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Ellison v. Brady: A Legal Compromise with Reality in Cases of Sexual Harassment

Patricia J. Almony

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ELLISON v. BRADY: A LEGAL COMPROMISE WITH REALITY IN CASES OF SEXUAL HARASSMENT

After a brief discussion of work, he would turn the conversation to a discussion of sexual matters.

His conversations were very vivid. He spoke about acts that he had seen in pornographic films involving such matters as women having sex with animals and films showing group sex or rape scenes.

He talked about pornographic materials depicting individuals with large penises or large breasts involved in various sex acts. On several occasions, [he] told me graphically of his own sexual prowess.¹

Regardless of whether the allegations were true, the words sparked public debate about sexual harassment of women in the workplace. Although men also suffer from sexual harassment, most victims of sexual harassment in the work environment are women.² Women have in

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¹ Hill: The ‘most difficult... experiences of my life,’ PHILA. INQUIRER, Oct. 12, 1991, at A7. This quote is part of a formal statement made by Anita Hill during the confirmation hearings of Supreme Court Associate Justice Clarence Thomas. Id. The Senate Judiciary Committee invited Hill, a professor of law at the University of Oklahoma, to testify at the hearings after she claimed that Thomas had sexually harassed her. Id. According to Hill, the alleged harassment occurred when she worked as an assistant for Thomas at the Department of Education and then later at the Equal Employment Opportunity Commission (EEOC). Id.

² Male victims of sexual harassment in the workplace account for only “one-tenth of the number of cases filed [with the EEOC] by women.” Neal Templin, As Women Assume More Power, Charges Filed by Men May Rise, WALL ST. J., Oct. 18, 1991, at B3. Such a discrepancy between the numbers of male and female victims can be explained by the fact that “most sexual harassment cases really aren’t about sex, but power.” Id. Women comprise 45.4% of the work force in the United States, but women comprise less than this percentage in most professional occupations. Barbara Marsh, Women in the Work Force, WALL ST. J., Oct. 18, 1991, at B3 (compilation of statistics). For example, in 1990, only 40% of executive, administrative and managerial jobs were filled by women, and only 8% of engineers, 36% of mathematicians and computer scientists, 19% of physicians and 21% of lawyers and judges were female. Id. Furthermore, only three women serve as chief executive officers of Fortune 500 Industrial and Fortune 500 Service Companies, and only 56% of those companies have female directors on their boards. Id. Therefore, because men continue to dominate the corporate power structure, the gender of sexual harassment victims is usually female. See CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 9-10 (1979) (“[T]he sexual harassment of women can occur largely because women occupy inferior job positions and job roles; at the same time, sexual harassment works to keep women in such positions.”).

One lawyer has suggested that “more men will experience sexual harassment over the coming years as women assume more positions of power in cor-
fact suffered sexual harassment throughout history;\(^3\) the publicity which surrounded Anita Hill’s claim against Supreme Court nominee Clarence Thomas only exposed the magnitude of the problem. Media polls conducted during the hearing confirmed what many women already knew: sexual harassment of women pervades the workplace\(^4\) and affects corporate America,” but today sexual harassment in the workplace is still a problem faced predominantly by females. Templin, \textit{supra}, at B3.

3. See Jill L. Goodman, \textit{Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go}, 10 \textit{Cap. U. L. Rev.} 445, 448 (1981). Until the late 1800s, most women who worked outside the home were house servants. \textit{Id.} The males in these households often sexually harassed their female servants. \textit{Id.}

Around the turn of the century, more women, mostly from poor backgrounds, joined the workforce. \textit{Id.} at 449. However, “[t]aking a job was considered neither respectable nor something an honest woman would do, and women who did so were considered to have given up their claim to gentle treatment. The distinction between women who sold their labor and women who sold their bodies was often not made.” \textit{Id.} Consequently, sexual harassment pervaded the work environment of women; their powerlessness forced them to accede to the threats and abuse of their male supervisors. \textit{Id.} at 449-50.

This harassment has continued to persist throughout the twentieth century. The term “sexual harassment” was first used in the 1970s to describe such discriminatory, sex-related conduct in the workplace. \textit{Id.} at 445; \textit{see also Mackinnon, supra} note 2, at 27-28 (“Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a general, shared, and social definition of it inaccessible. \[But\] \[t\]he unnamed should not be mistaken for the nonexistent.” (footnote omitted)).

4. During the hearings on Hill’s claim, the \textit{New York Times}, in conjunction with CBS News, conducted a poll of 512 adults across the country. Elizabeth Kolbert, \textit{Sexual Harassment at Work Is Pervasive, Survey Suggests}, \textit{N.Y. Times}, Oct. 11, 1991, at A1. The results indicated that approximately 40% of the women polled had experienced sexual harassment at work, and about half of the men polled “said that at some point while on the job, they had said or done something that could have been construed by a female colleague as harassment.” \textit{Id.} According to the results, “sexual harassment, even if largely unreported, is a pervasive problem in the workplace.” \textit{Id.}

men in all professions\textsuperscript{5} across the country.\textsuperscript{6}

Only recently, however, has sexual harassment emerged as a viable cause of action under Title VII of the Civil Rights Act of 1964.\textsuperscript{7} Consequently, courts are still struggling over how to determine whether the alleged conduct constitutes actionable sexual harassment. In particular, courts are split over whether a defendant’s conduct should be judged from the perspective of a reasonable person or a reasonable victim of the plaintiff’s sex in determining whether such behavior establishes an actionable claim of sexual harassment.\textsuperscript{8}

In \textit{Ellison v. Brady},\textsuperscript{9} the United States Court of Appeals for the Ninth Circuit.

\textsuperscript{5} See Goodman, supra note 3, at 453 (quoting \textit{Sexual Harassment in the Federal Government, Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 64-66 (1979) (testimony of Helen Lewis)). Sexual harassment cases reflect the variety of occupations in which working women have been sexually harassed. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (assistant bank manager); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (internal revenue agent); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (police officers); Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) (surgical resident); Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (secretary); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (police dispatcher).

\textsuperscript{6} Goodman, supra note 3, at 453 ("[W]omen [are] affected by sexual harassment in every region of the country, and in both large and small cities." (citing Peggy Crull, \textit{The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, Working Women’s Institute Research Series, Report No. 3 (1979)).


The EEOC only litigates a small percentage of the claims it receives each year. For example, in 1990 the EEOC received 5,694 complaints of sexual harassment but only filed suit in 50 of these cases. Lewin, supra, at A17. Plaintiffs whose claims are rejected by the EEOC must employ a private attorney if they wish to pursue their claim. Id. Because the EEOC accepts so few claims, and because Title VII generally allows only back pay and/or reinstatement, many lawyers by-pass the EEOC filing procedure and instead sue for intentional infliction of emotional distress. Id.; see also 42 U.S.C. § 2000e-5(g) (1988) (courts may grant any type of equitable relief, including injunctions against prohibited conduct or orders for administrative action, “which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay”).

\textsuperscript{8} Compare Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (reasonable woman standard should be used in determining whether conduct constitutes actionable sexual harassment under Title VII); with Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (dual standard combining subjective viewpoint of victim and objective perspective of reasonable employee) and Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (dual standard combining subjective viewpoint of victim and objective perspective of reasonable person), cert. denied, 481 U.S. 1041 (1987).

\textsuperscript{9} 924 F.2d 872 (9th Cir. 1991).
Circuit tried to resolve this uncertainty. The Ninth Circuit held that a *reasonable victim* standard should be used in cases where employees allege hostile environment sexual harassment under Title VII. In so holding, the Ninth Circuit rejected the application of the reasonable person standard because it can be unfair to harassment victims in situations where sexually discriminatory conduct is the behavioral norm. In such cases, the court explained, a reasonable person might not perceive a defendant's conduct as discriminatory, even though the conduct would in fact establish an actionable claim of discrimination.

