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

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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

INTRODUCTION

Courts have been taking note of sexual harassment in the workplace and recognizing it as a cause of action since the early 1980s.1 Traditionally, in order to determine whether a cause of action existed for sexual harassment, courts used the “reasonable person” standard.2 Recently, however, a number of courts have replaced the reasonable person standard with the “reasonable woman” standard for the purpose of determining whether sexual harassment exists in a particular workplace.3 This Note is concerned with whether the use of the reasonable woman standard should be continued by courts. This Note focuses on the use of the reasonable woman standard in the context of hostile environment sexual harassment claims brought under Title VII of the Civil Rights Act.4 The use of the reasonable woman standard outside of Title VII sexual harassment cases,5 or


5. The use of the reasonable woman standard outside of sexual harassment cases
quid pro quo sexual harassment cases, will not be addressed.

Critics of the reasonable person standard's use in hostile environment sexual harassment cases argue that men and women have widely varying perceptions of conduct which constitutes sexual harassment. They argue that since most judges and employers are male, when they apply a reasonable person standard, they are in effect applying a male-biased standard. Such a standard, it is argued, ignores the experiences of women, and reinforces the prevailing levels of sexual harassment. Therefore, they urge the adoption and use of a reasonable woman standard which would allow courts to consider the differences between men and women.6

This Note attempts to determine whether such a standard is needed, whether it is useful and appropriate in this context, and whether its use should be continued. Initially, the idea of a reasonable woman standard seems quite appealing and practical. However, this Note concludes that the reasonable woman standard should not be used, and the reasonable person standard should be retained. While arguably the use of the reasonable woman standard would force courts, or the triers of fact, to take women's perceptions and experiences into account, ultimately, it will interfere with and retard the achievement of the goal of Title VII—the elimination of discrimination in the workplace. The addition of gender to the reasonable person standard will lead to the addition of other subjective elements, such as race and ethnicity. Such a subjective standard will cause confusion for, and unfairly burden, employers who are subject to financial liability for a violation of Title VII. It will be very difficult for employers to announce and enforce policies concerning sexual harassment that conform to a subjective, rather than an objective standard. Hence, the goal of Title VII will become more difficult to achieve.

Part I describes the problem generally. The argument for the adoption of a reasonable woman standard in hostile environment sexual harassment cases is described. Part II looks for guidance to other areas of law to see whether a gender-biased reasonable person standard has been used, and if so, in what context. In particular, this part examines areas of tort law and criminal law which have traditionally used the objective reasonable person standard and where, arguably, men and women have different perceptions of conduct which is the

6. See infra part I.C. for a detailed description of the argument favoring the adoption of a reasonable woman standard.
basis of the cause of action. Notably, the reasonable woman standard has rarely been used. Part III outlines several reasons why the reasonable person standard should be retained in hostile environment sexual harassment cases.

I. THE "REASONABLE WOMAN" STANDARD

A. Introduction

Courts have been recognizing causes of action for hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964 since the early 1980s. The purpose of Title VII is to afford employees a discrimination-free environment, and therefore engender equal opportunity for everyone. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." The Equal Employment Opportunity Commission ("EEOC") issued guidelines on sex discrimination in 1980, which have been extensively referred to and used by the courts in defining and recognizing a cause of action for hostile environment sexual harassment. The guidelines state that:

Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environ-

There are two widely accepted categories of sexual harassment. The first is quid pro quo. This is the type which is described in the EEOC guidelines under section 1604.11 (1) and (2). Subsection (3) describes the second category, hostile environment sexual harassment, with which this Note is concerned. In the 1986 case of Meritor Savings Bank v. Vinson, the Supreme Court finally recognized that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964. In so doing, the Court relied on the EEOC guidelines and determined that non-economic injury, such as psychological harm, created by a hostile environment was a "term or condition of employment" within the meaning of Title VII.

Since Meritor, courts have generally recognized that five elements need to be present before liability for hostile environment sexual harassment will be found. Generally, these are:

(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability.

