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SEXUAL HARASSMENT JURY INSTRUCTIONS EFFECTS ON JURY DECISIONS

By
Karen Leigh Matsinger

A Thesis

Submitted in partial fulfillment of the requirements of the
Master of Mental Health Counseling and Applied Psychology Degree
of
The Graduate School
at
Rowan University
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Approved by _____
Advisor

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ABSTRACT

Karen Leigh Matsinger

SEXUAL HARASSMENT JURY INSTRUCTIONS EFFECTS ON JURY DECISIONS

2007/08

Dr. Eleanor Gaer

Master of Mental Health Counseling and Applied Psychology

This study compares the effect of reasonable standards on the jury's verdict in a sexual harassment lawsuit. One hundred and fifty seven participants (82 males, 74 females and 1 unidentified), ages ranging from 16 to 90, ($M = 22.74$) were randomly divided into juries (7 reasonable woman, 8 reasonable person, and 9 reasonable worker). Participants were given a written sexual harassment case, judge's instructions, and a survey to complete before and after the group had reached a unanimous verdict.

It was hypothesized that participants who applied the reasonable woman standard would be more likely to take the complainant's perspective. This hypothesis was found to be supported by a significant difference between worker and woman juries' use of the terms of hostile work environment. There were significant interactions between those who did and did not experience sexual harassment in the workplace and their judgments of both, hostile work environment and severity.

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CHAPTER I

Literature Review

Congress passed the Civil Rights Act in order to prohibit a broad range of employment discrimination; including discrimination based on an individual's gender. In 1972, congress created the Equal Employment Opportunity Commission and passed the Equal Employment Opportunity Act, giving the Equal Employment Opportunity Commission power to enforce Title VII. A growing number of plaintiffs originally made efforts to bring sexual harassment claims to the attention of the courts under Title VII. These claims initially failed because courts construed the events as interpersonal conflicts or normal interaction between sexes, rather than gender-based discrimination barred by Title VII (e.g., *Barnes v. Train*, 1974; *Corne v. Bausch & Lomb, Inc.*, 1975; *Barnes v. Costle*, 1977).

Although courts did not initially recognize sexual harassment as a valid or genuine claim under this Act, sexual harassment began to emerge as a valid cause of action in 1976. This was the year a lower court in Washington, D.C. recognized quid pro quo sexual harassment as discrimination in *Williams v. Saxbe* (1976). The Equal Employment Opportunity Commission published guidelines in 1980 that provided a framework for this new claim, and the Supreme Court adopted it. The guidelines identified quid pro quo harassment and hostile environment harassment and the Supreme Court later adopted this distinction (Epstein, 2004).

The Equal Employment Opportunity Commission (1994) defines “Quid pro quo” to be conditions in which an employee has rejected an employer’s sexual advances and the supervisor has taken adverse, tangible, retaliatory action against the employee. A prima facie case (meaning "on its first appearance", or "by first instance" used in common law jurisdictions to denote evidence that is sufficient, if not rebutted, to prove a particular proposition or fact) for quid pro quo harassment is established if the employee shows that (1) he/she was a victim of a pattern or practice of sexual harassment attributable to their employer; and (2) the plaintiff applied for and was denied an employment benefit for which they were technically eligible, and for which they had a reasonable expectation (*Bundy v. Jackson*, 1981).

Under the Equal Employment Opportunity Commission Guidelines (1990), an employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible employment action, the employer is liable unless he or she proves that: 1) they exercised reasonable care to prevent and promptly correct any harassment; and 2) the employee unreasonably failed to complain to management or to avoid harm otherwise. U.S. Circuit Courts have issued contradictory opinions about what constitutes a “tangible employment action” (*Parkins v. Civil Constructors of Ill., Inc*, 1998; *Grozdanich v. Leisure Hills Health Ctr., Inc*, 1998).

Foote & Goodman-Delahunty (1999) reported that the legal fundamentals and policy of a hostile workplace environment claim differ from those of a quid pro quo claim in that workers, subordinates, or supervisors can create a hostile workplace atmosphere without any threat of the loss of tangible job benefits, if the harassing behavior

unreasonably changes the employee's working conditions and creates an abusive workplace environment.

According to Koen (1989), *Meritor Savings Bank, FSB v. Vinson* (1986) was the first Supreme Court case to recognize a hostile environment claim, and it significantly changed the landscape of this field of law. The Court explained that the Equal Employment Opportunity Commission had interpreted Title VII to afford "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," therefore a lack of tangible employment action should not necessarily doom a plaintiff's sexual harassment claim (Koen, 1989. p. 294).

Events that led to the *Meritor* case are described by Waller (2007) who describes the case of a female bank teller named, Ms. Vinson, who was hired at Meritor Savings Bank by Sidney Taylor. Taylor was her immediate supervisor for the next four years. Vinson testified that Taylor was at first a "fatherly figure" but that he eventually asked her to dinner, where he suggested that they go to a motel in order to have sex. Vinson consented, she said, out of fear that she would lose her job. She continued to have sex with him over the course of two years, and said that on several occasions he forcibly raped her. Taylor denied ever having had sex with Vinson.

Vinson was promoted several times during the years she worked at Meritor, but she was fired in 1978 after a series of disputes with Taylor (though the reason for her firing is not specified in the judicial opinion). She had never filed a complaint with the bank concerning Taylor's behavior. The court found that the sexual relationship between Vinson and Taylor was voluntary and that the bank had no responsibility for Taylor's behavior since it did not know about it. It also held that she had not suffered any

economic harm, noting that her promotions had not been based upon her participation in the relationship (Waller, 2007).

The appeals court remanded the case, saying that the district court had mistakenly treated the case as a quid pro quo complaint rather than a hostile environment complaint. It also held that the district court should not have relied on testimony about Vinson's dress or personal fantasies in deciding the relationship as voluntary, and that an employer is responsible for the behavior of its supervisory personnel whether it knows about it or not.

The Supreme Court agreed with the district court that Vinson's participation in the sexual relationship was voluntary, and held that testimony about her speech or dress was admissible in making that determination. However, it agreed with the appeals court that economic damage is not required for a hostile environment complaint (*Meritor Savings Bank, FSB v. Vinson et al*, 1996). The *Meritor* court's definition of welcomeness (not necessarily implied, it said, in Vinson's voluntary relationship) is now a foundation of sexual harassment case law. In *Meritor*, the court adopted language written by the Eleventh Circuit Court in *Henson v. Dundee* (1982):

In *Meritor Savings Bank, FSB v. Vinson* (1986), the court decided that sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be

demeaning and disconcerting as the harshest of racial epithets.