The Ninth Circuit stated that the reasonable victim standard, however, avoids reinforcing established misconceptions of what behavior is or is not discriminatory by considering the different perspectives of the harassers and the victims. Such consideration, the court emphasized, is important because in most sexual harassment cases women are victims of male harassers, and women as a group "share a common perspective which men do not necessarily share." The court therefore ap-

10. The reasonable victim standard encompasses both the reasonable man and reasonable woman standards; the use of the term "victim" indicates that the gender of the victim determines the standard's perspective. *Id.* at 879. Courts that have expressed the reasonable victim standard in terms of a reasonable "woman" (i.e., a court which adopted the reasonable victim standard in a case where the victim was female) will apply a reasonable "man" standard in cases where the victim is male. *See, e.g., id.* at 879 n.11 ("Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man."); *Andrews*, 895 F.2d at 1482 ("reasonable person of the same sex in that position"); *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) (if victim is male employee, "the 'reasonable man' standard should be applied"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) ("a reasonable person of [the plaintiff's] sex"). Therefore, in describing the standard, the term "reasonable victim" can be used interchangeably with the terms "reasonable woman" or "reasonable man," depending on the gender of the victim.

11. *Ellison*, 924 F.2d at 879. Courts have recognized two forms of sexual harassment: quid pro quo and hostile environment. For an explanation of these two forms of sexual harassment, see infra notes 24-28 and accompanying text. *Ellison* concerns only hostile environment sexual harassment. *Ellison*, 924 F.2d at 875.

13. *Id.* at 878.
15. *Ellison*, 924 F.2d at 879. The Ninth Circuit suggests that the reasonable victim standard will benefit all harassment victims regardless of their sex in situations where discriminatory conduct would be perceived under the reasonable person standard as nondiscriminatory. *Id.* at 878. However, most sexual harassment charges are filed by female victims against male harassers because of the power of men relative to the power of women in today's work force. *See Lewin, supra* note 7, at A17 ("[M]ost of the cases involve women bringing charges against men."). For a discussion of courts' focus on the female plaintiff, see infra note 17.
plied the reasonable victim standard (a reasonable woman standard because the victim was female) to the facts of the case. The court concluded that a reasonable woman in the plaintiff's position could have considered the defendant's conduct "sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment."16

This Note discusses the emergence of hostile environment sexual harassment as a basis for sex discrimination claims under Title VII. In particular, it focuses on the different standards courts have adopted when determining whether evidence of offensive conduct establishes an actionable claim of hostile environment sexual harassment. Against this background, the Ninth Circuit's rationale for adopting the reasonable victim standard is analyzed. Finally, this Note analyzes the impact which this standard will have on cases brought by female plaintiffs17 and on the perceptions of men and women as to what constitutes acceptable sexual behavior in the workplace.

I. DEVELOPMENT OF THE SEXUAL HARASSMENT CLAIM UNDER TITLE VII

A. Emergence of the Sexual Harassment Claim

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."18

The first sexual harassment cases to arise under Title VII involved situations where women were fired for refusing to accede to their employers' sexual advances.19 Yet, many of these early claims were unsuc-

16. Ellison, 924 F.2d at 880.
17. The Ninth Circuit in Ellison, as well as other courts which have adopted the reasonable victim standard, concentrated its analysis on how the reasonable victim standard will benefit female plaintiffs because women are victims of male harassers in the majority of cases. Id. at 879; see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990); Lewin, supra note 7, at A17. Therefore, this Note focuses on the standard's impact in cases brought by female plaintiffs while acknowledging that sexual harassment of men does exist, and that male victims will also benefit from the reasonable victim standard.
18. 42 U.S.C. § 2003e-2(a)(1) (1988). Title VII also prohibits an employer from "limit[ing], segregat[ing] or classif[y]ing his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2(a)(2) (emphasis added).
19. Goodman, supra note 3, at 459. The first case to recognize a sexual harassment claim under Title VII was Williams v. Saxbe, 413 F. Supp. 654
cessful because the language of Title VII does not explicitly prohibit sexual harassment. Consequently, courts initially rejected sexual harassment as a viable cause of action under Title VII. In fact, many cases reveal that judges viewed the problem as a "personal matter, neither employment-related nor sex-based.”

In 1980, the Equal Employment Opportunity Commission (EEOC) recognized sexual harassment as an actionable claim under Title VII. Additionally, the EEOC issued Guidelines which defined two types of sexual harassment: quid pro quo and hostile environment. Quid pro

(D.D.C. 1976), rev’d in part on other grounds, vacated in part sub. nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). See Pollack, supra note 4, at 45-46 n.30. In Williams, the plaintiff claimed that she had been fired for refusing her supervisor's sexual advances. Williams, 413 F. Supp. at 655-56. The court held that Title VII recognizes a cause of action for "alleged discriminatory imposition of a condition of employment by [a] supervisor." Id. at 661. After reviewing the administrative record, the court decided that substantial evidence rationally supported the conclusion that the defendant's sexual advances imposed "conditions of employment" upon the plaintiff which were discriminatory on the basis of sex. Id. at 663.


22. Pollack, supra note 4, at 46. For example, in Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (1975), rev’d on procedural grounds, 562 F.2d 55 (9th Cir. 1977), the district court concluded that Title VII protects employees only from discriminatory employment policies, such as those policies that result in discriminatory hiring or job assigning. Corne, 390 F. Supp. at 163. The court held that sex-related conduct of an employer which is not done pursuant to discriminatory employment policies does not fall within the Title VII prohibition. Id. Such conduct, the court continued, is better characterized as "nothing more than a personal proclivity, peculiarity or mannerism . . . [for the satisfaction of] a personal urge." Id.; see also Goodman, supra note 3, at 459-60 ("Judges, seeing 'personal' rather than employment relationships and fearing a flood of claims, balked at holding employers liable and refused to see discrimination on the basis of sex in sexual harassment.").


24. EEOC Guidelines, supra note 23, § 1604. The Guidelines explain that the EEOC analyzes claims of sexual harassment "on a case by case basis." Id. § 1604.11(b). The EEOC must "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." Id.

25. Rizzolo, supra note 20, at 267. Subsections (1) and (2) of § 1604.11(a) of the Guidelines describe quid pro quo sexual harassment; subsection (3) describes hostile environment sexual harassment. See EEOC Guidelines, supra note 23, § 1604.11(a). Although the Guidelines do not use the terms "quid pro quo" or "hostile environment," courts have used these phrases to describe the two types of sexual harassment under Title VII. See, e.g., Meritor, 477 U.S. at 65 (us-
quo sexual harassment occurs when submission to unwelcome sexual conduct, such as sexual advances or requests for sexual favors, "is made either explicitly or implicitly a term or condition of an individual's employment," or "is used as the basis for employment decisions affecting [the] individual."26 The Guidelines defined hostile environment sexual harassment as unwelcome sexual conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."27 By recognizing hostile environment sexual harassment, the EEOC sanctioned sex discrimination claims that were similar to the previously established racial and ethnic Title VII harassment claims based on discriminatory work environments.28

Although the Guidelines do not have the force of law,29 they serve "[a]s an 'administrative interpretation of the Act by the enforcing agency.'"30 Thus, after the Guidelines were issued, federal district and appellate courts uniformly relied on the Guidelines' interpretation of Title VII sex discrimination in determining whether unwelcome sexual

26. EEOC Guidelines, supra note 23, § 1604.11(a)(1)-(2). Quid pro quo harassment is characterized by a trade-off: the employer demands sexual favors as a condition for granting employment security or advancement. Rizzolo, supra note 20, at 268. To prevail upon a claim, a plaintiff must prove that he or she had to "comply sexually [with the harasser's demands] or forfeit an employment benefit." MacKINNON, supra note 2, at 32.