The fourth element is the concern of this Note. "For 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.'" The inquiry of whether this element has been fulfilled may be made using an objective standard, a subjective standard, or by using a gender- or sex-specific objective standard. An objective standard means that the situation is viewed from the perspective of the reasonable person to determine if it pro-

12. 29 C.F.R. § 1604.11(a) (1980).
13. See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 618 (6th Cir. 1986); Henson, 682 F.2d at 908 n.18.
15. See id. at 73.
16. Id. at 65.
17. See Rabidue, 805 F.2d at 619-20; Henson, 682 F.2d at 903-05.
19. Meritor, 477 U.S. at 67 (quoting Henson, 682 F.2d at 904) (alteration in original).
duced a hostile environment. The reasonable person is not given any of the characteristics of the actual plaintiff; s/he exists independently of the real plaintiff. Under a subjective standard, the situation is viewed from the perspective of the actual plaintiff. The plaintiff’s thoughts, emotions, and state of mind are relevant. Under the gender-specific objective standard, the objective reasonable person is given the subjective characteristics of the sex or gender of the plaintiff, so that the situation is viewed from a reasonable woman’s point of view when the plaintiff is a woman.

It has been decided, and is generally accepted, that an objective standard should be used to determine whether the conduct is sufficiently pervasive to interfere with the plaintiff’s work, altering the conditions of employment, and producing a hostile or offensive environment. The reason espoused for not using a subjective standard is that we need to protect employers from claims of sexual harassment by hypersensitive, idiosyncratic plaintiffs. The issue that courts are still wrestling with is whether the conduct must be viewed from the viewpoint of a reasonable person, or that of a gender-specific reasonable person, i.e., a reasonable woman. The reasonable person standard has been criticized and attacked by many authors, and it has been repeatedly urged that courts substitute a reasonable woman standard. In fact, a number of courts have already adopted such a standard.

22. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).
23. See King v. Board of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).
25. Of course, if the victim was a man, then the standard used would be the reasonable man standard. Since the vast majority of sexual harassment claims are brought by female plaintiffs, for brevity’s sake I will refer to the gender-specific reasonable person standard as the reasonable woman standard throughout the rest of this Note.
27. See, e.g., Rabildeaux v. Osceola Ref. Co., 805 F.2d 611, 626, 628 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part); see also Note, supra note 24, at 1459.
28. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Andrews v. Philadelphia,
B. Different Perceptions of Men and Women

Numerous authorities and several empirical studies suggest that men and women have different perceptions of what conduct constitutes sexual harassment. In a 1988 report by the U.S. Merit Systems Protection Board on the nature and extent of sexual harassment in the federal government, it was found that where a co-worker was the offender, only 47% of men defined sexual remarks as sexual harassment, compared with 64% of women; 60% of men defined suggestive looks as sexual harassment, compared to 76% of women; 66% of men and 76% of women defined pressure for dates as sexual harassment; 67% of men and 84% of women defined letters and calls as sexual harassment; 82% of men and 92% of women defined deliberate touching as sexual harassment; and 90% of men defined pressure for sexual favors as sexual harassment, compared to 98% of women. In addition, a study reported in the Harvard Business Review in 1981, found that only 32% of women agreed or partly agreed that the amount of sexual harassment at work is greatly exaggerated, compared with 66% of the men.

University of Arizona professor Barbara Gutek surveyed 1200 men and women for a study of sex in the workplace. Her study confirms the existence of a wide gap in men's and women's definitions of what constitutes sexual harassment. Her study reveals that women are much more likely to regard a sexual encounter, verbal or physical, as coercive. They are less likely to view such conduct as flattering. While 66% of the men said they would consider a sexual proposition flattering, only 17% of the women agreed. Conversely, 63% of the women said they would be insulted by a proposition.
compared with 15% of the men who said they would be insulted.\textsuperscript{34}

\textbf{C. Argument for the Adoption of the "Reasonable Woman" Standard}

The critics of the reasonable person standard argue that such a standard is male-biased and ignores the experiences of women.\textsuperscript{35} This view is espoused in spite of the fact that the reasonable person, as borrowed from negligence literature, is given both male and female associations.\textsuperscript{36} The argument for the adoption of the sex-specific reasonable person standard is that most employers who are responsible for creating the hostile environment, and most judges who are responsible for determining whether a hostile environment exists, are male. Therefore, they have a male perspective of what constitutes sexual harassment. Consequently, when they apply the reasonable person standard, they are applying a male-biased standard.\textsuperscript{37} Under this biased standard, conduct which a reasonable woman finds sufficient to create a hostile environment, but which a reasonable man does not, will not be found to be prohibited under Title VII. In effect, it is said that the use of the reasonable person standard carries with it "the risk of reinforcing the prevailing level of discrimination" in the workplace, which discrimination Title VII was designed to eliminate.\textsuperscript{38} Conversely, it is said that the gender- or sex-specific reasonable person standard allows courts to consider salient sociological differences.

