

## HARASSMENT IN THE WORKPLACE: WHEN WILL THE REACTIONS OF ETHNIC MINORITIES AND WOMEN BE CONSIDERED REASONABLE?

[*WATKINS V. BOWDEN*, 105 F.3D 1344 (11TH CIR. 1997)]

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### I. INTRODUCTION

In Mobile, Alabama, an African-American male employee at a paper mill was repeatedly called racist names by his co-workers and supervisors.<sup>1</sup> He was also the target of racist graffiti scrawled on the walls in the paper mill's bathrooms.<sup>2</sup> And on one occasion, two of his co-workers paraded around his desk wearing white clothes imitating the Ku Klux Klan.<sup>3</sup>

In San Mateo, California, a female employee at the Internal Revenue Service received bizarre love letters from a male co-worker who was obsessed with her.<sup>4</sup> The letters implied that the two had an ongoing relationship when, in actuality, none existed.<sup>5</sup>

In Atlanta, Georgia, an African-American female employee at the DeKalb County Solicitor's Office was the target of sexist and racist jokes.<sup>6</sup> Her co-workers also mimicked African-Americans and made comments about African-American males' genitals.<sup>7</sup>

In all of these true stories, the individuals believed that they had been harassed in the workplace.<sup>8</sup> They came to this conclusion based upon their experiences as African-Americans and as women.<sup>9</sup>

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1. See *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1518 (D. Me. 1991), *vacated in part by* 765 F. Supp. 1529 (D. Me. 1991).

2. See *Harris*, 765 F. Supp. at 1518.

3. See *id.* at 1517-18.

4. See *Ellison v. Brady*, 924 F.2d 872, 873-76 (9th Cir. 1991).

5. See *id.*

6. See *Watkins v. Bowden*, 105 F.3d 1344, 1347-49 (11th Cir. 1997).

7. See *id.* at 1346-49.

8. See *Ellison*, 924 F.2d at 874. See also *Harris*, 765 F. Supp. at 1511; *Watkins*, 105 F.3d at 1350-51.

9. See *Ellison*, 924 F.2d at 874. See also *Harris*, 765 F. Supp. at 1511; *Watkins*, 105 F.3d at 1350-51.

Unfortunately, in each case there were other individuals, such as supervisors, who either characterized the discriminatory conduct as horseplay or trivialized the matter.<sup>10</sup>

There exists a divergence of views among the federal circuit and district courts concerning the correct-objective standard that should be applied in hostile work environment cases when the victims claiming harassment are women and ethnic minorities.<sup>11</sup> In the past, courts generally applied the "reasonable man/person" standard.<sup>12</sup> That standard, however, has proven to be inadequate to judge women and ethnic minorities because of a pervasive white Anglo-Saxon male bias.<sup>13</sup>

Some courts have taken a positive step by recognizing the inapplicability of the "reasonable man/person" standard to women and ethnic minorities in the harassment context and instead apply gender-conscious and race-conscious standards.<sup>14</sup> Unfortunately, other courts, including the Eleventh Circuit,<sup>15</sup> continue to apply the "reasonable man/person" standard when confronted with employment discrimination cases, irrespective of the gender or ethnic background of the victim.<sup>16</sup>

In *Watkins v. Bowden*,<sup>17</sup> the Eleventh Circuit held that a victim was not permitted to ask for a jury instruction that essentially required the

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10. See *Ellison*, 924 F.2d at 882. See also *Harris*, 765 F. Supp. at 1518; *Watkins*, 105 F.3d at 1350.

11. See *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999) (applying a "reasonable person" standard); *Watkins*, 105 F.3d at 1352 (applying a "reasonable person" standard); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996) (applying a "reasonable person" standard); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) (applying a "reasonable person" standard). But see *Ellison*, 924 F.2d at 879 (applying a "reasonable woman" standard); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (applying a "reasonable person of the same sex" standard); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (applying a "reasonable woman" standard); *Stingley v. State of Arizona*, 796 F. Supp. 424, 428 (D. Ariz. 1992) (applying a "reasonable person of the same gender and race or color" standard); *Harris*, 765 F. Supp. at 1516 (applying a "reasonable black person" standard). In *Oncala v. Sundowner Offshore Services Incorporated*, 532 U.S. 75 (1998), the United States Supreme Court found "that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* at 81. Even though this holding failed to specifically state whether race and gender constitute "circumstances," perhaps this is a positive sign that the Court is moving in the direction of setting precedent for the use of contextual standards in the area of employment discrimination law in the near future. See Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1261 (1998).

12. See Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 771.

13. See William Joseph Wagner, *Ideals, Beliefs, Attitudes, and the Law* by Guido Calabresi, 35 CATH. U. L. REV. 335, 341 (1985) (book review). See also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 218 (1994); Forell, *supra* note 12, at 774; Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 864 (1997); Tam B. Tran, Comment, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357, 368 (1998).

14. See *Ellison*, 924 F.2d at 879; *Yates*, 819 F.2d at 637; *Stingley*, 796 F. Supp. at 428; *Harris*, 765 F. Supp. at 1516.

15. See *Watkins*, 105 F.3d at 1352.

16. See *Richardson*, 180 F.3d at 436; *Gillming*, 91 F.3d at 1172; *DeAngelis*, 51 F.3d at 594.

17. 105 F.3d 1344 (1997).

jury to stand in the victim's shoes.<sup>18</sup> In so holding, the court ignored the fact that courts do allow such instructions in other areas of the law.<sup>19</sup> Courts have generally encouraged instructions that inform jurors that the standard is that of a person "said to be identical with the actor,"<sup>20</sup> when faced with cases involving physical disabilities.<sup>21</sup> These types of instructions are also becoming more common in the criminal-law context.<sup>22</sup> In order to ensure justice to female and ethnic minority employees, the concept of "walk[ing] a mile in the victim's shoes"<sup>23</sup> must be extended to employment discrimination law.

