

The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?

TONI LESTER*

INTRODUCTION

Public response to the accusations made by Anita Hill during the Clarence Thomas Supreme Court nomination hearings makes it clear that people differ when it comes to determining whether certain conduct is acceptable or whether it is sexual harassment.¹ As one major study of more than 20,000 federal government employees showed, men tended to feel that the problem of sexual harassment in the workplace was greatly exaggerated, while women did not.² Given these differing perspectives, whose point of view should be adopted to determine what constitutes sexual harassment in a court of law?

The law has traditionally delegated the responsibility for answering this question to the "reasonable man" (more recently called the "reasonable person"), a mythical individual who is supposed to represent a composite of society's highest values. The reasonable person test purports to establish liability objectively by asking the question: "What would the reasonable person have perceived in the same situation?" Although some

* Assistant Professor of Law and Dill International Research Fellow, Babson College; B.S., 1975, Georgetown University; J.D., 1979, Georgetown University Law Center. The author wishes to thank graduate students Susan Condon and Jill Larocca for their assistance in the collection of research data for this Article, and the Babson Board of Research for its continuing support.

1. See *Who's Telling The Truth?*, BOSTON GLOBE, Oct. 15, 1991, at 57. See also Ellen Goodman, *A Reasonable Standard*, BOSTON GLOBE, Oct. 13, 1991, at 83 (quoting University of Michigan law professor Kim Lane Scheppele, who said, "[M]en see the sex first and miss the coercion, women see the coercion and miss the sex."); *How Not to Vex Your Female Colleague*, ECONOMIST, Oct. 12, 1991, at 26.

2. The study of federal government employees, conducted by the U.S. Merit Systems Protection Board, showed that 44% of men and 23% of women thought that the problem of sexual harassment was greatly exaggerated. The study also showed that men were more likely to believe that the victims brought the harassment on themselves. OFFICE OF MERIT SYS. REVIEW AND STUDIES, U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FED. WORKPLACE, IS IT A PROBLEM? 31 (1981)[hereinafter 1981 MERIT STUDY]. See also U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FED. GOV'T: AN UPDATE (1988) [hereinafter 1988 MERIT STUDY] (This follow-up to 1981 MERIT STUDY showed that six years later, the problem of harassment had remained virtually unchanged.).

believe that the test is a fair standard for assessing liability,³ others criticize it for preserving the status quo — an elite white-male power structure that treats women unfairly.⁴ The controversy over this test is particularly heated in cases in which it is alleged that sexual harassment has created a hostile work environment. In 1986, the United States Supreme Court ruled that sex-based behavior that creates such an environment is an illegal form of sex discrimination.⁵ There still seems to be a wide “perception gap” in the federal courts, however, when it comes to determining whether a work environment is sufficiently hostile to support a sexual harassment claim.

Courts have adopted two decidedly different approaches in making their determinations. At one end of the spectrum is the reasonable person standard articulated by the majority in *Rabidue v. Osceola Refining Co.*⁶ This standard attempts to evaluate whether the conduct in question would interfere with the “hypothetical reasonable individual’s work performance and seriously affect the psychological well-being of that reasonable person under like circumstances”⁷ Applying this test, the Court of Appeals for the Sixth Circuit found that women who are subjected to certain kinds of workplace harassment are not entitled to legal redress because such harassment is pervasive and tolerated by the society at large.⁸

At the other end of the spectrum is the reasonable woman (or victim) test espoused by the dissent in *Rabidue* and by the majority in the Ninth Circuit case *Ellison v. Brady*.⁹ This test asks the question: Would a reasonable woman find the conduct in question offensive?¹⁰ In contrast

3. See Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1181 (1990) (discussing the traditional 19th century view of the reasonable person test).

4. See Kim Lane Schepple, *The Reasonable Woman*, THE RESPONSIVE COMMUNITY, Fall 1991, at 36, 41. See generally Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991); Ehrenreich, *supra* note 3.

5. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

6. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). It should be noted that some judges expressly refer to the reasonable person test but implicitly use the reasonable woman test. See *Watts v. New York City Police*, 724 F. Supp. 99, 104 (S.D.N.Y. 1989) (although the court said that it would review the plaintiff’s allegations from the perspective of a “reasonable person facing the same situation,” the court also cited an article that advocated the reasonable victim standard to support its analysis). For the purposes of this Article, the words, “the reasonable person test,” will be used to refer to a specific mode of analysis that fails to place any significant emphasis on the reactions and experiences of the “reasonable woman.” The specific characteristics of the test will be elaborated on in Part II.

7. *Rabidue*, 805 F.2d at 620.

8. *Id.* at 622.

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

10. *Id.* at 879. See also *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting).

to *Rabidue*, the majority in *Ellison* attempted to counteract, not tolerate, what it saw to be a pattern of unfair harassment against women. Since to date the United States Supreme Court has not reviewed the standards set down in either *Rabidue* or *Ellison*, each federal circuit court is left to its own devices when determining which standard to apply. This Article has two purposes. The first purpose is to introduce the reader to the principal characteristics of both the reasonable person and the reasonable woman tests. It is this author's belief that if the United States Supreme Court were to require federal courts to uniformly apply the reasonable woman test to sexual harassment cases, women would win harassment suits much more often than they would if the reasonable person test were used.¹¹ The second purpose of this Article, therefore, is to show how the reasonable woman test will affect the outcomes of future harassment cases. This will be accomplished by looking at several previously decided sexual harassment cases in which the employer prevailed in order to show how the reasonable woman test might have caused the decisions in those cases to turn out differently. It is hoped that by looking at cases in this manner, conclusions can be drawn about how similar cases might be decided in the future.

To accomplish these objectives, Part I of this Article will examine the sources of sexual harassment law, including Title VII of the Civil Rights Act of 1964,¹² the Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment,¹³ and *Meritor Savings Bank v. Vinson*,¹⁴ the United States Supreme Court decision that set the ground rules for the sexual harassment decisions under discussion.

Part II will cover the main components of the reasonable person test, including a discussion of the way in which the test was initially used in both negligence and rape law. For an analysis of how the test later evolved in sexual harassment law, Part III will examine how it was used in *Meritor* and *Rabidue*. Part IV will examine the reasonable woman test, as it was described by the dissent in *Rabidue*, by the majority in *Ellison*, and in a more recent Florida case, *Robinson v. Jacksonville Shipyards, Inc.*¹⁵

Using its distinguishing elements, the reasonable woman test will then be applied in Part V to five cases that rejected the sexual harassment claims under review. This analysis will reveal that the plaintiffs in all

11. Indeed, there seems to be a growing trend in this direction already. See Eric J. Wallach and Alyse L. Jakobson, *Reasonable Woman Test Catches On*, NAT'L L.J., July 6, 1992, at 21-26.

12. 42 U.S.C. § 2000e (Supp. II 1991).

13. 29 C.F.R. § 1604 (1991).

14. 477 U.S. 57 (1986).

15. 760 F. Supp. 1486 (M.D. Fla. 1991).

but one of those cases would have won had the reasonable woman test been used.¹⁶ The conclusion of this Article will address the implications of these findings for both employees and business managers.

I. SOURCES OF SEXUAL HARASSMENT LAW

A. *Title VII and EEOC Regulations*

It is illegal under Title VII of the Civil Rights Act of 1964 for employers to discriminate on the basis of sex, race, religion or national origin.¹⁷ Although the term "sex" was originally added to the statute to stifle its passage,¹⁸ Title VII has since become the chief source of sexual harassment law.

It was not until the late 1970s that courts began to acknowledge that sexual harassment was a form of sex discrimination under Title VII.¹⁹ In 1980, the EEOC officially began to refer to the term "sexual harassment" when it issued guidelines which made the following types of conduct illegal: unwanted "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."²⁰ The guidelines also state that a harassment claimant must have been subjected to at least one of the following three situations:

- (1) the harassment was made either explicitly or implicitly a term or condition of the plaintiff's employment,
- (2) employment de-

16. It should be noted that courts sometimes find simultaneously that the plaintiff was sexually harassed and that the employer should not be held liable. This happens when an employer successfully convinces a court that it should not be held vicariously liable because it was not aware that the plaintiff was being harassed. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.119, 1213 (1989) ("[M]ost courts have required some knowledge on the part of the employers, particularly when the harassment was perpetuated by a coworker."). In addition, a victim may quit her job and later sue her employer on the grounds that she was constructively discharged because of the harassment. In such cases, courts have occasionally found that, although the harassment took place, the company should not be held liable because it took appropriate steps to remedy the situation. See *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987). This Article, however, will only focus on the extent to which the courts have ruled on the victim's claim that she was sexually harassed, notwithstanding a possible ultimate finding for the employer on other grounds.

17. 42 U.S.C. § 2000e (1988 & Supp. II 1991).

18. See CHARLES AND BARBARA WHALEN, *THE LONGEST DEBATE - A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-118 (1985) (discussing how civil rights foe Judge Howard Smith proposed that the word "sex" be added to Title VII so that the law would become so controversial that no one in Congress would vote in favor of it). See also Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 439-43 (1966).

19. See *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); *Barnes v. Costle*, 561 F.2d 983 (1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

20. 29 C.F.R. § 1604.11(a) (1991).

cisions about the plaintiff were made based on the extent to which he or she submitted to or rejected the harassment, or (3) the harassment had the purpose or effect of *unreasonably interfering with the plaintiff's work performance or creating an intimidating, hostile, or offensive working environment*.²¹

Despite the EEOC's guidelines, however, many courts were not willing to review hostile work environment claims.²² Even though women who work in hostile environments do so at enormous emotional cost,²³ these courts apparently believed that Title VII was only designed to punish quid pro quo harassment (i.e., harassment that causes some type of tangible economic loss).²⁴ The United States Supreme Court, however, ultimately rejected this view in *Meritor*, and held that hostile work environment claims should be just as actionable as quid pro quo harassment claims.²⁵

B. *Meritor Savings Bank v. Vinson*²⁶

The United States Supreme Court rendered its first sexual harassment decision in the *Meritor* case. Michele Vinson, a teller-trainee at Meritor Savings Bank, alleged that she had been forced to have sex with her boss on numerous occasions because she was afraid of losing her job.²⁷ At trial, the district court rejected Vinson's claim and concluded that she had not been subjected to quid pro quo harassment.²⁸ However, the court never questioned whether Vinson might have been psychologically harmed by her supervisor's behavior and therefore entitled to pursue a hostile environment claim. Deciding that the district court's analysis was therefore flawed, the Supreme Court remanded the case to evaluate whether Vinson's boss had created a hostile work environment.²⁹

21. *Id.* (emphasis added).

22. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 59 (1986) (discussing the district court's findings that the plaintiff's claims were not actionable because her harassment did not have an economic effect). See also *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Marguerite Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).

23. See Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 84, 85 n.6 (1984-1985) (discussing how harassment victims experience a variety of stress-related symptoms, including high blood pressure, ulcers, insomnia, and anxiety).

24. For a discussion of quid pro quo harassment, see CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-47 (1979).

25. 477 U.S. at 67.

26. 477 U.S. 57 (1986).

27. *Id.* at 59.

28. *Id.* at 67.

29. *Id.*

The *Meritor* decision was a mixed blessing for sexual harassment victims. First, the highest court in the country expressly acknowledged that sexual harassment was, in fact, a form of sex discrimination under Title VII. Second, the Court supported the EEOC's position that harassment resulting solely in psychological harm could also be actionable under Title VII. However, the Court also implicitly endorsed the use of the reasonable person test in sexual harassment law. This last aspect of the decision would prove to have troubling consequences for subsequent harassment victims.

The reasonable person test makes some of its earliest appearances in both negligence and rape law. A discussion of its use in these two areas will provide insight into how it is now being used in sexual harassment law, and why it is so controversial.

II. THE REASONABLE PERSON TEST IN NEGLIGENCE AND RAPE LAW

A. *Negligence Law*

Generally, a person will be found guilty of negligence if it can be shown that a person's conduct created an *unreasonable* risk of harm to others.³⁰ In a negligence case, the courts ask: "what would the reasonable person . . . have done under the same circumstances as those in which the defendant found himself".³¹ Although some regard is given to what the defendant *actually thought*, negligence defendants are presumed to possess "certain basic knowledge common to the community"³² and are judged by the extent to which they do (or do not) follow the dictates of that knowledge.

For example, a judge in a negligent-driving suit may conclude that a reasonable person would not knowingly drive a car with brakes dangerously in need of repair. But what if the defendant had decided that he could maneuver the car safely on his own just before he got into a car accident? The judge would still probably find the defendant negligent because, in the judge's mind, the defendant's perspective was not within the range of societal expectations about reasonable behavior. Thus, this particular car owner would be compared to the reasonable car owner, someone who only exists in the abstract.

Theoretically, courts defer to existing societal norms when they try to determine if the type of conduct described above is reasonable under the circumstances. Proponents of the reasonable person test believe that by so adhering to community standards, judges are able to render neutral

30. EDWARD J. KIONKA, *TORTS IN A NUTSHELL* 48 (1992).

31. *Id.* at 50.

32. *Id.* at 51.

and unbiased decisions.³³ But to what extent is a particular judge or a jury really able to ascertain the community's perspective in a negligence case? In all likelihood, the judge in this example will simply consult his or her own intuition to determine how the community would view the defendant's behavior. Thus, there exists great potential for personal bias to taint the decision-making process.

An additional problem arises when one realizes that the underlying presumption of the reasonable person test—that some type of consensus exists about basic social interactions—may be flawed. The standard assumes that there is enough of an agreement in the community to create a consensus in the first place. However, many believe that, contrary to being a melting pot of values, America is made up of myriad subgroups, divided along racial, gender, and a variety of other lines, each possessing unique and sometimes conflicting perspectives.³⁴ Feminist legal scholars note that the flaw in the reasonable person test is particularly apparent in cases that focus on male-female relationships. For marginally empowered groups like women, they argue, courts use the reasonable person test to make decisions about women in a paternalistic manner.³⁵ To support this view, they point to the way in which rape law has been used to unfairly discriminate against women victims—the very group that the law is supposed to protect.³⁶

B. Rape Law

Many of the underlying premises of sexual harassment law are derived from early rape law.³⁷ In rape law, courts traditionally used the reasonable person test to focus on the issue of consent. Until quite recently, in order to prevail in most rape cases the prosecution had to show that a woman was forced to have sexual intercourse without her consent.³⁸ Consent was found when the court concluded that *the defendant perceived*

33. See Erenreich, *supra* note 3, at 1181.

34. See generally Scheppele, *supra* note 4.

35. *Id.* at 36.

36. *Id.* at 38.

37. For an in-depth discussion of the parallels between these two areas of law, see generally Estrich, *supra* note 4.

38. Although this is the language used in most common law rape cases, the rape reform statutes of the 1970s and 1980s were heavily influenced by the Model Penal Code redefinition of rape, which suggested that rape be defined as sex that results from force or the threat of imminent death. See SUSAN ESTRICH, REAL RAPE 61 (1987) (Courts continue to unduly focus on the victim by interpreting the new statutes to mean that rape occurs if "force . . . is used to overcome female nonconsent.'). See also Estrich, *Sex at Work*, *supra* note 4, at 814 (Reform efforts, which tried to reshift the focus from consent to force, "were short-sighted at best" because "the inquiry has too often remained focused on . . . the woman's role in provoking, and accepting . . . the rightness of her rape.').

that consent was given.³⁹ The fact that the victim *actually* did not want to have sex was often disregarded by the courts.

A close examination of rape law reveals that judges who apply the reasonable person test have often focused "to an unusually high degree on the actions, reactions, motives, and inadequacies of the victim . . . [as opposed to] those of the defendant."⁴⁰ Support for this conclusion can be found in the following list of situations in which women were deemed to have given their consent:

(1) The woman did not physically resist the unarmed rapist;⁴¹

(2) The woman assumed the risk of being raped by placing herself in what was deemed to be an obviously dangerous situation;⁴²

(3) The woman had the type of sexual fantasies and/or sexual life that demonstrated to the court that she had a propensity to want to have sex with the alleged rapist;⁴³

(4) The woman wore the type of clothing that demonstrated to the court the rapist was justified in finding her sexually provocative;⁴⁴ or

(5) The woman's credibility was questioned because she failed to report the rape immediately after it occurred.⁴⁵

39. See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR, THE SOCIAL COST OF RAPE* 58 (1991).

40. Estrich, *Sex at Work*, *supra* note 4, at 815.

41. See *State v. Rusk*, 424 A.2d 720, 734 (Md. 1981) (Cole, J., dissenting). *But see* GORDON & RIGER, *supra* note 39, at 58-59 (describing how some states have adopted rape statutes that liberalize the resistance requirement by weighing a variety of factors, like the age of the victim and her strength relative to the rapist).

42. *Rusk*, 424 A.2d at 734.

43. See GORDON & RIGER, *supra* note 39, at 59 ("[L]awyers infer that an unchaste woman would be more likely than a virtuous woman to agree to have intercourse with an assailant."). *But see id.* at 65 (discussing how some states, like Michigan, have eliminated the use of the victim's sexual history as evidence in rape cases).

44. See Christopher Boyd, *Accuser's Underwear Can Be Used as Evidence*, BOSTON GLOBE, Oct. 31, 1991, at 25 (The writer discusses the fact that the judge in the William Kennedy Smith rape trial agreed to let the defense admit evidence about the condition of the alleged rape victim's bra and underpants ostensibly for the purpose of refuting the victim's claims that a struggle took place. The prosecutor objected to the evidence by arguing that the defense was trying to convince the jury that "any woman who buys underwear at Victoria's Secrets can't be a victim of a sexual assault."). Compare E.R. Shipp, *Tyson Found Guilty on 3 Counts as Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at A1, B15 (discussing how the prosecutor in boxer Mike Tyson's rape trial emphasized the victim's lack of intent to have sex with Tyson by pointing to the supposedly nonprovocative clothing that she wore, which included "pink polkadotted pajama bottoms . . . underneath the three piece floral print outfit she hastily threw on when going to meet Mr. Tyson").

45. See E.R. Shipp, *Bearing Witness to the Unbearable*, N.Y. TIMES, July 28, 1991, at 2 (The writer discusses a gang rape trial brought by a 22-year-old woman against six St. John University male students. One juror justified his refusal to convict the men by saying that he was "bothered that it took the woman more than two weeks to report the incident to campus authorities.").

The case of *State v. Rusk*⁴⁶ demonstrates how some judges have used the reasonable person test to conclude that a woman consented to have sex with an alleged rapist. The court in *Rusk* focused on the circumstances described in items 1 and 2 on the foregoing list. In this case, a woman agreed to give a man that she met in a singles bar a ride home. When she declined his invitation to come up to his apartment, he grabbed her car keys and refused to return them to her unless she came inside with him. Because she was in what she perceived to be a dangerous and unfamiliar part of town, she agreed to go inside. Once inside, he began to lightly choke and undress her and told her that if she had sex with him, he would give her back the car keys. Crying, she agreed.⁴⁷ From his perspective, the woman consented to have sex. From her perspective, she was raped.

The Maryland trial court convicted the man of rape, but eight out of the thirteen judges sitting on the intermediary appeals court overturned the conviction. Finally, on appeal, the highest court in Maryland split four to three in favor of upholding the defendant's conviction.⁴⁸

Agreeing with the intermediary court's decision, the dissent in *Rusk* vehemently disagreed with the majority's conclusion that the woman did not consent to have sex. Despite the fact that she said she believed that physical resistance would have caused her rapist to retaliate even more violently, the dissent criticized the woman for not resisting anyway. Absent such resistance, the dissent concluded that it was reasonable for the man to think that the woman wanted to have sex.⁴⁹

In adopting this belief, the dissent was expressing what leading rape law scholar Susan Estrich has described as the "traditional male notion . . . [that] in a fight the person attacked fights back."⁵⁰ Margaret T. Gordon and Stephanie Riger, authors of the book *The Female Fear, The Social Cost of Rape*, have said that the theory underlying this notion is that "persons worthy of the protection of the law would defend their virtue by undergoing a significant degree of other physical harm before submitting to a sexual attack."⁵¹ Studies have shown, however, that women fear that their very lives are in danger when they are confronted by a

46. 424 A.2d 720 (Md. 1981).

