court in *Oncale* elaborated explicitly on the objective perspective from which the harassment should be judged.[53] The perspective should be that of a reasonable person in the plaintiff's position, considering "all the circumstances."[54] The factors the Court specified as "all of the circumstances" were much more far-reaching and sensitive to the social context of the alleged harassment than those originally identified in *Harris*.[55] Furthermore, the *Oncale* Court's emphasis on placing "the reasonable person in the plaintiff's position" to answer the question of severity has led some scholars to argue that *Oncale*'s redefinition of *Harris* not only protects the reasonable woman standard, but may implicitly encourage its use.[56] Whether or not the Supreme Court intended to implicitly endorse the reasonable woman standard, it has yet to clearly accept or reject the standard, and the circuit courts remain split.[57]

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[52] *See* 523 U.S. 75, 79 (1998). On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions, including being physically assaulted in a sexual manner and threatened with rape by supervisors and a co-worker. *See id.* at 77. The Fifth Circuit affirmed the district court decision that there was no cause of action for male-on-male harassment under Title VII, but the Supreme Court rejected that outright. *Id.* at 77, 79. Although male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, Congress did intend "to strike at the entire spectrum of disparate treatment of men and women in employment." *See id.* at 78, 79; Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986).

[53] *See Oncale*, 523 U.S. at 81; *Harris*, 510 U.S. at 23; *Meritor*, 477 U.S. at 64.

[54] *Oncale*, 523 U.S. at 81 (quoting *Harris*, 510 U.S. at 23).

[55] *Id.* at 81–82; *Harris*, 510 U.S. at 23.

> In same–sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Oncale, 523 U.S. at 81–82.

[56] *Oncale*, 523 U.S. at 81–82; *Harris*, 510 U.S. at 23; Hill, *supra* note 1, at 175.

[57] *See Oncale*, 523 U.S. at 81; *Harris*, 510 U.S. at 21; Shoenfelt et al., *supra* note 6, at 636.

II. Mapping out the Debate

Over the past fifteen years, the reasonable woman standard has received much attention in academic literature.[58] In fact, a study examining every reported federal district and appellate court opinion between 1986 and 1995 involving sexual harassment in the workplace found "more articles discussing the reasonable woman standard than courts adopting [it]."[59] The crux of the debate lies in defining the purpose of Title VII and how best to achieve it.[60]

Those in favor of the reasonable woman standard view the precise purpose of Title VII as preventing behavior that is so debilitating that it hinders a woman's job performance and thereby denies her an equal opportunity to achieve.[61] From that perspective, the reasonable woman standard is a means of narrowing the divergent perceptions of men and women regarding acceptable behavior.[62] Consequently, they reason, if male perceptions of acceptable behavior could be changed to more closely match those held by women, more men would reject the harassing conduct that poisons a female victim's work environment.[63] The hope is that greater success for female plaintiffs in the courtroom will more accurately reflect the reality of sexual harassment as experienced by American working women.[64]

In contrast, those opposed to the reasonable woman standard argue that it is inherently contrary to the principle of equality under Title VII.[65] In that light, a separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable.[66] Furthermore, some suggest that it is both unfair and confusing for male fact-finders and well-intentioned em-

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[58] *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. 548, 584 (2001).

[59] *See id.*

[60] *See* 42 U.S.C. § 2000e–2(a)(1) (1994); Juliano & Schwab, *supra* note 58, at 583–84 & nn.140–41.

[61] *See* 42 U.S.C. § 2000e–2(a)(1); Brenneman, *supra* note 9, at 1306; *see also* Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) ("In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act.").

[62] *See* Brenneman, *supra* note 9, at 1305.

[63] *See id.* at 1306.

[64] *See* Kerns, *supra* note 17, at 229; Angela Baker, Comment, *Employment Law—The "Reasonable Woman" Standard Under* Ellison v. Brady*: Implications for Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. Corp. L. 691, 713 (1992).

[65] *See* 42 U.S.C. § 2000e–2(a)(1); Juliano & Schwab, *supra* note 58, at 583 & n.141.

[66] *See* Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 Lab. Law. 203, 203, 210 (1992).

ployers to be asked to apply such a standard.[67] Although the majority of this vigorous debate has taken place in the abstract, each side's rationale has fueled the ongoing circuit split.[68]

A. *Arguments for the Reasonable Woman Standard*

1. Divergent Perceptions, Divergent Worlds

Central to the argument made by proponents of the reasonable woman standard, including the *Ellison* majority, is that men and women perceive certain interpersonal behaviors differently.[69] They emphasize research showing that behavior that many men consider not only harmless and innocent, but even flattering, is perceived as offensive by many women.[70] This gap between male and female perceptions, they claim, indicates a lack of social consensus on the appropriate standard of behavior.[71]

The reason proponents give for such divergent perceptions is that men and women actually live in materially different social worlds, structured by a gender hierarchy.[72] The differences between these two worlds include an economic and professional disparity between men and women, which creates unequal positions of power in the workforce.[73] Furthermore, they point out that women live under a constant threat of sex-related violence.[74] Most victims of sexual harassment in

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[67] *See* Saba Ashraf, Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 Hofstra L. Rev. 483, 484 (1992).

[68] *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (citing *Sexual Harassment Claims*, *supra* note 33, at 1455); Juliano & Schwab, *supra* note 58, at 584.