(Henson v. Dundee, 1982, p. A 24-25).

Since the court's ruling in *Meritor Savings Bank, FSB v. Vinson* (1986), employees claiming hostile work environment in sexual harassment must demonstrate that the treatment was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment (Henson v. Dundee, 1982, p. A 24-25)."

The Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex Regulations consider this kind of harassment to consist of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... has the purpose or effect of creating an intimidating, hostile, or offensive working environment (Equal Employment Opportunity Commission, p. 1604.11; A3)."

Other courts erroneously transposed an intentional component into a requirement that the harasser engage in the conduct at issue because of sexual intent, in part relying on language in the Equal Employment Opportunity Commission Guidelines on sexual harassment that the conduct be sexual in nature (e.g., *King v. Hillen*, 1994). Gradually, the element that the harassing conduct must be sexual in nature was broadened to include unfulfilled threats to force a sexual quid pro quo, discussing sexual activities, telling off-color jokes, unnecessary touching, remarking on physical traits, displaying sexually suggestive material, using demeaning or inappropriate vocabulary, using indecent gestures, sabotaging the victim's work, engaging in hostile physical conduct, granting job favors to those who take part in consensual sexual activity, using crude and offensive language (Foote, 2004, p. 19-21). For example, courts held that intimidation and hostility toward women because they are women can result from conduct other than explicit sexual

advances (e.g., *Andrews v. City of Philadelphia*, 1990; *Hall v. Gus Construction Company*, 1988).

Ranney (1997) recounts the events that lead to the lawsuit filed on behalf of a female worker who alleged abusive work environment because of gender against her former employer, Forklift Systems, Inc. On November 9, 1993, the Supreme Court of the United States decided the case, *Harris v. Forklift Systems, Inc.* The Federal District Court was held to have applied incorrect standards under Title VII of Civil Rights Act of 1964 in rejecting a female worker's claim alleging abusive work environment because of gender. Harris sued her former employer, respondent Forklift Systems, Inc., claiming that the conduct of Forklift's president toward her constituted abusive work environment harassment because of her gender in violation of the Title VII of the Civil Rights Act of 1964. Declaring this is a closed case, the District Court found that among other things, Forklift's president often insulted Harris because of her gender and often made her the target of unwanted sexual innuendos.

The court concluded that the comments in question did not create an abusive environment because they were not "so severe as to ... seriously affect Harris' psychological well-being or lead her to suffer injury." (*Harris v. Forklift Systems Inc.*, p. A34-35) The Court of Appeals affirmed. Harris was one of only two female managers at Forklift Systems. The other female manager was the daughter of the company president, Charles Hardy, who was also the man Harris accused of harassment. Hardy, whom the district court's report characterized as a vulgar man, had a habit of asking female employees to retrieve coins from his front pants pockets or to pick up objects he tossed on the floor before him while he commented on their clothing. He occasionally suggested to

Harris, in the presence of other employees, that she clinched contracts with customers by sexual means. When she finally complained about his behavior, he expressed surprise and promised to modify it but soon reverted to his prior manner. Harris finally resigned her position with Forklift. The initial mediator's report in this case, which was adopted by both the trial and appeals courts, found that the other female employees did not object to what it called the joking work environment at Forklift and concluded that Harris's status as a manager made her more sensitive to Hardy's behavior than the female clerical employees. Harris lost her claim at both the trial and appeals levels (Ranney, 1997).

According to Wall (2000), the Supreme Court reviewed Harris's case solely to determine whether the “*Rabidue* standard of harm was required to prevail in a sexual harassment suit was appropriate,” (Wall, 2000, p.243) which means the reaction of a reasonable person in essentially similar circumstances was required to prevail in a sexual harassment suit (*Rabidue v. Osceola Refining Co.*, 1986). It concluded that a plaintiff may prevail in a suit "before the harassing conduct leads to a nervous breakdown" (Wall, 2000, p. 243). One Supreme Court judge wrote in deciding this case that determining whether an environment is hostile is an ambiguous endeavor, and proposed an objective standard testing whether the plaintiff's work performance had suffered. Another judge added a concurring opinion, specifying that a plaintiff need show not that tangible productivity has been affected by harassing behavior but that harassment had made it more difficult to do the job.

In the case of *Harris v. Forklift Sys., Inc.* (1993), the Supreme Court considered whether a plaintiff was required to prove psychological injury in order to prevail on a cause of action alleging hostile environment sexual harassment under Title VII of the

Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. A unanimous Court held that if a workplace is permeated with behavior that is severe or pervasive enough to create a discriminatorily hostile or abusive working environment, Title VII is violated regardless of whether the plaintiff suffered psychological harm. The Court's decision reaffirms *Meritor Savings Bank v. Vinson* (1986), and is consistent with existing Equal Employment Opportunity Commission policy on hostile environment harassment. Consequently, the Equal Employment Opportunity Commission is continuing to conduct investigations in hostile environment harassment cases in the same manner as it has previously (Wall, 2000).

The Court in *Harris* adopted the totality of the circumstances approach which the Commission had previously set forth in its "Guidelines on Discrimination Because Of Sex" and in its Policy Guidance "Current Issues of Sexual Harassment." Thus, in evaluating "welcomeness" and whether conduct was sufficiently severe or pervasive to constitute a violation, investigators should continue to "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred (Pace, 2002, p.8)." The Court also noted that the factors that indicate a hostile or abusive environment may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. The factors cited by the Court corresponds those detailed in the Equal Employment Opportunity Commission's Policy Guidance "Current Issues of Sexual Harassment." Moreover, both the Court and the Equal Employment Opportunity Commission have stressed that an employee is not required to show any single factor in

order to succeed on a hostile environment cause of action (*Harris, v. Forklift Systems, Inc.*, 1993).

The Court's rejection of the psychological injury requirement was also consistent with the Equal Employment's Opportunity Commission's *Policy Guidance on Current Issues of Sexual Harassment* (1990). The Equal Employment Opportunity Commission explicitly rejected the notion that in order to prove a violation, the plaintiff must prove not only that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment, but also that plaintiff's psychological well-being was affected. While investigators may consider psychological injury as a factor in assessing whether a hostile environment has been created, they should keep in mind that neither this nor any other single factor is required to state a cause of action for hostile environment harassment (EEOC; *Policy Guidance on Current issues of Sexual harassment*, 1990).