47. *Id.* at 721-723.

48. *Id.* at 720.

49. *Id.* at 728-38 (Cole, J., dissenting) ([P]otential rape victims "must follow the natural instinct of every proud female to resist, by more than mere words . . . unless the defendant has objectively manifested his intent to use physical force . . ." (emphasis added)).

50. SUSAN ESTRICH, *REAL RAPE* 62 (1987).

51. GORDON & RIGER, *supra* note 39, at 59.

rapist.⁵² In response to such fears, many women feel that it is safer for them not to resist when they are attacked.⁵³ This may be because, in general, women, while children, are taught not to fight or defend themselves.⁵⁴

Thus, the reasonable person test, in this instance, may actually be the *reasonable man* test, a test that requires women to do the very thing that they have been told by society not to do. The implications of this view for sexual harassment victims are far reaching. What type of resistance must a woman show to prove that she does not welcome the sexually charged overtures of her supervisor? If she remains silent in response to propositioning or vulgar remarks in the workplace, will her silence be equated with consent by the courts?⁵⁵ If a woman fails to use her company's grievance procedures, will her hesitation later cause her credibility to be questioned?

The dissent in *Rusk* also expressed the belief that the victim assumed the risk of being raped when she agreed to give her rapist, a stranger she met in a singles bar, a ride home. Assumption of risk is a defense available in negligence law. Generally, this defense allows a defendant to argue that a plaintiff should not be able to recover for injuries caused by the defendant's negligence because the plaintiff chose to engage in conduct with the defendant while being aware of the dangers associated with that conduct.⁵⁶

The dissent in *Rusk* used the assumption of risk argument to point out that the rape victim was a "woman *familiar* with the social setting in which these two actors met. . . . She got out of the car, . . . and followed him up the stairs to his room. She *certainly had to realize* that they were not going upstairs to play Scrabble."⁵⁷ Furthermore, by downplaying the fact that she stated that she was afraid of being in a dangerous

52. SUSAN BROWNMILLER, *AGAINST OUR WILL, MEN WOMEN AND RAPE* 401 (1976) (discussing Boston College study of 80 rape victims).

53. *Id.* at 403 (discussing 1971 study by sociologist Menachem Amir of 646 rape cases in the Philadelphia area).

54. GORDON & RIGER, *supra* note 39, at 60.

55. Even courts that have shown some sympathy for the victim's perspective have expressed confusion over what the relationship between silence and unwelcomeness in sexual harassment law. See *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) ("In some instances a woman may have the responsibility of telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome."). Note that the court in this case did not describe specific situations in which silence would be an acceptable response to harassment.

56. KIONKA, *supra* note 30, at 116.

57. *State v. Rusk*, 424 A.2d 720, 734 (Md. 1981) (Cole, J., dissenting) (emphasis added).

neighborhood at night,⁵⁸ the dissent implied that the victim deserved to be raped because she should have known better.

As the foregoing list indicates, some courts have also allowed testimony about the victim's sexual fantasies and sexual history to be used to discredit her.⁵⁹ Some courts have even concluded that a victim's manner of dress is probative of her intent to consent to the sexual overtures of an alleged rapist.⁶⁰ Susan Estrich has noted that this is why it is "often the victim [who is] victimized a second time by a legal system which focused more on determining her fault than that of the man's."⁶¹ There has been a tendency for many courts to adopt this same approach in sexual harassment law.

III. THE REASONABLE PERSON TEST IN SEXUAL HARASSMENT LAW

Using the reasonable person test in a manner that is consistent with its use in rape law, some courts have declared that a woman welcomes sexual harassment under one or more of the following set of circumstances:

(1) The woman assumed the risk of her harassment by choosing to take a job where the harassment occurs;⁶²

(2) The woman was sexually active or had sexual fantasies prior to being harassed;⁶³

(3) At the time of the harassment, the woman spoke or dressed in such a manner that was deemed to be provocative by a court;⁶⁴ or

(4) The woman was silent when she was harassed or failed to report the harassment immediately after it happened.⁶⁵

58. *Id.* at 734 ("It was an ordinary street . . .").

59. For example, during the notorious New Bedford Rape trial in 1984, in which four of six men were convicted of raping a woman in a pool hall, the court allowed testimony to be introduced that indicated that the victim was lonely because she had not been sexually active for several months. See Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, in *AT THE BOUNDARIES OF LAW, FEMINISM AND LEGAL THEORY* 95, 106 (Martha Albertson et al. eds., 1991). See also ESTRICH, *REAL RAPE*, *supra* note 38, at 43 (citing *State v. Anderson*, 137 N.W.2d 781, 783, n.2 (1965) in turn quoting *GLANDVILLE WILLIAMS, CORROBORATION - SEXUAL CASES* 662-71 (1962)). For an in-depth discussion of the history of this aspect of rape law, see also BROWNMILLER, *supra* note 52, at 409-20 (1976).

60. See Boyd, *supra* note 44.

61. Estrich, *Sex at Work*, *supra* note 4, at 813.

62. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

63. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

64. *Id.*

65. See *Waltman v. International Paper Co.*, 875 F.2d 468, 484 (5th Cir. 1989) (Jones, J., dissenting) (discussing the significance of the fact that the plaintiff never relied on the company's grievance procedures). See also *Sparks v. Pilot Freight Carriers, Inc.*,

The above list reveals that some judges hold certain basic assumptions about how men and woman should relate to one another in the workplace. Some of these assumptions were directly sanctioned by the United States Supreme Court's decision in *Meritor*.

A. *Meritor and the Reasonable Person*

The EEOC guidelines state that harassment must be "unwelcome" for it to be actionable.⁶⁶ The unwelcomeness requirement is analogous to the lack of consent requirement in rape law. As has been previously discussed, courts that use the reasonable person test in rape law have often allowed evidence about the victim's clothing and speech to be used to prove that the victim consented to be raped. Apparently believing that this type of analysis unfairly blamed the victim, the court of appeals in *Meritor* refused to allow the defendant to introduce testimony about the plaintiff's manner of dress or her sexual fantasies into evidence.⁶⁷ The United States Supreme Court, however, disagreed.

The Supreme Court explained that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is *obviously* relevant."⁶⁸ The Court also acknowledged that there was no per se rule against allowing testimony into evidence about the plaintiff's publicly expressed sexual fantasies.⁶⁹ However, the Court gave no guidance on how provocativeness should be measured or by whom, or what limits should be placed on the admissibility of testimony about a victim's sexual fantasies.⁷⁰

830 F.2d 1554, 1566 (11th Cir. 1987) (Hill, J., dissenting) ("[W]here it is found that the supervisor's behavior was ambiguous, i.e. less than overtly offensive, a second finding must be made as to whether the plaintiff, by some objective action at the time of the allegedly offensive conduct *displayed objection* to the conduct of the supervisor." (emphasis added)).

66. 29 C.F.R. § 1604.11(a) (1991).

67. *Meritor*, 477 U.S. at 67.

68. *Id.* at 69 (emphasis added).

69. *Id.* at 67, 71.

70. Determining sexual provocativeness can be a very subjective process. Wendy Pollack describes a situation in which men and women held decidedly different views about whether a particular woman was provocative. The incident took place in a student cafeteria in a carpentry school:

Whenever a woman walked through the cafeteria, especially a young woman, the place would go wild. The men would shout, whistle and howl One woman in particular was a favorite target She wore the same white painters' pants that all the other painters wore. There was nothing in her dress or manner that welcomed the men's behavior. . . . I asked my fellow carpenters . . . "What is going on here?" Their response was, "she's asking for it. Look at the way she wears those pants." The [woman] avoided the cafeteria after that.

Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 57 n.73 (1990).

Further evidence that the Court condoned the use of the reasonable person test can be found when one looks at how it addressed the hostile work environment issue. As has been mentioned, the EEOC guidelines state that the harassment must either "unreasonably interfere with an individual's work performance . . . [or create] an intimidating, hostile, or offensive working environment."⁷¹ The Court, however, expanded this description by stating that for "harassment to be actionable, it must [also] be sufficiently *severe* or *pervasive* 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"⁷²

By adding the italicized words, the Supreme Court minimized the experiences of harassment victims and drastically raised the standard that victims would have to meet in harassment cases. For example, under the EEOC guidelines, harassment victims simply had to show that they were made to feel "timid or fearful," because this is the literal definition of the term "intimidating."⁷³ However, following the Supreme Court's ruling, a complainant would also have to show that the harassment was "diffused throughout *every part of*"⁷⁴ her job situation.

This new standard seems to recognize only harassment that occurs in the most extreme and outrageous cases.⁷⁵ As one author has explained, the Court essentially chose "to evaluate claims not by the offender's actions, but by how much a woman can tolerate."⁷⁶ Judges in subsequent cases have thus been able to justify their rejection of harassment claims by arguing that the harassment was not frequent enough⁷⁷ or long-lasting enough⁷⁸ to be pervasive and therefore actionable pursuant to *Meritor*.

71. 29 C.F.R. § 1604.11(a)(3) (1991).

72. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904) (11th Cir. 1982)).

73. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 634 (1987).

74. *Id.* at 878 (defining the word "pervasive").

75. Pollack, *supra* note 70, at 60-61.

76. *Id.* at 60 n.88.

77. See *King v. Board of Regents*, 898 F.2d 533, 539-40 (7th Cir. 1990) ([T]he court found that suggestive remarks and touching constituted sexual harassment because they were "unwelcome *repeated acts*" occurring over a four-month period. (emphasis added)); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) ([T]he court said that plaintiff must demonstrate that the psychological "injury resulted not from a single or isolated offensive incident . . . , but from incidents . . . that occurred with some frequency."); *Scott v. Sears Roebuck Co.*, 798 F.2d 210, 214 (7th Cir. 1986) ("[T]he comments and conduct of other mechanics is too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim."); *Kaufman v. Amtax Planning Corp.*, 669 F. Supp. 572, 573 (S.D.N.Y. 1986) ([A] plaintiff had to show "more than a few isolated incidents of sexual harassment . . . sporadic conversation [is] insufficient.").