[69] *See* Baker, *supra* note 64, at 702 ("Conduct that many men consider unobjectionable may offend many women.") (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

[70] *See* Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See it . . . Some Won't*, Harv. Bus. Rev., Mar.–Apr. 1981, at 78; Kerns, *supra* note 17, at 215 & n.100; Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 Cardozo Women's L.J. 195, 211–12 (1995); Cigoy, *supra* note 8, at 1093–94; Brenneman, *supra* note 9, at 1293–94; Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L.J. 35, 52 & n.56 (1990).

[71] *Sexual Harassment Claims*, *supra* note 33, at 1451. Dissenting in *Rabidue*, Judge Keith noted the irony in using the reasonable person standard to define sexual harassment because the notions of reasonable behavior according to that standard were fashioned by the offenders themselves—men. *See* 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting); Brenneman, *supra* note 9, at 1290.

[72] *See* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169, 1209 (1998); Baker, *supra* note 64, at 702.

[73] *See* Kerns, *supra* note 17, at 219.

[74] *See id.* at 215 & n.101.

the workplace are women, and women are victims of assault and rape in disproportionately higher numbers than men.[75] Therefore, they claim that women will be more sensitive than men to conduct that is sexual in nature because to women any form of sexual conduct, even the most mild, may instinctively trigger concern that the conduct will lead to a more violent sexual assault.[76]

Some of those in favor of the gendered reasonableness standard insist that the workplace is under male control.[77] This means that sexual harassment functions to preserve male supremacy and reinforce masculine norms, particularly where the entry of a woman into a particular workforce appears to call that control into question.[78] Frequently, proponents maintain, sexual harassment has more to do with power than with sexual desire.[79] Therefore, these forms of sexual harassment are directed at women as a group as an accepted mode of expressing masculinity or masculine camaraderie, thereby entrenching male norms in the workplace.[80]

Sexual harassment is not a gender-neutral problem.[81] Therefore, according to advocates of the reasonable woman standard, a gender-neutral standard is simply inadequate because it will never reflect nor protect the unique interests of its victims.[82]

2. "Gender-Neutral" Is Male-Biased

Furthermore, advocates of the reasonable woman standard claim, the reasonable person standard is inherently male-biased and it systematically ignores the experiences of women.[83] They stress that American jurisprudence has historically evaluated conduct by comparing it to contemporary societal norms, represented by the "reasonable man."[84]

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[75] *See* Cigoy, *supra* note 8, at 1094. One proponent noted that one in three women in America will be raped, and at least one out of two women will be sexually harassed during her educational or professional career. *See* Kerns, *supra* note 17, at 209 nn.73–74.

[76] *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Cigoy, *supra* note 8, at 1094–95.

[77] *See* Hill, *supra* note 1, at 173.

[78] *See* Abrams, *supra* note 72, at 1205–06.

[79] Kenealy, *supra* note 66, at 204.

[80] *See* Abrams, *supra* note 72, at 1213.

[81] Kerns, *supra* note 17, at 197.

[82] *See id.* at 196, 197.

[83] *See Ellison* 924 F.2d at 879; Goldberg, *supra* note 70, at 212; Hill, *supra* note 1, at 173; Kerns, *supra* note 17, at 210.

[84] Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 541 (1993); *see* Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 232–33 (1993).

This tradition left women, among other groups, excluded from discussions on reasonableness in the law.[85] Moreover, these advocates highlight the relatively recent replacement of the term "reasonable man" with "reasonable person" in a judicial attempt to create a sex-blind standard of neutrality.[86] However, many believe that the reasonable person has always maintained its masculine roots because the one-word substitution did not catalyze a change in the underlying model.[87] Therefore, this attempt at political correctness may have merely obscured the sexism within the law instead of eradicating it.[88] By applying this standard, advocates reason, courts hide behind a guise of neutrality while they actually apply an unchanged, male-biased standard.[89]

According to proponents of the reasonable woman standard, this problem is further exacerbated by the fact that the majority of judges are men, and that they apply a legal standard from their male perspective.[90] They argue that, at the very least, the gender-specific reasonableness standard forces male fact-finders to address the hypothetical reasonable woman's perspective that they would otherwise ignore.[91] Otherwise, proponents contend, these male fact-finders would simply reinforce "the prevailing level of discrimination" against women if allowed to adhere to the male-biased standard.[92] However, the fact that offensive behavior is common does not make it welcome, wanted, or acceptable to women.[93] Nor does the fact that such behavior is common

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[85] *See* Kerns, *supra* note 17, at 210.

[86] *See* Arbery, *supra* note 84, at 541; Kerns, *supra* note 17, at 210.

[87] *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 23 (1988); Kerns, *supra* note 17, at 218.

[88] *See* Bender, *supra* note 87, at 21–23.

[89] *See* Abrams, *supra* note 72, at 1173 (citing Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 464–71 (1997)); Goldberg, *supra* note 70, at 212.

[90] *See* Kerns, *supra* note 17, at 210. One scholar argues:

> [Judges] deny claims they deem unjustified because of one of four misconceptions: 1) if a work environment is sexually charged, women assume the risk of sexual harassment by entering it; 2) some women deserve and/or welcome sexual harassment; 3) women complaining of sexual harassment are not credible; or 4) men's "innocent flirting" will suddenly become actionable as sexual harassment.

