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# **ELLISON v. BRADY: FINALLY, A WOMAN'S PERSPECTIVE**

Debra A. Profio\*

## INTRODUCTION

In January, 1991, the Ninth Circuit Court of Appeals handed down a groundbreaking decision in the area of sexual harassment law.<sup>1</sup> In *Ellison v. Brady*,<sup>2</sup> the court determined that in Title VII<sup>3</sup>

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1. Judicially recognized forms of sexual harassment include unwelcome sexual advances, unwanted physical contact, offensive verbal conduct, and symbolic harassment. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 29 (1979); Barbara L. Zalucki, *Discrimination Law — Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 162–170 (1989). See also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (Court held actions constituted sexual harassment where supervisor made numerous sexual advances, fondled, and forcibly raped female employee); *Katz v. Dole* 709 F.2d 241 (4th Cir. 1983) (verbal abuse in the form of sexual slurs, insults, and innuendoes constituted sexual harassment); *Zabkowitz v. West Bend Co.* 589 F. Supp. 780 (E.D. Wis. 1984) (drawings depicting plaintiff in sexual acts held to constitute hostile environment); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (liability for sexual harassment imposed on employer based on pervasiveness of sexually-oriented magazines, pin-up pictures, and sexually demeaning remarks and jokes by plaintiff's male co-workers).

Congress passed Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination. 42 U.S.C. § 2000e-2(a) (1982). Two distinct categories of sexual harassment have evolved under which relief under Title VII may be sought. The first category is a *quid pro quo* action. In *quid pro quo* sexual harassment, a woman is forced to comply sexually or forfeit an employment benefit. MACKINNON, *supra*, at 32. The second category of sexual harassment, "hostile environment," concerns the situation "in which sexual harassment simply makes the work environment unbearable." *Id.* Hostile environment sexual harassment can have the "effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Zalucki, *supra*, at 151–52.

Victims of sexual harassment may suffer feelings of humiliation, degradation, shame, embarrassment, and anger. Additionally, significant physical effects such as

sexual harassment cases the facts must be judged from the perspective of a "reasonable woman." *Ellison* marked a change from such cases as *Rabidue v. Osceola Refining Co.*<sup>4</sup> which utilized a "reasonable person" standard in adjudicating the plaintiff's sexual harassment claim. In making its decision, the *Ellison* court stated that by requiring the use of the reasonable woman standard in sexual harassment cases, the court was attempting to bridge the gap between male and female perceptions of what conduct constitutes workplace sexual harassment.<sup>5</sup> This Note reviews and evaluates this Ninth Circuit decision and poses some questions about whether the reasonable woman standard will accomplish the *Ellison* court's stated goal.

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stomachaches, migraines, dizzy spells, and loss of appetite may occur. MACKINNON, *supra*, at 47.

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

3. Title VII of the Civil Rights Act of 1964 attempted to protect women against sex discrimination on the job by inserting the term "sex" in the language of Title VII. The term "sex" was hastily inserted the day before the legislation was passed; the main purpose of the legislation was the protection of ethnic groups in the work force. Robert Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 887, 880 (1967).

Title VII provides in pertinent part:

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

42 U.S.C. § 2000e-2(a) (1982) (emphasis added).

The Equal Employment Opportunity Commission ("EEOC") was created to guide implementation of and compliance with Title VII. According to the three-part definition of sexual harassment set forth by the EEOC:

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

Equal Employment Opportunity Commission Guidelines, 29 C.F.R. § 1604.11(a) (1988) [hereinafter EEOC Guidelines]. See also Zalucki, *supra* note 1, at 151-52.

In 1986, the United States Supreme Court in *Meritor* first recognized a "hostile environment" cause of action under Title VII for sexual harassment. In *Meritor*, the Court, relying on the EEOC Guidelines, determined that the scope of Title VII forbids a hostile work environment based on discriminatory sexual harassment. *Id.* at 66.

4. 805 F.2d 611 (6th Cir. 1986).

5. 924 F.2d at 881.