## II. CASE DESCRIPTION

In Atlanta, Georgia, Phyllis Watkins ("Watkins"), an African-American female, was an employee at the DeKalb County Solicitor's Office.<sup>24</sup> The county solicitor, Ralph Bowden ("Bowden"), hired her to fill an assistant solicitor position.<sup>25</sup> There were no other African-American attorneys working in the office.<sup>26</sup>

Watkins claimed that she endured sexual and racial harassment throughout the period of her employment.<sup>27</sup> After several weeks at work, Watkins met with Cliff Howard ("Howard"), the chief assistant solicitor, and complained about the harassment, which included comments regarding the size of African-American males' genitals and sexual and racial jokes.<sup>28</sup> Howard assured Watkins after their meeting that he would talk to the individuals involved and would inform Bowden of the situation.<sup>29</sup> However, he failed to do so, and the harassment continued.<sup>30</sup>

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18. *See id.* at 1352. The victim in this particular case should have been entitled to an instruction that required the jurors to consider how her ethnicity and gender affected her perceptions of her working environment.

19. This holds true in criminal and tort law.

20. WILLIAM PROSSER, *THE LAW OF TORTS* § 32, 151 (4th ed. 1971).

21. In tort law (negligence cases), courts have generally allowed instructions that charge the jury that the standard used to evaluate the defendant's conduct or plaintiff's conduct, in the case of contributory negligence, is that of a person with the same physical disability. *See* *Shepherd v. Gardner Wholesale, Inc.*, 256 So. 2d 877, 882 (Ala. 1972); *Mem'l Hosp. of S. Bend, Inc. v. Scott*, 300 N.E.2d 50, 56 (Ind. 1973); *Roberts v. State of Louisiana*, 396 So. 2d 566, 567 (La. Ct. App. 1981) (applying a "reasonably prudent blind person" standard); *Otterbeck v. Lamb*, 456 P.2d 855, 861 (Nev. 1969) (approving a "reasonably prudent person suffering from the same physical impairment in the same or similar circumstances" instruction); *Brunner v. John*, 274 P.2d 581, 582 (Wash. 1954).

22. Some courts have allowed the use of a "reasonable and prudent battered woman" standard for the objective component of the self-defense inquiry in criminal law. *See* *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988); *Commonwealth v. Stonehouse*, 555 A.2d 772, 784 (Pa. 1989); *State v. Burtzlaff*, 493 N.W.2d 1, 9 (S.D. 1992) (approving an instruction to the jury to view the situation "through the eyes of a reasonable and prudent battered woman.").

23. *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991).

24. *See* *Watkins v. Bowden*, 105 F.3d 1344, 1346 (11th Cir. 1997).

25. *See id.*

26. *See id.*

27. *See id.* at 1351.

28. *See id.* at 1347.

29. *See id.*

30. *See id.* at 1347, 1350. Watkins' co-workers inquired and made remarks about her sexual

Three months later, Bowden fired Watkins.<sup>31</sup> He claimed that he was discharging her because he was not pleased with her work performance.<sup>32</sup> She contended that she was being terminated in retaliation for complaining about her co-workers' conduct.<sup>33</sup> Bowden's response to this allegation was that he was unaware of her complaints to Howard concerning sexual and racial harassment.<sup>34</sup>

Watkins brought suit in the United States District Court for the Northern District of Georgia, naming Bowden and the county as defendants.<sup>35</sup> The lawsuit included a large number of claims, most of which the court dismissed on summary judgment.<sup>36</sup> One of the four claims allowed to go forward was a hostile work environment sexual and racial harassment claim.<sup>37</sup> Upon conclusion of the jury trial, three more of Watkins' claims were dismissed when the court ordered directed verdicts in favor of the defendants.<sup>38</sup> The only allegation that was left for the jury to decide was the hostile work environment sexual and racial harassment claim against the county.<sup>39</sup>

With regard to the objective component of the hostile work environment inquiry, the court originally instructed the jury to view the situation from a "reasonable African-American" or "reasonable woman" perspective.<sup>40</sup> However, defense counsel succeeded in persuading the court to change the instruction so as to apply a

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relations with her husband. *See id.* at 1347. Once, a co-worker told her that the black waste paper basket in his office symbolized an African-American male sex organ. *See id.* Watkins' co-workers also told sexual and racial jokes in her presence and mimicked African-Americans. *See id.* at 1347-49. At a Bar Association luncheon that Watkins and some of her colleagues attended, the speaker told racist and sexist jokes. *See id.* at 1348. When Watkins voiced her concerns about the speaker to Bowden, he responded insensitively. *See id.* Watkins' co-workers also constantly challenged the competence of a judge who presided over most of their cases by alleging that the judge obtained her position based solely upon her ethnicity and gender. *See id.* at 1347, 1349.

31. *See id.* at 1348. Watkins accepted Bowden's offer to resign, so she would not be fired. *See id.*

32. *See id.* Bowden claimed that he fired Watkins "because she (1) did not know the Federal Rules of Evidence; (2) did not get along with [Ann] Elmore, [the 'trial specialist']; (3) dressed inappropriately for court; (4) could not take criticism well; and (5) could not operate under pressure." *Id.*

33. *See id.*

34. *See id.* at 1349.

35. *See id.* at 1350-51.

36. *See id.* at 1351.

37. *See id.* Watkins' three other claims were as follows:

A retaliatory discharge claim under the First Amendment based on her complaints of sexual and racial harassment; a retaliatory discharge claim under the First Amendment based on her complaint about the speech given at the bar luncheon; [and] a retaliatory discharge claim under the Equal Protection Clause based on her complaints of sexual and racial harassment . . .

*Id.* Watkins did not bring her hostile work environment sexual and racial harassment suit pursuant to Title VII, but instead brought it under the Equal Protection Clause. *See id.* "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918).

38. *See Watkins*, 105 F.3d at 1351.