Brennan, *supra* note 5, at 549–50 (footnotes omitted). For an extensive discussion on the application of these judicial misconceptions in *Rabidue v. Osceola Refining Co.*, see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1193–1208 (1990).

[91] *See* Gettle, *supra* note 5 at 856.

[92] Hill, *supra* note 1, at 173 (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

[93] Pollack, *supra* note 70, at 65.

mean that a woman is not negatively affected by it.[94] Without the reasonable woman standard, as the *Ellison* Court articulated, "[h]arassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[95] Consequently, these proponents consider the reasonable woman standard necessarily preferable to the reasonable person standard because they believe that the former is a male-biased "gender neutral" standard that only reinforces a male-dominated status quo.[96]

3. Effectuating Title VII

Those in favor of the reasonable woman standard assert that Title VII was designed to eliminate barriers to equal opportunity, whether those barriers are constructed negligently or intentionally.[97] They insist that the reasonable woman standard does not establish a higher level of protection for women than men; it simply allows women to participate in the workforce on equal footing with men.[98] In general, courts that have adopted the woman's view as the norm have done so with the intent to heighten male sensitivity to the effects of sexually offensive conduct in the workplace.[99] The hope is that this heightened sensitivity will bridge the gender gap on perceptions of harassing conduct.[100] Ultimately, as the theory goes, this will actually affect the behavior of the workers and supervisors who create discrimination and deny opportunity through sexual harassment.[101]

These proponents maintain that Title VII was not intended to affirm the status quo, but rather "to strike at the entire spectrum of disparate treatment of men and women in employment."[102] Therefore, in order for it to succeed, Title VII must be interpreted in a way that can actually "bring about a magical transformation in the social mores of

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[94] *Id.*

[95] 924 F.2d at 878.

[96] *See* Gettle, *supra* note 5, at 856.

[97] 42 U.S.C. § 2000e–2(1)(a) (1994); *Ellison*, 924 F.2d at 979; *see* Brenneman, *supra* note 9, at 1297.

[98] Goldberg, *supra* note 70, at 212.

[99] *Sexual Harassment Claims*, *supra* note 33, at 1459. Some objectors to the reasonable woman standard have expressed concern that many lawsuits might be filed against men who simply did not realize their actions were harassing. *See id.* at 1459 n.55; Brenneman, *supra* note 9, at 1296.

[100] *See* Gettle, *supra* note 5, at 857–58.

[101] *See* Brenneman, *supra* note 9, at 1306.

[102] 42 U.S.C. § 2000e–2(a)(1); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); *see* Pollack, *supra* note 70, at 65.

American workers."[103] Proponents believe that the reasonable woman standard does just that by rejecting the hidden male bias in a "gender-neutral" standard, and reflecting instead the perspective of those the law actually seeks to protect—women.[104]

B. *Arguments for the Reasonable Person Standard*

1. Defending the Reasonable Person

In contrast, those who support the reasonable person standard contend that it is necessary because it provides a neutral and abstract measure so that the law is not decided according to the whims of individual judges or juries, but rather based on societal consensus.[105] Furthermore, the reasonable person represents an average or typical person, accounting for all weaknesses tolerated by the community, and for all the facts and circumstances surrounding the act in question.[106]

This defense stems from the idea that objectivity and judicial neutrality are fundamental precepts of American jurisprudence.[107] The principle of "reasonableness" is appealing, therefore, because it provides an objective means of superimposing community standards upon an individual and because its application requires judicial neutrality.[108] Consequently, in order to function effectively, "reasonableness" must at least be facially neutral because prevailing social norms determine its boundaries.[109]

For that reason, the major flaw these defenders find with the reasonable woman standard is that it is not even facially neutral.[110] In fact, it is specifically constructed to categorically exclude the male perspec-

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[103] *See* Brenneman, *supra* note 9, at 1306 (quoting Rabidue v. Osceola Refining Co., 805 F.2d 611, 620–22 (6th Cir. 1986)).

[104] *See* Kerns, *supra*, note 17, at 230.

[105] Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 Cornell L. Rev. 1398, 1431 (1992); *see also* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 32 (5th ed. 1984) ("The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad of the particular actor; and it must be, so far as possible, the same for all persons, since law can have no favorites.") (footnotes omitted).

[106] *See* Keeton et al., *supra* note 105, § 32; Adler & Pierce, *supra* note 8, at 807.

[107] *See* Robert Unikel, "*Reasonable*" *Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 Nw. U. L. Rev. 326, 328, 329 (1992).

[108] *See id.* at 329. Unikel describes the American legal system's need for objectivity as deriving from an attempt to reconcile the basic contradiction between an individual's freedom to act and an individual's security from the effects of others' actions. *See id.* at 328.

[109] *See id.* at 348.