## I. THE REASONABLE WOMAN STANDARD

Kerry Ellison, the plaintiff in *Ellison*,<sup>6</sup> brought a Title VII sexual harassment claim against her employer, the Internal Revenue Service. The action stemmed from obsessive behavior by a co-worker, including a string of love letters, telephone messages, and other inappropriate conduct which frightened Ellison and made her working environment intolerable.<sup>7</sup>

Ellison's co-worker, Sterling Gray, first invited her to lunch and she accepted, as it was standard practice for revenue agents to eat lunch together.<sup>8</sup> Gray apparently viewed this luncheon differently than Ellison did and thereafter "started pestering Ellison with unnecessary questions and to hang around her desk."<sup>9</sup> After rejecting two other lunch invitations, Ellison was handed a message by her harassing co-worker which read:

I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.<sup>10</sup>

Ellison's subsequent avoidance of Gray was met with a three-page letter from him, full of sexual connotations, indicating that he had been watching her:<sup>11</sup>

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 [sic] so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks. . . . I will [write] another letter in the near future.<sup>12</sup>

Afraid of the potential consequences of Gray's behavior, Ellison felt that she could no longer work comfortably with him in the same office.<sup>13</sup> The obsessive tone of Gray's love letters left Ellison frightened of what may happen next. Ellison informed her supervisor of her co-worker's behavior and insisted that either she or Gray be transferred to another office.<sup>14</sup> Gray was subsequently transferred for six months. He was, however, granted permission to

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6. *Id.* at 872.

7. *Id.* at 874.

8. *Id.* at 873.

9. *Id.*

10. *Id.* at 874.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

return to the same office as Ellison a few months later.<sup>15</sup> Upon learning of Gray's return, Ellison became frantic and filed a formal complaint with her employer. The IRS settled this complaint in favor of Gray.<sup>16</sup> After the Equal Employment Opportunity Commission ("EEOC") confirmed the Treasury Department's decision on a different ground, Ellison filed suit in the district court alleging hostile environment sexual harassment.<sup>17</sup> The district court utilized the reasonable person standard and determined that the conduct was "isolated and genuinely trivial," thereupon granting defendant's motion for summary judgment.<sup>18</sup>

In reversing the lower court ruling, the Ninth Circuit applied the "reasonable victim" standard and determined that the harasser's conduct was sufficiently severe or pervasive to alter the conditions of Ellison's employment. The court determined that in proving that a defendant's conduct was sufficiently severe and pervasive so as to alter the conditions of a victim's employment, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."<sup>19</sup>

The *Ellison* court reasoned:

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.<sup>20</sup>

The court recognized that what men and women find objectionable may differ; therefore, it makes sense to consider the circumstances from the victim's perspective in evaluating the severity and pervasiveness of the harassment.<sup>21</sup> In particular, what a female victim may perceive as offensive behavior may not be perceived as such by the male harasser. The *Ellison* court further recognized that some women may consider sexually-oriented behavior by male co-work-

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15. *Id.*

16. *Id.*

17. *Id.* at 875.

18. *Id.* at 876.

19. *Id.* at 878. Repeated incidents usually create a stronger claim for hostile environment, but a single incident may be sufficient depending on its severity. *See, e.g., Vance v. Southern Bell Telephone & Telegraph Co.* 863 F.2d 1503, 1510 (11th Cir. 1989) (holding that a case for racial hostile environment was proven by two incidents of a noose hanging over an employee's work station).

20. 924 F.2d at 878.

21. *Id.*

ers threatening in light of the social reality that women are more likely victims of rape and sexual assault.<sup>22</sup> Men "may view [such] conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."<sup>23</sup> Thus, the court in *Ellison* attempted to close the gap in perceptions between what men and women view as threatening behavior by adopting the reasonable woman standard.

The court justified its ruling by declaring:

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'<sup>24</sup>

In applying the new standard, the Ninth Circuit determined that a reasonable woman in Ellison's position would have perceived Gray's behavior as sufficiently severe or pervasive to alter the conditions of her employment, or to create an abusive working environment.<sup>25</sup> By its ruling in *Ellison v. Brady*, the Ninth Circuit hoped to establish a standard of workplace conduct that would bridge the gap between male and female perception of "what conduct offends reasonable members of the other sex."<sup>26</sup>

## II. CRITICISM OF THE STANDARD

This transition from the reasonable person standard to the reasonable woman standard in Title VII sexual harassment cases raises many questions. Most importantly, can male jurors be sufficiently educated as to what conduct a woman would find offensive enough to create a hostile working environment? How will juries be educated as to the differences in male and female perspectives and the

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22. *Id.* at 879.