The Court in *Harris* used the reasonable person standard for assessing hostile environment claims. Previously, in its *Policy Guidance on "Current Issues of Sexual Harassment,"* the Equal Employment Opportunity Commission (1990) had adopted a reasonable person standard: "determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person (*Rabidue*, 1988, p. 424)."

Adler and Peirce (1993) reported that in defining the hypothetical reasonable person, the Equal Employment Opportunity Commission has emphasized that "the reasonable person standard should consider the victim's perspective and not stereotyped ideas of acceptable behavior (*Rabidue*, 1988, p. 430)." In *Harris*, the Court did not elaborate on the definition of reasonable person. The Court's decision was consistent with

the Equal Employment Opportunity Commission's view that a reasonable person is one with the perspective of the victim. As a result, investigators should continue to consider whether a reasonable person in the victim's circumstances would have found the alleged behavior to be hostile or abusive.

One significant problem with the “reasonable person standard is that it does not take into account the differences between how men and women experience sexual behavior (*Ellison v. Brady*, 1991, p. 19).” Conduct that may offend a woman may not offend a man, possibly because women are more susceptible to violence such as sexual assault and rape. In other words, men and women may be inherently differently situated with regard to sexual harassment (Adler & Peirce, 1993).

Review of the objective reasonableness standard in Title VII sexual harassment cases examines policies or goals that underlie subjective and objective aspects of the test to determine whether harassing conduct is sufficiently abusive and hostile to violate the law; (a) elimination of gender bias norms, (b) eradication of harassment, and (c) uniformity. Four formulations of objective reasonableness are distinguished: the reasonable person, victim, women, and employee (Foote and Goodman-Delahunty, 1999).

Johnson (1993) suggests that the following cases would not have differed in outcome had the reasonable person standard been applied.

Robinson v. Jacksonville Shipyards, Inc. (1991)

Ellison v. Brady (1991)

Lipsett v. University of Puerto Rico (1988)

Andrews v. City of Philadelphia (1990)

Spencer v. General Electric Co. (1988)

Burns v. McGregor Electronic Industries, Inc. (1993)

Lester (1993) suggests that the following cases would have differed had the reasonable women standard instead of the reasonable person standard been applied.

Fair v. Guiding Eyes for the Blind (1990)

Jones v. Flagship International, Inc., (1986)

Lipsett v. University of Puerto Rico, (1988)

Scott v. Sears, Roebuck & Co., (1986)

Hoffman (2004) argues the point that different groups of women who work for the same company could be treated differently by the males with whom they work. Hoffman calls this selective sexual harassment, and makes the argument that different women can be viewed as reasonable based on their given label (based on the males' perception of the females' sexual orientation) by the male coworkers. Hoffman undertook a case study of two women who worked for a cab company (one was heterosexual and the other was a lesbian), which suggests that women who openly admit to being lesbians are not subjected to the same environment as heterosexual women. Therefore, no harassed workers could be called on by 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.

According to Rubin (1995), sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that enters into employment decisions and/or conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

In hostile work environment complaints, the work environment must become so offensive as to adversely affect an employee's job performance.

A hallmark of a sexual harassment claim is that the advances are unwelcome. Unwelcome means that the person did not invite or solicit the advances. This is determined by an objective standard and not the claimant's subjective feelings. On the other hand, even voluntary participation in sexual activity does not mean that the advances were not unwelcome. One factor to consider is whether the person indicated that the advances were unwelcome notwithstanding consent.

Hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a job benefit. Hostile work environment harassment does not require an impact on an economic benefit. It can involve coworkers, third parties, or supervisors. It is not limited to sexual advances; it can include hostile or offensive behavior based on the person's sex. It can occur even when the conduct is not directed at the claimant but still impacts on his or her ability to perform the job. It typically involves a series of incidents rather than one incident although a single offensive incident may constitute a hostile work environment (Rubin 1995).

Petrocelli and Repa (1999) argue that three criteria must be met in a claim of harassment based on a hostile work environment for the plaintiff to prevail. The conduct of the defendant was unwelcome. The conduct of the defendant was severe, pervasive, and regarded by the claimant as so hostile or offensive as to alter his or her conditions of employment. The conduct of the defendant was such that a reasonable person (other reasonable terms where later applied, such as women, worker, victim) would find it hostile or offensive.

To decide on plaintiff's claim of sexual harassment, the trier-of-fact (judge or jury) must decide three issues. First the trier-of-fact must determine whether the plaintiff has proved by a preponderance of the evidence (more than 50% in the plaintiff's favor) that the alleged conduct actually occurred. Second, the trier-of-fact must find that some or all of the alleged conduct occurred and must decide whether the plaintiff has proved by a preponderance of the evidence (more than 50% in the plaintiff's favor) that the conduct constitutes sexual harassment. This requires that the trier-of-fact decide whether the conduct occurred because of plaintiff's sex, and if so, whether the conduct was severe or pervasive enough to make a reasonable person (worker or woman) believe that the conditions of employment were altered and the working environment was intimidating, hostile or abusive.

According to Foote & Goodman-Delahunty (2005), in deciding whether the conduct of a defendant is sufficiently severe or pervasive to create a hostile working environment, the trier-of-fact must view the conduct from the perspective of a reasonable person (worker or woman), not from the plaintiff's own subjective perspective. In other words, the issue that must be decided is not whether the plaintiff personally believed that their working environment was hostile. The issue that must be decided is whether a reasonable person (worker or woman) would find the working environment hostile. Thus, if only an overly-sensitive person would view the conduct as sufficiently severe or pervasive to create a hostile working environment, but a reasonable person (woman or worker) would not, it is not harassing conduct for which the plaintiff can recover. By the same token, even if the plaintiff personally did not find the alleged conduct to be severe or pervasive, but a reasonable person (worker or woman) would, it is harassing conduct

for which the plaintiff can recover. The trier-of-fact must use their own judgment in deciding whether a reasonable person (worker or woman) would consider the working environment hostile.

According to Foote & Goodman-Delahunty (2005), the objective reasonable person standard is intended to safeguard employers against claims by hypersensitive individuals and against claims based on petty slights. In other words, a subjective perception that the workplace is hostile is inadequate; only behavior so objectively offensive as to alter the conditions of the victim's employment constitutes prohibited harassment.

A hypersensitive or idiosyncratic employee will not state a cause of action unless the complained of conduct, objectively viewed, is harassing. (p.58-59)

Strong arguments can be made for the support or rejection of a reasonable woman standard. While not categorically arguing for such a standard, Baird, et al. (1995) pointed out that since, over-all, women rated scenarios in the work environment as more harassing than men (and both men and women viewed behavior by a male perpetrator as more likely to qualify as harassment), it may be unfair to use a reasonable person standard, an average of men's and women's interpretations of harassment. Researchers have tempered the interpretation of their findings by calling attention to claiming that such a standard is ambiguous and vague and that it singles out women for special treatment (Baird et al., 1995).