78. See, e.g., *Barbetta v. Chemlawn Serv. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) ([T]he alleged harassment "amounted to more than sporadic conduct" and "incidents took place over a period of 2 years.").

Critics of the use of the reasonable person test have thus complained that *Meritor* enabled courts to look "to the victim, not for her perspective on what behavior she affirmatively . . . accepts . . . nor for what is [actually] harmful to her,"⁷⁹ but for the purposes of defining her reality "through the eyes of the perpetrator."⁸⁰ In constructing its own version of the reasonable person test, the court in *Rabidue* borrowed liberally from *Meritor* to seek a similar result.

*B. Rabidue v. Osceola Refining Co.*⁸¹

The sexual harassment claim in *Rabidue* was brought by Vivienne Rabidue, an administrative assistant, against her employer, Osceola Refining Company. Rabidue charged that she had been repeatedly subjected to vulgar remarks made by a coworker, Douglas Henry, and to the photos of naked and scantily dressed women in the offices of other male coworkers. Henry customarily called women in the company "whores" and "cunts" and specifically referred to Rabidue as a "fat ass."⁸² Neither the company nor the court disputed Henry's use of vulgarities or the presence of the photos.⁸³

After she was fired from her job for insubordination, Rabidue sued the company for sexual harassment. In her claim, she asserted that both Henry's comments and the photo displays created a hostile work environment.⁸⁴ Agreeing with the district court's decision to deny Rabidue's claim, Judge Krupansky, speaking for the majority, gave what is perhaps the purest description of the reasonable person test to date: "[I]n the absence of conduct which would interfere with that *hypothetical reasonable individual's work performance* and affect seriously the psychological well-being of that *reasonable person under like circumstances*, a plaintiff may not prevail . . . regardless of whether the plaintiff was actually offended by that defendant's conduct."⁸⁵

In purporting to speak on behalf of the hypothetical reasonable person, however, the court made no attempt to ascertain what the society at large, and women in particular, would have thought about Henry's vulgarities or pornographic displays. More importantly, the court did not try to determine if men or women had conflicting perceptions about the

79. Pollack, *supra* note 70, at 60.

80. *Id.* at 62.

81. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

82. 805 F.2d at 624 (Keith, J., dissenting).

83. *Id.* at 615.

84. *Id.* at 614-15.

85. *Id.* at 620 (emphasis added).

type of harassment that women complain about.⁸⁶ In contrast to *Rabidue*, the courts in both *Robinson v. Jacksonville Shipyards, Inc.* and *Ellison v. Brady*, which will be discussed in Part IV, did make such an effort.

Instead, the majority in *Rabidue* emphasized what it believed to be the victim's personal inadequacies. It found that Rabidue was "abrasive, rude, [and] antagonistic."⁸⁷ Ironically, the court also acknowledged that she was a "capable, independent, [and] ambitious"⁸⁸ employee who had been consistently promoted over a three-year period.⁸⁹ However, the court made no attempt to reconcile these conflicting characterizations by trying to determine if the photo displays or Henry's vulgarities were the real cause of Rabidue's antagonistic behavior.⁹⁰ Finally, even though the court admitted that Henry was an "extremely vulgar and crude individual,"⁹¹ it decided that the company was justified in firing Rabidue.

The majority also stated that judges in sexual harassment cases should consider the "lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into the environs, coupled with the *reasonable expectation of the plaintiff upon entering that environment.*"⁹² In adopting this view, the court intimated that Rabidue assumed the risk of being harassed when she took a job with the company.⁹³ However, the court never attempted to determine whether or not Rabidue actually knew about Henry or the posters before she took the job. Thus, the assumption of risk analysis seems to be largely based on conjecture.

It would appear that even if Rabidue had been able to show that she was unaware of the risks associated with working for Osceola, the court would still have rejected her claim. As the majority stated:

Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to — or can — change this. Although Title VII is the federal court mainstay in the struggle for equal employment opportunity for female workers . . . it is quite different to claim that Title VII was designed to bring

86. It is also interesting to note that the 1981 MERIT STUDY, *supra* note 2, which demonstrated that the two sexes have different perspectives about this issue, had been published and available for five years by this time, but the court did not rely on it.

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

88. *Id.*

89. *Id.* at 614-15.

90. *Compare* *Tunis v. Corning Glass Works*, 698 F. Supp. 452, 460 (S.D.N.Y. 1988) ([T]he "unfriendliness induced by a hostile work environment can hardly justify the firing of the employee who was subject to that environment.").

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

92. *Id.* at 620 (emphasis added).

93. *Id.* at 620-21.

about a magical transformation in the social mores of American workers.⁹⁴

The court also minimized any emotional trauma that Rabidue may have experienced by stating that the nude posters and Henry's remarks, "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."⁹⁵ Furthermore, the majority belittled Rabidue's harassment by placing it within the context of a larger "society that condones and publicly features and commercially exploits open displays of written and pictorial erotica."⁹⁶ Since *Rabidue* disavowed the psychological effects that the Osceola work environment may have had on Rabidue and, instead, stressed her personal inadequacies and the voluntariness of her behavior, there are strong parallels in this decision with the decisions in the rape cases discussed earlier. The use of the reasonable person test thus poses serious problems for women whose experiences are in conflict with the values and perspectives of judges who apply the test to excuse harassment. As Catherine MacKinnon has noted: "If the pervasiveness of an abuse [in society] makes it non-actionable, no inequality sufficiently institutionalized to merit a law against it would be actionable."⁹⁷ Judges who use the reasonable woman test, however, claim that many of the problems posed by *Rabidue* can be avoided if more attention is given to the victim's perspective.

IV. THE REASONABLE WOMAN TEST IN SEXUAL HARASSMENT LAW

As the discussion below will show, judges who use the reasonable person test and judges who use the reasonable woman test often hold strikingly different beliefs about the way in which men and women should relate to one another in the workplace and the extent to which sexually charged behavior should be actionable under Title VII. One of the most impassioned pleas for the adoption of the reasonable woman test was first made by Judge Keith in his dissenting opinion in *Rabidue*.

A. *Rabidue's Dissenting Opinion*

Objecting to the majority's decision, Judge Keith criticized the court for failing "to account for the wide divergence between most women's

94. *Id.* at 621 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

95. *Id.* at 622.

96. *Id.*

97. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 115 (1987).

views of appropriate sexual conduct and those of men.”⁹⁸ Keith also chastised the majority for arguing that Rabidue assumed the risk of her harassment by deciding to work for Osceola. As he explained, “no woman should be subjected to an environment where her . . . sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative”⁹⁹

In Judge Keith’s view, the majority was wrong to minimize the psychological impact that pin-up posters and vulgar comments can have on female employees. He said, “pervasive societal approval . . . [of pornography] . . . stifles female potential and instills the debased sense of self-worth which accompanies stigmatization.”¹⁰⁰ Finally, Judge Keith remarked that the new test would shield employers from neurotic complainants because it relies on pertinent sociological data about men and women in general.¹⁰¹

Although he did not sway the majority in *Rabidue*, Judge Keith’s proposed new standard has since gained considerable momentum in the courts. His call for a test that gives increased consideration to the underlying sociological differences that exist between men and women, received special attention in both *Ellison* and *Jacksonville Shipyards*.

B. *Ellison v. Brady*¹⁰²

The plaintiff in *Ellison* worked as a revenue agent for the Internal Revenue Service (IRS) in California. Unlike the work environment in *Rabidue*, which included vulgar remarks and pornographic photos, Ellison’s harassment was limited to the conduct of one specific coworker, Sterling Gray. Gray harassed Ellison over a period of almost four months.¹⁰³

First, Gray invited Ellison to lunch. Then he invited her to go out for a drink after work and to have lunch with him again. She did go to lunch with him the first time, something commonly done by coworkers in her office. However, she declined his last two requests. Gray then began to send Ellison a series of notes in which he professed his romantic interest in her. His first note said, “I cried over you last night and I’m totally drained today”¹⁰⁴ This was followed by another note, which said, “I have enjoyed you so much over these past few months. Watching

98. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (citing Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)).

99. *Id.* at 626-27.

100. *Id.* at 627.

101. *Id.* at 626.

102. 924 F.2d 874 (9th Cir. 1991).

103. *Id.* at 873-84.

104. *Id.* at 874.

you. Experiencing you from O so far away. . . . [We] are striking off such intense sparks."¹⁰⁵

Intimidated by Gray's overtures, Ellison first asked a coworker to try to convince Gray to stop. When the coworker was not successful, Ellison then complained to Gray's supervisor, who temporarily removed Gray to another job site. However, Gray continued to write to Ellison. Finally, when Ellison learned that Gray would be returning to work in her office within six months, she decided to press charges against the IRS for failing to protect her from being harassed further.¹⁰⁶ At the trial, the district court concluded that Ellison had overreacted to Gray's behavior, which it characterized as isolated and trivial.¹⁰⁷ The court of appeals, however, disagreed with this characterization.

Noting that "Title VII's protection of employees from sex discrimination should come into play long before the point where victims of sexual harassment require psychiatric assistance,"¹⁰⁸ the court of appeals concluded that the perspective of the reasonable victim (not the reasonable person) should be used to evaluate whether Ellison's harassment was sufficiently severe and pervasive to be actionable.¹⁰⁹ Specifically, the court ruled that:

In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we 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.¹¹⁰

By adopting this view, the court found that what many men view as harmless, many women find threatening. The court supported this assertion by citing Justice Department and FBI statistics, which showed that women are the primary victims of rape.¹¹¹ In light of these statistics, the court observed that it is reasonable for women to fear that harassment will escalate to violent sexual assault.¹¹² Within this context, the court acknowledged that Ellison was understandably frightened by Gray's behavior because she "didn't know what he would do next."¹¹³ As such,

105. *Id.*

106. *Id.* at 874-75.