23. *Id.*

24. *Id.* at 880 (citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

25. *Id.*

26. *Id.* at 881.

ramifications of allowing sexual harassment to continue in the workplace?<sup>27</sup>

A. *The Transition from Reasonable Person to Reasonable Woman: Accounting for Difference*

Prior to *Ellison*, most courts employed a reasonable person standard in evaluating the severity of alleged sexual harassment.<sup>28</sup> The reasonable person, following its predecessor, the reasonable man, embodies the "standard of conduct which the community demands. [The law demands that this standard] be an external and objective one, rather than [that of] individual judgment . . . of the particular actor; and it must be, so far as possible, the same for all persons. . . ." <sup>29</sup> This person is a "personification of a community ideal of reasonable behavior, determined by the jury's social judgment."<sup>30</sup>

The conduct of the reasonable person may vary in any given situation; consequently, the trier of fact is directed to consider the factual circumstances and measure the actor's behavior by what the "reasonable person" would do "under the same or similar circumstances."<sup>31</sup> Therefore, the standard encompasses both objective and subjective factors:<sup>32</sup> an objective standard which utilizes the community ideal of reasonable behavior by applying the reasonable person standard and a subjective standard by considering the particular factual circumstances to determine whether the conduct at issue was reasonable.

Commentators, such as Guido Calabresi, have criticized the shift from the reasonable man standard to the reasonable person standard,<sup>33</sup> suggesting that this transition was purely semantic.<sup>34</sup>

27. Another important question is whether the Ninth Circuit decision will lead to utilization of even more victim-specific standards, such as those incorporating race and class considerations. Would courts, for instance, impose a "reasonable Asian woman" standard if the victim is Asian or a "reasonable middle class white woman" standard if the victim is white and middle class? Critics suggest that *Ellison* might lead to the imposition of victim-specific standards in every case where the standard is "reasonableness." Joanna Stark Abramson, *Sex Harassment Case Praised, Panned For Easing Jury Access*, MICH. LAW. WKLY., June 3, 1991, at 1.

28. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 7611 (6th Cir. 1986); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

29. W. KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* 173-74 (5th ed. 1984).

30. *Id.* at 175.

31. *Id.*

32. *Id.*

33. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES & THE LAW* 30 (1985).

34. *Id.* at 30.

While recognizing that the shift to a reasonable person standard attempts to encompass the viewpoints of many groups, these commentators argue that the standard has fallen short of such expectations when actually applied. Though there has been a semantic change in the standard of reasonableness under the "reasonable person" standard, reasonableness is still measured by upper-middle class male values. The fictitious reasonable person standard explicitly uses middle class, male values as the objective standard, treating those values as representative of American society. This tradition has historical roots. For example, Roman law envisioned the reasonable person as "the good father of the family."<sup>35</sup> Today, the image of the reasonable person invoked in the United States is of "the man who takes the magazine at home and in the evening pushes the lawnmower in his shirt sleeves."<sup>36</sup> By invoking male stereotypes, the reasonable person standard excludes those whose role has never been defined in terms of lawn-mowing or magazine reading. Thus, despite its facial gender and class neutrality, the reasonable person standard continues to ignore any viewpoint other than that of the middle class male.

*Rabidue v. Osceola Refining Co.*<sup>37</sup> provides a vivid example of male-oriented application of the reasonable person standard in Title VII sexual harassment cases. The Sixth Circuit in *Rabidue* determined that a trier of fact must adopt the perspective of a reasonable person when judging whether the conduct in question constitutes sexual harassment. The plaintiff in *Rabidue* charged her employer with creating a hostile work environment by permitting various forms of sexual harassment in violation of Title VII. Ms. Rabidue alleged that a co-worker continually made vulgar and obscene comments about women generally,<sup>38</sup> sometimes directing them at her, and that male employees displayed pictures of nude or scantily-clad women around the workplace without reprimand.<sup>39</sup>

The *Rabidue* majority applied the reasonable person standard and held that the defendant's behavior was not so startling as to seriously affect the psyche of a reasonable person; thus, Ms. Rabidue failed to prove a hostile environment.<sup>40</sup> This decision was made despite a clear record that the work environment at the Osce-

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35. *Id.* at 23.