\textsuperscript{34} See id. at 96-97.
\textsuperscript{35} See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Ehrenreich, supra note 26, at 1207-08.
\textsuperscript{36} Nancy Ehrenreich suggests that the reasonable person identifies with males and females, and therefore conveys the idea of mediation and compromise:

While the central figure of the image is male, it nevertheless carries both masculine and feminine associations. Located at home, in the domestic sphere usually associated with women, the figure is also situated outdoors, in the prototypically male realm of car repairs, sports, and barbecues. The action he is engaged in—lawnmowing—also conveys mixed messages that suggest a mediating role. On the one hand, physical labor is usually associated with male virility. On the other hand, lawnmowing itself is one of those baneful tasks often required (so the ideology goes) of "henpecked" husbands by their wives, and thus could be seen as evidence of emasculation. In short, associating the "man in his shirtsleeves" with the "female" world, the symbol feminizes him; associating him with the "male" world, it preserves his masculinity intact. It presents him as a compromise between the effeminized man (or femaleness) and the purely masculine one (or maleness), as a mediator between extremes.

Ehrenreich, supra note 26, at 1211-12 (citation omitted).
\textsuperscript{37} See Abrams, supra note 26, at 1203.
between men and women, as well as shield employers from the "hyper-sensitive" complainant.\(^3\)

II. LOOKING FOR AUTHORITATIVE GUIDANCE

A. Legislative History and the EEOC

Title VII was enacted by Congress with the goal of eliminating discrimination against blacks and other minorities in the workplace.\(^4\) The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives.\(^4\) This was reportedly done in an attempt to defeat its passage.\(^4\) Nonetheless, the bill quickly passed as amended.\(^4\) Therefore, there is no legislative history available which would assist the courts in determining how sexual discrimination or harassment is to be defined or evaluated.

The EEOC is the agency responsible for enforcing the Civil Rights Act.\(^4\) In 1988, it issued a notice on sexual harassment. The notice states that in determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a reasonable person, i.e., that the trier of fact must adopt the perspective of a reasonable person’s reaction to a similar environment under similar circumstances.\(^4\) Patently, the EEOC did not advocate a gender-specific reasonable standard. The EEOC guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”\(^4\) The courts that have already adopted a reasonable woman standard did not refer to or discuss the EEOC’s use and retention of the reasonable person standard. They apparently did not use the offered guidance.

\(^{39}\) See Ellison, 924 F.2d at 879.
\(^{42}\) See Estrich, supra note 29, at 816-17; Michelle R. Pierce, Note, Sexual Harassment and Title VII—A Better Solution, 30 B.C. L. Rev. 1071, 1076 (1989).
\(^{45}\) See EEOC, NOTICE NO. 915.035, POLICY GUIDANCE ON CURRENT ISSUE OF SEXUAL HARASSMENT 4 (1988).
\(^{46}\) Meritor, 477 U.S. at 65 (citing General Elec. Co. v. Gilbert, 429 U.S. 124, 141-42 (1976)).
B. Other Areas of Law

1. Tort Law

Due to the lack of available legislative history and a conclusive authoritative determination of whether a gender-specific reasonable person standard is appropriate in the area of sexual harassment, this Note turns to other areas of the law. It would be helpful and useful to see if, and when, it is used in other circumstances, and to see if, and when, other subjective elements have been given to the reasonable person. This Note directs attention first to tort law. Initially, it must be noted that although the reasonable person in negligence cases is given the physical attributes of the plaintiff, this is irrelevant to the analysis in this Note. The advocates of the reasonable woman standard want the reasonable person in sexual harassment cases to be given the subjective characteristic of sex on the basis that men and women have different perceptions. Accordingly, the analysis contained herein is concerned with situations in which the reasonable person standard has been altered by the addition of subjective elements in order to account for the perception, or level of awareness of the actual plaintiff, not for any physical attributes.

