Women Treated Differently: Why the “Reasonable Woman” Standard Might Not Be Reasonable

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Abstract

Sexual harassment law addresses hostile environments by evaluating whether the workplace environment would be considered hostile by a “reasonable woman.” But who is a reasonable woman? Defendant-employers may present one group of women employees as representative “reasonable” women and assert that any of these women’s co-workers who have had different experiences with regard to sexual harassment are not “reasonable.” However, when male employees categorize various groups of female co-workers differently and, subsequently, treat them differently, the experiences of women from one of these groups would not be indicative of the experiences of women from another group. This “selective sexual harassment” was present in the workplace I studied: while both groups of women were “reasonable,” they had very different experiences, only one of which might be confirmed by a court as the perspective of “reasonable” women. This article advocates for a version of the “reasonable victim” standard to facilitate a closer analysis of hostile environment sexual harassment suits.

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Determination of who should be recognized by the law as “reasonable women” proves difficult when groups of women employees are treated differently from other groups of women employees at the same worksite. The law assumes that a discriminating employer treats all women similarly (Crenshaw, 1988; Welsh, 1999). However, workplace dynamics are more complex than a simple comparison to a hypothetical employee permits. When the court is confronted with different groups of women who experience their shared workplace differently, it may privilege the understanding and experiences of one group over the other (Crenshaw, 1988; Welsh, Dawson, & Nierobisz, 2002). Various scholars have demonstrated that which group’s point of view is adopted greatly affects how a case will be decided (e.g., Schultz, 1998; Weiner et al., 2002; Welsh, 1999).

In this study, I draw on empirical data to illustrate how similar women workers on the same shifts at the same company might be treated very differ-
ently by their male co-workers and, thus, have different workplace experiences. At the particular worksite studied, men’s assignment of labels to different groups of women created radically different workplace experiences for each group of women. Some women were labeled “heterosexual” while others were labeled as “lesbian” – labels that did not perfectly match the reality of the women’s own self-definition. This differential treatment of groups of women resulted in one group being sexually harassed while the other group was not. I refer to this phenomena as “selective sexual harassment.”

Such selective sexual harassment of only some of the women employees could be used and misconstrued by the defendant-employer to counter legitimate claims of hostile environment sexual harassment. Sometimes employers counter claims of sexual harassment by presenting testimony from women who did not experience hostile environment sexual harassment at the same worksite with the same male co-workers as the women who brought the discrimination suit. The non-harassed women’s testimony raises the question of whose workplace experience is believable. By presenting these non-harassed women’s testimony, employers attempt to discredit the harassed workers, making their accusations seem inaccurate, oversensitive, or dishonest. This strategy implicitly asserts that only one version of the workplace can be correct: either all women were harassed or none were.

To accurately address this situation, the court must comprehend the dynamics of the worksite in question and the effects of selective sexual harassment of differently labeled workers. Otherwise, without a more nuanced understanding of the workplace situation by the court, the non-harassed group of women could easily be presented as the standard for “reasonable women” at that worksite and plaintiff-employees might seldom defeat this employer defense.

In this article, I argue that the reasonable woman standard is insufficient to represent the complexity of workplace sexual harassment. When the reasonable woman standard allows some women at a worksite to be held as the standard for “reasonableness” while others, by contrast, are deemed “unreasonable,” it fails to embrace women’s workplace reality: that similar, side-by-side coworkers might experience the workplace differently. This means that some women might be harassed, experiencing a hostile work environment, while their female coworkers are not. Therefore, this paper concludes by advocating a “reasonable victim” standard that will facilitate a closer examination of the workplace circumstances of the plaintiff-employee. This level of examination would allow attorneys to distinguish between differently treated groups of women co-workers. This more nuanced understanding could enable the court to identify and comprehend selective sexual harassment.
Review of the Literature

 Hostile Environment Sexual Harassment – Who is “Reasonable”? 