107. *Id.* at 876.

108. *Id.* at 878.

109. *Id.*

110. *Id.* at 879.

111. *Id.* at 879 n.10.

112. *Id.* at 879.

113. *Id.* at 874.

the court concluded that a reasonable woman in Ellison's place would have had the same reaction to Gray.¹¹⁴

Many of the court's comments are supported by the *1981 Merit Study* cited in the Introduction to this Article. The study showed that men tend to think that the problem of sexual harassment is greatly exaggerated while women do not.¹¹⁵ In fact, the court referred to a follow-up to the *1981 Merit Study*, the *1988 Merit Study*, to support its contention that sexual harassment is still a major problem.¹¹⁶ This practice of relying on objective sociological data to construct a reasonable woman standard was further expanded upon in *Jacksonville Shipyards*.

*C. Robinson v. Jacksonville Shipyards, Inc.*¹¹⁷

The court in *Jacksonville Shipyards* relied on an extensive record of expert testimony concerning how women are negatively impacted by sexual harassment.¹¹⁸ The court used this evidence to create a hypothetical reasonable woman¹¹⁹ and compare the plaintiff in the case to that woman. Based on this comparison, the court found that the plaintiff's reactions were reasonable under the circumstances.

The plaintiff in *Jacksonville Shipyards*, Lois Robinson, worked as a first class welder at Jacksonville Shipyards, Inc. from 1977 to 1988. Women in the shipyard, at their peak, numbered only seven out of 1,101 employees as skilled craftworkers. During her tenure at the company, Robinson alleged that she was subjected to two types of sexual harassment. First, pictures of nude and partially nude women appeared throughout the shipyard, and were possessed by or displayed on the walls and in the offices of low-level employees and management alike.¹²⁰ The decision lists almost three pages of examples which describe an abundance of photographic displays of women in a variety of sexually demeaning or provocative poses.¹²¹

Second, Robinson said that she was personally subjected to sexually provocative remarks made by several male coworkers. The remarks included such comments as, "I'd like to get in bed with that,"¹²² and

114. *Id.* at 880.

115. 1981 MERIT STUDY, *supra* note 2.

116. *Ellison*, 924 F.2d at 881 n.15.

117. 760 F. Supp. 1486 (M.D. Fla. 1991).

118. *Id.* at 1502-07.

119. *Id.* at 1507 n.4.

120. *Id.* at 1493-94.

121. For example, there was a drawing on a wall showing the frontal view of a naked female torso with the words 'USDA Choice' written under it, *id.* at 1495, and a calendar showing a naked woman bending over to show her buttocks and genitals. *Id.* at 1496.

122. *Id.* at 1498.

“Watch out for Chet. He’s Chester the Molester.”¹²³ In addition, the walls of Robinson’s work area were littered with obscene images and comments directed towards her. Both the allegations concerning the photos and the personalized attacks on Robinson were verified by the testimony of two other female coworkers.¹²⁴

Although both Robinson and her two female coworkers convinced the court that they were *personally* offended and intimidated by the harassment complained of, the court stated that in order for Robinson to prevail, she would have to show that a *reasonable woman* “would perceive that an abusive working environment [had] been created.”¹²⁵ For an evaluation of how women in general would react to the shipyard work environment, the court thus sought the advice of two experts on sexual harassment. Both experts concluded that women in general would have had the same reaction as Robinson.

One expert, a professor of psychology and an expert on sex-stereotyping, explained that studies have shown that pornography in the workplace caused men to view women coworkers as sex objects.¹²⁶ She also noted that there was a tendency in situations in which women were in the minority for male managers to trivialize complaints brought by women about sexual harassment.¹²⁷ Another expert, a consultant specializing in preventing sexual harassment, explained that women typically have a variety of reactions to harassment, ranging from total denial and avoidance of the problem—engaging in sexual banter in order to diffuse the situation—to filing formal complaints. Since most women fear reprisals, however, the expert said that few ever formally complain.¹²⁸

Relying on the above testimony, the court criticized *Rabidue* for overestimating the general public’s reaction to pornography and for failing to recognize that women cannot avoid pornography in the workplace as easily as they can avoid it in public.¹²⁹ The court also concluded that “the cumulative, corrosive effect of [the shipyard] environment over time [would have affected] the psychological well-being of a reasonable woman placed in [the same] conditions.”¹³⁰ Robinson was thus able to win her suit because the court believed that a reasonable woman faced with the

123. *Id.*

124. *Id.* at 1499.

125. *Id.* at 1524.

126. *Id.* at 1503.

127. *Id.* at 1504.

128. *Id.* at 1506.

129. *Id.* at 1526 (“Pornography in the workplace may be far more threatening to women workers than it is to the world at large. Outside . . . [it] can be protested or substantially avoided—options that may not be available to women disinclined to challenge their employers.”).

130. *Id.* at 1524-25.

same harassment would have been justifiably intimidated by that harassment.

It is clear from the above discussion that the reasonable woman test can be an aggressive champion of the rights of sexual harassment victims. But is it really the panacea that many legal scholars say it is? Part V will attempt to answer this question by applying the test to five post-*Meritor* sexual harassment cases that were decided in favor of the employer.

V. APPLICATION OF THE REASONABLE WOMAN TEST TO FIVE POST-MERITOR CASES

The courts in the five cases to be discussed in this section all used the reasonable person test either explicitly or implicitly to conclude that the harassment complained of did not create a hostile work environment. The analysis below will show that, in four of the five cases, the decisions would have been different had the reasonable woman test been used. The main characteristics of the reasonable woman test will be derived from the analysis of the *Ellison* and *Jacksonville Shipyards* decisions covered in Part IV. Each case will be discussed in chronological order, with the earlier cases being covered first.

A. *Jones v. Flagship International*¹³¹

Benita Jones, the plaintiff in this case, was an attorney who worked as a manager for equal employment opportunity programs at Flagship International. Her duties included investigating discrimination complaints against the company and representing the company in lawsuits. While working for the company, Jones claimed that her married supervisor, Jared Metze, propositioned her during business trips on three separate occasions over a period of several months. During one of those trips, Metze was alleged to have asked Jones to accompany him to a hotel because, as he put it, she needed the "comfort of a man."¹³² Jones said that she turned down all of Metze's requests.¹³³

Jones also testified that when a company vice president made figures of bare-breasted mermaids to be used as table decorations during an office party, Jones complained in writing on behalf of herself and other female employees that the decorations were offensive. She received a written reprimand about her complaints from the same vice president.¹³⁴

131. 793 F.2d 714 (5th Cir. 1986).

132. *Id.* at 716.

133. *Id.*

134. *Id.* at 717.

Eventually, Jones filed a race and sex discrimination suit against the company for unequal pay and sexual harassment, respectively.¹³⁵ After that, the company fired her because it claimed, among other things, that she had an unacceptable conflict of interest because of the suit.¹³⁶

The district court concluded that, even if the harassing incidents described by Jones had actually taken place, the harassment was neither pervasive enough to create an abusive work environment¹³⁷ nor serious enough to have adversely affected Jones.¹³⁸ The court of appeals agreed with this decision.¹³⁹

The two courts tied the seriousness of Jones' harassment to the number of times that it occurred. Although advocates of the reasonable woman test also believe that it is important to focus on the quantitative characteristics of harassment, some argue that a plaintiff's claims should not be dismissed solely because she failed to meet some arbitrarily set numerical test. As the court in *Ellison* indicated, an isolated act, if it is serious enough, should be enough to constitute illegal harassment.¹⁴⁰

Using this approach, Metze's supervisory role would be subject to much greater scrutiny. The *1988 Merit Study* showed that men and women almost uniformly agree that uninvited pressure for sex *from a supervisor* should constitute illegal sexual harassment.¹⁴¹ The survey sponsor opined that supervisor harassment may be especially dangerous because supervisors have the power to retaliate against complaining employees by undermining their job status.¹⁴² Also, a supervisor can affect a victim's future job prospects by giving her poor job references.

135. She ultimately dropped her race discrimination charges. *Id.* at 718.

136. *Id.* at 717.

137. *Id.* at 720, 720 n.6.

138. *Id.* at 720 n.6, 721 n.7.

139. *Id.* at 721, 729.

140. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (citing *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) ("[A]lthough a single act can be enough . . . repeated incidents create a stronger claim . . . , with the strength of the claim depending on the number of incidents and the intensity of each incident." (emphasis added)). See also *Watts v. New York City Police Dept.*, 724 F. Supp. 99, 105 (S.D.N.Y. 1989) ("Conduct less pervasive, but more offensive in form and effect, than slurs and epithets can so poison a working environment as to render it abusive. Physical assaults of a sexual nature obviously constitute incidents that tend to satisfy this criterion of severity."). See also *Abrams*, *supra* note 16, at 1212 (criticizing the *Flagship* decision, Professor Abrams said that "some behavior—such as an ambiguous sexual request from a supervisor—is so inherently coercive, or so powerful in its ability to sexualize, that a single incident may be sufficient to poison the atmosphere for a woman employee.").

141. 1988 MERIT STUDY, *supra* note 2, at 13 (99% of the women and 95% of the men surveyed agreed with this).

142. *Id.* See also 1981 MERIT STUDY, *supra* note 2, at 30 ("The discrepancy may imply that since supervisors hold positions of power, their behavior should be exemplary.").

Furthermore, because the *Ellison* court ruled that propositions from a coworker were illegal under Title VII, it probably would have found Metze's conduct to be particularly offensive because Metze was Jones' supervisor. This, coupled with the evidence about the company's insensitivity to the bare-breasted decorative displays, probably would have been enough to convince the *Ellison* court that Jones was subjected to a hostile work environment.

Like the court in *Flagship*, the court in the following case also ignored the hierarchical relationship that existed between the plaintiff and one of her alleged harassers.