Further, in professional negligence or malpractice cases, the defendant is held to possess the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing. This essentially translates into a “reasonable person engaged in the same profession as plaintiff” standard. Although a subjective element is being added to the objective standard, professional negligence or malpractice cases are not relevant to this inquiry. In sexual harassment cases, a subjective characteristic of the plaintiff or victim is to be assigned to the reasonable person; whereas in professional negligence cases, a subjective characteristic of the actor or defendant is being assigned to the reasonable person. Further, while in sexual harassment cases, the subjective characteristic is based on the varying perceptions of two groups, in professional negligence cases, the subjective characteristic is based on the varying levels of knowledge and skill possessed by two groups. Hence, this line of cases is not

47. See W. Page Keeton et al., Prosser & Keeton on the Law of Torts 175-76 (5th ed. 1984); Warren A. Seavy, Negligence—Subjective or Objective?, 47 Harv. L. Rev. 1, 13-17 (1927).
48. See Keeton et al., supra note 47, at 187.
49. See id. at 186-87.
comparable to or useful in this analysis.

This Note analyzes specifically the torts of invasion of privacy and the infliction of emotional distress because these are both tort actions which may be brought on the basis of the same conduct for which a Title VII action may be brought. Further, in both of these tort actions the reasonable person is used to judge or evaluate the conduct of the offender. This is in contrast to situations in which the reasonable person is used to evaluate the conduct or reaction of the injured person or victim. For example, in self-defense cases, the reasonable person is used to evaluate whether the victim's use of force was justified.

In invasion of privacy cases, the intrusion must be something which would be highly offensive or objectionable to a reasonable person of ordinary sensibilities. Courts have consistently used the objective standard of the reasonable person. There are no reported cases showing that a gender-specific reasonable person standard has ever been used.

Similarly, in cases of intentional or negligent infliction of emotional distress, there can be no recovery unless the distress is such that a reasonable person could not cope with it. No instances were found where a gender-specific reasonable person was used to determine if there could be recovery for the infliction of emotional distress. Moreover, with the exception of one court, all courts that have considered the tort of infliction of emotional distress have used the wholly objective standard of a reasonable person, adding no subjective characteristics of the plaintiff. In Plaisance v. Texaco, the United States Court of Appeals for the Fifth Circuit dismissed a claim.

53. 937 F.2d 1004 (5th Cir. 1991).
by a tugboat captain for the negligent infliction of emotional distress under the Federal Employers Liability Act ("FELA")/Jones Act. Although the court applied a "reasonable person, normally constituted" standard, it noted that the reasonable person in a maritime case is a "far heartier breed" than in other cases. The court turned the wholly objective standard into a somewhat subjective "reasonable seaman" standard. In so doing, the court seems to be suggesting that reasonable persons and reasonable seamen have different perceptions or impressions of what conduct would cause emotional distress.

The actual reason the court gave the reasonable person in emotional distress cases brought under the FELA/Jones Act a tougher constitution than that of a reasonable person was to restrict the liability of vessel owners. It was not to account for their different comprehensions, awarenesses, or perceptions of conduct which would cause emotional distress. By allowing recovery, the Fifth Circuit became one of only two circuits to allow recovery for purely emotional injury under the FELA/Jones Act. In an earlier case, Gaston v. Flowers Transportation, the Fifth Circuit noted that basing the imposition of damages on an employer on factors which are entirely incidental to the operation of the vessel and which bear little or no relationship to the safety of the venture is random and wayward. The court said that such an imposition of damages serves in no way to advance the major subsidiary purpose of affording such remedies to seamen under the FELA/Jones Act—to hold out incentives to their employers to reduce dangers and to operate safely. It seems that the Court of Appeals had the same concern of a purposeless extension of employer liability in mind when it stated that a reasonable seaman was of a heartier breed than the reasonable person in non-maritime infliction of emotional distress cases. The court noted in Plaisance that it wanted a rule which allowed recovery for true, significant mental injuries. The court also said that it was mindful of the three considerations limiting recovery for emotional injury: (1) mental

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55. Plaisance, 937 F.2d at 1010 n.7.

56. Id. at 1012 (Jones, J., dissenting).

57. 866 F.2d 816 (5th Cir. 1989).

58. Id. at 820.
injury is often temporary and relatively clear, (2) there is a danger that mental claims will be falsified, and (3) there is a perceived unfairness in imposing liability where the injury is a remote consequence of the wrongful act.\(^5^9\)

While wanting to allow recovery for genuine injury, the court did not want to extend the liability of vessel owners so as to have them pay in situations where they could not have controlled or reduced the danger which caused the injury. Instead of tinkering with the traditional reasonable person standard to achieve its goal, the court should have found and used another mechanism for achieving the balance it desired between allowing recovery for authentic claims and protecting employers from excess liability.