Perry, Kulik, & Bourhis, (2004) hypothesized that when other variables (e.g.

severity of the harassing behavior, presence of witnesses) are held constant, hostile environment sexual harassment cases heard under reasonable woman standard will be more likely to result in decisions that favor the plaintiff than cases that are not heard under this standard.

The researchers found only a weak relationship between legal standard and court decision in actual legal cases. The results suggested that hostile environment sexual harassment cases that operated under a reasonable women standard were somewhat more likely to be decided for the plaintiff than cases that did not operate under a reasonable women standard. The article suggested looking at judge gender and legal standard (it also implied that there were not enough female judges who hear cases involving sexual harassment), investigating the use of alternatives to the reasonableness standards that have been proposed (e.g. respectful person standard) in an effort to understand their potential impact on court decisions, and adapting the fact pattern methodology used in experimental studies to samples of actual judges to get a fuller understanding of how a variety of factors jointly influence the judicial decision making process (Perry et al., 2004).

The Supreme Court enacted sexual harassment laws under Title VII in 1964, since that time, the courts have established articulated and altered the field of sexual harassment law. The legal standard of reasonableness, which is used by the courts to determine liability in sexual harassment cases, has particularly been a source of question among the legal community.

This current study intends to pursue Perry et al's (2004) suggestion to, "explore the use of alternative reasonableness standards by comparing the reasonable woman

standard to the reasonable person and reasonable worker standard.” (Perry et al, 2004, p. 22)

The purpose of this study is to determine if the participants who applied the reasonable woman standard, as compared with those using the gender-neutral reasonable person or worker standard, would be more likely to take the complainant’s perspective. Furthermore, it is hypothesized that the more the jurors discuss the definitions of reasonable the more likely they will be to find for the plaintiff when the wording is “reasonable woman” as opposed to “worker or person.”

CHAPTER II

Methodology

Participants

The sample consisted of 157 participants randomly divided into one of three groups. Participants were 82 males, and 74 females. One participant did not list their gender. They encompassed a wide range of ages, races, and socio-economic backgrounds. The participants age ranged from 16 to 90, (mean age = 22.74 years).

Participants reported a wide variety of work experience including; 79 (47.4%) participants who worked in retail or food service industries, 13 (7.8%) participants who worked as police officers, lifeguards, or security, 18(10.8%) who reported employment as office workers, 13 (7.8%) teachers, aides, or counselors, 2 (3%) participants who reported being self-employed, 13 (7.8%) tradesmen, 3 (1.8%) theater workers, 1(.6%) poker dealer, 1(.6%) person who reported being retired, 4 (2.4%) environmental workers, and 10 (6%) who did not respond.

Participants' responses as to how long they have been employed ranged from 0 to 35 years with a mean of 2 years and 3 months. Six of the 157 participants reported that they have served on a jury in the past.

Participants were recruited from either Rowan University's undergraduate psychology classes or Atlantic Cape Community College's student enrollment. Rowan students were required to sign up to participate in research in order to meet the class

requirements. Atlantic Cape Community College students were recruited by professors who volunteered the students to participate as a class. All Atlantic Cape Community College students were informed that they did not have to participate and not participating would not be held against them. All participants were given an informed consent form to sign (See appendix H for full documentation.).

Neither the colleges, nor the professors, nor the students were offered any incentive to participate, although students were given class credit by their professors.

Materials

Each participant was given a written sample of a sexual harassment complaint entitled, *Mary (Plaintiff) v. X Company and Joe (Defendant)* (See Appendix E for full documentation.). Each participant also received a written explanation of the judge's instructions. The judge's instructions were taken from the New Jersey jury instructions, *Specific prima facie burden to be included in general charge; section G. Sexual harassment; hostile environment (11/99)*. The instructions explained legal standards that must be met in order for the jury to decide in favor of either the plaintiff or the defendant. Included with the judge's instructions was definition of the reasonable standard, unwelcome, and hostile work environment (See Appendix F for full documentation.). After reading the case and the judge's instruction, participants answered a survey that asked questions regarding the participant's individual decision regarding the case, a form to record the mock jury's decision as a whole, and a repeat survey of the individual's decision regarding the case.

A Sony® Micro cassette-Recorder M-470 was used to record each mock jury group while they discussed the case and determined the verdict. Jury groups ranged from

2 to 12 members each. ($M = 6.5$)

Design and Procedure

Instructions were given to each mock jury explaining that they were to read the case, the judge's instructions, and then complete the first survey individually. This was followed by each jury being audio recorded while discussing the case and unanimously deciding whether Joe and Company X were either liable or not liable. After the mock jury had a verdict each participant was asked to finish the next questionnaire individually. In order to control for acquiescence by the participants, they were not told what the purpose of the test was until the entire sample group had completed the surveys and returned the surveys to the researcher. Each participant was given a debriefing before they were dismissed from the classroom (See Appendix I for full documentation.).

The packet given to each participant included a questionnaire that asked demographic questions, such as gender, age, year of school, major, work experience and whether the participant had ever served jury duty in the past.

The surveys were designed with Likert scales to measure the participants' responses. The participants were asked to indicate their degree of agreement with each statement listed in the survey. The five-level Likert scale asked the participants to circle either; strongly disagree, disagree, neutral, agree, or strongly agree; with 1 for strongly disagree and 5 for strongly agree. This scale was used for all of the jury decision questions with the exception of the question regarding severity which was scored with a 1 to 10 rating (1 less severe; 10 More severe). Participants were asked to respond to statements about the case, such as, "There was a hostile work environment," or "The conduct was severe or pervasive enough to make a reasonable worker believe that the

conditions of employment were altered and the working environment was intimidating, hostile, or abusive. (See Appendix for full documentation.).

All testing sites were college classrooms. In all trials the researcher used the same standard procedure administering the instructions and surveys. The same researcher gave the instructions to every mock jury. Each jury was given as much time as needed for the jury to agree to a unanimous decision.