[110] *See id.* at 357.

tive and establish female norms as the sole measure of appropriate conduct in certain circumstances.[111] Defenders argue that by explicitly promoting only the interests and ideals of women, the reasonable woman standard violates the fundamental principle of neutrality.[112] Moreover, it violates each individual's right to equal treatment under the law because it is not "indifferent and the same to all parties."[113] Therefore, unlike the reasonable person, the reasonable woman standard corrupts formal equality because it is not neutral, and it blatantly differentiates between parties.[114]

2. More Harm Than Good

Although the intentions behind the reasonable woman standard may be noble, opponents argue that its problems overwhelm its utility for women as a group because it (1) essentializes women, (2) affirms and entrenches gender stereotypes, and (3) undermines the legitimacy of sexual harassment claims.[115]

Feminists who oppose the gendered legal standard emphasize that different women define harassing behavior differently.[116] They point out that the same suggestive conduct may strike some women as harassment, while others might accept it as normal.[117] Moreover, women cannot be considered a homogeneous group because they each have different experiences, views, and perceptions.[118] Opponents argue that the reasonable woman standard ignores those differences because it requires that all harassing behavior conform to certain acceptable cri-

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[111] *Id.*

[112] Unikel, *supra* note 107, at 357.

[113] *See id.* (quoting John Locke, Two Treatises of Government 367 (Peter Laslett ed., 1965) (1690)).

[114] *Id.* at 356.

[115] *See* Arbery, *supra* note 84, at 552; Cahn, *supra* note 105, at 1415–16, 1419–20; Kenealy, *supra* note 66, at 207, 210. Abrams explains that the verb "essentialize" comes from the noun "essentialism," which pejoratively refers to a "monolithic" women's experience "that can be described independent of other facets of experience like race, class, and sexual orientation." Abrams, *supra* note 72, at 1173 n.23 (quoting Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 588 (1990)).

[116] *See* Cahn, *supra* note 105, at 1416.

[117] *E.g.*, *id.*; *see* Ashraf, *supra* note 67, at 501–02 (discussing the U.S. Merit Systems Protection Board Study, which reported that sixty-four percent of women defined suggestive looks from coworker as sexual harassment, while thirty-six percent did not) (citing Office of Merit Review & Studies, U.S. Merit Sys. Protection Bd., Sexual Harassment in Federal Government: An Update 14 (1988)), *available at* http://www.mspb.gov/studies/rpt_june1988_harupdate/1988%20sexual%20harassment%20report.htm.

[118] *See* Ashraf, *supra* note 67, at 502.

terion before it is legally actionable.[119] They point out that this certain acceptable criterion may look general, but is actually specific.[120] They assert that a woman who does not fit into the confines of a white, upper-class, heterosexual profile may be unable to find a place in the reasonable woman standard.[121]

Furthermore, feminist opponents argue that the reasonable woman standard is destructive to women because it actually embodies and perpetuates stereotypes, requiring women to conform to them in order to obtain a legal remedy.[122] They believe that because the reasonable woman will be defined by a mostly male judiciary, it is likely that the judiciary will merely reflect preexisting stereotypes of womanhood as defined by men: that women are sensitive, delicate, and in need of special protection in the workplace.[123] Ultimately, although it is easiest to simply use one stereotype to define the perceptions of all women on types of sexually harassing behavior, convenience does not justify the practice.[124]

In addition, opponents maintain that the reasonable woman standard would eventually undermine the legitimacy of sexual harassment claims by sending negative messages to women and exculpatory messages to men.[125] On one hand, the standard tells women that they are inherently unreasonable, for if they were objectively reasonable, a separate legal standard would not be necessary.[126] Meanwhile, on the other hand, the standard provides men with an excuse, or plausible deniability, for their behavior: how are they to know that their conduct was offensive since they are not reasonable women?[127] Underlying these mes-

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[119] *See* Cahn, *supra* note 105, at 1416.

[120] *See* Bernstein, *supra* note 89, at 473; Cahn, *supra* note 105, at 1415.

[121] *See* Bernstein, *supra* note 89, at 473; Cahn, *supra* note 105, at 1415. Bernstein suggests that the reasonable woman standard contains hidden normative premises, which elevates this one type of woman above others. *See* Bernstein, *supra* note 89, at 473. For more extensive discussions on essentialism and bias contained in defining the nature of "woman," see Harris, *supra* note 115, at 588.

[122] *See* Cahn, *supra* note 105, at 1419.

[123] *See* Kenealy, *supra* note 66, at 204; Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift Systems, Inc.: *The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127, 136 (1994).

[124] *See* Cahn, *supra* note 105, at 1419–20.

[125] *See* Kenealy, *supra* note 66, at 206, 210; Bittner, *supra* note 123, at 135.

[126] Kenealy, *supra* note 66, at 210.

[127] *See* Bittner, *supra* note 123, at 135; Kenealy, *supra* note 66, at 207. Kenealy asserts that the message the courts send through the reasonable woman standard is that "[m]en, intending only to be complimentary, unknowingly sexually harass women. Because women find it so unsettling, the courts will recognize a cause of action which would otherwise go undetected by reasonable men." Kenealy, *supra* note 66, at 207.

sages, opponents find a trivializing and demeaning assumption: sexual harassment is more a matter of perception than a fact of reality.[128]

Opponents insist that in contrast, if all of society were to condemn sexual harassment, the conduct would be more effectively eradicated than it would be by condemnation from women alone.[129] Therefore, only by applying the reasonable person standard can courts send the message "that sexual harassment is as visible and recognizable to men as it is to women, and that men whose conduct rises to the level of harassment are neither ignorant nor well-intentioned."[130]

Finally, other opponents of the reasonable woman standard warn that it creates a slippery slope toward an impossibly fragmented jurisprudence.[131] Because Title VII bars discriminatory behavior based not only on sex, but also on race, color, religion, or national origin, some claim that the rationale for adopting a reasonable woman standard could easily be applied to adopting a separate standard for any minority group— "reasonable Haitian woman," "reasonable African-Americans," "reasonable Muslims."[132]

3. Application Yields Unnecessary Confusion

According to those opposed to separate reasonableness standards, the reasonable woman standard injects needless confusion into the law by asking men, who make up the majority of both judges and employers, to apply it.[133] Many wonder: if the true nature of sexual harassment can only be perceived through the eyes and minds of women, then how

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[128] Kenealy, *supra* note 66, at 209. Even more trivializing is the notion that "special" treatment for women is necessary because women's reactions to workplace behavior simply do not follow the expected, normal human responses. *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J.L. & Feminism 41, 64 (1989).