*B. Scott v. Sears, Roebuck & Co.*¹⁴³

Scott was one of the only two females who participated in a mechanic trainee program at Sears, Roebuck & Co. in Chicago. The program was specifically designed to train women for jobs traditionally held by men. Scott was put under the tutelage of a senior mechanic, Eddie Gadberry. Scott alleged that Gadberry asked her out for dates and responded to her requests for advice or help by saying, "What will I get for it?"¹⁴⁴ Scott also alleged that Gadberry made suggestions that she give him a rub down. In addition to Gadberry's remarks, Scott also complained that one male coworker once slapped her on her buttocks, and that another commented that she "must moan and groan while having sex."¹⁴⁵ Scott did not report these incidents to anyone until after she was fired and had decided to sue Sears for sex discrimination.¹⁴⁶

The court of appeals said that, assuming that all of Scott's complaints were true, the Sears work environment was not sufficiently hostile to support Scott's sexual harassment claim. Citing *Meritor*, the court noted that Gadberry's comments were not pervasive enough or psychologically debilitating enough to affect Scott's work performance.¹⁴⁷

A court applying the reasonable woman test, however, might have viewed the Gadberry-Scott relationship from Scott's perspective and decided the case very differently. Scott was a trainee on probation and Gadberry was assigned to train her. Through his performance evaluations, Gadberry had the power to influence whether or not Scott could remain at Sears after her probation ended.¹⁴⁸ In many ways their relationship

143. 798 F.2d 210 (7th Cir. 1986).

144. *Id.* at 211.

145. *Id.* at 212.

146. *Id.* at 211-12.

147. *Id.* at 213-14.

148. The court noted that Gadberry gave Scott a good evaluation on one occasion. However, this evaluation was given in the absence of any complaints having been made by Scott and before she filed her suit. *Id.* at 212.

was similar to the employee-supervisor relationship discussed in the *Flagship* case above. Within this context, absent some overt indication from Scott that she was interested in Gadberry, Gadberry's requests for dates appear to be improper because of the unique position that he held over Scott.

As for the harassment from Scott's coworkers, which included battery, the court maintained that it was "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim."¹⁴⁹ However, the *Jacksonville Shipyards* court cautioned that courts should not "carve the work environment into a series of discrete incidents . . . [without taking into account the fact that] the impact of separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes."¹⁵⁰ Using this reasoning, it could be argued that, to a reasonable woman, Gadberry's comments and the harassment from her coworkers had the *cumulative* effect of creating an unreasonably hostile work environment for Scott.

In fact, the *Ellison* court expressly criticized the way in which the court in *Sears* evaluated Scott's harassment. Characterizing Scott's overall harassment as "egregious,"¹⁵¹ the *Ellison* court chastised the *Sears* decision for failing to sufficiently focus on the overall impropriety of the harassment that Scott had to tolerate. The court in *Ellison* implied that, by their very nature, certain types of conduct have a debilitating effect on women. "Surely," the court noted, "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they . . . require psychiatric assistance."¹⁵²

Because she did not complain about the harassment until after she was fired, the court in *Sears* also questioned Scott's contention that she was seriously offended by Gadberry's behavior. By questioning Scott's credibility in this manner, the court chose to ignore the possibility that Scott may have failed to report the harassment because she feared reprisals, and not because she found the harassment acceptable. Indeed, the 1988 *Merit Study* indicates that some employees fear taking any action at all because they are afraid that their jobs will be made unpleasant afterwards.¹⁵³

However, it is not immediately clear how the *Ellison* court would have specifically addressed this issue. The plaintiff in *Ellison* behaved very differently from Scott. Prior to having filed her suit, Ellison first

149. *Id.* at 214.

150. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525 (M.D. Fla. 1991).

151. *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991).

152. *Id.* at 878.

153. 1988 MERIT STUDY, *supra* note 2, at 27.

complained to a coworker about her harasser. Soon after that, she talked to her supervisor about it.¹⁵⁴ Given the fact that the *Ellison* opinion condemned the *Scott* decision,¹⁵⁵ however, it is possible that Scott's credibility would not have been categorically dismissed by the *Ellison* court on this issue alone.

In contrast to *Ellison*, the *Jacksonville Shipyards* case directly addresses this topic. In *Jacksonville Shipyards*, the court noted that it would have been ineffective for the plaintiff to complain to her union representatives because the representatives themselves had engaged in the offensive conduct under review.¹⁵⁶ Thus, if Scott could have produced evidence to show that the Sears management had also engaged in or tolerated harassing behavior in the past, her reasons for not complaining might have been understandable to the *Jacksonville Shipyards* court. Furthermore, the court might have even decided that it was reasonable for Scott to *assume* that Sears would not have responded well to her grievances because many other women share this same fear. In making this determination, the court might have relied on the *1988 Merit Study*, which showed that harassment victims often feared that they would be reprimanded or ignored if they complained to management.¹⁵⁷

As the above indicates, Scott would probably have won her suit if the reasonable woman standard had been used. This would have also been the case for the next plaintiff, who, among other things, alleged that she was harassed by someone who held a supervisory position over her.

C. *Lipsett v. University of Puerto Rico*¹⁵⁸

Anabelle Lipsett was enrolled as a resident intern in a five-year General Surgery Residency Training Program at the University of Puerto Rico School of Medicine. During her tenure in the Program, thirty-one men and five women were enrolled as residents. It was the general practice in the Program for the junior residents to work under the supervision of more senior residents. Lipsett claimed that her harassment consisted of receiving sexually suggestive comments and propositions, and being forced to view pornographic material in the hospital.¹⁵⁹

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

155. *Id.* at 877.

156. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1517 (M.D. Fla. 1991).

157. 1988 MERIT STUDY, *supra* note 2, at 27-28. See also MACKINNON, *supra* note 24, at 49 (1979) ("Those who complain, as well as those who do not, express fears that their complaints will be ignored, will not be believed, that they instead will be blamed, . . . or told . . . that they are blowing it all out of proportion.").

158. 864 F.2d 881 (1st Cir. 1988).

159. *Id.* at 886-88.

The alleged harassment occurred on several levels. First, she charged that the male residents displayed pornographic centerfolds on the walls of the resident dining and meeting room, as well as a sexually explicit drawing of her own body. This was further exacerbated by a list that the male residents put on the bulletin board in the same room, which referred to the plaintiff as "'Selastraga,' translated to literally mean 'she swallows them.'"¹⁶⁰ Lipsett's testimony about the pornographic wall displays was corroborated by another female intern.¹⁶¹

Finally, Lipsett complained that two male residents offered to protect her from being harassed if she would have sex with them. When she complained to the chief resident about this, she was told that it was common for a junior female resident to be involved with a senior resident in order to make it easier for her to get through the program.¹⁶²

In a parallel suit before the same court against the Veterans Administration Hospital,¹⁶³ Lipsett complained that during a rotation to do training at the Veterans Hospital, one senior resident, Dr. Novoa, humiliated her in front of a patient by saying that Lipsett was going to give the patient pleasure during Lipsett's administration of a rectal sigmoidoscopy. Dr. Novoa was also alleged to have told Lipsett that women could not be relied upon to do surgery when they were "in heat."¹⁶⁴

Largely ignoring most of Lipsett's allegations, the district court granted motions for summary judgments for both defendants. It found that the harassment at the University of Puerto Rico caused no debilitating effects and that Lipsett's problems were due largely to her lack of tact in dealing with the male residents in the Program.¹⁶⁵ With respect to Dr. Novoa's remarks, the district court found that they were "too isolated and infrequent to be considered sufficiently severe or pervasive."¹⁶⁶ The court also belittled Lipsett's complaints by saying that her failure to report Dr. Novoa was proof that she had not been emotionally harmed by his comments.¹⁶⁷ Ironically, the court stated that it used the reasonable woman test to render its decision.¹⁶⁸ However, because the court minimized the overall impact of the harassing incidents on Lipsett, its analysis is more typical of the reasonable person test.

160. *Id.* at 888.

161. *Id.* at 904.

162. *Id.* at 888.

163. *Id.* at 1197.

164. *Lipsett v. Rive-Mora*, 669 F. Supp. 1188 (D.P.R. 1987), *rev'd*, 864 F.2d 881 (1st Cir. 1988).

165. *Lipsett v. University of P.R.*, 864 F.2d 881, 904 (1st Cir. 1988).

166. *Rive-Mora*, 669 F. Supp. at 1204.

167. *Id.*

168. *Id.* at 1199.

Using the reasonable woman test, the court in *Jacksonville Shipyards* would have probably characterized the pornography on the dining and meeting room wall as a visual assault on Lipsett's sensibilities.¹⁶⁹ This characterization is particularly appropriate since the pictures were placed on the walls of a room that Lipsett could not avoid, especially since it was the room where meals were served and staff meetings took place. The court would have also noted that the presence of the magazine pictures, combined with the sexual caricature of Lipsett and the degrading nickname that the male residents used for her, served to unduly sexualize the work environment and to denigrate Lipsett's professional accomplishments.¹⁷⁰

Both the *Ellison* and *Jacksonville Shipyards* courts probably would have also found that Dr. Novoa's comments were unreasonably offensive. As the discussion of the *Flagship* and *Sears* cases shows, the two courts probably would have believed that Dr. Novoa placed Lipsett in an untenable position because of his supervisory role. Either she endured his comments in order to continue to remain under his tutelage or she reported him and risked his giving her unusually difficult or demeaning assignments.

In light of the above analysis, the two courts would have found that Lipsett was subjected to a hostile work environment at both the Veterans Hospital and the University of Puerto Rico. In fact, the district court decision was reversed and remanded on appeal because the court of appeals felt that Lipsett had made out a prima facie case of sexual harassment.¹⁷¹

Unlike the previous four cases, which involved heterosexual harassment, the plaintiff in the next case alleged that she was harassed by her homosexual boss.

D. *Fair v. Guiding Eyes for the Blind*¹⁷²

Kimberly Fair worked as the Associate Director of Admissions for Guiding Eyes for the Blind, Inc., a company that taught people how to use guide dogs. She complained that Martin Yablonski, the executive

169. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1495 (M.D. Fla. 1991).

170. See *Id.* at 1505 ("A second effect of stereotyping is denigration of the individual merit of the person who is stereotyped.").