Notably, after hearing the case en banc, the Fifth Circuit held that the facts of the case were such as to make it unnecessary for the court to decide whether the Jones Act permits recovery for purely emotional injuries.\(^6^0\) The court disavowed its previous holding and instead reaffirmed its decision in \textit{Gaston}.\(^6^1\) In \textit{Gaston}, the court had denied recovery for a purely emotional injury. It is also noteworthy that no other circuit followed the Fifth Circuit’s earlier lead in the adoption of such a nonsensical standard. Hence, the reasonable seaman standard seems to have no present applicability. It does not offer useful guidance for determining whether a reasonable woman standard should be used in sexual harassment cases. It seems that in \textit{Plaisance}, the court created the reasonable seaman standard in order to limit the liability of vessel owners, not to account for differences in perceptions of seamen and non-seamen of conduct that causes emotional distress.

2. Criminal Law

In criminal law, the reasonable woman standard is largely absent. Although it has been rejected by nearly every court,\(^6^2\) in \textit{Washington v. Wanrow},\(^6^3\) the Supreme Court of Washington allowed the use of a reasonable woman standard in a self-defense instruction to the jury. In reviewing the self-defense instruction that had been given in the second degree murder conviction of a woman, the court determined

\(^{59}\) \textit{Plaisance}, 937 F.2d at 1010.
\(^{60}\) \textit{Plaisance} v. Texaco, Inc., 966 F.2d 166, 167 (5th Cir. 1992).
\(^{61}\) \textit{Id.}
\(^{63}\) 559 P.2d 548 (Wash. 1977).
that the defendant "was entitled to have the jury consider her actions in light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination." Additionally, some courts have allowed expert testimony on the battered woman syndrome in order to assist the jury in determining the reasonableness of the use of, and degree of, force used in a case involving recognized circumstances of self-defense.65

Both the acceptance of a reasonable woman standard in a self-defense instruction in Washington v. Wanrow, and in the use of testimony regarding the battered woman syndrome, the woman's perception is being used to judge and evaluate her own conduct, i.e., whether her use of force was justified. Therefore, the analysis of those cases is inapplicable in hostile environment sexual harassment cases where the woman's perception would be used to judge or evaluate the harasser's conduct. Hence, these cases cannot be used as authoritative guidance.

It is helpful to look specifically at situations in the criminal context where a reasonable woman's perception has been used to judge the offender's/aggressor's actions. An example of such a situation is the use of the reasonable woman standard in determining whether force was used in rape. Notably, no court has adopted the reasonable woman standard in evaluating the alleged rapist's use of force. Additionally, no court has used the reasonable woman standard to evaluate the offender's/aggressor's conduct in any other area of criminal law where a woman is the victim. This remains true despite the fact that feminist scholars in the area of criminal law have urged advocates and judges to adopt the perspective of the woman in formulating and adjudicating the elements of a crime.66

From the analysis of the use of a reasonable woman standard in criminal law and tort law, it is apparent that courts insist on holding on to a wholly objective reasonable person standard and have never attributed the subjectiveness of gender to the objective reasonable person. If a subjective standard is not allowed in other areas of the law in which reasonable men and reasonable women would arguably have different perceptions, then there seems to be no justification for allowing a partially subjective standard in evaluating sexual harass-
III. RETAINING THE OBJECTIVE "REASONABLE PERSON"

A. Reasons Supporting Retention

There are strong reasons supporting the retention of an objective reasonable person standard in Title VII hostile environment cases for making the determination of whether certain behavior is violative or prohibited. The use of the reasonable woman standard outside Title VII hostile environment sexual harassment cases is not being addressed here.

First, the elimination of discrimination in the workplace, a goal of Title VII, cannot be realized if prohibited conduct is not clearly defined. Prohibited conduct needs to be clearly defined so that people, specifically employers who are the ones actually subject to financial liability under Title VII, can shape the behavior of their employees by effectuating company policies which conform to that standard. The clearest standard of all is a wholly objective standard. By adding subjective elements to the standard more confusion is created for employers subject to financial liability, for employees/coworkers who are the potential offenders, and for judges.