[129] Arbery, *supra* note 84, at 540–41.

[130] Kenealy, *supra* note 66, at 204.

[131] *See* Unikel, *supra* note 107, at 350. Scales warns against trusting "slippery slope" arguments; however, in this case, the idea for separate minority group standards has had some legal and scholarly support. *See* Scales, *supra* note 1, at 106–07. In *Harris v. International Paper Co.*, the district court explicitly adopted the "reasonable black person" standard to determine whether a hostile work environment existed. 765 F. Supp. 1509, 1516 (D. Me. 1991), *vacated in part for other reasons*, 765 F. Supp. 1529 (1991). More recently, in *Muzzy v. Cahillane Motors, Inc.*, the Supreme Judicial Court of Massachusetts affirmed a jury instruction containing the term "objectively reasonable woman of lesbian orientation." 749 N.E.2d 691, 693, 698 (Mass. 2001); *see also* Tran, *supra* note 5, at 357 (advocating the application of a "reasonable minority woman" standard); Meri O. Triades, *Finding a Hostile Work Environment: The Search for a Reasonable Reasonableness Standard*, 8 Wash. & Lee Race & Ethnic Ancestry L.J. 35 (2002) (explaining the need for a "reasonable black woman" standard).

[132] 42 U.S.C. § 2000e–2(a)(1) (1994); *see* Adler & Pierce, *supra* note 8, at 822–23.

[133] *See* Kenealy, *supra* note 66, at 206; Ashraf, *supra* note 67, at 496, 500.

can men be expected to reach the correct decision through their own faculties?[134] For example, if a male judge or employer uses a woman he knows well as reference points, such as his wife, he risks essentializing all women based on his wife's race, class, and sexual orientation.[135] If, however, he employs his own perspective, then he is merely applying a male-biased view of what he thinks the reasonable woman's perception should be.[136] Thus, men cannot be expected to successfully apply a reasonableness standard based on a woman's perspective.[137] Opponents contend that this needless confusion not only subjects employers to substantial financial liability; the confusion also inhibits employers' ability to shape the behavior of their employees by effectuating company policies to abide by legal standards.[138]

4. Equality Goals of Title VII

Those who defend the reasonable person standard stress that Title VII prohibits employment practices that deprive individuals of equal status on the basis of group affiliation.[139] Consequently, the equality Title VII seeks to achieve will only exist in the workplace when a reasonable person, male or female, can identify and object to harassing conduct.[140]

Although the reasonable woman standard may seem to be a legal victory for women, its opponents claim that it threatens to do more harm than good.[141] Instead of promoting gender equality, it entrenches essentialism and stereotyping.[142] Instead of legitimizing sexual harassment claims, it suggests that certain conduct is actionable solely be-

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[134] Johnson, *supra* note 45, at 642.

[135] Bernstein, *supra* note 89, at 474.

[136] *See id.*

[137] *See* Ashraf, *supra* note 67, at 500. Consequently, the reasonable woman standard fails to assure greater reliance on the female perspective than does the reasonable person standard. Unikel, *supra* note 107, at 369. Some opponents assert that the passage of the Civil Rights Act of 1991 negates the entire argument that the reasonable woman standard is necessary to compensate for the male-dominated judiciary because the Act allows the issue of reasonableness to be decided by a jury. *See* Pub. L. No. 102–166, 105 Stat. 1071 (1991). Before the 1991 Act, a trial by jury was generally denied for Title VII actions. *See* Johnson, *supra* note 45, at 667; Ashraf, *supra* note 67, at 496. Presumably, since the passage of the Act, there will be women on the jury who will prevent the application of a judge's male-biased standard. *See* Ashraf, *supra* note 67, at 501.

[138] *See* Ashraf, *supra* note 67, at 496.

[139] 42 U.S.C. § 2000e–2(a)(1) (1994); Arbery, *supra* note 84, at 505.

[140] 42 U.S.C. § 2000e–2(a)(1); Bittner, *supra* note 123, at 137.

[141] *See* Arbery, *supra* note 84, at 506.