171. *Lipsett v. University of P.R.*, 864 F.2d 881, 914 (1st Cir. 1988) (holding that the district court should have required the defendant to submit evidence to refute Lipsett's claims). The court of appeals also directed the district court to analyze the case from both a male and female perspective. *Id.* at 898.

172. 742 F. Supp. 151 (S.D.N.Y. 1990).

director of the company, regularly spoke to her about his homosexuality and gossiped about the sexuality of other people. On one occasion, Fair claimed that Yablonski said that he knew about the homosexual secrets of a married man. On another occasion, Yablonski commented that the women at a particular meeting had been "'salivating [about another man at the meeting] and thinking about all that slurpy sex!'"¹⁷³ Finally, Fair said that Yablonski challenged her religious views about abortion and homosexuality.¹⁷⁴

Fair claimed that Yablonski's comments constituted actionable sexual harassment and that he fired her after she made it clear to him that she found his comments offensive. However, the district court rejected her arguments. Expressly applying the reasonable person test, the court said that a plaintiff in a sexual harassment suit must show that but for her sex, she would not have been harassed.¹⁷⁵ Although it characterized Yablonski's comments as "petty, inappropriate . . . and unprofessional,"¹⁷⁶ the court concluded that they did not single her out just because she was a woman.¹⁷⁷ In addition, the court held that Yablonski's remarks posed no direct sexual threat to Fair since she said that he was a homosexual and not interested in women.¹⁷⁸

It is possible that a court using the reasonable woman test would have rendered the same decisions in this case. Although Yablonski did hold a position of power over Fair, it is unlikely that the *Ellison* or *Jacksonville Shipyards* courts would have believed that he unfairly abused that power to exploit Fair because she was a female.

In both *Ellison* and *Jacksonville Shipyards*, the harassment consisted of personal comments or propositions that were related to a man's *specific sexual interest in the plaintiff or his stated sexual interest in women in general*. The court in *Ellison* sought to protect women from the underlying threat of violence that it believed was implicitly present in heterosexual harassment.¹⁷⁹ Thus, because Yablonski made it very clear that he was only interested in men, the *Ellison* court probably would have concluded that it was not reasonable for Fair to feel sexually threatened by him.

173. *Id.* at 153.

174. *Id.*

175. *Id.* at 156 (citing *Barnes v. Costle*, 561 F.2d 983, 990 & n.55 (D.C. Cir. 1977)).

176. *Id.* at 155.

177. *Id.* at 156 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802; *Rabidue v. Osceola Ref. Co.*, 805 F.2d. 611, 619-20 (6th Cir. 1986); *Henson v. Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

178. *Id.* ("Comments of a homosexual nature, directed at a man, on the other hand, might be considered to be based on sex.").

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

However, had Fair been either a heterosexual or a homosexual man, Yablonski's comments might have been found to be more obviously offensive and threatening to Fair.¹⁸⁰ Thus, under both a reasonable person and a reasonable woman analysis, Fair's claims probably would have been denied.

The last case to be discussed in this section, *Burns v. McGregor Electronic Industries*,¹⁸¹ is noteworthy because the plaintiff's personal life was used to discredit her sexual harassment claim.

E. Burns v. McGregor Electronic Industries

Burns worked for McGregor Electronics, a stereo speaker manufacturing company owned by Paul Oslac. Burns alleged that Oslac constantly harassed her by talking about sex, showing her pornographic magazines, making lewd gestures, and inviting her out for dates.¹⁸² Although Burns complained to her supervisor about Oslac, nothing was done to stop his conduct. In fact, Burns complained that her supervisor teased her about Oslac and that she was also harassed by several coworkers. Eventually, Burns quit her job because she said that the McGregor work environment made her upset and nervous.¹⁸³

Over a two-and-a-half-year period, Burns returned a second time to work for McGregor Electronics, quit once more, and returned a third and final time. She said that she kept going back because she needed the work to support herself, her father, and her brother.¹⁸⁴ During these last two periods, employees at the company learned that Burns had appeared nude in a motorcycle magazine, and some employees began to gossip about her and call her vulgar names.¹⁸⁵ In addition, Oslac continued to proposition and physically harass her.¹⁸⁶ Burns finally quit her job for the last time, because, as she put it, the work environment was "hostile and offensive."¹⁸⁷

The district court acknowledged that Burns did not welcome Oslac's advances and that coworkers at the company had ostracized her both

180. See MACKINNON, *supra* note 24, at 205 ("Sexual coercion from a gay male superior presents one of the few situations in which an uninterested male employee has a chance of facing a situation similar to that which many women employees commonly confront every day.").

181. 955 F.2d 559 (8th Cir. 1992).

182. *Id.* at 559-60.

183. *Id.* at 560.

184. *Id.* at 561.

185. *Id.* at 560.

186. *Id.* at 561 (Once, when other employees were present, Oslac grabbed Burns and "cupped his hand as if to grab her breast.").

187. *Id.* at 562.

before and after they learned about the magazine photo. However, in the court's view, because of Burns' "willingness to display her nude body to the public . . . her testimony that she was offended by sexually directed comments and Penthouse or Playboy pictures [was] not credible."¹⁸⁸

By focusing on Burns' outside sex-related activities (i.e., the nude magazine), the court applied the reasonable person test in a manner that was consistent with both *Meritor* and the rape cases discussed in Part II. By emphasizing those activities, the court in effect blamed Burns for the harassment that befell her. The court interpreted *Meritor's* endorsement of the admissibility of a victim's sexually provocative speech to include speech that occurred both inside and outside of the work setting, even when that speech was directed towards the general public and not towards any particular person. Using this reasoning, a woman who appears nude in a magazine or a film, would probably never be able to prevail in a rape case or sexual harassment suit.

A court applying the reasonable woman test, however, probably would have argued that within the workplace setting, Burns had a reasonable expectation that she would not be harassed, notwithstanding her appearance in the magazine. This view is based on a distinction that is made between what happens in the workplace and what happens outside of the workplace.

In *Jacksonville Shipyards*, for instance, testimony was given by one expert witness who stated that the average female would not be offended by pornography in the workplace. However, the court discounted this testimony because it was based on a study of women who viewed pornography at their leisure in a relaxed atmosphere, and not in a job setting.¹⁸⁹ The court explained that "the effect of pornography on workplace equality is obvious. . . . [It] communicates a message about the way [a manager] views women, a view strikingly at odds with the way women wish to be viewed *in the workplace*."¹⁹⁰

In this case, Burns' desire to come to work and simply do her job was never questioned by the district court. The court also never attempted to ascertain what her reasons were for appearing in the magazine and whether or not she hoped that her photo would invite sexual overtures from her coworkers or Oslac. In fact, the district court admitted that Burns did not welcome Oslac's overtures, either before or after Oslac learned about the magazine photo.¹⁹¹ Reviewing these facts, the court in *Jacksonville Shipyards* might have concluded that Burns never intended to use her magazine photo to invite propositions from any particular

188. *Id.* at 562-63.

189. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1509 (N.D. Fla. 1991).

190. *Id.* at 1526 (emphasis added).

191. *Burns*, 955 F.2d at 564.

coworker or Oslac, that such overtures were therefore an unreasonable interference with her job-related activities.

Judge Keith in *Rabidue* probably would have also supported this conclusion. He believed that even pornography industry employees should be entitled to work in harassment-free job settings. As long as "nudity, sexually explicit language or even simulated sex [are] inherent aspects of . . . what is required professionally,"¹⁹² he said, employees should not be able to object to it. However, the moment that such behavior is directed at a particular employee for non-job related reasons, that employee should be entitled to Title VII protection, he said.¹⁹³

The district court in *Burns* also failed to acknowledge that the lewd gestures and pornographic material exhibited by Oslac *before* the news leaked about the magazine photo were severe or pervasive enough to constitute sexual harassment under Title VII.¹⁹⁴ By minimizing the impropriety of Oslac's conduct and the impact that his behavior may have had on Burns, the court failed to look at the power differential that existed between Burns and Oslac.

Oslac was the owner of the company, a person over whom Burns had little or no power. As has been mentioned in the above discussion on the *Flagship* and *Sears* cases, a court applying the reasonable woman test probably would have decided that, for Burns, the power differential transformed what might have been simply annoying conduct on the outside into threatening and demeaning conduct at work.

As the above discussion indicates, Burns probably would have won her sexual harassment claim if her claim had been subjected to the reasonable woman test.¹⁹⁵

F. How the Reasonable Woman Test Will Affect Future Cases

The chart on the following page shows some of the contrasting assumptions that have been articulated by judges who use the reasonable person test and judges who use the reasonable woman test. At their extremes, the two tests are virtual mirror images of one another. As the chart indicates, the reasonable woman test breaks with tradition by taking an almost completely different view of the way in which sexually charged behavior affects women at work. The test allows the victim, not the

192. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting).

193. *Id.*

194. *Burns*, 955 F.2d at 564-65.

195. In fact, the court of appeals reversed and remanded the district court decision because it felt that Oslac's conduct was sufficiently severe to have created an abusive work environment. *Id.* at 566.

harasser, to play the chief role in evaluating whether or not behavior is offensive in a given case. As a result, the reasonable woman test has the potential to drastically change the way in which sexual harassment cases are decided in the future.