39. *See id.*

40. *See id.*

“reasonable person” standard.<sup>41</sup> The jury verdict favored the defendant.<sup>42</sup> Watkins’ appeal to the Court of Appeals for the Eleventh Circuit was in vain.<sup>43</sup>

### III. BACKGROUND

#### A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based upon a person’s race, color, religion, sex, or national origin.<sup>44</sup> The pertinent provision of Title VII states:

It shall be an unlawful employment practice for an employer . . . 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,<sup>45</sup> or national origin . . .<sup>46</sup>

Title VII “is aimed at the consequences or effects of an employment practice;”<sup>47</sup> therefore, women and those of various ethnic backgrounds can use it as a tool to combat workplace harassment.<sup>48</sup>

#### 1. Hostile Work Environment Sexual Harassment

For over twenty years, a person who endured hostile work environment sexual harassment did not have an actionable claim under Title VII.<sup>49</sup> Finally in 1986, in *Meritor Savings Bank v. Vinson*,<sup>50</sup> the United States Supreme Court held that sexual harassment was a form of sex discrimination.<sup>51</sup> Accordingly, the Court found that a victim could

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41. *See id.*

42. *See id.*

43. *See id.* at 1356.

44. *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

45. In the early versions of Title VII, discrimination was only precluded on the basis of race, color, religion, and national origin. *See* 110 CONG. REC. 2577-84 (1964). Discrimination based upon sex was eventually included in an amendment on the House floor. *See id.*

46. 42 U.S.C. § 2000e-2(a)(1) (1994).

47. *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971).

48. *See* Kathryn Abrams, *The State of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1198 (1989).

49. *See* JUDITH GREENBERG ET AL., *WOMEN AND THE LAW* 286 (2d ed. 1998). When women brought lawsuits against men for sexual harassment, courts dismissed the cases because the behavior complained of was simply characterized as being the result of men with bad social skills. *See id.*

50. 477 U.S. 57 (1986).

51. *See id.* at 73. The Equal Employment Opportunity Commission (“EEOC”) is the government agency that is in charge of ensuring compliance with the anti-discrimination laws. *See* Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCHOL. PUB. POL’Y & L. 519, 519 (1999). In 1980, the EEOC published regulations directed at sexual harassment. *See* 29 C.F.R. § 1604.11(a) (1999). The regulations define sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . .” *Id.* The regulations state that sexual harassment is a form of sex discrimination that violates Title VII. *See id.* Even though the regulations do not have the force of law, the EEOC “constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-73 (1986) (relying upon the EEOC regulations in its decision).

bring a hostile work environment sexual harassment action under Title VII.<sup>52</sup>

Since that decision, a number of sexual harassment complaints have been filed with the United States Equal Employment Opportunity Commission ("EEOC").<sup>53</sup> According to the Office of Research, Information, and Planning from EEOC's Charge Data System, 25,194 sex-based charges of discrimination were brought in the year 2000.<sup>54</sup> Of this total, 15,836 complaints alleged sexual harassment.<sup>55</sup>

In *Meritor*, the Court also decided that in order to have a valid complaint for hostile work environment sexual harassment, victims must show that the conduct they endured was "severe or pervasive."<sup>56</sup> Later, in an equally important case concerning hostile work environment sexual harassment, the Supreme Court reaffirmed the standard that victims must prove the conduct they endured throughout the period of their employment was "severe or pervasive" enough to impede their work environment.<sup>57</sup>

## 2. Hostile Work Environment Racial Harassment

Hostile work environment racial harassment has been actionable under Title VII since 1971.<sup>58</sup> In 1999, 2,089 racial harassment complaints were filed with the EEOC.<sup>59</sup>

Unlike hostile environment sexual harassment, hostile environment racial harassment remains undefined.<sup>60</sup> The EEOC sexual harassment regulations, however, explicitly state that hostile work environment sexual harassment principles were founded upon those principles

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52. See *Meritor*, 477 U.S. at 73.

53. See EEOC's Charge Statistics compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System, at <http://www.eeoc.gov/stats/charges.html> (last modified Jan. 18, 2001).

54. See *id.*

55. The total number of sexual harassment charges filed with the EEOC is steadily rising. See EEOC's Charge Statistics compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System, at <http://www.eeoc.gov/stats/harass.html> (last modified Jan. 18, 2001). In 1992, 10,532 sexual harassment claims were filed with the agency. See *id.* In the year 2000, the number had risen to 15,836. See *id.*

56. See *Meritor*, 477 U.S. at 67. The Court decided that victims had to prove the conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting in part *Henson v. Dundee*, 682 F.2d 897, 904 (1982)).

57. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Even though *Watkins* brought her claim under 42 U.S.C. section 1983, the "severe or pervasive" standard still must be met. See *Watkins v. Bowden* 105 F.3d 1344, 1355 n.19. (11th Cir. 1997).

58. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991) (stating "[t]he Supreme Court drew its limiting language from *Rogers* . . . , the first case to recognize a hostile racial environment claim under Title VII.").

59. See EEOC's Charge Statistics compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System, at <http://www.eeoc.gov/stats/harassment.html> (last modified July 11, 2000). In the year 2000, thirty-six percent, 28,945 charges, of all discrimination complaints filed with the EEOC were race-based. See EEOC's Charge Statistics compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System, at <http://www.eeoc.gov/stats/charges.html> (last modified Jan. 18, 2001).

60. See *supra* note 51 for the definition of sexual harassment.

established in hostile work environment harassment based upon race, color, religion, and national origin.<sup>61</sup> Thus, the principles of sexual and racial harassment are often used interchangeably.<sup>62</sup>

Another similarity between sexual and racial harassment is the standard of actionable harassment.<sup>63</sup> Since courts have made it clear that not all discrimination constitutes harassment,<sup>64</sup> victims of both hostile work environment racial and sexual harassment must prove the conduct they endured was “severe or pervasive” enough to impede their work environment.<sup>65</sup>

In order for the jury to reach this determination, the conduct must be scrutinized from both a subjective and an objective standpoint.<sup>66</sup> Title VII is not violated if the jury decides either that the victim did not believe the environment was abusive or another person in the victim’s position would not have found the environment abusive.<sup>67</sup>

The objective element of the standard of conduct requires a degree of reasonableness.<sup>68</sup> Determining who is reasonable, however, has yielded conflict among the courts.