[142] *See* Cahn, *supra* note 105, at 1416; Unikel, *supra* note 107, at 352; Arbery, *supra* note 84, at 506.

cause women are hypersensitive.[143] Instead of deterring unreasonable conduct by setting clear guidelines, it confuses employers about the policies they are expected to enforce.[144]

According to its opponents, the reasonable woman standard is antithetical to the most basic goal of Title VII—the elimination of discrimination in the workplace.[145] Such opponents even contend that the reasonable woman standard is as inappropriate and divisive as the once-normative reasonable man standard.[146] Furthermore, courts can only affirm that reasonable women are as reasonable as anyone else and that sexual harassment is recognizable by both men and women if they examine sexual harassment claims through the neutral perspective of the reasonable person.[147] Defenders of the reasonable person standard maintain that equality should remain the ideal, and that the law can have no favorites.[148]

III. Has She Made a Difference?

Ann Scales suggests that "bickering about rules and standards in the abstract" has led feminists to waste decades trying to create the "new, improved equality standard . . . [to finally achieve] justice in the world."[149] Similarly, some legal researchers have wondered whether this debate over semantic legal standards is a just waste of time.[150] Two recent studies question whether jurors are even capable of changing their perspectives when given a different standard, thereby altering the final judgments in sexual harassment cases.[151] These studies, one conducted in 1995 and the other in 2002, reached the same conclusions: (1) men are less likely than women to perceive sexual harassment in a given situation; and (2) changes in the legal standard applied yielded no impact on the final judgments of harassment.[152] Both concluded that the reasonable woman standard is an ineffective remedy for the effects of

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[143] *See* Kenealy, *supra* note 66, at 210; Arbery, *supra* note 84, at 551.

[144] Ashraf, *supra* note 67, at 484.

[145] *Id.*

[146] Bittner, *supra* note 123, at 137.

[147] Kenealy, *supra* note 66, at 209–10.

[148] *See* Keeton et al., *supra* note 105, at § 32; Arbery, *supra* note 84, at 553.

[149] Scales, *supra* note 1, at 84.

[150] *See* Shoenfelt et al., *supra* note 6, at 669; Richard L. Weiner et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 Law & Hum. Behav. 263, 276 (1995).

[151] *See* Shoenfelt et al., *supra* note 6, at 658; Weiner et al., *supra* note 150, at 276.

[152] *See* Shoenfelt et al., *supra* note 6, at 667; Weiner et al., *supra* note 150, at 276.

the gender difference in perceptions of hostile environment sexual harassment.[153]

However, it may be instructive to look at the past fifteen years of sexual harassment case law data to understand how the application of the two different reasonableness standards has actually affected outcomes for plaintiffs.[154] Analyzing case law data is not an easy task. For that reason, this analysis is very narrowly focused on the reasonableness standard used to assess the hostile work environment element of a sexual harassment claim.[155] By isolating this one variable from the many others that influence ultimate outcomes of hostile work environment cases, this analysis seeks to discern any possible correlation between the reasonableness standard applied and the successful establishment of an objectively hostile work environment.[156]

A. *Reasonableness Standard Actually Employed by Circuit*

Part of what has caused the debate over standards to regenerate over the years is that some circuit courts have not followed their own precedents.[157] For example, in the First, Second, Sixth, Seventh, and Eighth Circuits, the courts have seemingly adopted the reasonable woman standard in some cases, only to follow it by years of consistent applications of the reasonable person instead.[158] Therefore, in order to

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[153] *See* Shoenfelt et al., *supra* note 6, at 669; Weiner et al., *supra* note 150, at 278.

[154] *See* Shoenfelt et al., *supra* note 6, at 669; Weiner et al., *supra* note 150, at 278.

[155] For a much more expansive survey, comprehensively covering the final conclusions reached in every federal appellate court opinion on sexual harassment law between 1986 and 1995, see Juliano & Schwab, *supra* note 58.

[156] *See id.* at 571, 572. Other possible variables include, for example, the specific facts of the case; how sensitive the judge is to context; general regional sentiments on sexual harassment, race, and class of the victim and the harasser; and type of employment. *See id.* While any of these other variables may be equally, if not more, important in any given case or jurisdiction, this study assumes *cetaris paribus* in order to examine the effect of the reasonableness standard applied. *See id.*

[157] For a sampling of cases where courts have failed to follow precedent, see *infra* note 158.

[158] *Compare* Torres v. Pisano, 116 F.3d 625, 632 & n.6 (2d Cir. 1997) (applying a reasonable woman standard), Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994) (applying a reasonable woman standard), Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993) (adopting a reasonable woman standard), *and* Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988) (noting the importance of the woman's perspective), *with* Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998) (applying a reasonable person standard), Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (accepting a reasonable person standard); Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 444 (7th Cir. 1994) (applying a reasonable person standard), *and* Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990) (applying a reasonable person's perspective).

analyze the effect of the reasonable woman standard, it is necessary to first determine which standard is currently being used the majority of the time in each jurisdiction.[159]

In most cases to date, the Ninth and Third Circuits have applied a gender-specific reasonableness standard.[160] All other circuits either apply a reasonable person standard or mention objective and subjective components but fail to apply any reasonableness test at all.[161] Only the Fifth Circuit has explicitly rejected the reasonable woman standard; however, the Sixth, Eighth, and Eleventh Circuits have indirectly opted for the reasonable person over the reasonable woman.[162]

B. *Rates of Plaintiff Success: Establishing an Objectively Hostile Work Environment*

The greatest hope of proponents of the reasonable woman standard was that the new standard would allow more female plaintiffs to meet the objective test for hostile work environment claims, thereby

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[159] *See, e.g.*, *Torres*, 116 F.3d at 633 n.6; Watkins v. Bowden, 105 F.3d 1344, 1356 n.22 (11th Cir. 1997). Legal scholars have conducted similar analyses, reaching different conclusions based on the year conducted. *Compare* Shoenfelt et al., *supra* note 6, at 637–38 & nn.23–25 (noting that the Third and Ninth Circuits use reasonable woman, while all other circuits use either reasonable person or victim standards), *with* Bittner, *supra* note 123, at 127 nn.4 & 5 (noting that the Second, Fourth, Tenth, and Eleventh Circuits have adopted reasonable person standard, while the First, Third, Sixth, Eighth, and Ninth Circuits have adopted reasonable woman standard).