SOME CONTRASTING ASSUMPTIONS

| THE REASONABLE PERSON TEST | vs. | THE REASONABLE WOMAN TEST |
|--|-----|---|
| 1. Harassment (i.e. pornography and vulgar comments) should be tolerated because it is prevalent in the society at large. ¹⁹⁶ | | 1. Women who object to pornography can avoid or protest it in society, but they are less able to do so in the workplace because of the unequal power relationship that exists between them and their male employers. ¹⁹⁷ |
| 2. A victim who is silent or who takes too long to report her harassment is not credible. ¹⁹⁸ | | 2. Because harassment victims often fear that no action will be taken if they complain, the absence of complaints does not mean that harassment did not take place. ¹⁹⁹ |
| 3. A victim assumes the risk of her harassment because she chooses to work in a company where harassment takes place. ²⁰⁰ | | 3. A work environment that contains sexually offensive behavior does not excuse nor endorse that behavior. ²⁰¹ |
| 4. Isolated incidents of harassment are not pervasive enough to constitute actionable harassment. ²⁰² | | 4. Harassment can be actionable even if it occurs infrequently, when the qualitative nature of the harassment is egregious. ²⁰³ |
| 5. It is acceptable to ask questions about a victim's sex life or sexual fantasies to determine if she welcomed her harassment. ²⁰⁴ | | 5. A victim does not relinquish her Title VII rights because of the private and consensual sexual activities that she engages in. ²⁰⁵ |
| 6. It is appropriate to admit evidence about a victim's speech or dress because this may indicate that she welcomed her harassment. ²⁰⁶ | | 6. A victim's use of profane language may simply be a part of her efforts to fit in to the work environment and is not proof that she welcomed her harassment. ²⁰⁷ |

196. *Rabidue*, 805 F.2d at 622.

197. *Id.* at 627 (Keith, J., dissenting). See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (N.D. Fla. 1991).

198. See *Monroe-Lord v. Hytche*, 668 F. Supp. 979, 984 (D. Md. 1987) (The court found it difficult to believe that the plaintiff, a university professor, would have suffered "repeated incidents of sexual harassment over a seven-year period and neither tell anyone

For instance, there is a strong presumption that supervisor harassment automatically harms the victim because supervisors have the ability to sabotage the present and future job prospects of their employees. This might even apply to cases in which a supervisor propositions an employee only once. A similar presumption would also apply to coworker harassment if it takes place more than once and the nature of the harassment is particularly egregious, or if the employer has reason to know about it.²⁰⁸ However, victims should be cautioned that they may be called upon to cite sociological data to counter accusations that they have overreacted or exaggerated the extent to which they were negatively affected by the conduct under review.

about them or report them to university officials.''); *Benton v. Kroger Co.*, 640 F. Supp. 1317, 1321 (S.D. Tex. 1986) (The court questioned the plaintiff's credibility in part because she had several opportunities to report the alleged harassment, but never did so.).

199. *Jacksonville Shipyards*, 760 F. Supp. at 1506.

200. *Rabidue*, 805 F.2d at 620.

201. *Id.* at 626 (Keith, J., dissenting). *See also Jacksonville Shipyards*, 760 F. Supp. at 1526 ("A pre-existing atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality that a sign declaring 'Men Only.'").

202. *Rabidue*, 805 F.2d at 620. *See also Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (Jones, J., dissenting) (Commenting on plaintiff's claims that she was touched, made the object of sexually suggestive comments, and subjected to pornographic graffiti, Judge Jones noted that because the touching incidents "were spaced well apart chronologically . . . [t]here [was] no pattern, conspiracy or consistency to the offensive physical incidents.").

203. *See Watts v. New York City Police Dept.*, 724 F. Supp. 99, 105 (S.D.N.Y. 1989) (When a female police officer was sexually assaulted two times within a three day period, the court said "conduct less pervasive, but more offensive in form and effect, than slurs and epithets can so poison a working environment as to render it abusive. Physical assaults of a sexual nature obviously constitute incidents that tend to satisfy this criterion of severity.").

204. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986). *See also Walker v. Sullair Corp.*, 736 F. Supp. 94, 98 (W.D.N.C. 1990) (In rejecting the plaintiff's hostile environment claim, the court noted that she had been sexually involved previously with other company employees and had discussed her sex life with coworkers as well.).

205. *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983).

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

207. *See Morris v. American Nat. Can Corp.*, 730 F. Supp. 1489, 1495 (E.D. Mo. 1989) (The "[p]laintiff's use of profane language . . . could be part of plaintiff's efforts to fit in to the environment at hand. Such conduct, however, does not justify the harassing conduct plaintiff then endured."). *See also David Holtzman and Eric Trelz, Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U. L.J. 239, 261 (1987) ("Contemporaneous statements that sexual advances are welcome or unwelcome are obviously more objective expressions than are accounts of dreams or idle discussions about sex.").

208. *See Abrams, supra* note 16, at 1212.

There is also a clear presumption that pornography has an unreasonably negative impact on women and that it should not be tolerated in the workplace. This is especially true for pornography that depicts nude or partially nude women in sexually demeaning poses. As the court in *Jacksonville Shipyards* observed, this type of pornography causes men to overly sexualize their interactions with women coworkers and to treat those coworkers as sex objects.²⁰⁹ It is not likely, however, that this will lead to an all out ban on photographic displays of women in the workplace. Less sexually-overt depictions of women, like those found in the Sports Illustrated Swimsuit edition, probably would still be allowed by the courts.²¹⁰

Even under the reasonable woman test, some conduct of a sexual nature would still be allowed in the workplace. This will be especially true for conduct that is welcomed by female employees. Under the reasonable woman test, however, evidence about the victim's sexual life or about her failure to report the harassment, may not be enough to prove welcomeness. A defendant may instead have to produce evidence that the victim, either through words or in writing, indicated that she was open to her alleged harasser's overtures.

Finally, courts will also not view sexually charged comments made by homosexual men to be sufficiently threatening to women to warrant the unique protection that Title VII affords. As the district court in *Fair* said, such comments, while they may be in poor taste, do not sufficiently threaten female employees.²¹¹ However, using a more contemporary version of the reasonable man test, heterosexual or homosexual men may have a Title VII cause of action for this type of harassment.

VI. CONCLUSION

Since the Clarence Thomas hearings, the EEOC has estimated that it has received fifty percent more sexual harassment claims in 1992 than it did last year during the same period.²¹² Clearly, sexual harassment is

209. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991).

210. Questions have also been raised about the constitutionality of banning all pornography in the workplace. Some groups, like the American Civil Liberties Union, feel that such a ban violates employee First Amendment free speech rights, especially when women are not directly exposed to the pornography (i.e. when it is in someone's desk or in their locker). The 11th Circuit Court of Appeals will be reviewing this issue on appeal in the *Jacksonville Shipyards* case. See Arthur S. Hayes, *Pinup Cases Splits Free Speech Activists*, WALL ST. J., April 29, 1992, at B12.

211. *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151, 156 (S.D.N.Y. 1990).

212. Marilyn Adams, *Sex Harassment Charges Up Sharply*, BOSTON GLOBE, July 13, 1992, at 3.

a serious problem for both employers and employees alike. From both an ethical and an economic perspective, managers should attempt to eliminate it from the workplace. The negative emotional impact, and the high rate of absenteeism and poor job performance caused by harassment, are well-documented.²¹³ This, combined with the fact that the revisions to the Civil Rights Act of 1866 gives victims of intentional sex discrimination the right to sue for up to \$300,000 in punitive damages,²¹⁴ makes it imperative that managers develop strategies to deal with this problem.

Companies should not wait until they are the objects of bitter and protracted litigation before they begin to implement policies to deal with sexual harassment. Many legal experts believe that the most effective way for companies to combat sexual harassment is to adopt clearly articulated policies that both condemn harassment and educate employees about its nature and effects.²¹⁵ Some states are even considering adopting laws that require companies to educate their employees about sexual harassment.²¹⁶ However, policies that pay lip service to this goal, while failing genuinely to implement it, will not protect companies from liability.

Companies can show that they are making good-faith efforts to address sexual harassment by establishing programs that consist of the following:²¹⁷

(1) *A Policy Statement.* Companies should make a general verbal and written announcement to all employees that sexual harassment is illegal and will not be tolerated. The policy statement should include the following elements:

(a) *Specific Examples.* Since men and women often experience the same types of behavior from very different perspectives, it is important for companies to give specific examples of the types of conduct that will not be tolerated. For instance, the *Jacksonville Shipyards* court required

213. 1988 MERIT STUDY, *supra* note 2, at 39-42 (The study estimated that 36,647 victims left their jobs, \$26.1 million worth of sick leave was used to cope with harassment, and the value of worker productivity declined by \$128 million as a result of harassment.).

214. 42 U.S.C. § 1981(a) and (b) (Supp. II 1992).

215. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991). See generally *Abrams*, *supra* note 16, at 1216. *Abrams* says that legal decisions do not "organize or educate employees to produce . . . necessary changes in conduct." *Id.* She, therefore, recommends that companies implement compliance programs that provide guidelines for employees that describe unacceptable conduct. She also suggests that supervisors be held responsible for monitoring the effectiveness of those guidelines on a periodic basis. *Id.* at 1217-19.

216. See Kimberly Blanton, *Mass. Sexual Harassment Bill Filed*, BOSTON GLOBE, Dec. 10, 1991, at 39.

217. All of the suggestions are taken from the harassment policy mandated by the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1541-46 (M.D. Fla. 1991).

the employer to issue a policy statement that described unwanted sexual advances as "jokes or comments about a person's sexuality or sexual experience directed at or made in the presence of any employee who indicates or has indicated in any way that such conduct in his or her presence is unwelcome."²¹⁸ Kathryn Abrams also suggests that companies use readings, films and simulations to demonstrate potentially offensive situations.²¹⁹

(b) *A Description of Penalties.* The policy statement should also describe penalties that will be applied to those who harass other employees. Depending on the severity of the harassment, penalties can range from formal reprimands and probationary periods to dismissal.

(c) *Grievance Procedures.* The policy statement should describe a grievance procedure that makes it clear how investigations will be carried out and to whom employees can complain. The grievance procedure should also note that within the bounds of the investigatory process, confidentiality will be observed.

(2) *Ongoing Educational Programs.* In addition to issuing a policy statement, companies should establish ongoing educational programs that provide general orientation seminars for new employees, and periodic safety meetings for existing employees.

The above suggestions are not meant to be an exhaustive study of the type of sexual harassment programs and policies that companies should adopt. Any company, however, that genuinely decides to adopt measures of this kind will be well on its way to bridging the wide and costly perception gap that exists between the sexes. It is only through the implementation of such measures that sexual harassment will be eliminated in the workplace to any significant degree.

218. *Id.* at 1543.

219. *See* Abrams, *supra* note 16, at 1219.