### B. Who is reasonable?

At common law, white Anglo-Saxon males were the reasonable actors.<sup>69</sup> The “reasonable man” standard made its debut in *Vaughan v. Menlove*, an 1837 case.<sup>70</sup> The “reasonable man” standard developed at

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61. See 29 C.F.R. § 1604.11 n.1 (1999) (stating “[t]he principles involved here continue to apply to race, color, religion, or national origin.”). Courts held that racial harassment claims were actionable under Title VII approximately sixteen years before finding the same true for sexual harassment claims. Thus, courts have applied concepts established in racial harassment to sexual harassment cases. See *Faragher v. Boca Raton*, 524 U.S. 775, 787 n.1 (1998).

62. See *Faragher*, 524 U.S. at 787 n.1.

63. See *id.*

64. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Rogers v. EEOC*, 454 F.3d 234, 238 (5th Cir. 1971). A suit based solely upon insensitivity, for example, would not be sufficient to constitute discriminatory harassment. See *Faragher*, 524 U.S. at 788.

65. See *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1519 (D. Me. 1991) (finding the frequency of the racial jokes and comments along with the severity of the racially-motivated conduct rose “to the level of racial harassment by creating an intimidating, hostile and offensive work environment so severe and pervasive that it substantially altered [the plaintiff’s] working conditions.”); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (finding that a woman who was receiving love letters from a co-worker “could consider [the conduct] . . . sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment.”).

66. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-2 (1993); *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997).

67. See *Forklift*, 510 U.S. at 21-2; *Watkins*, 105 F.3d at 1355. The “severe or pervasive” standard “requires both an individualized inquiry and a ‘community norm’ inquiry.” Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1407-08 (1992).

68. See Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1213 (1990). See also Cahn, *supra* note 67, at 1404.

69. See Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the “Reasonable Man.”* 8 RUTGERS-CAM. L.J. 311, 312 (1976-77). See also Dolkart, *supra* note 13, at 218; Wendy Parker, *The Reasonable Person: A Gendered Concept*, 23 VICTORIA U. WELLINGTON L. REV. 105, 108 (1993); Zalesne, *supra* note 13, at 864; Wagner, *supra* note 13, at 341; Tran, *supra* note 13, at 368.

70. See 132 Eng. Rep. 490 (1837). See also Collins, *supra* note 69, at 312-13 n.4; Forell, *supra*

common law because courts needed a uniform criteria by which to judge the conduct of individuals.<sup>71</sup> This standard defined the boundaries of acceptable behavior, and that which did not fall within these lines was deemed unreasonable.<sup>72</sup> The “reasonable man” has provided the foundation for many areas of American law.<sup>73</sup>

“Ways of looking at what is reasonable and what is not . . . inevitably derive from the point of view of those who dominate law-making in a given society.”<sup>74</sup> At common law, white Anglo-Saxon males were the lawmakers.<sup>75</sup> Thus, what was deemed reasonable was based upon the experiences and attitudes of these individuals.<sup>76</sup> For example, in *Daniels v. Clegg*,<sup>77</sup> the Supreme Court of Michigan held that the “reasonable man” standard did not apply to the conduct of a woman who was alleged to have been contributorily negligent in an accident.<sup>78</sup> The court’s decision seems to indicate that, even in 1873, it was aware of the fact that the “reasonable man” standard did not account for the capabilities, perceptions, or experiences of women.<sup>79</sup>

What was considered reasonable was characteristic of white men.<sup>80</sup> In theory, the words “reasonable man” were sweeping terms that included all people, but in actuality, the “reasonable man” standard swept only so far as to encompass white Anglo-Saxon males, as illustrated in *Daniels*.<sup>81</sup> In order for objective standards to be valuable,

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note 12, at 772; Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK U. L. REV. 629, 639 (1997).

71. See Collins, *supra* note 69, at 314. “As an abstract standard, it purportedly represents the values and expectations of neither the judge, nor the jury, nor any other actual person.” Forell, *supra* note 12, at 772.

72. See Parker, *supra* note 69, at 106.

73. See Collins, *supra* note 69, at 313.

74. Forell, *supra* note 12, at 774 (quoting DEAN CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 29 (1985)).

75. See Andre Cummings, “Lions and Tigers and Bears, Oh My” or “Redskins and Braves and Indians, Oh Why”: Ruminations on *McBride v. Utah State Tax Commission*, *Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 26-9 (1999).

76. See *id.*

77. 28 Mich. 32 (1873).

78. See *id.* at 42. The court affirmed the lower court’s instruction to the jury that “[they] should consider the age of the [female], and the fact that she was a woman . . . .” *Id.* at 40.

79. See *id.* at 41-2.

No one would ordinarily expect, and the defendant had no right to expect, from a young woman thus situated, the same amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment, in short the same degree of competency, which he would expect of ordinary men under like circumstances; nor, consequently, would it be just to hold her to the same high degree of care and skill.

*Id.* at 42.

80. See Parker, *supra* note 69, at 108-10. “Given that the reasonable man concept encapsulates the ordinariness and the normalcy of the standard against which conduct is measured, its restriction to male experiences implies that to be other than male is to be other than ordinary or normal.” *Id.* at 110. See also Wagner, *supra* note 13, at 341; Tran, *supra* note 13, at 368.

81. See Parker, *supra* note 69, at 106. See also Dolkart, *supra* note 13, at 218; Forell, *supra* note 12, at 774; Wagner, *supra* note 13, at 341; Tran, *supra* note 13, at 368. See also *Daniels*, 28 Mich. at 40-2.

they must reflect the beliefs of the general public.<sup>82</sup> It seems clear that a white Anglo-Saxon male bias pervades the “reasonable man” standard.<sup>83</sup>

### 1. *Evolution of the “Reasonable Man” Standard*

In the late 1970s, courts began applying the “reasonable person” standard in an attempt to transform the “reasonable man” standard into a more objective test.<sup>84</sup> The “reasonable person” standard was supposed to be an all-inclusive term that replaced the less inclusive “reasonable man” standard.<sup>85</sup> Unfortunately, the difference between the “reasonable man” standard and the “reasonable person” standard is one only of name, not principle.<sup>86</sup>

The vast numbers of lawmakers continue to be white Anglo-Saxon males;<sup>87</sup> therefore, the evolving laws and standards continue to be “slanted heavily toward the white male bias.”<sup>88</sup> As a result, ethnic minorities and women are limited to the views and experiences of white Anglo-Saxon males.