27. EEOC Guidelines, supra note 23, § 1604.11(a)(3).


In Rogers, the plaintiff, an Hispanic woman, alleged that her employer, an optometrical firm, discriminated against its Hispanic clientele. Rogers, 454 F.2d at 236. The employer argued that its segregation of minority patients was not directed toward its employees. Id. at 238. However, the court found that the employer's discrimination against minority patients could have created a hostile working environment for minority employees, including the plaintiff. Id. at 240-41. This hostile environment formed the basis of the plaintiff's Title VII claim against her employer for ethnic discrimination. Id. at 238.

The court reasoned that Title VII protection from discrimination with respect to "terms, conditions and privileges" of employment extends beyond the economic aspects of employment to include the working environment. Id. Therefore, if the ethnic harassment had polluted the working environment, it constituted unlawful discrimination under Title VII. Id. The court remanded the case for a factual determination of whether the ethnic harassment had created a discriminatory work environment. Id. at 241.

29. Meritor, 477 U.S. at 65 ("[W]hile not controlling upon the courts by reason of their authority ... [the Guidelines] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976), and quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

conduct had created "hostile or abusive work environment[s]." 31

B. Supreme Court Recognizes Hostile Environment Sexual Harassment Claim

In 1986, the Supreme Court validated Title VII sexual harassment claims based on hostile work environments in Meritor Savings Bank v. Vinson. 32 In rejecting the notion that Title VII is "limited to 'economic' or 'tangible' discrimination," 33 the Court interpreted "Title VII [as] afford[ing] employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 34 In arriving at this conclusion, the Court noted that ethnic or racial harassment that creates a hostile work environment is a form of discrimination because it affects "the emotional and psychological stability of minority group workers." 35 By analogy, the Court acknowledged that unwelcome sexual harassment has the same discriminatory impact when it creates a hostile or abusive work environment. 36 Quoting Henson v. City of Dundee, 37 one of

31. Id. at 66; see, e.g., Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (quoting Guidelines for definition of hostile environment sexual harassment); Henson v. City of Dundee, 682 F.2d 897, 903 n.7 (11th Cir. 1982) (recognizing Guidelines as "well founded in Title VII principles previously enumerated by the courts"); Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (quoting and applying Guidelines to resolve hostile environment sexual harassment case).

32. 477 U.S. 57 (1986). Plaintiff Vinson, an assistant manager at defendant's bank, brought a hostile environment sexual harassment claim against her supervisor and the bank. Id. at 60. Vinson testified that her supervisor "made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours." Id. She acceded to her supervisor's demands for sexual favors because she was afraid she would lose her job if she did not comply. Id. During work hours, Vinson's supervisor also "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." Id.

Based on these facts, the Court held that the plaintiff established "a violation of Title VII by proving that discrimination based on sex ha[d] created a hostile or abusive work environment." Id. at 66. In so holding, the Court explicitly validated the hostile environment sexual harassment cause of action under Title VII. See id.

33. Id. at 64. Quid pro quo sexual harassment claims are characterized by "'economic' or 'tangible' discrimination." Id. at 65. The Court refers to hostile environment sexual harassment as non quid pro quo. See id.

34. Id. (citing 45 Fed. Reg. 74,676 (1980)).

35. Id. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). Early sexual harassment cases focused on the effect that the harassing conduct had on a plaintiff's psychological state to determine whether the conduct was "sufficiently severe or pervasive" to constitute sexual harassment. Id. at 67; see Howard A. Simon, Ellison v. Brady: A "Reasonable Woman" Standard for Sexual Harassment, 17 EMPLOYEE REL. L.J. 71, 74 (1991). For a discussion on how this focus changed after Meritor, see infra notes 46-47 and accompanying text.

36. Meritor, 477 U.S. at 66. The Court relied on the Fifth Circuit's rationale in Rogers to explain why sexual harassment which creates a hostile environment is a form of discrimination. Id.; see Rogers, 454 F.2d at 238.

37. 682 F.2d 897 (11th Cir. 1982). In Henson, the plaintiff, a female police
the first cases to uphold a hostile environment sexual harassment claim, the Court stated:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.38

Accordingly, the Court explicitly acknowledged that sexual harassment may create a hostile work environment, and that such an environment constitutes the basis for an actionable discrimination claim.

The Meritor Court cautioned, however, that sexually offensive conduct in the workplace does not always constitute actionable sexual harassment under Title VII.39 Title VII sexual harassment claims are limited to cases where a plaintiff can prove that he or she suffered unwelcome sexual conduct which was "sufficiently severe or pervasive 'to alter the conditions of [the plaintiff's] employment and create an abusive working environment.' "40 For instance, the Meritor Court suggested that a "mere utterance" that hurts an employee's feelings will not be "sufficiently severe or pervasive" to uphold a sexual harassment claim.41

The Court thus focused its analysis on the severity and pervasiveness of the sexual harassment, yet it did not examine from whose perspective the extent of the harassment should be determined.42 The Court merely stated that the success of a victim's harassment claim depends upon whether the victim's working conditions have been adversely affected by the harassing conduct.43 Moreover, to make this determination, the Court stated that the totality of the circumstances

dispatcher, brought a hostile environment sexual harassment claim against the City of Dundee. Id. at 899. She alleged that her male supervisor had verbally abused her with sex-related language. Id. As a result, "this harassment ultimately led her to resign under duress." Id.

The court decided that the plaintiff had adequately proven that the verbal harassment from her supervisor created a hostile environment. Id. at 905. The harassment was "sufficiently pervasive so as to alter the conditions of employment and create" a viable discrimination claim under Title VII. Id. at 904.

38. Meritor, 477 U.S. at 67 (quoting Henson, 682 F.2d at 902).
39. Id. The allegations in Meritor "include[d] not only pervasive harassment but also criminal conduct of the most serious nature." Id.
40. Id. (quoting Henson, 682 F.2d at 904). For a discussion of Henson, see supra note 37 and accompanying text.
41. Id. (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).
42. See id.
43. See Simon, supra note 35, at 74 ("[T]he 'pervasive and severe' test goes not to the effect of the harassing conduct on the victim, but to the conduct itself.")
must be examined.\textsuperscript{44} The Court emphasized, however, that the victim's working conditions, not workplace conditions in general, should be considered in determining the presence of a hostile environment.\textsuperscript{45}

C. From Rabidue to Ellison: Courts Lack Consensus

Hostile environment sexual harassment cases prior to Meritor analyzed whether a defendant's conduct sufficiently altered the working conditions to affect the psychological well-being of the plaintiff.\textsuperscript{46} Post-Meritor cases shifted the analysis to whether an objective third party could reasonably perceive the defendant's conduct as creating a hostile environment.\textsuperscript{47} These latter cases, however, demonstrate a lack of con-

\textsuperscript{44} Id. at 69. See EEOC Guidelines, supra note 23, § 1604.11(b) (EEOC will consider "the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred"). In Meritor, the Court found "that a complainant's sexually provocative speech or dress" is relevant to the totality of the circumstances analysis. Meritor, 477 U.S. at 69.

\textsuperscript{45} See Meritor, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). In quoting Henson, the Meritor Court added the word "victim" to modify employment. Id. Compare Henson, 682 F.2d at 904 ("to alter the conditions of employment and create an abusive working environment") with Meritor, 477 U.S. at 67 (quoting Henson, 682 F.2d at 904) ("to alter the conditions of [the victim's] employment and create an abusive working environment"). This addition indicates that the focus in determining whether harassment has altered conditions of employment should be on the victim's working conditions, not on the environment of the workplace in general. See Meritor, 477 U.S. at 67. Therefore, although the Court did not explicitly state a standard, "[Meritor] approached hostile environment sexual harassment from the subjective viewpoint of the particular plaintiff, and imposed the objective requirement of notification to the harasser that his conduct is unwelcome." Nancy Brown, Note, Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment, 25 Hous. L. Rev. 441, 457 (1988).

\textsuperscript{46} Simon, supra note 35, at 74. Decisions prior to Meritor "emphasized the lack of any psychological injury to the plaintiffs arising from that conduct." Id.; see, e.g., Henson, 682 F.2d at 904 ("Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.") (emphasis added).