Participants were randomly divided into 24 mock juries with sizes ranging from 2 to 11. ($M = 6.5$) Participants were divided into mock juries that had three different sets of reasonable standard. The groups consisted of 7 juries who were asked to determine liability based on the reasonable woman standard, 8 juries who decided the case using the reasonable person standard and 9 juries who used the reasonable worker standard. All instructions were identical except for the words (reasonable person, reasonable woman, or reasonable worker). Three sets of instructions were presented to groups with definitions of reasonable person, reasonable worker or reasonable woman (See Appendix G for full document.). The groups were told to read the sexual harassment complaint and to arrive at a decision in 20 minutes. Participants would individually fill out a questionnaire about the case prior to making their decision and again after the decision is made.

All groups were told that they would be audio tape recorded as they attempted to reach a verdict. To check whether the participants had a firm grasp of the meaning of the reasonable standard the recordings were then analyzed to determine to what extent the participants discussed the “reasonable person, woman, or worker” standard and what impact the standard had on their final decision.

CHAPTER III

Results

It was hypothesized that participants, who apply the reasonable woman standard, as compared with those using the person or worker standard, would be more likely to take the complainant's perspective. There was a significant difference between woman, $\chi^2(4, N = 49) = 62.066, p < .01$, person, $\chi^2(4, N = 55) = 68.15, p < .01$, and worker standards, $\chi^2(4, N = 53) = 37.90, p < .01$, and pre- ($M = 2.43$) and post ($M = 2.47$) responses for point of view. Participants were asked, if they had judged the case from the point of view of the plaintiff, an objective observer, or both the plaintiff and an objective observer. Post-test scores of 145 (92.4%) of the participants in this study found that they judged this case from either the plaintiff's view or the plaintiff's and an objective observer's view. Post-test scores of 12 (7.6%) participants claimed to have judged the case from the plaintiff's point of view. Post-test scores of 59 (37.6%) of the participants claim to have judged the case from an objective observer's point of view in determining liability. Post-test scores of 86 (54.8%) of the participants claimed to have judged the case from both the plaintiff's and an objective observer's point of view (See Appendix A for figure 1.). The data collected partially supports the hypothesis that individual participants, who apply the reasonable woman standard as compared with those using the gender-neutral reasonable person or worker standard, would be more likely to take the complainant's perspective. In the current study, participants used the point of view of the plaintiff and an objective observer more in the post test than in the pretest.

Those participants who reported a score of 5 (strongly agree) to the statement, “I have personally experienced sexual harassment in the work place.” judged the defendant’s conduct to be more severe ($M = 6.97$; on a ten point scale) than those participants who reported a score of 1 (strongly disagree) to the statement, “I have personally experienced sexual harassment in the work place ($M = 5.94$).” Analysis of total scores of participants who reported that they had not experienced sexual harassment in the workplace to participants who reported that they had experienced sexual harassment in the workplace using a pair-wise comparison shows that the difference is approaching significance with those who said they had experienced sexual harassment saying the environment was more severe ($M = 3.98$) (See Appendix B for figure 2.). $F(4, 126) = .590, p = .058$

There was a marginally significant interaction between judgments of hostile work environment and those who had experienced sexual harassment in the workplace. Participants who had reported that they had experienced sexual harassment in the workplace ($M = 4.22$) judged the case as more hostile than those who had not done so (See Appendix C for figure 3.). $F(1,127) = 2.57, p = .04$

Participants who reported that they disagreed with the statement, “I have personally experienced sexual harassment in the workplace,” reported that they found the defendant’s behavior to be more unwelcome on the post test than they had reported on the pretest. $F(4,127) = 1.36, p = .052$ Also, individual participants who reported that they agreed with the above statement reported that they found the defendant’s behavior to be more unwelcome after they have met with other jury members and discussed the case. Their pre- and post-test scores were significantly different. $F(4,127) = 1.36, p = .039$

Descriptive statistics show that 59.2% (posttest) of the participants agreed that the defendant's actions created a hostile work environment, while 26.1% (posttest) of the participants strongly agreed that the defendant's actions created hostile work environment. Most of the participants also agreed (57.3% posttest) or strongly agreed (26.1% posttest) that the defendant's conduct was unwelcome by the plaintiff. Participants agreed (51.6% posttest) or strongly agreed (26.1% posttest) the harassment was due to the plaintiff's sex.

Nineteen mock juries decided that the defendant, Joe, and Company X were liable and 5 mock juries decided that the defendant, Joe, and Company X were not liable. A cross-tabulation of juries assigned to each standard determined significant differences in judgments of liable and not liable for the reasonable woman standard, the reasonable person standard and the reasonable worker standard; woman, $\chi^2(1, N = 49) = 9.01, p = .012$, person, $\chi^2(1, N = 54) = 17.04, p < .01$, worker, $\chi^2(1, N = 53) = 29.03, p < .01$, (See Appendix D for figure 4.).

It was believed that participants assigned to the reasonable woman standard (as compared to the reasonable person or worker standard) would lower their thresholds and therefore be less affected by individual-difference factors. The data collected does partially support the hypothesis that the participants assigned to the reasonable woman standard would lower their thresholds and therefore be less affected by individual-difference factors. There was a significant difference between the mock juries using the reasonable woman standard ($M = 4.57$), the mock juries using the reasonable person standard ($M = 2.13$), and the mock juries using the reasonable worker standard ($M = .78$). The mean reported above represents the number of times each jury mentioned the word

hostile. The woman group mentioned “hostile” significantly more than either the person or worker groups $F(2, 23) = 3.33, p = .055$. Tukey is $p < .045$ between woman and worker.

There was no significant difference between juries for mentioning the words unwelcome, whether the behavior of the defendant constitutes sexual harassment, whether the plaintiff’s work conditions were altered, and whether or not the participants found the defendant’s behavior to be severe and pervasive.

It was hypothesized that the more the jurors discuss the definitions of reasonable the more likely they would be to find for the plaintiff when the wording is reasonable woman as opposed to worker or person. The findings show that participants in all three groups did not mention the term reasonable often ($M = 1.13$). The participants instead discussed the term hostile more frequently ($M = 2.33$). $F(2, 23) = 3.33, p = .055$

Therefore, the data does not support the third, and final, hypothesis that more the jurors discuss the definitions of reasonable the more likely they would be to find for the plaintiff when the wording is reasonable woman as opposed to worker or person.

Participants in the reasonable woman jury used the words hostile work environment more than in the reasonable worker jury. Participants in the reasonable woman jury also mentioned the reasonable standard the most times even though overall there was only a marginal significant difference between juries.

CHAPTER IV

Discussion

Strong arguments have been made for the support or rejection of a reasonable woman standard. Prior research (Baird, 1995) pointed out that since, over-all, women rated scenarios in the work environment as more harassing than men it may be unfair to use a reasonable person standard, an average of men's and women's interpretations of harassment.