Some circuits continue to use the “reasonable man/person” standard in employment discrimination law.<sup>89</sup> Other circuits have moved beyond the “reasonable man/person” standard and have adopted more contextual standards that allow the victim to be judged by a gender-conscious or a race-conscious standard.<sup>90</sup>

### 2. *Alternatives to the “Reasonable Man/Person” Standard*

The alternatives to the “reasonable man/person” standard are gender-conscious and race-conscious standards. The gender-conscious standard has been termed the “reasonable woman” standard,<sup>91</sup> and an

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82. See Parker, *supra* note 69, at 106. See also Forell, *supra* note 12, at 774; Wagner, *supra* note 13, at 341.

83. See Parker, *supra* note 69, at 109. See also Wagner, *supra* note 13, at 341.

84. See Cahn, *supra* note 67, at 1405.

85. See Parker, *supra* note 69, at 108.

86. See *id.* at 105. See also Forell, *supra* note 12, at 774.

87. See Cummings, *supra* note 75, at 26-9. See also Wagner, *supra* note 13, at 341. Of 535 members, the 106th Congress was composed of sixty-five women, thirty-seven African-Americans, eighteen Hispanics, five Asian and Pacific Americans, and one Native American. See CONGRESS A TO Z 304 (Ann O'Connor & David R. Tarr eds., 1999). See also United States Initial Report to the United Nations Committee on The Convention on the Elimination of all forms of Racial Discrimination, submitted September 2000 at <http://www1.umn.edu/humanrts/usdocs/cerdinitial.html> (last modified Mar. 4, 2001).

88. Cummings, *supra* note 75, at 29.

89. See Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994).

90. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (applying a “reasonable woman” standard); Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991) (applying a “reasonable black person” standard).

91. See Ellison, 924 F.2d at 879 (applying a “reasonable woman” standard); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (applying a “reasonable woman” standard); Stingley v. State of Arizona, 796 F. Supp. 424, 428 (D. Ariz. 1992) (applying a “reasonable person of the same gender

example of a race-conscious standard is the “reasonable African-American or black” standard.<sup>92</sup> One court even utilized what it referred to as the “reasonable person of the same gender and race or color” standard, which allowed it to fill in the applicable gender and race on a case-by-case basis.<sup>93</sup> The jurisdictions that utilize these standards recognize and value the unique effects that gender and race have on the perceptions and attitudes of individuals.<sup>94</sup>

#### IV. ANALYSIS

In *Watkins*, the issue before the Eleventh Circuit was whether the district court’s final instruction to the jury to use a “reasonable person” objective standard, instead of a “reasonable African-American or woman” objective standard, was prejudicial and erroneous.<sup>95</sup>

The Eleventh Circuit gave only one reason in holding that the district court’s corrected instruction was not prejudicial or erroneous.<sup>96</sup> The court clung to the use of the words “reasonable person” in *Harris v. Forklift Systems, Incorporated*,<sup>97</sup> claiming that it was required to follow precedent.<sup>98</sup> Ironically, in a lengthy footnote, it acknowledged circuit decisions that have diverged from *Forklift* and have applied more contextual standards.<sup>99</sup> The Eleventh Circuit, however, refused to follow this trend.<sup>100</sup>

##### A. Criticism

The court in *Watkins* incorrectly decided that the trial court’s second jury instruction was a correct statement of the applicable law based solely upon the Supreme Court’s use of the words “reasonable person” in *Forklift*.<sup>101</sup> If the Eleventh Circuit had recognized that in *Forklift* the Supreme Court was concerned with setting precedent on the issue of actionable conduct in harassment cases<sup>102</sup> and not on the correct

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and race or color” standard).

92. See *Stingley*, 796 F. Supp. at 428 (applying a “reasonable person of the same gender and race or color” standard); *Harris*, 765 F. Supp. at 1516 (applying a “reasonable black person” standard).

93. *Stingley*, 796 F. Supp. at 428.

94. See *Ellison*, 924 F.2d at 878-79; *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Yates*, 819 F.2d at 637 n.2.

95. See *Watkins v. Bowden*, 105 F.3d 1344, 1352 (11th Cir. 1997).

96. See *id.* at 1356. The circuit court also affirmed the district court’s decision to grant the defendants’ motions for directed verdicts on the other three claims. See *id.* at 1351-55.

97. 510 U.S. 17 (1993).

98. See *Watkins*, 105 F.3d at 1356. The Eleventh Circuit found that “the court properly instructed the jury on the objective component of the standard for evaluating hostile work environment claims; indeed, *Harris* compels the ‘reasonable person’ instruction.” *Id.* at 1352.

99. See *id.* at 1356 n.22.

100. See *id.* at 1356.

101. See *id.*

102. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993). Even though this case would have been an opportune time for the Court to address the issue of race-conscious and gender-conscious standards in harassment cases, it failed to do so. Some courts recognize the generic usage of the phrase “reasonable person” in *Harris* and continue to apply gender-conscious and race-conscious

standard for the objective component of the hostile work environment inquiry, the outcome in *Watkins* would have been different.<sup>103</sup>

The original instruction provided by the district court, like those utilized by other courts that have applied contextual standards, recognized the significant role that race and gender played in shaping *Watkins*' perceptions. In *Ellison v. Brady*,<sup>104</sup> the Ninth Circuit applied a "reasonable woman" standard to a situation involving a female who was receiving bizarre love letters from a male co-worker.<sup>105</sup> In its decision, the court explicitly stated it was applying the "reasonable woman" standard because of the failure of the "reasonable person" standard to embrace the perceptions of women.<sup>106</sup> Similarly, in *Harris v. International Paper Corporation*,<sup>107</sup> a district court applied a "reasonable black person" standard because it found that the "reasonable person" standard ignored the perceptions of African-Americans.<sup>108</sup> Like the plaintiffs in *Ellison* and *Harris*, *Watkins*' experiences as an African-American and as a woman led her to perceive her co-workers' conduct and comments as harassment. The district court's second instruction, however, trivialized these perceptions.