Since the courts adopted the idea of hostile-environment sexual harassment (Bundy v. Jackson, 1981) – and, later, the Supreme Court (Meritor Savings Bank v. Vinson, 1986) – a primary challenge of sexual harassment law is to define when harassment becomes so severe and prevalent that it creates a hostile environment. In seeking to assess this, the courts began moving from a “reasonable person” standard to a “reasonable woman” standard, beginning with Judge Keith’s dissent in Rabidue (Rabidue v. Osceola Refining Co., 1986). In 1991, the Ninth Circuit Federal Appellate Court developed the reasonable woman standard (Ellison v. Brady, 1991): “conduct a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.”

A key defense of a defendant-employer facing a hostile environment sexual harassment charge would be to argue that the plaintiff is hypersensitive and is reacting unreasonably; if the plaintiff’s reaction is truly unwarranted, then the employer should not be held responsible to placate such an over-sensitive person (Welsh, 1999). The employer could demonstrate the plaintiff’s unreasonableness by showing that a typical “reasonable person” or “reasonable woman” would not have the same reaction as the “extreme” stance of the plaintiff (Cahn, 1992).

However, a more powerful defense than using a hypothetical reasonable woman would be to provide testimony from the plaintiff’s female co-workers who were exposed to the same environment with the same male co-workers at the same time who state that they did not experience a hostile environment (Burns, 1995). Such testimony could be persuasive evidence that the plaintiff misunderstood or was overly-sensitive to the “harmless” actions of her male co-workers. Sometimes this is a sufficient defense, but other times it is not successful (e.g., Harris v. Forklift Sys., 1993 in which the defense lost even though other employees testified that the defendant was offensive but did not create a hostile work environment).

But what if only a specific group of women – only those labeled in certain ways by their male co-workers – are the subject of sexual harassment? This would mean that other women at the worksite did not experience such harassment.

Thus, the question, which group constitutes “reasonable women,” becomes crucial (Goodman-Delahunty, 1999; Schultz, 1998; Weiner et al., 2002). The implications of selective sexual harassment are that women who raise hostile environment sexual harassment claims might have to confront testimony from other similar-seeming women co-workers stating that they did not experience any sexual harassment (Schultz, 1998; Welsh, Dawson, & Nierobisz, 2002). The courts’ reluctance in acknowledging the contrary experiences of different groups of similar-seeming women has important legal
When the law denies the presence of differently treated groups of women employees, the court assumes that the woman has been treated in a way that she has not and subsequently bases its decisions on incorrect understandings of the plaintiff’s experiences (Goodman-Delahuntys, 1999; Welsh et al., 2002). Moreover, if the plaintiff belongs to a smaller subgroup of women, which experiences very different treatment than the larger group of women, she will have even greater difficulty winning her suit (Crenshaw, 1988).

**Token Women and Workplace Segregation**

Kanter’s research demonstrates that differently labeled women in the same organization who work with the same male co-workers might be treated very differently. If the women of one of the groups experiences hostile sexual harassment, then this difference in treatment could have important consequences, should the harassed women bring their grievance to trial. This disparity in treatment means that the account of one woman cannot be assumed to represent the circumstances for other differently labeled women co-workers. The effect of these different labels means that the various groups of women experience their shared workplace differently.

The likelihood that groups of women co-workers may be differently labeled and treated very differently by their male co-workers is greater when these women are in a numeric minority at their workplace, i.e., when they are “token” women employees, as is the situation for the women in this study. Kanter found that male colleagues rarely saw token women as individuals, but rather as gender stereotypes, often used to reinforce the dominant masculine subculture (1982).

A good example of this is Paap’s work on women in construction, where women constitute only 2% of the workforce. She explains that who one is matters less than how one is labeled in determining one’s treatment in the workplace (1999). Paap demonstrates how the inclusion of small groups of women in traditionally male industries is explained away by dismissing the individual women as “You’re either a bitch, a dyke, or a whore” (1999 p. 168).