36. *Id.*

37. 805 F.2d 7611 (6th Cir. 1986).

38. *Id.* at 615.

39. *Id.*

40. *Id.* at 622.



ola Refining Company was permeated with misogynistic paraphernalia and behavioral patterns. For example, one poster showed a "prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'"<sup>41</sup> This poster remained on the wall for eight years.<sup>42</sup> Various remarks referring to women as "whores," "cunt," "pussy," and "tits" were routinely made by one of Ms. Rabidue's male co-workers.<sup>43</sup>

The *Rabidue* dissent acknowledged the severity of the misogynistic atmosphere at Osceola Refining Company and advocated using a "reasonable victim" standard to analyze whether the conduct alleged by the plaintiff created a hostile environment. The dissent argued that the majority's reasonable person analysis of the plaintiff's substantive claims was erroneous, since "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."<sup>44</sup> By utilizing the reasonable person standard in sexual harassment cases, the dissent suggested that courts "are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."<sup>45</sup> Therefore, by denying the plaintiff's claim in *Rabidue*, the majority, in essence, sent a message that pornography and lewd comments in the work place are acceptable, thereby allowing men to behave in a manner offensive to women without fear of punishment.

The *Rabidue* dissent and the *Ellison* majority, by advocating the use of a reasonable woman standard when determining whether a hostile work environment has been created, reinforce the distinction between the perceptions of women and men. These opinions recognize the male bias inherent in the application of the reasonable person standard, as well as the disparity between male and female perceptions of harassing conduct. The *Ellison* court, employing a reasonable woman standard, refused to ratify the prevailing level of

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41. *Id.* at 624 (Keith, J., dissenting in part).

42. *Id.*

43. *Id.*

44. *Id.* at 626 (Keith, J., dissenting in part).

45. *Id.* at 626. Subsequent cases indicate that the reasonable woman standard has not been adopted uniformly in all circuits. *See, e.g.,* *Brown v. General Motors Corp.*, No. 88-0568-CV-W-9, 1991 U.S. Dist. LEXIS 14779 (10th Cir. Oct. 9, 1991) (utilizing reasonable person standard); *Kouri v. Liberian Services, Inc.*, No. 90-00582-A, 1991 U.S. Dist. LEXIS 4153 (4th Cir. Feb. 6, 1991) (utilizing reasonable person standard); *Harlow v. City of Kansas City*, No. 89-0623-CV-W-6, 1991 U.S. Dist. LEXIS 7596 (8th Cir. May 29, 1991) (utilizing reasonable person standard); *cf. Smolsky v. Consolidated Rail Corp.*, No. 90-4634, 1991 U.S. Dist. LEXIS 18301 (3d Cir. Dec. 12, 1991) (utilizing reasonable woman standard).

sexual harassment in the workplace as opposed to the *Rabidue* majority which allowed sexually harassing behavior to continue in the workplace. By requiring an analysis from the victim's perspective, the *Ellison* court has increased the likelihood that the trier of fact will consider the current position of women in society and their sensitivity to certain conduct which men might find unobjectionable.