[160] *See, e.g.*, Dominguez-Curry v. Nev. Transp. Dept., 424 F.3d 1027, 1034 (9th Cir. 2005) (adopting the "reasonable woman" standard); Shramban v. Aetna, 115 F. App'x 578, 579 (3d Cir. 2004) (applying the standard of a "reasonable person of the same sex in that position"). *But see, e.g.*, Clegg v. Falcon Plastics, Inc., 174 F. App'x 18, 24 (3d Cir. 2006) (requiring the application of the reasonable person standard); Walpole v. City of Mesa, 162 F. App'x 715, 716 (9th Cir. 2006) (requiring use of the reasonable person standard).

[161] *See, e.g.*, Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (applying reasonable person standard); Jennings v. Univ. of N.C., 444 F.3d 255, 269 (4th Cir. 2006) (applying reasonable person standard); Whittaker v. N. Ill. Univ., 424 F.3d 640, 645 (7th Cir. 2005) (deciding that a hostile work environment requires both subjective and objective severity or pervasiveness); Petrosino v. Bell Atl., 385 F.3d 210, 221–22 (2d Cir 2004) (considering reasonable woman, but applying reasonable person standard); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1219 (10th Cir. 2003) (applying the reasonable person standard).

[162] Watkins v. Bowden, 105 F.3d 1344, 1356 (11th Cir. 1997) (holding no reversible error in "reasonable person" standard after *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21(1993)); Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (finding "reasonable person" standard appropriate after Supreme Court's use in *Harris*, 510 U.S. at 21); Hartleip v. McNeilab, Inc., 83 F.3d 767, 776 (6th Cir. 1996) (adopting *Radtke v. Everett*, 501 N.W.2d 155, 165 (Mich. 1993), which "concludes that a gender-conscious standard must be rejected"); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a 'reasonable woman.'").

leading to more favorable legal outcomes.[163] The greatest fear of objectors was that the new standard would preordain outcomes for female plaintiffs, thereby unfairly punishing employers.[164] After fifteen years of jurisprudence, neither dream nor nightmare has become reality.[165]

This survey reviews 281 cases of hostile work environment claims that have arisen in each federal district.[166] The review consisted of a tailored assessment of two factors: (1) which of the two reasonableness standards, if any, was articulated by the court; and (2) whether the court found that the plaintiff had successfully established that the conduct was severe or pervasive enough to create an objectively hostile work environment.[167] However, it should be noted that this data is not concerned with any ultimate conclusions regarding overall plaintiff win rates for hostile work environment claims.[168] These results provide only a glimpse, at best, into an over-arching trend in hostile work environment judgments as they relate to the reasonableness standard used.[169]

Table 1: Rates of Plaintiff Success in Establishing Objective Hostile Work Environment

Circuit	Reasonableness Standard			Results		
	Woman	Person	None	Wins	Losses	% of Plaintiff Success
1st	0	13	0	9	4	**69.23**
2d	1	14	16	17	14	**54.83**
4th	0	9	6	8	7	**53.33**
3d	17	6	0	12	11	**52.17**
D.C.	0	1	3	2	2	**50**
9th	20	4	0	11	13	**45.83**
10th	0	10	16	11	15	**42.3**
8th	1	26	17	17	27	**38.63**
5th	0	13	0	5	8	**38.46**
11th	0	8	8	6	10	**37.5**
6th	1	22	5	8	20	**28.57**
7th	1	29	14	12	32	**27.27**

[163] *See* Baker, *supra* note 64, at 713.

[164] *See* Ashraf, *supra* note 67, at 502; Unikel, *supra* note 107, at 335.

[165] *See infra* note 170 and accompanying table and text.

[166] The cases chosen for review were identified on the courts of appeal database in Westlaw, using the command "78K1185 & REASONABLE." Many of the cases reviewed are not officially published.

[167] For the purposes of this survey, see *supra* note 21 and accompanying text.

[168] Simply because a plaintiff successfully established the objectively hostile prong of the claim does not suggest that the plaintiff also met the other requirements of a hostile work environment claim, such as liability, or that the harassment was based on sex. *See* Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997) ("Even if a work environment is found to be hostile, a plaintiff must also show that the conduct creating the hostile work environment should be imputed to the employer.").

[169] *See infra* note 170 and accompanying table and text.

Table 1 shows that plaintiff success rates vary by circuit. In the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, plaintiffs only established the objective element in their hostile work environment cases in twenty-seven to thirty-eight percent of appellate cases. Meanwhile, in the First, Second, Third, and Fourth Circuits, plaintiffs established the objective element in fifty-two to sixty-nine percent of their cases on appeal.