**My Research Focus**

The impact of different labels for similarly situated, but alternately labeled, women is that some women could suffer severe sexual harassment while others experience none at all – the phenomena I call “selective sexual harassment.” Thus, which group of women constitutes “reasonable women” and, therefore, which experience will be privileged by the court is crucial to plaintiffs receiving a fair and adequate hearing of their complaint.
The reasonable woman standard is problematic because it does not recognize that women in the same worksites might be treated very differently, with some being harassed while others are not (Goodman-Delahunty, 1999). In other words, different groups of “reasonable women” may have very contradictory workplace experiences. Thus, the reasonable woman standard allows defendant-employers to present one group of women employees as representative “reasonable” women, and, thus, asserts that any of these women’s co-workers who may have had different experiences, particularly with regard to sexual harassment, are not “reasonable.” At the workplace I studied, one group of women was harassed while the other was not, based on which labels their male co-workers assigned to them. Thus, while both groups of women were “reasonable,” they had very different experiences, only one of which might be confirmed by a court as the perspective of “reasonable” women.

Therefore, in order to understand hostile environment sexual harassment and adequately assess the “reasonableness” of harassment claims, a careful understanding of workplace dynamics needs to be developed. In particular, selective sexual harassment needs to be studied to learn how some women can be singled out for harassment while their female co-workers beside them on the same shift are not. In this paper, I explore selective sexual harassment and discuss its implications for sexual harassment law.

Sampling and Methods

I draw on interview and observation data from a cooperative taxicab company, “Coop Cab” which employs approximately 150 workers, 16.3% of whom are women. This percentage is just above Kanter’s definition of “token workers” as being at or below 15% (1982). This is a particularly good organization for studying selective sexual harassment because not only are men numerically predominant at this particular company, but the company is in a male-dominated industry. For example, even though some of the women had been involved in the founding of the organization and had greater tenure at Coop Cab than many male workers, these women often had the less desirable shifts and were less frequently promoted. Thus, this company offers insights applicable to other companies in male-dominated industries.

Although the interviews were semi-structured, all interviews – ten women and ten men – were open-ended. The interviews averaged two and one-half hours; the shortest one ran just under an hour, and the longest duration was nearly five hours. I used a set of predetermined questions as initial probes on a wide variety of work-related topics. Follow-up questions were based on each interviewee’s response. With each structured set of questions, I encouraged the informants to tell me “anything they thought applied.”

In addition to interviews, I also observed meetings, attended formal grievance meetings, “hung out” in the break room, and read several years’
worth of back issues of the company newsletter. Although these are not specifically cited in this paper, they contributed to my knowledge of the cab company.

Since a key aspect of this research involved people’s perceptions of sexual harassment, I had the interviewees themselves define “sexual harassment.” In many interviews, the term sexual harassment was brought up by the interviewees themselves. I deliberately chose not to offer the legal definition of harassment on the basis of sex as defined in Sec 703 of Title VII of the Civil Rights Act (1964), because I feared this official definition would inhibit the interviewees from using their own definitions of “sexual harassment.”

Because I am interested in men’s treatment of their women co-workers, I was careful to triangulate my data on this phenomenon. “Triangulation” refers to collecting stories of the same phenomena from interviewees with very different perspectives (Stake 1994). This allows me to explore a given phenomenon — such as sexual harassment — from a variety of standpoints, thus, substantiating that the researcher’s evolving understanding of the phenomenon is accurate and not simply reflecting the bias of an insular group of friends. By triangulating, I was able to confirm the dynamics the interviewees described, thus, heightening the validity of the data. To gather this information, I asked about men’s accounts of themselves, men’s accounts of other men’s behavior, and women’s accounts of men’s behavior. Each way of gathering this data produced similarly accurate accounts.

Results

At the worksite I studied, men divided their women co-workers into two groups and assigned different labels to each group. Based on these labels, men sexually harassed some women, but left others alone. The label each woman received did not necessarily reflect the woman’s self-identity, but rather reflected how her male co-workers perceived her and chose to treat her. These findings raise important questions about the efficacy of the reasonable woman standard. If the workplace experiences of the non-harassed women can be privileged as the accurate version of that worksites’ gender dynamics and, therefore, the “reasonable” woman’s perspective, then the harassed women are cast as the “unreasonable” women whose workplace experiences presumed inaccurate. Thus, the reasonable woman sexual harassment standard might not only be inadequate but even regressive in trying to address complex workplace situations. In this section, I present data that illustrate this selective sexual harassment of one of these groups of women.