Prior to *Ellison*, other courts also explored the different perspectives between men and women. In *Yates v. Avco Corp.*,<sup>46</sup> the Sixth Circuit, utilizing a reasonable woman standard, acknowledged that "men and women are vulnerable in different ways and offended by different behavior."<sup>47</sup> A year later, the First Circuit in *Lipsett v. University of Puerto Rico*<sup>48</sup> also considered the differences in perspectives between the sexes. According to the First Circuit, "a male supervisor might believe . . . that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive."<sup>49</sup>

Despite the apparent difference in perspectives between men and women, some commentators have criticized the transition from reasonable person to reasonable woman in sexual harassment law. These commentators argue that, while the reasonable person standard arguably takes both the female and male perspective into account, the reasonable woman standard would automatically take only the woman's perspective into account.<sup>50</sup>

The problem with rejecting the use of the reasonable woman standard is that, in application, the reasonable person standard ignores the perspective of women. At least one post-*Ellison* case, decided under a reasonable person standard, demonstrates that application of the reasonable person standard does not adequately reflect the concerns of female victims of sexual harassment. On

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46. 819 F.2d 630 (6th Cir. 1987).

47. *Id.* at 637.

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

49. *Id.* at 898. See also Nancy S. Ehrenreich, *Pluralistic Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (asserting that the majority opinion in *Rabidue* is consistent with attitudes of men who tend to view milder forms of harassment, such as suggestive looks, requests for dates, and sexist jokes, as harmless social interactions to which only overly-sensitive women would object); Kathryn Abrams, *Gender Discrimination & The Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (suggesting men view sexual taunts, inquiries, or magazines as harmless amusement).

50. Terri Pristin, *Feminists Make Their Legal Case; Some Scholars Are Arguing that the Legal System is Biased Because it Reflects Male Values. Judges are Starting to Listen*, L.A. TIMES, Mar. 15, 1991, at A1.

facts arguably more egregious than *Ellison*, the district court in *Kouri v. Liberian Services, Inc.*<sup>51</sup> held that the plaintiff did not prove the creation of a hostile environment in violation of Title VII because she failed to show that the alleged sexual harassment was unwelcome and that it was sufficiently severe or pervasive to create an abusive working environment.<sup>52</sup>

In *Kouri*, the plaintiff's male supervisor insisted on escorting her to and from her office, decided to whom she could and could not speak while at work, and insisted on walking plaintiff to her car each night.<sup>53</sup> Twice, the plaintiff's supervisor insisted on escorting the plaintiff home and, instead of leaving the plaintiff at her front door, walked her all the way to her bedroom, sat on her bed, and massaged the plaintiff's hands, despite her insistence that he leave.<sup>54</sup>

The court stated that the plaintiff did not make any "realistic" effort to cut off the defendant's behavior<sup>55</sup> and alleged that the plaintiff "fed off" the defendant's "fragility."<sup>56</sup> The court was not convinced that the defendant's conduct was unwelcome. In justifying its decision, the court reasoned:

Most importantly, however, Kouri did not once make a serious demand on Todd to stop paying such close attention to her. She indicated that she continually asked him not to touch her and that she attempted to avoid his hugs, yet it seems certain that her requests were not delivered with any sense of urgency, sincerity, or force. In essence, she was sending out mixed signals.<sup>57</sup>

Further, the court sympathized for the supervisor in this case, stating that "the evidence demonstrated that [plaintiff's supervisor] lived in something of a fantasy world, like a faithful dog, constantly expressing his affection and hoping to receive more of the same in return."<sup>58</sup> Ultimately, the court determined that the defendant's conduct would not have interfered with a reasonable person's working environment so as to affect his or her psychological well-being in violation of Title VII. In fact, the court suggested that the plaintiff was attempting to "stick" defendant with the blame for all "her

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51. No. 90-00582-A, 1991 U.S. Dist. LEXIS 4143 (4th Cir. Feb. 6, 1991).

52. *Id.* at \*24.

53. *Id.* at \*3.

54. *Id.* at \*4.

55. *Id.* at \*16.

56. *Id.*

57. *Id.* at \*17.

58. *Id.* at \*18.

psychological woes"<sup>59</sup> and that if she had acted like a reasonable person, she could have stopped him.<sup>60</sup>

If the trial court in *Kouri* had applied the reasonable woman standard to these facts, the outcome may have been different. Any reasonable woman under these circumstances would likely have been frightened and bothered by the defendant's behavior and felt that it created an intimidating, hostile, or offensive working environment. Indeed, the facts of *Kouri* seem more outrageous than those in *Ellison* since, unlike Ellison, Kouri's every move was restricted by her harasser. In addition, Kouri was harassed by her supervisor, not by her co-worker as in *Ellison*. If, under the reasonable woman standard, the defendant's conduct in *Ellison* created a hostile environment under Title VII, certainly the defendant's behavior in *Kouri* constituted a hostile environment.