\textsuperscript{47} See Simon, supra note 35, at 74-75. This shift in analysis introduces the objective perspective of a reasonable third-party into the determination of whether the defendant's conduct created a hostile work environment. See Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (Under "[t]he objective [standard] . . . the finder of fact must actually determine whether the work environment is sexually hostile."). In Ellison, the Ninth Circuit explained "that the 'pervasive and severe' test goes not to the effect of the harassing conduct on the victim, but to the conduct itself." Simon, supra note 35, at 74. The Ninth Circuit concluded that conduct can be sufficiently severe and pervasive to constitute sexual harassment even though it has not seriously affected the victim's psychological state. Ellison, 924 F.2d at 878. The court reasoned that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. . . . Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." Id. (citation omitted). As a
The court thus decided that even though result, the court held that the appropriate test for identifying valid hostile environment sexual harassment claims is one where the degree of hostility is determined from the objective viewpoint of the reasonable victim. *Id.* For a further discussion of this shift from a subjective to an objective analysis of the work environment's hostility, see *infra* notes 51, 90-96 and accompanying text.

48. 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). In *Rabidue*, the plaintiff worked for seven years "as the sole woman in a salaried management position" at a refining company. *Id.* at 623 (Keith, J., concurring in part, dissenting in part). During that time, she frequently saw posters of nude women displayed in the workplace and heard anti-female obscenities. *Id.* at 623-24 (Keith, J., concurring in part, dissenting in part). In addition, the plaintiff was denied management privileges that other managers received, including "free lunches, free gasoline, a telephone credit card or entertainment privileges." *Id.* at 624 (Keith, J., concurring in part, dissenting in part).

A majority of the court concluded: "[T]he obscene language and the sexually oriented posters did not rise to a level substantially interfering with the plaintiff's work performance that created an intimidating, hostile, or offensive work environment . . . ." *Id.* at 623.

49. *Id.* at 620. If the plaintiff satisfies his or her burden of proof under the reasonable person standard, he or she is then required to "demonstrate that [he or] she was actually offended by the defendant's conduct and that [he or] she suffered some degree of injury as a result of the abusive and hostile work environment." *Id.*

In adopting the Sixth Circuit's *Rabidue* standard for hostile environment sexual harassment cases, the Seventh Circuit described it as a "dual standard" combining the objective perspective of the reasonable person with the subjective viewpoint of the victim. *See,* e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989). Designating the *Rabidue* standard as a "dual standard," however, is misleading because only the objective factor of the two-part test (i.e., the reasonable person standard) goes to the determination as to whether the alleged sexual harassment created a sufficiently hostile environment. *See* *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990). Analysis of the plaintiff's subjective viewpoint serves only to establish that the plaintiff suffered some kind of injury for which he or she can claim judicial relief. *Id.* ("The subjective factor . . . demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief. The objective [standard], however, is the more critical for it is here that the finder of fact must actually determine whether the work environment is sexually hostile."). For a further discussion of the Seventh Circuit's dual standard, see *infra* note 57.

50. *Rabidue*, 805 F.2d at 620. The court reasoned that although Title VII was meant to provide women with an opportunity in the work force, it was not "designed to bring about a magical transformation in the social mores of American workers." *Id.* at 621 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)). In other words, Title VII was merely intended to give women an equal chance to obtain employment or promotions; it was not
the plaintiff in *Rabidue* was female, she could prevail on her sexual harassment claim only by proving that a reasonable person, viewing the facts from a gender-neutral perspective, would have perceived the defendant's conduct as interfering with the work performance and "affect[ing] seriously the psychological well-being of that reasonable person." The court concluded that applying the reasonable person standard would protect "both plaintiffs and defendants."

The dissent in *Rabidue*, however, argued that the reasonable person standard "fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men." Therefore, instead of protecting both defendants and plaintiffs, this standard only protects the former by "sustain[ing] ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." The dissent asserted that a reasonable victim standard better protects all interests involved. The victim's perspective recognizes the differences in opinion between men and women, and the reasonableness requirement "shield[s] employers from the neurotic complainant."

Since *Rabidue*, four other circuits have addressed the issue of what standard should be applied in sexual harassment cases, but only the

meant to change work environments where sexual jokes and vulgarities are the norm. *Id. Contra Andrews*, 895 F.2d at 1483 ("Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.").

51. *Rabidue*, 805 F.2d at 620. The court's directive that the fact-finder must consider how seriously the defendant's conduct affected the plaintiff's psychological well-being as well as how it interfered with the plaintiff's work performance indicates that the court had not completely shifted away from pre-*Meritor* cases, such as *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), which relied on the psychological well-being of the plaintiff as an indication of a hostile environment. *Cf. Ellison*, 924 F.2d at 878 ("It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment."). *Ellison* completely shifts the focus of analysis away from whether the hostile conditions of employment were severe enough to affect the psychological well-being of the plaintiff to whether the harasser's conduct was sufficiently severe and pervasive to create a hostile work environment. See *Id.* For a further discussion of this shift in analysis, see *supra* notes 46-47, *infra* notes 90-96 and accompanying text.

52. *Rabidue*, 805 F.2d at 620. The court explained that the reasonable person standard protects defendants by preventing claims of harassment based on behavior that would not offend reasonable individuals, even though the "plaintiff was actually offended by the defendant's conduct." *Id.*

53. *Id.* at 626 (Keith, J., concurring in part, dissenting in part) (citing Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 *Harv. L. Rev.* 1449, 1451 (1984) (advocating application of reasonable woman standard in cases where plaintiff is female)).

54. *Id.* (Keith, J., concurring in part, dissenting in part).

55. *Id.* (Keith, J., concurring in part, dissenting in part).

56. Of the four other courts that have examined the issue, three of them have adopted the reasonable victim standard. See *infra* note 61.

Although the Court of Appeals for the Eleventh Circuit has not considered whether the standard in hostile environment sexual harassment cases should be
Seventh Circuit has followed the reasonable person standard. Even the Sixth Circuit has retreated from its Rabidue position; one year after Rabidue, the Sixth Circuit rejected the reasonable person standard and adopted the reasonable victim standard in Yates v. Avco. The Yates majority quoted Rabidue's dissenting opinion and agreed that "men and women are vulnerable in different ways and offended by different behavior." The court concluded that these differences were valid reasons for analyzing sexual harassment claims from the perspective of a reasonable man or a reasonable woman, depending on the victim's sex.

The other courts which have since adopted the reasonable victim standard have relied on the same justifications that were invoked by the

a reasonable person or a reasonable victim, a district court in that circuit has concluded that the appropriate perspective is that of a reasonable victim. See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991). For a discussion of Robinson, see infra notes 65-69 and accompanying text.

See, e.g., King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989). In Brooms, the United States Court of Appeals for the Seventh Circuit clarified its earlier holding in Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986), regarding what standard should be applied in hostile environment sexual harassment cases. Brooms, 881 F.2d at 418. The court said a "dual standard" should be used in determining whether the alleged harassment had created hostile working conditions. The subjective standard examines whether the harassment adversely affected the particular plaintiff; the objective standard considers "the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well being." Id. at 419 (emphasis added). Therefore, a claim of hostile environment sexual harassment may be upheld "[o]nly if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action." Id. (emphasis added).

One other court, the Fifth Circuit, has applied the reasonable person standard to hostile environment sexual harassment claims, but its opinions have not discussed why this standard is appropriate. See Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Bennett v. Corroom Black Corp., 845 F.2d 104 (5th Cir.), cert. denied, 489 U.S. 1020 (1988). The opinions merely state that a reasonable person would or would not find particular conduct offensive. See, e.g., Bennett, 845 F.2d at 106 ("Any reasonable person would have to regard these [pornographic] cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.").