In essence, the Eleventh Circuit decided that *Watkins* should not be allowed to ask for an instruction that would draw the jurors' attention to her personal attributes. While courts generally do not allow such instructions,<sup>109</sup> there are some extremely important exceptions to this rule that are worth examining.

In tort law,<sup>110</sup> for example, courts typically do allow jury instructions that focus on physical attributes.<sup>111</sup> And in criminal law, some courts have replaced the "reasonable man/person" standard with a "reasonably prudent battered woman" standard in cases involving battered women self-defense.<sup>112</sup>

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standards. See *Hixson v. Norfolk S. Ry. Co.*, No. 94-5832, 1996 U.S. App. LEXIS 15421, at \*10 (6th Cir. June 10, 1996) (applying a "reasonable woman" standard); *Mullins v. Campbell Soup Co.*, No. 93-56492, 1995 U.S. App. LEXIS 11918, \*12 (9th Cir. Apr. 3, 1995) (applying a "reasonable woman" standard); *Stingley v. State of Arizona*, 796 F. Supp. 424, 428 (D. Ariz. 1992).

103. Even if the outcome in *Watkins* had remained the same, the rationale of the court would have at least differed, and perhaps would have been more persuasive.

104. 924 F.2d 872 (9th Cir. 1991).

105. See *Ellison v. Brady*, 924 F.2d 872, 872-79 (9th Cir. 1991).

106. See *id.* at 879. "We adopt the perspective of a reasonable woman because we believe that a sex-blind reasonable person standard tends to be male biased and tends to systematically ignore the experiences of women." *Id.*

107. 765 F. Supp. 1509 (D. Me. 1991).

108. See *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991).

109. For example, according to Kansas' statute for vehicular homicide, an individual is judged by a "reasonable person" standard. See KAN. STAT. ANN. § 21-3405 (1999).

110. The area of tort law that is of particular relevance is the theory of negligence.

111. See *supra* note 21 for cases permitting juries to focus on physical attributes. See also Warren Seavey, *Negligence-Subjective or Objective*, 41 HARV. L. REV. 1, 1 (1927).

112. See *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988); *Commonwealth v. Stonehouse*, 555 A.2d 772, 784 (Pa. 1989); *State v. Burtzlaff*, 493 N.W.2d 1, 9 (S.D. 1992).

### 1. Tort Law

The question in tort law for determining whether the actor/defendant complied with the correct standard of care with respect to the theory of negligence is once again, who is reasonable?<sup>113</sup> In general, state courts allow instructions that essentially direct the jury to walk in the defendant's shoes in cases involving physical handicaps.<sup>114</sup>

For example, in *Roberts v. State of Louisiana*,<sup>115</sup> the Court of Appeals of Louisiana held that the standard used to evaluate the defendant's conduct should be that of a person with the same physical handicap.<sup>116</sup> In *Roberts*, the plaintiff sued a blind vendor for negligence after being injured when the two collided in a post office hallway.<sup>117</sup> The plaintiff claimed that the vendor was negligent for not using his cane to aid him in maneuvering around the building.<sup>118</sup> The court did not apply the "reasonable man" standard in this case because it found that the standard would unjustly force the defendant to conform to a standard that did not account for his physical disability.<sup>119</sup>

A physically-impaired person is not expected to behave in the same manner that a person without that physical disability would act.<sup>120</sup> A blind man will not be held to the same standard as a man who can see.<sup>121</sup> Similarly, the conduct of a hearing-impaired woman will not be held to the same standard as a woman who can hear.<sup>122</sup> This principle has dominated in tort law.<sup>123</sup> Courts refrain from applying the "reasonable man/person" standard in negligence cases involving physical disabilities because it does not account for these important personal characteristics, which notably affect the perceptions and conduct of individuals.

### 2. Criminal Law

A person who has "commit[ted] a reasonable self-defensive act" will not be punished in criminal law.<sup>124</sup> Traditionally, courts analyzed

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113. See Klein, *supra* note 70, at 638.

114. See James Fleming, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 18 (1951). See also PROSSER, *supra* note 20, at 151-52.

115. 396 So.2d 566 (La. Ct. App. 1981).

116. See *Shepherd v. Gardner Wholesale, Inc.*, 256 So. 2d 877, 882 (Ala. 1972); *Roberts v. State of Louisiana*, 396 So. 2d 566, 567 (La. Ct. App. 1981); *Otterbeck v. Lamb*, 456 P.2d 855, 861 (Nev. 1969).

117. See *Roberts*, 396 So. 2d at 567.

118. See *id.*

119. See *id.*

120. See PROSSER, *supra* note 20, at 151-52. See *Mem'l Hosp. of S. Bend, Inc. v. Scott*, 300 N.E.2d 50, 56 (Ind. 1973); *Brunner v. John*, 274 P.2d 581, 582 (Wash. 1954).

121. See *Roberts*, 396 So. 2d at 567 (stating "that [the defendant] was acting as a reasonably prudent blind person would under these particular circumstances."); *Cook v. City of Winston-Salem*, 85 S.E.2d 696, 700-01 (N.C. 1955); *Argo v. Goodstein*, 265 A.2d 783, 788 (Pa. 1970). See also PROSSER, *supra* note 20, at 151-52.

122. See *Kerr v. Connecticut Co.*, 140 A. 751, 752 (Conn. 1928); *Otterbeck v. Lamb*, 456 P.2d 855, 861 (Nev. 1969). See also PROSSER, *supra* note 20, at 151-52.