#### B. *The Reasonable Juror*

One problem with invoking the reasonable woman standard is in its application: can we really expect *men* to think about and understand how a *woman* would perceive certain environments and behavior? One critic has stated:

Now there is a big unknown. What would a 'reasonable woman' think? Can a man on a jury ever decide what a reasonable woman would find to be impermissible conduct? Wouldn't every person who didn't have the criterion of the plaintiff have trouble deciding the facts?<sup>61</sup>

Ironically, this same objection was made decades ago, when commentators questioned the ability of women jurors to think and decide cases logically and rationally.<sup>62</sup> When women were first allowed to sit on juries, there was doubt that women could overcome their "feminine logic" and "women's intuition" and apply the reasonable man standard.<sup>63</sup> Such sentiments eventually were dismissed when commentators began rejecting the notion "that men have a monopoly on the characteristics of good jurors."<sup>64</sup> Over time, such sentiments became less influential as more women served on juries with favorable responses from judges, and men came to

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59. The plaintiff apparently had a history of medical problems, including clinical depression, miscarriages, migraines, anxiety, and sleeplessness. *Id.* at \*7.

60. *Id.* at \*19.

61. Abramson, *supra* note 27, at 1.

62. Shirley S. Abrahamson, *Justice & Jurors*, 20 GA. L. REV. 257, 267 (1986).

63. *Id.* at 267.

64. *Id.*

recognize that women could be good jurors.<sup>65</sup> Will a similar result occur when courts require male jurors to apply the reasonable woman standard in sexual harassment cases? Will men eventually become educated enough in the perceptions of women to know what conduct constitutes sexual harassment in the eyes of a woman?<sup>66</sup>

Short of the unlikely event of all-female juries in sexual harassment cases, perhaps allowing expert testimony in these actions will assist in educating men about the perceptions of women and the ramifications of allowing sexual harassment to perpetuate in the workplace. In *Robinson v. Jacksonville Shipyards, Inc.*, the Middle District of Florida indicated that the reasonable woman standard should be used and expert testimony should be allowed in sexual harassment cases. In *Robinson*, both plaintiffs and defendants were allowed to present expert testimony. In fact, the court relied heavily on plaintiff's expert testimony on sexual stereotyping in determining that the conduct by plaintiff's co-workers constituted a hostile environment. According to the court, the testimony of plaintiff's expert witness:

provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provide[d] an evidentiary basis for concluding that a sexualized working environment is abusive to a woman because of her sex.<sup>67</sup>

The allowance of expert testimony such as the type permitted in *Robinson* makes clear the direct relationship between various forms of sexual harassment and the creation of a hostile environment for female workers. For this reason, it would be a benefit to the overall effectiveness of the reasonable woman standard if more courts follow the example of the Middle District of Florida. An inequity, however, may occur because of the expense involved in hiring expert witnesses. The exorbitant cost of employing some expert witnesses may be prohibitive to certain plaintiffs. An employer, on the

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65. *Id.*

66. There is little evidence to support a definitive conclusion on whether men will eventually become educated enough about the perceptions of women to know what conduct constitutes sexual harassment in the eyes of a woman. Many cases of sexual harassment are dismissed upon summary judgment motions or are bench trials, thereby eliminating the possibility that the case will be brought before male jurors. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (bench trial); *Smolsky v. Consolidated Rail Corp.*, No. 90-4634, 1991 U.S. Dist. LEXIS 18301 (3d Cir. Dec. 12, 1991) (dismissed upon motion for summary judgment).

67. *Robinson*, 760 F. Supp. at 1505.

other hand, may have the means more readily available to hire experts.