In discussing the objective theory, Oliver Wendell Holmes noted that "[i]f . . . 'the actual state of the parties' minds' is relevant, then each litigated case must become an extended factual inquiry into what was 'intended,' 'meant,' 'believed,' and so on." However, he went on to say that "[i]f . . . we can restrict ourselves to the 'externals' (what the parties 'said' or 'did'), then the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedents about recurring types of permissible and impermissible 'conduct.'" In the same way, if a wholly objective standard is used in sexual harassment cases, courts may quickly develop and accumulate precedent about which conduct is prohibited. In so doing, they will be offering greatly needed guidance to employers. Arguably, even with the use of a less than objective standard, a body of precedent setting boundaries for which conduct is permissible and which is impermissible may eventually develop. However, it will

69. Id.
develop much more slowly. The use of a subjective standard would produce inconsistency in the results and the conclusions reached by the courts, thereby creating confusion. The same conduct while found to be permissible under the use of a subjective standard by one court may be found to be impermissible by the use of a subjective standard by another court. As a result, employers will not have guidance on what conduct they should prohibit.

Second, there is a problem of logical extension of the principle to other areas. If the reasonable woman standard is accepted in order to reflect the fact that men and women have such divergent views of what constitutes sexual harassment, then the same ought to hold true for a black plaintiff with regard to racial harassment. It may be argued that because of the different socialization experiences that blacks and whites have in America, they have very different perceptions of conduct that may constitute a hostile environment based on racial harassment. This seems to lead to the conclusion that the conduct must be viewed from the perspective of a "reasonable black person" in a hostile environment racial harassment action brought by a black plaintiff under Title VII of the Civil Rights Act.

This is the very conclusion that a federal district court came to recently in analyzing a claim for racial harassment in *Harris v. International Paper Co.*[^70] Although the claim was brought under the Maine Human Rights Act ("MHRA"), the court ruled that Title VII would be used as persuasive authority in interpreting the MHRA since the MHRA was the state analogue to Title VII.[^71] The court first recognized that in the First Circuit, the reasonable woman standard was the correct one to be used in a Title VII sexual harassment claim. The court went on to say:

To give full force to . . . [the] recognition of the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment, and of white Americans, and black Americans in the case of racial harassment . . . [I]nstances of racial violence . . . which might appear to white observers as mere 'pranks' are, to black observers, evidence of threatening, pervasive attitudes closely tied with racial jokes, comments or nonviolent conduct which white observers are more

[^71]: Id. at 1511.
likely to dismiss as non-threatening isolated incidents. . . Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims, the fact finder must 'walk a mile in the victim's shoes' to understand these effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment racial harassment case is that of a reasonable black person. 2

A federal district court in Arizona agreed with the court in Harris and adopted the same standard. In Stingley v. Arizona, 73 the plaintiff, an African American woman, brought suit under Title VII of the Civil Rights Act for hostile environment sexual and racial harassment. 74 The court first noted that in Ellison v. Brady, the Ninth Circuit held that "the proper reference for evaluating the 'severity and pervasiveness' of the harassment is from the perspective of the reasonable victim of the same gender." 75 The court said that the reasoning in Ellison "may be applied seamlessly to racist environment claims . . . ." 76 The court concluded that "[t]he proper perspective from which to evaluate the hostility of the environment is the 'reasonable person of the same gender and race or color' standard." 77 Apparently, this standard is catching on rapidly.

The next logical step would be to argue that the conduct in a hostile environment claim brought under section 703 of Title VII based on religious harassment must be viewed from the perspective of the reasonable Muslim, Jewish, Catholic (or other religion of plaintiff) person, and in a hostile environment claim based on national origin harassment, it must be viewed from the perspective of the reasonable Pakistani, Japanese, Mexican (or some other national origin) person.

A major problem that must be addressed by the courts is deciding or drawing the line as to which characteristics of the plaintiff are to be given to the reasonable person. The court in Harris stated that the appropriate standard to be applied is that from the protected group

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72. Id. at 1515-16 (citations omitted).
74. Id. at 428.
75. Id.
76. Id.
77. Id. It is not quite clear whether the court means that hostile environment sexual harassment must be evaluated using the reasonable person of the same gender, and that hostile environment racial harassment must be evaluated using the reasonable person of the same race, or whether the court meant that any hostile environment claim brought under Title VII must be evaluated using the reasonable person of the same gender and race or color standard, regardless of whether a sexual, racial, or national origin harassment claim is brought.
of which the alleged victim is a member.\textsuperscript{78} This suggests that the only subjective characteristic to be ascribed to the reasonable person is the characteristic of the plaintiff on the basis of which the harassment is being claimed. For example, in the case of sexual harassment, the sex of the plaintiff should be ascribed to the reasonable person, and in the case of national origin harassment, the national origin of the plaintiff should be ascribed to the reasonable person. However, there is no rationale for drawing the line here.