The case of *Ellison v. Brady* which was used in this research set precedent for the use of the reasonable woman standard in many states; however, the data analyzed in this research did not show a difference in outcome when comparing the outcome of defendant's liability (yes, no) between the three groups (woman, person, or worker).

This research suggests that jury members are more likely to focus on whether the defendant's actions created a hostile work environment rather than whether the plaintiff's inability to perform his or her job under the stated conditions was reasonable.

Based on the findings of this research it seems more likely that the juror's past personal experiences with sexual harassment in the workplace are more of a contributing factor to the juror's final decision. Jurors may be determining liability based on their interpretation of the definition of hostile work environment, which is one of the criteria for determining sexual harassment, rather than the definition of the reasonable standard used in the judge's instructions.

Prior research pointed out that woman jurors rated scenarios in the work environment as more harassing than men jurors (Baird et al., 1995). This may also be true for participants who have personally experienced sexual harassment prior to sitting on a jury. The data collected in this study shows the interaction between those who reported and did not report being a victim of sexual harassment, and then, judgment of severity is approaching a significant difference.

Participants who reported that they disagreed with the statement, "I have personally experienced sexual harassment in the workplace," reported that they found the defendant's behavior to be more unwelcome on the post test. Also, individual participants who reported that they agreed with the above statement reported that they found the defendant's behavior to be more unwelcome after they have met with other jury members and discussed the case. The results suggest that all jurors tend to find the defendant's behavior as perceived as unwelcome by the plaintiff after discussing the case with other jury members.

However, when severity of the case was discussed by the juries, individual jury members who had experienced sexual harassment in the work place were more likely to find the case to be more severe than those jury members who had not had personal experience with sexual harassment. Based on the data, the participant's individual experiences with sexual harassment seem to be affecting the outcome of the individual's decisions. This should be investigated by future researchers. As mentioned above, prior research has shown a difference between males and females as to how each gender rates scenarios in the work environment as harassing (Baird et al., 1995). This current research has established that individuals with prior personal experience with sexual harassment in

the workplace also tend to deem the defendant's behavior as more severe. Future research should focus on differences between male and female jury members who report that they have had personal experience with sexual harassment and how that experience affects jury decisions.

Prior research has suggested that when other variables (e.g. severity of the harassing behavior, presence of witnesses) are held constant, hostile environment sexual harassment cases heard under reasonable woman standard will be more likely to result in decisions that favor the plaintiff than cases that are not heard under this standard (Perry et al., 2004). In this study, the prior involvement in sexual harassment cases by the participants was not accounted for before the research was conducted. In the current study, the fact that individuals who report having personally experienced sexual harassment in the work place deem the defendant's behavior to be more severe and hostile than other jury members is an important finding.

This study used a convenience sample comprised of college students from two institutions of higher learning. The majority of the participants were under the age of 21. One hundred and twelve (71.3%) of the participants were between the ages of 18 and 21. Due to the high percentage of participants who are in their late teens to early twenties it is highly unlikely that the results of the study can be generalized to the U.S. population which represents the true jury pool.

Another limitation that may have affected the outcome of this research is possible misinterpretation of the jury instructions or definitions by the participants. In one particular jury, one of the male participants convinced the other jurors that a liable verdict against the defendant would result in the defendant being placed on Megan's Law and

would ultimately force the defendant to register as a sex offender. The jurors were not instructed to discuss the ramifications of the verdict and this juror may have unintentionally hampered the results. In another group, a female is heard on the audiotape asking if the defendant is reasonable. Again, this leads the researcher to the assumption that at least one participant was not able to understand the judge's instructions and definitions needed to decide the case.

This research supports a marginally significant difference between the reasonable woman group and reasonable workers juries. Reasonable woman juries tended to use the term hostile work environment significantly more often than the reasonable workers group. No significant differences were found among the woman, person or worker groups in terms of saying the words unwelcome, severe, pervasive, if the case constituent sexual harassment or in determining liability. There was a significant difference between woman and worker when participants were asked individually to determine if the defendant's action created a hostile work environment. Individual participants in the reasonable woman group had higher scores for hostile work environment than the reasonable worker group. Participants in the reasonable woman group also mentioned the reasonable standard the most times even though overall there was only a marginal significant difference between juries which partially supports the original hypothesis.

This researcher proposes that future research on the effects of the reasonable standard on jury decisions consider the flaws of this study and rework future research accordingly. Emphasis should be placed on testing the participant's level of understanding in regards to the legal definitions used in the judge's instructions. Future research might include pre-jury selection testing, which is designed to test each potential

participant's ability to understand legal terms and concepts.

Future research should also be conducted that includes the independent variables reasonable woman, reasonable person, and reasonable worker, but limits the dependent variable to only include liability. In this study, including variables, such as hostile work environment, may have distracted the participants' attention away from the reasonable standard. The other variables are supposed to be the standard by which they make their decision. Based on this research that may not always be the case, since some mock juries in this research determined the case on only specific legal wording and did not take into account all of the standards. Often cases in this study were decided (according to the audio tapes) based on one or two legal standards alone. Groups were recorded who never mentioned the term reasonable, hostile, and severe. Groups varied in their discussions. Some groups did not discuss the case at all among themselves evidenced by their audio times of 45 seconds to decide the case, while other groups took as long as 20 minutes to discuss the legal standards that were given in the judge's instructions for the jury. Based on the findings it is possible that several of the participants did not understand the legal definitions that required comprehension in order to determine liability. Several examples of statements made by participants were mentioned earlier, (e.g., one participant convinced jurors that a liable verdict would result in the defendant being placed on Megan's Law and a female is heard asking if the defendant is reasonable) that suggest not all participants were able to understand the judge's instructions. Future research might consider testing if the participant's knowledge of the legal definitions is accurate before having them participate as a jury member.