123. See PROSSER, *supra* note 20, at 152. See also *supra* notes 120-22 for applicable case law.

124. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of*

the defendant's conduct by way of an objective test, the "reasonable man/person" standard.<sup>125</sup> However, because of criticism of the "reasonable man/person" standard, contemporary courts have been faced with the question of who is reasonable in criminal law.<sup>126</sup>

In self-defense cases involving battered women, the battered-woman syndrome is often at issue. The battered-woman syndrome explains why women stay in abusive relationships and describes the cycle that is characteristic of such relationships.<sup>127</sup> Expert testimony is often used to help explain the syndrome to the jury so it can determine whether the defendant reasonably feared imminent harm from her abuser so as to warrant self-defense.<sup>128</sup> To date, twenty-three state courts have recognized the syndrome.<sup>129</sup>

The battered-woman syndrome essentially "tells the story" from the perspective of the battered woman.<sup>130</sup> In light of the battered-woman syndrome and its acceptance within the scientific and legal communities, some courts have replaced the "reasonable man/person" standard with a "reasonably prudent battered woman" standard as the objective test.<sup>131</sup> These courts recognize that certain characteristics affect women's perceptions and actions in ways that are unfamiliar to individuals, regardless of gender, who have not been victimized in such battering relationships.<sup>132</sup> Unlike the "reasonable man/person" standard, the "reasonably prudent battered woman" standard accounts for the experiences and perceptions of battered women.

### B. Employment Discrimination Law

The general application of contextual standards by courts in the area of tort law should be extended to employment discrimination law. Like the experiences addressed above, gender and race affect the perceptions of individuals in unique and different ways.<sup>133</sup>

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*the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 3 (1998).

125. *See id.*

126. *See id.* at 4.

127. *See* Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 572-74 (1992). A battering relationship is composed of three phases: a period of increasing tension, the abuse, and then a reconciliation period. *See id.* at 572-73. These three phases continue throughout the relationship. *See id.* at 572. When some women realize that the relationship is not going to change, they kill their abuser out of fear for their own lives, and then assert the claim of self-defense. *See id.*

128. *See* State v. Koss, 551 N.E.2d 970, 973-74 (Ohio 1990); State v. Kelly, 478 A.2d 364, 379-80 (N.J. 1984).

129. *See* Heller, *supra* note 124, at 83. *See, e.g.,* Bonner v. State, 740 So. 2d 439, 441 (Ala. Crim. App. 1998); Commonwealth v. Stonehouse, 555 A.2d 772, 782-83 (Pa. 1989).

130. *See* Dowd, *supra* note 127, at 574.

131. *See* Stonehouse, 555 A.2d at 784; State v. Burtzloff, 493 N.W.2d 1, 9 (S.D. 1992).

132. *See* Stonehouse, 555 A.2d at 784; Burtzloff, 493 N.W.2d at 9.

133. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); Lipssett v. Univ. of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988); Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991).

### 1. Differences in Perceptions Based upon Gender

A principal reason for using a gender-conscious standard in hostile work environment sexual harassment cases is the difference between male and female perceptions concerning sexual encounters.<sup>134</sup> Sexual behavior<sup>135</sup> that men typically do not find offensive, often concerns and offends women.<sup>136</sup> According to a workplace sexual harassment survey conducted by the *Harvard Business Review*, in response to a hypothetical situation in which a male co-worker “eyes” a female co-worker “up and down,” twenty-four percent of women labeled the male’s conduct as sexual harassment.<sup>137</sup> By contrast, only eight percent of men viewed the same conduct as sexual harassment.<sup>138</sup>

In the workplace, women tend to find sexual comments degrading.<sup>139</sup> For example, a male may think that there is nothing wrong with commenting on a female co-worker’s body.<sup>140</sup> The female to whom the comment is directed, however, may feel like she is being sexually harassed.<sup>141</sup> Unlike women, “men are less likely to regard such conduct as harassing, and more likely to view it as a flattering reflection on their physical or personal attributes.”<sup>142</sup>

Since women are predominately the victims of sex crimes, many women fear that sexual comments and other sexual harassment of this nature may be leading in the direction of sexual assault.<sup>143</sup> Men, however, generally do not link sexual comments to a threat of future sexual violence.<sup>144</sup> In light of these extremely different perceptions on sex, there is a heightened need for a gender-conscious standard in hostile work environment sexual harassment cases.

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134. See *Ellison*, 924 F.2d at 878-79. This is not meant to imply unanimity among all women and men. The perception gap between males and females on the issue of sex is not the only reason why there is a need for a gender-conscious standard. Some courts have declared the “reasonable man/person” standard inadequate because it allows “a particular discriminatory practice [that is] common” to go unpunished. *Id.* at 878.

135. Sexual behavior includes comments, gestures, pictures, and uninvited touching.

136. See *Ellison*, 924 F.2d at 878-79; *Lipsett*, 864 F.2d at 898; *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) (stating “[w]e acknowledge that men and women are vulnerable in different ways and offended by different behavior.”).

137. Eliza G.C. Collins & Timothy B. Blodgett, *Sexual harassment . . . some see it . . . some won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 81. The males and females who were surveyed were subscribers of the *Harvard Business Review*. See *id.* at 80.

138. See *id.* at 81.

139. See *Abrams*, *supra* note 48, at 1205-06.

140. See *Lipsett*, 864 F.2d at 898.

141. See *id.* (stating “[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.”).

142. *Abrams*, *supra* note 48, at 1206.

143. See *id.* at 1205. See also *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). In 1998, sixty-seven per 100,000 women in the United States were raped. See 1998 FBI UNIFORM CRIME REP. at 24.

144. See *Ellison*, 924 F.2d at 879.

## 2. Differences in Perceptions Based upon Race and Color

There are not only distinct differences in the perceptions between males and females, but also between those of different ethnic backgrounds.<sup>145</sup> Unlike “target-group” members, “non-target-group” members commonly view<sup>146</sup> racial incidents in the workplace environment as isolated pranks.<sup>147</sup> There are many examples of “non-target-group” managers/employers dismissing racially-motivated conduct as either practical jokes or the action of employees with bad social skills.<sup>148</sup> For example, in one case, two employees dressed up in white clothes and paraded around an African-American co-worker’s desk imitating the Ku Klux Klan.<sup>149</sup> The supervisor who witnessed the conduct referred to it as horseplay.<sup>150</sup>

Just as women fear that sexual comments may be leading up to sexual violence, many African-Americans fear that racial incidents will develop into more serious racially-motivated acts of conduct.<sup>151</sup> This fear is warranted and real given that racially-motivated acts of violence directed at African-Americans have played a large role in shaping American culture.<sup>152</sup> Moreover, some racially-motivated acts or comments have a very different meaning when directed toward a particular ethnic group. For example, a noose strategically placed above a co-worker’s desk<sup>153</sup> would tend to carry more racial implications for an African-American than for a white Anglo-Saxon, because the noose symbolizes a form of racially-motivated violence that, at one point in American history, was commonly directed toward African-Americans.<sup>154</sup>

Also, racially-motivated comments and conduct commonly go unnoticed by “non-target-group” members.<sup>155</sup> For example, a word or phrase directed toward a member of a particular ethnic group may register as a racial slur, whereas a “non-target-group” member may not understand the derogatory nature of the comment.<sup>156</sup> The “reasonable man/person” standard, which deliberately ignores the experiences and

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145. See *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991).