Two female employees brought a sexual harassment claim against their male supervisor. Id. at 631. The court addressed the standard to be applied when it analyzed whether the harassment constituted a constructive discharge of one of the plaintiffs. Id. at 636-37. The court said the working conditions should be considered from the viewpoint of a "reasonable woman." Id. at 636.

Id. at 637 n.2 (quoting Rabidue, 805 F.2d at 626 (Keith, J., concurring in part, dissenting in part)).

Because the plaintiff in Yates was female, the court applied the reasonable woman standard. Id. at 637. But the court noted that in cases where the plaintiff is male, the appropriate objective standard would be that of a "reasonable man." Id. at 637 n.2.
Rabidue dissent, namely: (1) the divergence in men's and women's views as to whether conduct is offensive mandates viewing the circumstances from the perspective generally shared by reasonable members of the victim's gender; (2) the reasonable person standard reinforces existing stereotypes in discriminatory workplaces; and (3) an objective reasonable victim standard protects both the defendant-harasser and the plaintiff-victim.

As recently as March 1991, in Robinson v. Jacksonville Shipyards, Inc., a district court in the Eleventh Circuit also adopted the reasonable victim standard. In doing so, the Robinson court examined what evidence should be relevant in determining how reasonable members of the plaintiff's gender would perceive the defendant's conduct. The court emphasized that the context, or working environment, in which the alleged harassment occurred is an important factor to consider.

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61. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) ("[T]he discrimination [must] detrimentally affect a reasonable person of the same sex . . ."); Lipsett v. University of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (adopting reasonable woman standard to determine whether defendant's sexual conduct was unwelcome); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) ("The objective standard asks whether a reasonable person of [the plaintiff's] sex, that is, a reasonable woman, would perceive that an abusive working environment has been created.").

62. See, e.g., Lipsett, 864 F.2d at 898 ("[O]ften a determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or over-reacted to what the defendant claims were innocent or invited overtures.").

63. See, e.g., Andrews, 895 F.2d at 1483. The court suggested that a reasonable woman standard in sexual harassment cases would "prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women." Id.

64. Id. ("The objective [reasonable woman] standard protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment.").

65. 760 F. Supp. 1486 (M.D. Fla. 1991). In Robinson, the plaintiff, a female welder at defendant's shipyard, frequently saw nude pictures and heard verbal abuse of women. Id. at 1498. She also saw "abusive language written on the walls in her working areas." Id. at 1499.

66. Id. at 1524. This standard is consistent with the standard applied by the Eleventh Circuit in hostile environment cases based on racial harassment. See Vance v. Southern Bell Tel. & Tel., 863 F.2d 1503, 1510 (11th Cir. 1989). In Vance, an African-American female employee brought a hostile environment discrimination claim based on race against her employer. Id. at 1508. The court held that the existence of a hostile environment and its impact on the plaintiff's working conditions should be determined from the perspective of a reasonable minority employee. Id.

67. Robinson, 760 F. Supp. at 1524. The court explained that "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents." Id. (quoting Vance, 863 F.2d at 1510-11). Thus, examination of the context, or the totality, of the working environment is consistent with the notion that "[a] hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits." Id. (quoting Vance, 863 F.2d at 1511).
quently, expert testimony which considers a defendant’s conduct in the abstract should be given little, if any, attention. Only testimony of psychologists who consider the plaintiff’s work environment “provides a reliable basis upon which to conclude that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions.”

Shortly after Robinson was decided, the Ninth Circuit in Ellison v. Brady addressed the issue of what standard should be used. The court of appeals concluded that a reasonable victim standard should be used in determining whether sexual harassment has created an environment so hostile as to affect the working conditions of the plaintiff. In reaching this conclusion, the court analyzed and rejected arguments advocating a reasonable person perspective and discussed its reasons for adopting the alternative standard.

II. Ellison v. Brady: Case Discussion

In Ellison, a female Internal Revenue Service (IRS) agent brought a hostile environment sexual harassment claim against the Secretary of the Treasury Department of the United States. Ellison, the plaintiff, alleged that a male co-worker, Gray, began harassing her after she went to lunch with him one day. Several months later, Gray gave Ellison a note in which he expressed his romantic feelings for her. She did not, however, bring the matter to the attention of her supervisors at that time. Instead she asked another male co-worker to tell Gray that she

68. Id. Such evidence fails to consider the alleged conduct in the context of the work environment. Id. Because courts must examine the totality of the circumstances surrounding alleged harassment when evaluating hostile environment claims, abstract studies have no value in the assessment of the hostility created by the harassment. See id.

69. Id. at 1524-25. In Robinson, the plaintiff’s expert witnesses based their opinions on the reactions of women to conditions similar to those found in the plaintiff’s workplace. See id. at 1524. The court found this testimony relevant to its analysis of the totality of the circumstances. Id.

70. 924 F.2d 872 (9th Cir. 1991).

71. Id. at 879. The court stated: “We . . . prefer to analyze harassment from the victim’s perspective.” Id. at 878.

72. Id. at 875-81.

73. Id. at 873-75. The plaintiff appealed the district court’s order granting summary judgment for the defendant Secretary of the Treasury. Id. at 873.

74. Id. at 873. Gray “pester[ed] her with unnecessary questions and h[u]ng around her desk.” Id. Ellison tried to avoid him and declined his invitations for lunch or for a drink. Id. at 873-74.

75. Id. at 874. The note said: “I cried over you last night and I’m totally drained today. I have never been in such a constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day.” Id. The note “shocked and frightened” Ellison, and she showed it to her supervisor. Id.
was not interested in him.\textsuperscript{76}

The next week Ellison left for a four-week training program in another state.\textsuperscript{77} She did not see Gray again before she left, but he mailed her a “typed, single-spaced, three-page letter” in which he again expressed his interest in Ellison and said that he had been watching her.\textsuperscript{78} The letter upset Ellison, and she requested that either she or Gray be transferred to another branch office.\textsuperscript{79}

Gray transferred to another office and Ellison returned to her original workplace.\textsuperscript{80} However, Gray was given permission to return to the office where Ellison worked after remaining in the other branch office for six months.\textsuperscript{81} When Ellison heard about Gray’s permission to return, she filed a complaint with the Treasury Department and, when her complaint was rejected, appealed to the EEOC.\textsuperscript{82} After the EEOC refused to take any action, Ellison filed a Title VII sex discrimination claim in federal court against the Secretary of Treasury based on hostile environment sexual harassment.\textsuperscript{83}

The federal district court found that Ellison failed to state an actionable claim of hostile environment sexual harassment.\textsuperscript{84} On appeal, Ellison raised the following two issues: “(1) what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment, and (2) what remedial actions can shield employers from liability for sexual harassment by co-workers.”\textsuperscript{85} This Note focuses only on the first issue.\textsuperscript{86}

\textsuperscript{76} Id. Initially, Ellison did not want her supervisor to do anything about Gray’s conduct because “[s]he wanted to try to handle it herself.” \textit{Id.}

\textsuperscript{77} Id.

\textsuperscript{78} Id. A portion of the letter read: “I know that you are worth knowing with or without sex. . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan . . . .” \textit{Id.}

\textsuperscript{79} Id. Ellison explained that she reacted in fear, saying, “I just thought he was crazy. I thought he was nuts. I didn’t know what he would do next. I was frightened.” \textit{Id.}

\textsuperscript{80} Id.

\textsuperscript{81} Id. After he was transferred, “Gray filed union grievances requesting a return to [his original] office. The IRS and the union settled the grievances in Gray’s favor,” so he was permitted to return to the office where Ellison worked. \textit{Id.}

\textsuperscript{82} Id. at 874-75.

\textsuperscript{83} Id. at 875. The Treasury Department refused to take any action because it did not think Ellison’s complaint resembled the description of sexual harassment under the EEOC Guidelines. \textit{Id.} When Ellison appealed to the EEOC, the agency dismissed her complaint because it thought the Treasury Department had taken adequate measures to remedy the situation. \textit{Id.}

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 873.