If the very reason put forth for the allowance of a gender-specific reasonable person standard is that men and women have widely divergent perceptions of conduct which constitutes sexual harassment, then any time a group to which the plaintiff belongs, and the group to which s/he does not belong (based on a certain characteristic) have widely divergent perceptions of such conduct, the standard used should account for the difference in perceptions. For example, a study reported in the \textit{Harvard Business Review} found the existence of a difference in perception of men and women of sexual harassment and also found a difference in perception of sexual harassment between top level management and lower level management.\textsuperscript{79} While only forty-four percent of lower level management agreed or partially agreed that sexual harassment at work is greatly exaggerated, sixty-three percent of the top level management so agreed or partly agreed.\textsuperscript{80} This difference in perception ought to be similarly reflected in the standard used to evaluate the conduct.\textsuperscript{81} If the plaintiff bringing the sexual harassment action was a lower level female manager, then the standard used to determine whether the conduct created a hostile environment should be a “reasonable woman who is a lower level manager.” Similarly, perceptions of sexual, racial, or any other kind of harassment may be found to differ with varying socio-economic levels of the plaintiff. This should be reflected and accounted for in the standard as well. For example, if such a difference is found, then for a black person from a high socio-economic level bringing an action under section 703 for a hostile environment based on racial harassment, the standard used should be that of a “reason-

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\item \textsuperscript{78} Harris v. International Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991).
\item \textsuperscript{79} See Collins & Blodgett, supra note 31, at 81, 85.
\item \textsuperscript{80} See id. at 81.
\item \textsuperscript{81} The determination of whether two groups have divergent perceptions presents a problem. It remains to be decided how wide the divergence has to be before a separate standard is assigned, and what kinds of proof will be deemed adequate to show the existence of the divergence.
\end{itemize}
able black person of a high socio-economic level."

As can be seen, if we follow the reasonable woman standard to its logical progressive end, we will likely run into a great deal of difficulty. Inevitably, we will end up with a wholly or greatly subjective standard. As stated previously, the subjective standard is not workable in Title VII sexual harassment claims. It will not set forth the clear guidelines that people need in this area in order to conform their conduct to that which is not prohibited. Furthermore, judges cannot be expected to keep track of and understand the morass of perspectives involved.\(^8^2\) Can an American, white, male judge comprehend what a reasonable Arab would find to constitute a hostile environment based on national origin? It is difficult to accept or even imagine that a judge can truly be certain that while certain conduct would not be offensive enough to create a racial harassment hostile environment for a reasonable white person, it would be for a reasonable black person. We cannot be certain that a judge can readily distinguish between what a reasonable woman would find offensive, as compared with a reasonable man. We cannot assume that a judge will be able to grasp and comprehend, much less be able to apply, the standards using numerous perspectives. Undoubtedly, there will be great chaos.

Third, assuming it is accepted that men and women have sufficiently differing perspectives of what constitutes sexual harassment, it remains unclear how the reasonable woman standard accounts for the different perspectives. The premise underlying the reasoning of why the reasonable person standard is unusable is that this standard is male-biased.\(^8^3\) This is said to be so because, since most judges and employers (the people judging and allowing existence of the hostile environment) are male, in applying the standard of the reasonable person they are applying the reasonable male standard.\(^8^4\) If male judges are now forced to apply a reasonable woman standard, how can we be so sure that they are now applying a reasonable woman’s perception rather than a male-biased view of what the reasonable woman’s perception is?

It should also be noted that the argument for the adoption of the reasonable woman standard is not as compelling as it was before the

\(^{82}\) See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627 (6th Cir. 1986).
\(^{83}\) See GUTEK, supra note 32; Abrams, supra note 26; Ehrenreich, supra note 26.
\(^{84}\) See Abrams, supra note 26, at 1203.
passage of the Civil Rights Act of 1991. Under the Civil Rights Act of 1964, a trial by jury was generally denied for Title VII actions. The rationale for the denial was that only equitable, as opposed to legal remedies were available under Title VII, and juries are not provided for the resolution of equitable claims. The Civil Rights Act of 1991 has changed this. Now, compensatory and punitive damages (i.e., legal remedies) are available to a plaintiff bringing an action under section 703 for sexual harassment if the plaintiff can show that the harassment was intentional. This means that where these legal remedies are sought, a trial by jury is available. Therefore, although a trial by jury is not available in every sexual harassment action brought under Title VII, its availability has been significantly opened. The proponents of the reasonable woman standard maintain that the reasonable person standard is male-biased because most of the judges who apply it are male. Since it cannot be presumed that a jury for a sexual harassment case will be mostly male, in cases where a right to a trial by jury is available, it cannot be said that the application of the reasonable person standard will be an application of a male-biased standard. Presumably, there will be women on the jury who will prevent the application of a male-biased standard.