Men’s Labeling and Differential Treatment of Women Co-workers

The men at Coop Cab labeled their women co-workers and treated them differently based on those labels. Men sub-categorized the women at Coop Cab based on their perceptions or assumptions about these women’s sexual orientation. Each woman was placed into one of two categories: heterosexual
or lesbian. Men’s statements – as well as those of heterosexual, bisexual, and lesbian women – support this assessment that their labeling was binary.

These labels were not random or meaningless classifications. The labels “heterosexual” and “lesbian” implied certain types or stereotypes of women. Women whom the men labeled “heterosexual” were perceived by the men as inherently and always interested in romantic or sexual relationships with them. In contrast, the women whom the men labeled “lesbian” were seen as not only disinterested in intimate relations with the men co-workers, but as disdainful of all male contact. The perceptions of these labels greatly affected the nature of interactions between men and women within the company and, specifically, the likelihood of sexual harassment of individual women. While the particular names of the labels have importance and meaning outside their use for differential treatment, this paper focuses specifically on how the labels were used to harass some women while others were not harassed.

Importantly, the labels had nothing to do with sexual orientation per se; the phenomena of selective sexual harassment could have occurred with any other labels. The labels were distinct from women’s own identities – sometimes the labels correlated with the woman’s own self-identification, but other times they did not. Yet, in both situations, the labels had powerful effects on how the men treated their women co-workers and how these women experienced their workplace environment. Thus, the labels are important because they constitute an essential first step in engaging in differential treatment.

For example, Jo, who had been at the company for about seven years, preferred the men at the cab company to label her as a lesbian because she felt she was treated better by them when thus defined.

Jo: Sometimes I get treated like a lesbian, sometimes I get treated like a straight woman. I don’t like being treated like a straight woman. I actually think there is [a difference in treatment]. Generally speaking, I prefer people think of me as a lesbian… I find people approach me with just a lot more ease if they perceive that I’m straight. The men have learned their lessons with the lesbians, to be a little more stand-offish. If they’re single men, they treat the straight women like potential dates, someone to fuck, and that is different.

This “strategy” for avoiding sexual harassment by actively trying to be labeled lesbian is a strategy that several other women discussed. The experience reported by Jo and other women at Coop Cab – that lesbians workers were harassed less and that the women often preferred a label of “lesbian” to “heterosexual” – is contrary to the findings of other researchers who document virulent harassment of lesbian workers at other businesses (e.g., Schneider, 1982; Welsh, 1999).
Some “testing” of this assertion about Coop Cab’s selective sexual harassment was provided by the experiences of Mimi and Melody. These data are particularly instructive, since they demonstrate that the labels had little to do with women’s own identities and more to do with their male co-workers’ perceptions and treatment of the women. The labels of Mimi and Melody changed, Mimi’s through “coming out” and Melody’s by switching to a male partner. They both reported that how they were treated changed when their labels changed.

Mimi, who had come out to only some of her co-workers at the time of the interview, discussed how men’s reactions to, and interactions with, her changed as she came out to more and more people at the cab company. Below, Mimi describes an incident in which she stood up to her harasser who had labeled her “heterosexual.” In this occasion, a male co-worker, in front of other drivers, asked her to meet him at the airport to have sex with him.

Mimi believed that sexual harassment had been an issue because she was not completely out to everyone at the cab company and was labeled by some men as heterosexual and by others as lesbian.

Melody related experiences in which she felt that sometimes men labeled her as heterosexual and treated her one way, and other times categorized her as lesbian and treated her another way. When labeled as heterosexual by the men, these co-workers interacted with Melody more regularly, although the interactions were not always pleasant. However, when she was labeled as lesbian, she had significantly less interaction with the men at work but avoided sexual harassment. For example, Melody observed different behaviors from male co-workers depending on the sex of her current partner – and, hence, the label ascribed to her.

Melody: When I just started working here I was going out with a woman and then I started seeing a man...If you’re kind of established as a lesbian you don’t get harassed by the men at work. Once it got out [that I then was dating a man], it’s kind of open for question, some of them will try and...
make passes. I just don’t like it. It’s like if I was looking, believe me you’d know. It’s not like you have to find it out.