\textsuperscript{86} The second issue examines whether an employer can shield himself or herself from liability where the court concludes that the plaintiff suffered hostile
A. Majority Opinion Favors Reasonable Victim

The United States Court of Appeals for the Ninth Circuit began its determination of the appropriate standard by explaining the origin of the hostile environment sexual harassment claim. The Ninth Circuit had examined the merits of only three sexual harassment claims since the Supreme Court's decision in Meritor, and none of those cases answered the question at hand: From whose perspective should the circumstances be viewed? Therefore, while these cases "establish[ed] the framework" for analyzing Ellison's claim, they were not dispositive of the issue.

In deciding which standard to adopt, the court first considered the government's argument that it should apply a standard which would require that the defendant's conduct had an effect on "the plaintiff's psy-

environment sexual harassment. Id. at 882-83. Because the existence of hostile environment sexual harassment must be affirmatively established before a court considers the second issue of employer liability, this latter issue is not dispositive as to what standard should be applied. Consequently, this Note focuses solely on the first issue on appeal.


87. Ellison, 924 F.2d at 875.
88. Id. at 875-76. The first hostile environment sexual harassment claim decided by the Ninth Circuit after Meritor was Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). See Ellison, 924 F.2d at 875-76. In Jordan and a subsequent case, Vasconcelos v. Meese, 907 F.2d 111 (9th Cir. 1990), the Ninth Circuit reviewed the lower court's factual findings and agreed that they did not present evidence of conduct so severe or pervasive as to create a hostile work environment. Ellison, 924 F.2d at 876 (discussing Jordan and Vasconcelos). Consequently, the Ninth Circuit upheld the two lower court decisions because it "did not find [the district court's] factual findings clearly erroneous."

89. Ellison, 924 F.2d at 877. In Jordan, the court explained that the plaintiff must prove the following elements to succeed on such a claim: (1) he or she was subjected to sex-related verbal and/or physical conduct; (2) he or she did not welcome such conduct; and (3) the conduct was so offensive that it altered his or her working conditions "and create[d] an abusive working environment." Ellison, 924 F.2d at 875-76 (discussing Jordan).
While agreeing that, to be actionable, the harassment must alter the plaintiff’s working conditions and create an abusive or hostile environment, the court nonetheless concluded that the severe or pervasive determination goes to the defendant’s conduct, not to the hostility of the environment. Otherwise, the court explained, employees would have to wait until their work environment was so intolerable that it adversely affected their psychological well-being. Such a standard would thwart the purposes of Title VII. As the court indicated, “Title VII’s protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.” The court thus concluded that the fact-finder should focus on “the severity and pervasiveness” of the defendant’s conduct to determine whether it created a sufficiently hostile environment.

The court then turned to whether the defendant’s conduct should be viewed from the perspective of a reasonable person or a reasonable victim. The court concluded that “the severity and pervasiveness of sexual harassment should be evaluated from the reasonable victim’s perspective because the reasonable person standard reinforces the court’s conclusion that the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.”
discriminatory harassment.\textsuperscript{98} A reasonable person in circumstances where harassment is the prevailing norm would consider such conduct as commonplace and ordinary, not discriminatory.\textsuperscript{99} Therefore, the reasonable person standard actually validates the discriminatory status quo.\textsuperscript{100} The end result is that "[h]arassers could continue to harass . . . and victims of harassment would have no remedy."\textsuperscript{101}

In contrast, the court explained that the reasonable victim standard avoids reinforcing established stereotypes and discriminatory notions because it recognizes differences in opinion between harassers and their victims regarding what conduct is offensive.\textsuperscript{102} Specifically, the court emphasized the importance of considering the victim's perspective in cases brought by female plaintiffs against male harassers.\textsuperscript{103} It noted that women as a group "share common concerns [regarding sexual conduct] which men do not necessarily share."\textsuperscript{104} For example, sexual assault raises concerns that are peculiar to women.\textsuperscript{105} Moreover, men tend to view sexual conduct which women may find offensive not as discriminatory but rather as "harmless amusement."\textsuperscript{106} The court

\textsuperscript{98.} Id. The court quoted the EEOC Compliance Manual which states that "courts should consider the victim's perspective and not stereotyped notions of acceptable behavior." Id. (quoting EEOC Compl. Man. (CCH) ¶ 3112 (1988)).

The court's rationale parallels the reasoning in other cases, such as \textit{Yates}, which have applied the reasonable victim standard. \textit{See id.} at 879. In fact, the court quotes \textit{Lipsett, Yates, Andrews} and the \textit{Rabidue} dissent to justify its adoption of the reasonable victim standard. \textit{Id.} at 878. For a discussion of these cases, see \textit{supra} notes 53-64 and accompanying text.

\textsuperscript{99.} \textit{See Ellison}, 924 F.2d at 878-79.

\textsuperscript{100.} \textit{Id.} at 878. When a court uses the reasonable person standard, it "run[s] the risk of reinforcing the prevailing level of discrimination." \textit{Id.}

\textsuperscript{101.} \textit{Id.}

\textsuperscript{102.} \textit{Id.}

\textsuperscript{103.} \textit{Id.}

\textsuperscript{104.} \textit{Id.} at 879. Some scholars have reached the same conclusion that men and women have differing opinions about what conduct is appropriate in the workplace. \textit{See, e.g.,} Pollack, \textit{supra} note 4, at 52 n.56 (citing John Pryor & Jeanne Day, \textit{Interpretations of Sexual Harassment: An Attributional Analysis, 18 Sex Roles} 405, 405-17 (1988)).

\textsuperscript{105.} \textit{Ellison}, 924 F.2d at 879. The court reasoned that sexual conduct is a bigger concern to women than men because women are most often the "victims of rape and sexual assault." \textit{Id.} In fact, the court noted that "[i]n 1988, an estimated 73 of every 100,000 females in the country were reported rape victims." \textit{Id.} n.10 (citing \textit{Federal Bureau of Investigation, U.S. Dept't of Justice, Crime in the United States: Uniform Crime Reports 1988 at 16 (1989)}). The court explained that this disproportionate impact of sex-related crimes on women may also result in men and women perceiving sexual conduct differently:

Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

\textit{Id.} at 879.

\textsuperscript{106.} \textit{Id.} (citing Kathryn Abrams, \textit{Gender Discrimination and the Transformation
explained that these differences in perspective between men and women justify viewing the work environment from the perspective of the victim.\textsuperscript{107} According to the court: “[A] sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”\textsuperscript{108} Furthermore, the reasonableness requirement sufficiently protects employers “from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee.”\textsuperscript{109}

After explaining its reasons for adopting the reasonable victim standard, the court addressed two counterarguments against it. First, the court dismissed the argument that the reasonable victim standard “establish[es] a higher level of protection for women than men.”\textsuperscript{110} On the contrary, the court held that a standard incorporating a reasonable woman’s perspective promotes a “gender-conscious examination of sexual harassment [which] enables women to participate in the workplace on an...
equal footing with men.”

Secondly, the court explained that whether a harasser knows his conduct is offensive to the reasonable victim is not an issue in these cases because “Title VII is not a fault-based tort scheme.” In other words, if a co-worker or employer unknowingly acts in a way that offends a reasonable woman, he would be liable for sexual harassment provided that the conduct was unwelcome. Title VII seeks to end discriminatory conduct by focusing not upon the harasser’s motivation but upon how that conduct affects the work environment. Hence, “[t]o avoid liability under Title VII, employers may have to educate and sensitize their workforce” so that all employees know what conduct “a reasonable victim would consider unlawful sexual harassment.”

The court acknowledged that men and women could perceive the facts in Ellison differently. A man in the harasser’s position might perceive the conduct as an attempt to flirt with Ellison. Yet the same conduct “shocked and frightened” the female plaintiff. Such differ-

111. Ellison, 924 F.2d at 879. A standard which promotes an equal opportunity for women in the workplace is consistent with the goal of Title VII: to “afford[] employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

112. Ellison, 924 F.2d at 880.

113. Id. The court noted in a footnote that “[i]f sexual comments or sexual advances are in fact welcomed by the recipient, they, of course, do not constitute sexual harassment. Title VII’s prohibition of sex discrimination in employment does not require a totally desexualized workplace.” Id. at 880 n.13.