146. This is not meant to imply unanimity among “target-group” members, i.e., racial minorities, or “non-target-group” members, i.e., Caucasians.

147. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327-29 (1989).

148. See *id.*

149. See *Harris*, 765 F. Supp. at 1517-18.

150. See *id.*

151. See *id.* at 1515-16.

152. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

153. These are true facts from the case *Vance v. Southern Bell Telephone and Telegraph Company*, 863 F.2d 1503, 1506 (11th Cir. 1989).

154. See *Stingley v. State of Arizona*, 796 F. Supp at 424, 429 n.8 (D. Ariz. 1992).

155. See Matsuda, *supra* note 147, at 2327-29.

156. For example, calling an African-American a name such as “water buffalo” is extremely offensive. “Non-target-group” members may not recognize the derogatory nature of such a comment.

attitudes of ethnic minorities, but yet encompasses a white Anglo-Saxon male consciousness, is an inadequate standard by which to judge the perceptions of these individuals.

“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.”<sup>157</sup> These cultural experiences have shaped the perceptions and beliefs of ethnic group members in different, but in equally important ways that cannot be captured with the “reasonable man/person” standard, which is pervaded by a white Anglo-Saxon male bias. These experiences cannot simply remain unaccounted for in employment discrimination law.<sup>158</sup>

“[A] great disparity may exist between those who have experienced racial discrimination and those who have not directly suffered the effects of racial bias, and are therefore less likely to recognize its damaging nature.”<sup>159</sup> The race-conscious standard accounts for these different types of experiences and the emotions and perceptions that can be drawn from them.

### *3. Justification for the Use of Contextual Standards in Employment Discrimination Law*

The concept of reasonableness is extremely important in tort, criminal, and employment discrimination law.<sup>160</sup> In tort law, courts generally recognize the ineffectiveness of the “reasonable man/person” standard in attaining justice for the disabled and have replaced it with a standard that accommodates physical differences.<sup>161</sup> Similarly, the “reasonable man/person” standard has undergone changes to reflect the experiences of battered women in the criminal-law context.<sup>162</sup>

It is generally accepted that there is a large gap between the perceptions and experiences of individuals with physical disabilities and battered women versus individuals without these characteristics or experiences.<sup>163</sup> The physical disability and the battered woman standards rightfully account for these differences. The difference between the perceptions and experiences of ethnic minorities and between males and females is just as wide, yet there is reluctance on the part of the courts to diminish these gaps with the application of contextual standards.<sup>164</sup>

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157. Lawrence, *supra* note 152, at 322.

158. *See, e.g., id.*

159. Tran, *supra* note 13, at 368.

160. *See* Heller, *supra* note 124, at 4. *See also* Cahn, *supra* note 67, at 1404; Klein, *supra* note 70, at 638.

161. *See supra* notes 120-22 for cases permitting juries to focus on physical attributes.

162. *See* Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989); State v. Burtzloff, 493 N.W.2d 1, 9 (S.D. 1992).

163. *See supra* notes 120-22 and 131 for cases utilizing contextual standards in the areas of criminal and tort law.

164. A number of courts continue to apply a “reasonable person” standard in hostile work

## V. CONCLUSION

“Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”<sup>165</sup> Individuals’ perceptions of what amounts to “discriminatory intimidation, ridicule, and insult” are impacted by factors such as ethnic background and gender.<sup>166</sup>

The “reasonable man/person” standard has been portrayed as a gender and race-neutral standard when in actuality it has a white Anglo-Saxon male bias.<sup>167</sup> Consequently, the standard does not account for important differences in the perceptions and experiences of women and ethnic minorities.<sup>168</sup> In employment discrimination law, the differences in the perceptions of women and ethnic minorities compared to men and white Anglo-Saxons are great and particularly important.<sup>169</sup> Race-conscious and gender-conscious standards recognize and value the differences in these individuals’ perceptions.<sup>170</sup> Courts eagerly mold the standard of reasonableness to account for some personal characteristics such as physical disabilities, but when it comes to women and ethnic minorities there is suddenly overwhelming rigidity.<sup>171</sup>

Should the victim be allowed to ask for a jury instruction that requires the jury to stand in the victim’s shoes?<sup>172</sup> In *Watkins*, the Eleventh Circuit answered no;<sup>173</sup> however, the correct response should have been an emphatic yes. In order to create justice in the workplace and to establish a level playing field for women and ethnic minorities, the concept of “walk[ing] a mile in the victim’s shoes”<sup>174</sup> must be extended to employment discrimination law.

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environment cases. See *Richardson v. New York State Dep’t of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999).

165. *Meritor Sav. Bank v. Vinson*, 447 U.S. 57, 65 (1986).

166. *Id.* See also *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987); *Stingley v. State of Arizona*, 796 F. Supp. 424, 428-29 (D. Ariz. 1992).

167. See *Wagner*, *supra* note 13, at 341. See also *Cummings*, *supra* note 75, at 26-9.

168. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991); *Stingley*, 796 F. Supp. at 428-29.

169. See *supra* text accompanying notes 136-44 and 147-56 for a comparison.

170. This Comment is by no means implying that race-conscious and gender-conscious standards are lower standards than the “reasonable man/person” standard.

171. The United States Supreme Court must seize the next opportunity to resolve the conflict between the courts and set precedent for the use of contextual standards in employment discrimination law.

172. See *supra* text accompanying note 18.

173. See *Watkins v. Bowden*, 105 F.3d 1344, 1356 (11th Cir. 1997).

174. *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991).