However, the results of this data do not show that an application of the reasonable woman standard necessarily leads to significantly higher hostile work environment success rates than a strict use of the reasonable person standard, or even no reasonableness test at all.[170] Moreover, it is interesting to note that all four of the circuits that have considered the reasonable woman standard and have then rejected it in favor of the reasonable person (the Fifth, Sixth, Eighth, and Eleventh Circuits) rank on the lowest end of plaintiff success rates.[171] This data may reveal that there are other variables at play in these cases, which are equally, if not more significant than the reasonableness standard articulated by the court.[172]

As prior studies have concluded, the reasonable woman standard does not appear to be an effective means of changing the rate of which female plaintiffs are able to establish that the harassing conduct created an objectively hostile work environment.[173] However, the fact that both

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[170] *See, e.g.*, Hathaway v. Multnomah County Sheriff's Office, 123 F. App'x 806, 808 (9th Cir. 2005) (finding conduct insufficient for a reasonable woman to consider environment abusive). *But see, e.g.*, Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 89, 94 (1st Cir. 2006) (ruling that the plaintiff wins under the reasonable person standard); Schiano v. Quality Sys., Inc. 445 F.3d 597, 604, 606 (2d Cir. 2006) (finding that the plaintiff meets burden under hostile work environment without articulation of any reasonableness standard).

[171] *See, e.g.*, Nitsche v. CEO of Osage Valley Elec. Coop., 446 F.3d 841, 846 (8th Cir. 2006) (concluding plaintiff failed to meet high threshold under reasonable person standard); Tatt v. Atlanta Gas Light Co., 138 F. App'x 145, 148 (11th Cir. 2005) (finding plaintiff failed to establish objectively reasonable belief that defendant's conduct constituted actionable sexual harassment); Septimus v. Univ. of Houston, 399 F.3d 601, 611, 612 (5th Cir. 2005) (finding plaintiff failed to allege harassment that a reasonable person would find hostile or abusive); Valentine-Johnson v. Roche, 386 F.3d 800, 814 (6th Cir. 2004) (finding no actionable hostile work environment because court previously rejected claims based on more sexually offensive circumstances).

[172] *See* Juliano & Schwab, *supra* note 58, at 571, 572. One such significant variable may be geography, considering the fact that the six districts with the highest plaintiff success rates represent the Northeast and both coasts; meanwhile, the six districts with the lowest plaintiff success rates represent the South and Midwest.

[173] 42 U.S.C. § 2000e–2(1)(a) (1994); *see* Shoenfelt et al., *supra* note 6, at 669; Weiner et al., *supra* note 150, at 278.

of the circuits that have adopted the gender-specific standard (the Ninth and the Third) have generated higher plaintiff success rates than all four of those that have rejected it (Fifth, Sixth, Eighth, Eleventh) may be cause for further investigation.[174]

Conclusion

In 1990, Wendy Pollack wrote, "Women have named sexual harassment, but have lost control of the content of its definition."[175] Along the same lines, whether the court applies the gender-specific reasonableness standard or not, it fails to provide a framework or gauge by which to analyze the content of the claim.[176] This might suggest that either reasonableness standard has the potential to benefit sexual harassment plaintiffs.[177]

Despite strident arguments impugning the Court to reconcile the circuit court split, the reasonable woman standard does not appear to

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[174] *See, e.g.*, *Nitsche*, 446 F.3d at 846 (concluding plaintiff failed to meet high threshold under reasonable person standard); *Tatt*, 138 F. App'x at 148 (finding plaintiff failed to establish objectively reasonable belief that defendant's conduct constituted actionable sexual harassment); Dominguez-Curry v. Nev. Transp. Dept., 424 F.3d 1027, 1034–35 (9th Cir. 2005) (finding defendant's conduct sufficiently severe or pervasive, under the reasonable woman standard, to support a hostile work environment claim); *Septimus*, 399 F.3d at 611, 612 (finding plaintiff failed to allege harassment that a reasonable person would find hostile or abusive); *Roche*, 386 F.3d at 814 (finding no actionable hostile work environment because court previously rejected claims based on more sexually offensive circumstances); Bonenberger v. Plymouth Twp., 132 F.3d 20, 25–26 (3d Cir. 1997) (finding plaintiff satisfied hostile work environment claim under reasonable person of same sex standard).

[175] Pollack, *supra* note 70, at 48.

[176] *See* Kenealy, *supra* note 66, at 204.

[177] *See* King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994). Writing for the Federal Circuit in *King*, Judge Pauline Newman articulated this sentiment, finding it unnecessary to enter the reasonable woman versus reasonable person debate because neither standard would alter the court's intent to eliminate "the entire spectrum of disparate treatment of men and women" in employment. *See* 21 F.3d at 1582 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). As the *King* court stated:

> We need not enter this debate, for no principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.

Id. Contrarily, others might interpret this finding as proof that neither standard works because tort law is simply incompatible with the goals of Title VII. *See Sexual Harassment Claims*, *supra* note 33, at 1463–64; Cahn, *supra* note 105, at 1433 ("[C]ourts that use a reasonable woman standard can apply it in a manner that subordinates women just as easily as one that supports women.").

be a factor determinative of hostile work environment success rates.[178] Considering this lack of significant impact on outcomes, it is no wonder why the Supreme Court has refused to weigh in on this controversial issue.[179]

[178] *See* Brennan, *supra* note 5, at 547; Hill, *supra* note 1, at 172; Kerns, *supra* note 17, at 206–07.

[179] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); Harris v. Forklift Sys. Inc., 510 U.S. 17, 22 (1993); Hill, *supra* note 1, at 172.