In Meritor, the Supreme Court explained that “[t]he gravamen of any sexual harassment claim is that alleged sexual advances were ‘unwelcome.’” Meritor, 477 U.S. at 68 (citing 29 C.F.R. § 1604.11(a) (1985)). A determination as to whether the sexual advances were unwelcome is an issue of fact. Id. If the plaintiff’s “conduct indicated that the alleged sexual advances were unwelcome,” then the plaintiff has a valid claim of sexual harassment so long as she can prove that the advances created a hostile environment. Id. The Court cautioned that evidence of a plaintiff’s voluntary participation in the sexual conduct is not a defense to a sexual harassment claim; rather, such evidence is relevant “as a matter of law in determining whether he or she found particular sexual advances unwelcome.” Id. at 69.

114. Ellison, 924 F.2d at 880 (citing Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971)).

115. Id. (citing EEOC Guidelines, supra note 23, § 1604.11(f)).

116. Id.

117. Id. The court noted that the district court’s characterization of the harassment as “isolated and trivial” appears fair when the facts are viewed from Gray’s perspective. Id. Gray had written Ellison a love letter, had shown no animosity toward her and had offered to leave her alone. Id. Thus, Gray might have envisioned himself “as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words.” Id. The court concluded, however, that a reasonable woman in Ellison’s position could have perceived his conduct as creating a hostile work environment. Id.

118. Id. The reaction of Ellison’s female supervisor, Bonnie Miller, to Gray’s conduct supports the conclusion that a reasonable woman would have considered the severity and pervasiveness of Gray’s conduct sufficient to create a
ent views, the court said, demonstrate why a reasonable victim's perspective is necessary to achieve a nondiscriminatory work environment in situations where workplace conduct is based upon "ingrained notions of reasonable behavior fashioned by the offenders."119

After reviewing the facts, including the harasser's repeated expressions of love and "references to sex," the court concluded that "[a] reasonable woman could consider [the harasser's] conduct . . . sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment."120 The court therefore reversed the district court's grant of summary judgment and remanded the case for trial.121

B. The Dissent

In his dissenting opinion, District Court Judge Stephens122 rejected the reasonable victim standard primarily for the same reasons which prompted the majority to accept it.123 First, the dissent interpreted Title VII as mandating equal treatment of employees in a "gender neutral" workplace.124 To achieve this neutrality, the dissent thought that courts should adopt a neutral standard, such as the reasonable "‘victim,’ ‘target,’ or ‘person’” standard.125 Such a standard, the dissent argued, "will meet the needs of all who seek recourse under this section of
Title VII," not only women. Secondly, the dissent rejected the presumption that men and women necessarily perceive sex-related conduct differently. According to the dissent, this presumption, as well as the notion that the reasonable victim standard is objectively reasonable, is unsupported by evidence.

The dissent then argued that the better approach would examine only "the conditions of the workplace itself... as affected, among other things, by the conduct of the people working there as to whether the workplace as existing is conducive to fulfilling the goals of Title VII." This approach, the dissent explained, would obviate the need to examine competing viewpoints, and instead, it would require employers to recognize gender differences and to alter inappropriate conduct in workplaces where one sex predominates.

III. Analysis

By adopting the reasonable victim standard in hostile environment sexual harassment cases, the Ninth Circuit took an important step toward the elimination of sex discrimination in the workplace. Although this step is not free from stumbling blocks, at the very least it will contribute toward mutual understanding between genders in the workplace.

The adoption of a reasonable victim standard for sexual harassment is most significant in typical harassment cases involving female plaintiffs and male defendants because it recognizes a reality that the reasonable person standard ignores: women and men perceive the appropriateness

126. Ellison, 924 F.2d at 884 (Stephens, J., dissenting).

127. In making this assertion, the dissent ignores the fact that the reasonable victim standard, as adopted by the majority, would also apply to male plaintiffs. See id. at 885 (Stephens, J., dissenting). In such cases, the court would apply a reasonable man standard rather than a reasonable woman standard. Id. at 879 n.11.

128. Id. at 884 (Stephens, J., dissenting). The dissent does not say the presumption that men and women have different perspectives is always inaccurate. Id. (Stephens, J., dissenting). Rather, Judge Stephens says men and women do not "necessarily" view situations differently. Id. (Stephens, J., dissenting).

129. Id. (Stephens, J., dissenting). The dissent's approach would resemble pre-Meritor cases which focused on whether workplace conditions had been sufficiently altered to affect the plaintiff's psychological well-being rather than on whether the defendant's conduct was sufficiently severe and pervasive to create an objectively hostile environment. See Simon, supra note 35, at 74; see also Henon v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.") For a further discussion of the focus of analysis in earlier hostile environment sexual harassment cases, see supra note 46-47 and accompanying text.

130. Ellison, 924 F.2d at 885 (Stephens, J., dissenting).

131. For a discussion of the pervasiveness of sexual harassment in the workplace, see supra notes 2-5 and accompanying text.
of sexual conduct in the workplace differently.\textsuperscript{132} Although the dissent dismissed this fact as an unsupported presumption, these differing perspectives have been widely recognized.\textsuperscript{133} In fact, the enraged reaction of women to the disposition of sexual harassment allegations against the Supreme Court nominee Clarence Thomas, now Justice Clarence Thomas, supports the proposition that the genders view situations differently.\textsuperscript{134} Moreover, the biased treatment of early sexual harassment claims by male-dominated courts also reveals the gender difference regarding sexual conduct in the workplace.\textsuperscript{135}

\textsuperscript{132} See Kathryn Abrams, \textit{Gender Discrimination and the Transformation of Workplace Norms}, 42 \textit{VAND. L. REV.} 1183 (1989). Male perspectives “contribute, either intentionally or negligently, to the subordination of women” and are therefore not “appropriate sources for an employer’s or a judge’s perspective.” \textit{Id.} at 1206 n.103.

\textsuperscript{133} For discussion of the difference in perspective between men and women regarding sexual conduct, see \textit{supra} notes 101-02 and accompanying text. \textit{See also} Pollack, \textit{supra} note 4, at 52 n.56 (“Women and men often interpret the same behavior differently. In ‘ambiguous’ cases, e.g., a positive verbal comment about one’s physical appearance, women are more likely to perceive harm than men.” (citing John Pryor & Jeanne Day, \textit{Interpretations of Sexual Harassment: An Attributional Analysis}, 18 \textit{SEX ROLES} 405, 405-17 (1988))); Rizzolo, \textit{supra} note 20, at 268 (“same actions perceived by women as offensive and sexually harassing are seen by some men as harmless and innocent”).

The large number of women who claim they have experienced sexual harassment in the workplace also suggests that many men do not consider their sexual conduct offensive. \textit{But see} Kolbert, \textit{supra} note 4, at A1 (half of men polled admit “having said or done something that could have been construed by a female colleague as harassment”). Of course, the underlying premise in this argument is that at least some men would change their conduct if they knew that it was sexually offensive to women. \textit{Cf.} Brown, \textit{supra} note 45, at 456 n.123 (“It is assumed that most supervisors will behave reasonably once an employee has indicated that the behavior is unwelcome.”). This realization requires men to understand a reasonable woman’s perspective. For a discussion of how to sensitize the workforce so that men can understand a reasonable woman’s viewpoint, see \textit{infra} notes 143-44 and accompanying text.