The main criticism of the reasonable person standard has been that it fails to account for the differences in men’s and women’s perspectives. It is argued that the reasonable person standard assumes that there is some view of sexual harassment that we are all likely to share. However, the same can be said of the reasonable woman standard, i.e., it assumes a view of sexual harassment that all women are likely to share. The studies and surveys show otherwise. For example, in its 1988 study, the U.S. Merit Systems Protection Board

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90. See Abrams, supra note 26, at 1202.
91. See Ehrenreich, supra note 26, at 1214-19.
reported that sixty-four percent of the women defined suggestive looks from a co-worker as sexual harassment. This necessarily means that thirty-six percent of the women did not define such conduct as sexual harassment. Women cannot be considered a homogeneous group. They all have different experiences, views, and perceptions from each other. The criticism that the reasonable person standard assumes that people share a common view of something will be true of any objective standard. However, a subjective standard is unusable in this area. Therefore, an objective standard must be used.

B. Balancing Employer/Employee Rights.

The definition of "reasonableness" as applied in tort law should be carried forward to give content to the reasonable person as s/he is used in sexual harassment cases. There exists the objection that the goal of tort law and the goal of Title VII are too different from each other and therefore do not allow for the carrying over of the reasonable person standard. Simply stated, it might be argued that the goal of tort law is to enforce prevailing norms of conduct in society, whereas the goal of Title VII is to reform practices which are considered to be the norm in society. However, upon a close examination of the two areas of law, this Note concludes that this is not so.

While the goal of Title VII is to eliminate discriminatory barriers in employment and to afford "equality of opportunity," it is not to drastically change the thinking of society overnight. Title VII seeks to strike "a delicate balance between employer and employee rights." While Title VII seeks to remedy individual wrongs, it does not intend to punish employers. This balance would be upset and employers would be punished if it was found that Title VII prohibited all offensive conduct from the workplace since the employer is the one subject to financial responsibility for failing to prevent the occurrence of the conduct. Therefore, it cannot be said that Title VII was designed to bring about "a magical transformation in the social mores of American workers."

92. See Office of Merit Review & Studies, supra note 30, at 14.
Similarly, tort law achieves a balance between the rights of people in society by affording compensation for injuries sustained by one person as the result of the conduct of another. Tort law bases liability upon conduct which is socially unreasonable. It is undisputed that what is socially acceptable and unacceptable changes with time. "The reasonable [person in tort law] is not a static creation; his/her conduct necessarily varies with the circumstances and inevitably will vary as changing morality affects jurors' [and judges'] views of what [s/]he would do."

The objective reasonable person standard should be used in Title VII since it is a mechanism for balancing the differing considerations of employers and employees in the workplace. If the reasonable person is given subjective characteristics, this delicate balance is destroyed. In negligence, "[t]he standard of conduct which the community demands must be an external and objective one, rather than the individual judgment . . . of the particular actor, and it must be . . . the same for all persons, since the law can have no favorites."

The law cannot have any favorites under Title VII either.

It bears emphasis that the community which determines the conduct expected of the reasonable person is a community made up of women and men, not just of men. Furthermore, arguing that the trier of fact factors his/her bias into account when evaluating certain conduct has never been said to be a sufficient reason for discarding the objective standard. In any situation, under any given set of circumstances, the triers of fact and the litigants are bound to have differences, whether these differences are cultural, racial, economic, religious, or others. We cannot control the biases a trier of fact may bring with herself or himself. Also, even in the application of a subjective standard, a trier of fact may still consider his/her own biases and perspectives.

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98. See Keeton et al., supra note 47, at 6.
99. See id.
101. See Keeton et al., supra note 47, at 173-74.
CONCLUSION

This Note concludes that the use of the reasonable woman standard in hostile environment sexual harassment cases brought under Title VII should be discontinued. The addition of gender to the objective reasonable person standard will ultimately lead to a wholly or highly subjective standard. Such a subjective standard is unworkable in this area.

The objective reasonable person should be retained in Title VII hostile environment sexual harassment cases so that a clear, consistent body of law and standards can be established to guide people in their behavior. If so, eventually Title VII’s purpose can be realized.

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