Melody’s experience is particularly illustrative when that other, heterosexual-labeled women employees received especially trenchant sexual harassment when they first joined the company. Thus, both groups of women, whether labeled lesbian or heterosexual, might have encountered difficulties with their male co-workers as a group. Yet, only one group – the heterosexual-labeled women – experienced hostile environment sexual harassment: the dynamic of selective sexual harassment.

Discussion

This dynamic of selective sexual harassment (in the case of Coop Cab, male harassment of only heterosexual-labeled women co-workers) provides an important addition to the extant theory on hostile environment sexual harassment. This differential treatment of women workers – regardless of which particular labels are used to create this split – is rarely discussed in the cases and literature on sexual harassment. However, it poses an important issue regarding sexual harassment discrimination and, especially, the use of the reasonable woman standard.

These data illustrate how similar women in the same company with the same co-workers could experience very different levels of harassment – in fact, could have very different workplace experiences overall – depending on how they are labeled by their male co-workers. While this phenomenon of seemingly similarly-situated women being treated differently is, in itself, worthy of discussion and further exploration, this paper focuses on its implications for sex discrimination suits. Specifically, this selective sexual harassment of some women but not others in the same workplace poses problems for the prosecution of hostile environment sexual harassment cases in that the non-harassed co-workers could potentially offer counter examples that could bolster an employer’s defense. These non-harassed workers could be called on by their employers to demonstrate that they, as “reasonable women,” did not experience a hostile environment, thus questioning whether the plaintiffs qualify as “reasonable women” with worthy grievances.

Conclusions

One way to address the problem of selective sexual harassment would be by adopting a “reasonable victim” standard. This is somewhat similar to the “reasonable-person-in-the-plaintiff’s-position” standard applied by some courts; however, this reasonable victim standard goes beyond consideration of the plaintiff’s “fundamental characteristics” and general status, to also consider all relevant dynamics of the victim’s workplace and differential treatment. (See Brown v. Hot, Sexy, & Safety Prods. Inc., 1995; West v. Phila. Eliec. Co., 1995).

This “reasonable victim” standard circumvents many of the concerns over the reasonable woman standard, but, most importantly, focuses the at-
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tention on the circumstances of the specific plaintiff in her particular situation. In operationalizing a true “reasonable victim” standard, the court would address the entirety of the plaintiff’s workplace situation. This level of analysis would demand consideration of any group’s selective sexual harassment.

In this way, a reasonable victim standard can recognize the reaction of a victim of selective sexual harassment better than a more general reasonable woman standard – just as the reasonable woman standard recognizes the experiences of female victims of sexual harassment, even when their reactions would not be shared by similarly-situated men (Crenshaw, 1988; Goodman-Delahunty, 1999; Welsh et al., 2002).

Such changes in the legal standard must be introduced and argued by lawyers and embraced by the judiciary. Attorneys need to change the way they plead their cases to incorporate the theories of selective sexual harassment and the reasonable victim standard presented in this paper. Additionally, lawyers must introduce additional kinds of evidence in order to enable the court or the jury to make the highly nuanced analysis that would be necessary for a rigorous inquiry into the possibility of selective sexual harassment.

While it falls to attorneys to raise these arguments and offer the necessary evidence regarding selective sexual harassment and reasonable victims, the courts must be open to embracing these arguments when they have been well presented. Indeed, a new legal standard does not exist outside of what judges say the standard is.

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Endnotes

1. The name of the company, Coop Cab, is an alias as are all names I use to refer to interviewees.

2. Some scholars have argued in favor of a reasonable victim standard as part of a more conservative agenda, as an attempt to shift the focus of sexual harassment law toward a gender-neutral standard and away from the very gender inequalities which permit sexual harassment. This conservatism is not the motivation behind my suggestion, nor must such a shift necessarily accompany adopting a reasonable victim standard. In fact, focusing on the victim’s perspective emphasizes that sexual harassment is primarily about exploitation and power (Blumenthal, 1998). By focusing on the plaintiff’s status as “victim” rather than as “woman,” other important factors of the victim’s situation, in addition to gender, will be considered, including the divisional dynamics of the victim’s workplace that can lead to selective sexual harassment.
References


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