\textsuperscript{134} Female legislators, lobbyists, scholars and reporters attacked the Senate Judiciary Committee, composed entirely of males, for initially ignoring Anita Hill’s charges of sexual harassment against a Supreme Court nominee, now Supreme Court Associate Justice Clarence Thomas. \textit{Allegations Highlight Hidden Sex Issues}, \textit{N.Y. TIMES}, Oct. 11, 1991, at A1. They claimed that the Senators’ lack of initial consideration of Hill’s complaint reveals the insensitivity of men toward women’s concerns. \textit{Id.} Katherine T. Bartlett, a Duke University law school professor, summarized the perceived problem when she said:

There’s an astounding strength of feeling about this . . . . There’s a sense that there’s a gap in male understanding, in the understanding of the people making the decisions. There is a perception that a group of men may not have taken this as seriously as a group of women similarly situated would have taken it.

\textit{Id.} (quoting Katherine T. Bartlett).

\textsuperscript{135} \textit{Cf.} Pollack, \textit{supra} note 4, at 46. Before 1976, when sexual harassment was first recognized as a legal claim under Title VII, “courts treated sexual harassment in the workplace as a personal matter, neither employment related nor sex-based.” \textit{Id.} Even after 1976, some courts still refused to find actionable sexual harassment in the most obvious cases. \textit{See, e.g.}, Rabidue v. Osceola Ref.
Recognition of a woman's perspective is therefore not only fair but logical. Only legal standards which reflect reality most accurately can provide victims with fair remedies. Without such standards, victims will remain lost in a system which regularly ignores their experiences. The reasonable victim standard reflects the current gap in understanding between men and women regarding sexual conduct in the workplace. Therefore, this standard "shape[s] [the law] so that what really happens to women, not some male vision of what happens to women, is at the core of the legal prohibition." 136

As the law incorporates women's perceptions of certain conduct, the reality of women's experiences in the workplace will be recognized. 137 Consequently, the courts will be more "willing to give a liberal construction to the Guidelines and case law, to accept the woman's perspective, and to find actionable sexual harassment." 138 Meanwhile, the standard's reasonableness requirement allows for changes in women's perspectives toward sexual conduct. 139

Although the theory behind the reasonable victim standard is cogent, whether it will work as a practical matter is questionable. The standard confronts male jurors and judges with the problem of recon-

Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part) (no sexual harassment in situation where "female employees were exposed daily to displays of nude or partially clad women" and male supervisor "regularly spewed anti-female obscenity"), cert. denied, 481 U.S. 1041 (1987).

136. Pollack, supra note 4, at 42 (quoting MACKINNON, supra note 2, at 26).

137. See id. The fact that Ellison represents a consensus of the courts which have so far addressed the issue of the appropriate standard in sexual harassment cases suggests that the law is moving toward recognition of women's experiences. For a discussion of how the circuits have decided this issue, see supra notes 48-69 and accompanying text.

138. Pollack, supra note 4, at 48. The fact that the Ninth Circuit adopted the reasonable victim standard in Ellison is significant because the alleged sexual harassment in that case was arguably less severe and pervasive than the conduct in other cases where hostile environment sexual harassment has been found. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (female dispatcher daily subjected to crude and abusive language and to inquiries about her sexual practices); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (female welder witnessed numerous pictures and drawings of nude women and was subjected to verbal abuse on daily basis). Despite the lesser showing, the Ellison court still found sexual harassment under the reasonable victim standard. Ellison, 924 F.2d at 880. The court's willingness to adopt a reasonable victim standard under the facts in Ellison thus represents an increased sensitivity toward the female perspective.

139. Ellison, 924 F.2d at 879 n.12. In Ellison, the Ninth Circuit explained that a reasonableness standard provides a flexible analysis which can incorporate future changes in women's attitudes toward sexual conduct. Id. The court stated: "As the views of reasonable women change, so too does the Title VII standard of acceptable behavior." Id.; cf. Pollack, supra note 4, at 42 (quoting MACKINNON, supra note 2, at 26) ("The strictures of the concept of sex discrimination will ultimately constrain those aspects of women's oppression that will be legally recognized as discriminatory. At the same time, women's experiences, expressed in their own way, can push to expand that concept.").
eling their view of reality with that of a reasonable woman. Consequently, hostile environment sexual harassment cases might require expert testimony to establish what a reasonable woman would think in a given situation. The price of litigating a sexual harassment claim could increase, possibly resulting in a reduction in the number of female employees who seek relief from sexual harassment. What looks like a good standard in theory might therefore be difficult to implement in practice.

Despite this drawback, the standard will most likely have a beneficial, preventive impact. It will alert employers about their responsibility to create a nondiscriminatory environment for all of their employees, regardless of their sex. Consequently, the standard will encourage employers to "educate and sensitize their workforce to eliminate conduct which a reasonable victim would consider unlawful sexual harassment." Such a result will ultimately recognize the EEOC's directive:

140. See, e.g., Robinson, 760 F. Supp. at 1524. In Robinson, each party employed two psychologists who testified about how a reasonable woman would perceive the circumstances of that case. Id. The court rejected the testimony of the defendant's psychologists, who only testified as to how women react to offensive conduct in the abstract (they discussed the "level of offensiveness to women of pornographic materials" in a clinical study). Id. However, the plaintiff's psychologist discussed the effects of sexual stereotyping on women who had experienced work environments similar to the plaintiff's situation. The court decided that this testimony of the plaintiff's psychologists "provide[d] a reliable basis upon which to conclude that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions." Id.

141. The court's reliance on extensive expert testimony in Robinson suggests an increase in litigation costs are possible. For a discussion of the Robinson court's reliance on expert testimony, see supra note 140. If the potential relief seems small in comparison to the potential costs upon losing, plaintiffs will be unlikely to file claims. For a discussion of the relief available under Title VII, see supra note 7. This conclusion becomes even more plausible if plaintiffs consider the possibility that, upon losing, they might have to pay the defendant a "reasonable attorney's fee as part of the costs." See 42 U.S.C. § 2000e-5(k) (1988).

If, however, lawyers perceive the reasonable victim standard as improving a plaintiff's chances of winning, the increased litigation costs will not dissuade claims. Rather, the standard could have the opposite effect of actually increasing litigation. Nonetheless, the ultimate problem of getting male jurors and judges to stand in the shoes of a reasonable woman should make plaintiffs' lawyers think twice before assuming they have an "easy" case.

142. Simon, supra note 35, at 78 ("Employees can no longer safely assume that sexual conduct in the workplace is acceptable simply because it seems 'harmless' or 'in good fun' from a male perspective.").

143. Ellison, 924 F.2d at 880; see also Simon, supra note 35, at 78-79. Simon suggests guidelines that employers should follow to avoid liability, including the following: (1) "[e]stablish a policy" that informs employees about what conduct is considered offensive in the workplace and about what they can do if they have a complaint; (2) "[c]onsider the victim's perspective" in evaluating a female employee's complaint; and (3) "[t]ake prompt and forceful remedial action." Simon, supra note 35, at 78-79.

Simon notes that "[t]he reasonable woman standard will render some previously commonplace conduct actionable." Id. However, "fears that sexual har-
"Prevention is the best tool for the elimination of sexual harassment." 144

IV. CONCLUSION

Although no one solution will eradicate sexual harassment in the workplace, the adoption of the reasonable victim standard most accurately addresses it. The standard recognizes the different perspectives of men and women and attempts to reconcile them with legal reality. It also deals fairly with the complainant and the alleged harasser by ensuring that valid, reasonable claims are redressed. And regardless of whether the standard can be practically applied, it has the preventive impact of encouraging employers to implement a harassment policy and educate their employees about what conduct is appropriate in the workplace.

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assment law will 'chill' social relationships" are unfounded. Brown, supra note 45, at 454 n.110. Men and women will still enjoy friendly relationships in the workplace. In fact, an open dialogue between men and women about what conduct is offensive could improve the quality of these relationships. Id. "All that is required is a higher degree of disclosure of reaction by women and a higher degree of attention to that reaction by men." Id.

144. EEOC Guidelines, supra note 23, § 1604.11(f). The Guidelines continue:

An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id.