Another method of educating both male and female jurors would be to modify jury instructions to conform to the reasonable woman standard, and to provide an explanation of what the reasonable woman standard means in terms that a jury can understand. In a recent seminar given by the American Bar Association Section of Torts and Insurance Practice Committee on Employer-Employee Relations, various form jury instructions were distributed to the attendees. Among these form jury instructions was a model instruction explaining the use of the reasonable woman standard in determining whether workplace sexual harassment has occurred.<sup>68</sup>

The instruction provides:

In determining whether a hostile environment of sexual harassment exist[s] . . . you should apply a reasonable woman standard. This standard requires you to take into account the experiences and perceptions of women. If you find the conduct complained of by plaintiff sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, then you should find that sexual harassment existed. In applying the reasonable woman standard you must avoid stereotyped notions of acceptable behavior.<sup>69</sup>

Clearly such an instruction would be most effective when coupled with expert testimony explaining to the jury what stereotyped notions of acceptable behavior are and the effects of allowing such notions to enter into the workplace. Perhaps with the aid of expert testimony and jury instructions, men serving on juries will begin to understand the perspective of sexual harassment victims and the unfortunate impact this harassment has on their lives. This education of the jury may lead to a more accurate and consistent application of the reasonable woman standard.

### C. *Broader Implications of Ellison*

The symbolic importance of the shift from the reasonable person to reasonable woman standard in sexual harassment cases is significant. This move by the Ninth Circuit indicates that the views of women are gaining recognition and importance. By using a reasonable woman standard, the problem of sexual harassment in the workplace will be given greater attention. At least in the cases

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68. Harriet E. Cooperman, *The Plaintiff's Jury Instructions in a Hostile Environment Sexual Harassment Case 6* (Mar. 5, 1992) (unpublished manuscript, on file with the author).

69. *Id.*

brought to trial, the parties involved will be informed that certain behavior is perceived differently by women and that such behavior has serious consequences.<sup>70</sup> The significance of the problem of sexual harassment will hopefully not be limited to discussions within the courtroom, but will be disseminated within the communities.

To this end, one potential result of *Ellison* may be that more women will be encouraged to bring sexual harassment claims, since they may believe they have a greater likelihood of prevailing in their claims.<sup>71</sup> The filing of more claims may lead to further recognition of the problem of sexual harassment in the workplace. As a result, employers may invoke measures to solve the problem.<sup>72</sup>

### CONCLUSION

This new reasonable woman standard appears beneficial to women because more claims may reach the jury and, thus, more women may prevail through the jury's application of the reasonable woman standard. In light of the criticisms set forth above and the less than uniform acceptance of the standard in other jurisdictions, however, this result may be slow to come.

Moreover, use of the reasonable woman standard will prove an inadequate remedy if juries and judges are not educated to understand the plights and perceptions of women in the workplace and in society as a whole. Educating members of society about issues concerning women as a group will be essential to the successful implementation of this standard since this education will carry over to the bench and jury boxes. The advancement of women in the workplace, seminars focusing on sexual harassment, effective administrative remedies, and allowance of damages to victims of sexual harassment<sup>73</sup> are other alternatives which should be explored. If

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70. Stephen G. Hirsch, *Legislators Seek to Clarify Sexual Harassment Laws; Speier Wants to Adopt U.S. Court's Gender-Based Standard*, RECORDER, Feb. 3, 1992, at 1.

71. Some critics declare that the new standard will mean more cases get to the jury. Abramson, *supra* note 27, at 1.

72. An even broader method of educating society on the ills of sexual harassment is via legislative action. The *Ellison* decision has been a key factor in the proposal of a recent California legislative bill. Assemblywoman Jackie Speier (D-South San Francisco) has introduced AB 2265 designed to aid the victims of sexual harassment. The bill proposes to codify the use of the reasonable woman standard in sexual harassment cases and to lengthen the statute of limitations for victims filing sexual harassment complaints with the Department of Fair Employment and Housing from one to two years. Hirsch, *supra* note 70, at 1.

73. The new Civil Rights Act of 1991 permits such damages. Civil Rights Act of 1991, 105 Stat. 1071, 1073 (1991) (codified as amended at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

these changes are not made, we may be left with a purely semantic change from "reasonable person" to "reasonable woman" and the unfortunate result of male perceptions continuing to dominate the application of the standard used to adjudicate Title VII sexual harassment claims.