REFERENCES

- Adler, R. S. & Peirce, E. R. (1993). The legal, ethical, and social implications of the “reasonable woman” standard in sexual harassment cases. Fordham Law Review, 61, 773-824.
- Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).
- Baird, C. L., Bensko, N. L., Bell, P. A., Viney, W., & Woody, W. D. (1995). Gender influence on perceptions of hostile environment sexual harassment. Psychological Reports, 77, 79-82.
- Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
- Barnes v. Train, 13 Fair Employment Practice. Casoy. 124 (1974).
- Bundy v. Jackson, 205 U.S. App. D.C. 444; 641 F. 2d 934 (U.S. App. 1981).
- Corne v. Bausch & Lomb, 390 F. Supp. 161 (U.S. Dist. 1975).
- Ellison v. Brady, 924 F.2d 872, 879-80 (9th Cir. 1991).
- Equal Employment Opportunity Commission (1990, March 19). Current issues of sexual harassment. In EEOC Policy Guide (no. N-915-050). Retrieved September 8, 2007, from www.eeoc.gov/docs/currentissues.html.
- Equal Employment Opportunity Commission (1994, March 8). Guidelines on discrimination because of sex. In EEOC Policy Guide (No. N-915-002). Retrieved September 8, 2007, from <http://www.eeoc.gov/policy/docs/harris.html>.
- Epstein, E. (2004). Federal sexual harassment and the “reasonable women”

- standard. (2004). Georgetown Journal of Gender and the Law 4(9), 377-87.
- Foote, W. E. & Goodman-Delahunty, J. (1999). Pragmatic support for the reasonable victim standard in hostile workplace sexual harassment cases. Psychology, Public Policy, and Law, 5(3), 519-55.
- Grozdanich v. Leisure Hills Health Center, Inc. 48 F. Supp. 2d 885 (U.S. Dist 1999).
- Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988).
- Henson v. Dundee, 682 f.2d 897 (1982).
- Hoffman, E. A. (2004). Women treated differently: Why the “reasonable woman” standard might not be reasonable. Equal Opportunities International, 23(3-5), 67-80.
- Johnson, P. (1993). The reasonable woman standard in sexual harassment law: Progress or illusion? Wake Forest Law Review, 28, 619-669.
- King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994).
- Koen, C. M. (1989). Sexual harassments: Criteria for defining hostile environment. Employee Responsibilities and Rights Journal, 2(4), 289-301.
- Lester, T. (1993). The reasonable woman test in sexual harassment law - Will it really make a difference? Indiana Law Review, 26, 227-262.
- Pace, F. (2003). Concepts of ‘reasonableness’ in sexual harassment legislation: Did Queensland get it right? QUT Law and Justice, 3, 1-17.
- Parkins v. Civil Constructors of Illinois, Inc, 97 50142 (U.S. Dis. 1998).
- Perry, E. L., Kulik, C. T, & Bourhis, A. C. (2004). The reasonable women standard: effects on sexual harassment court decisions. Law and Human Behavior, 28, 9-27.
- Petrocelli, W., & Repa, B. K. (1999). Sexual harassment on the job; what it is & how to

stop it (4th ed.). California: Nolo Press.

Rabidue v. Osceola Refining Co, *ETC*. 481 U.S. 1041; 107 S. Ct. 1983,

decided 1987)

Rabidue v. Osceola Refining Co. 805 F.2d 611 (U.S. App. 1986).

Ranney, F. J. (1997). What's a reasonable woman to do? NWSA Journal 9(2), 1-21.

Rubin, P. N. (1995). Civil rights and criminal justice: Employment discrimination
overview [Electronic version]. Research in Action, 2-4.

Specific Prima Facie Burden to be Included in General Charge, Model Civil Jury
Charges. Retrieved on September 25, 2007, Available
at: <<http://www.judiciary.state.nj.us/civil/civindx.htm>>.

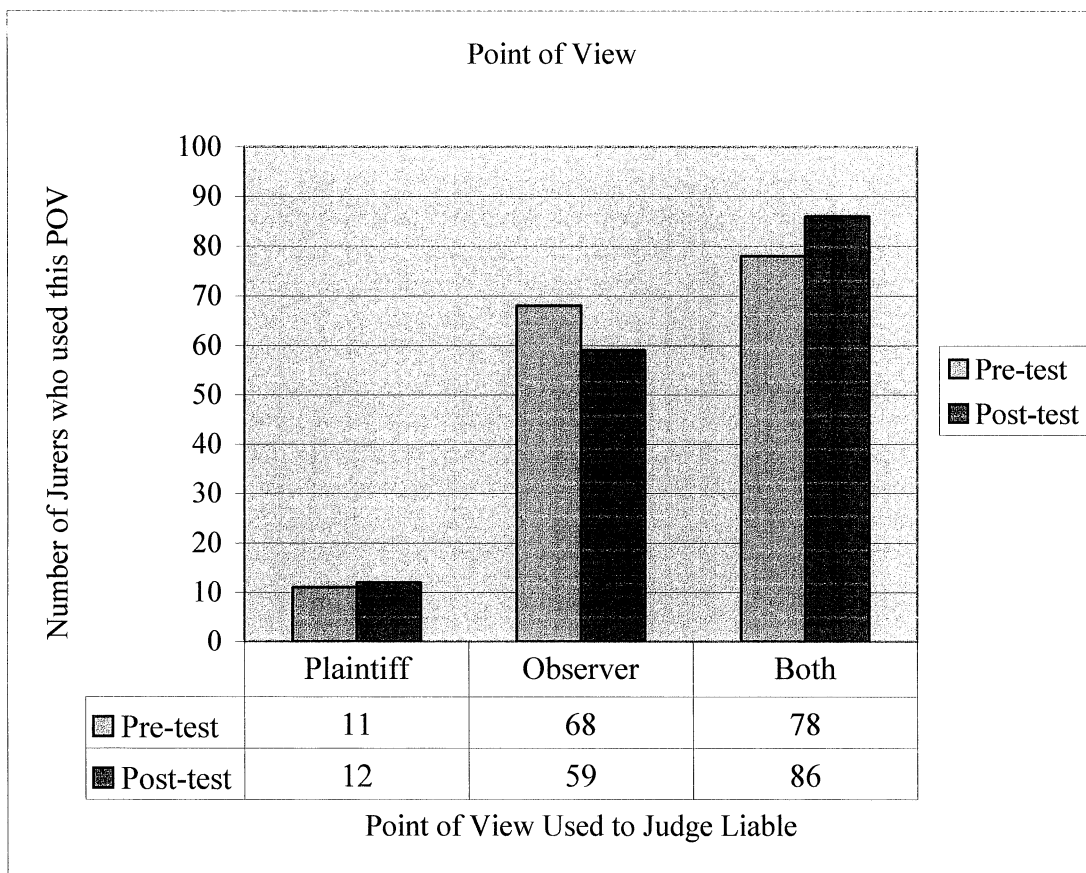
Wall, E. (Ed.). (2000). Confrontations and decisions: Sexual harassment. New York:
Prometheus Books.

Waller, B. (2007, May). New England Region's (FEW) "Mountain Air." (Available
from New England Region (FEW), P.O. Box 444, Farmington, NH 03835-0444).

Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

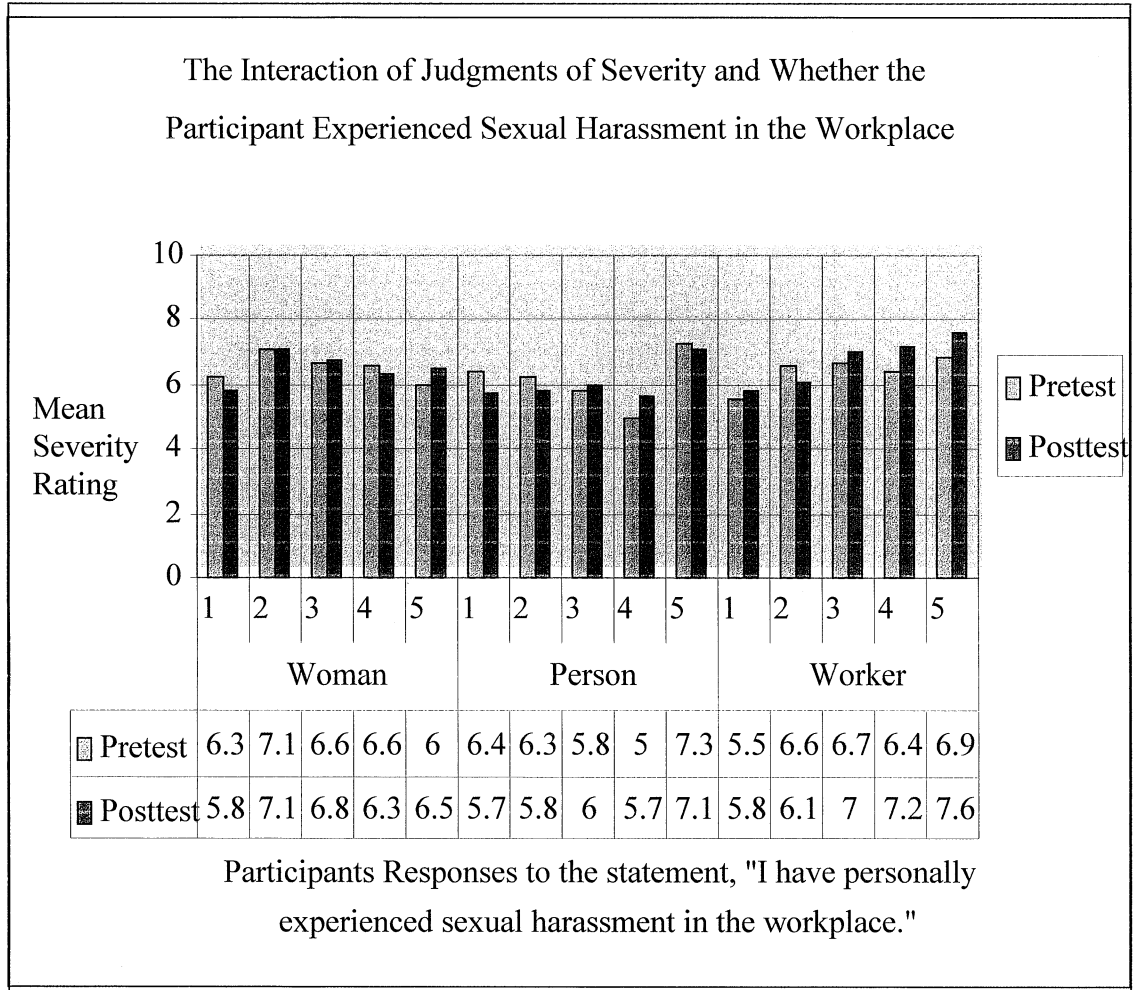
APPENDIX A

Figure 1. Point of View Participants Used to Determine Liability



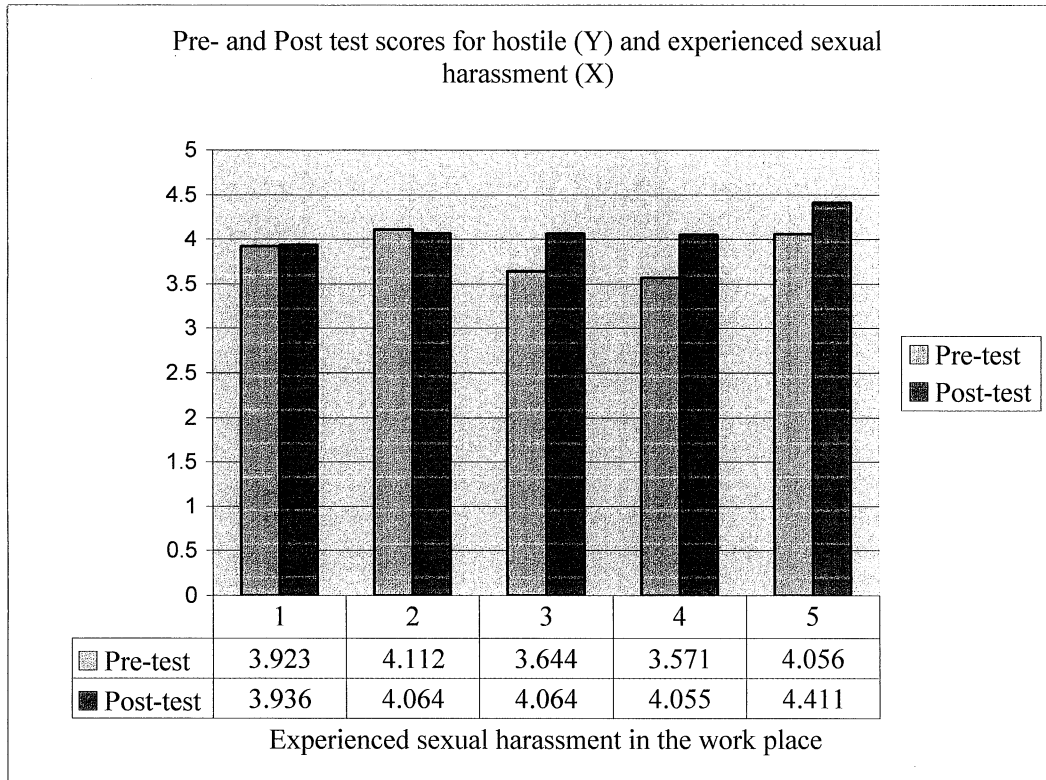
APPENDIX B

Figure 2. The Interaction of Judgments of Severity and Whether the Participant Experienced Sexual Harassment in the Workplace



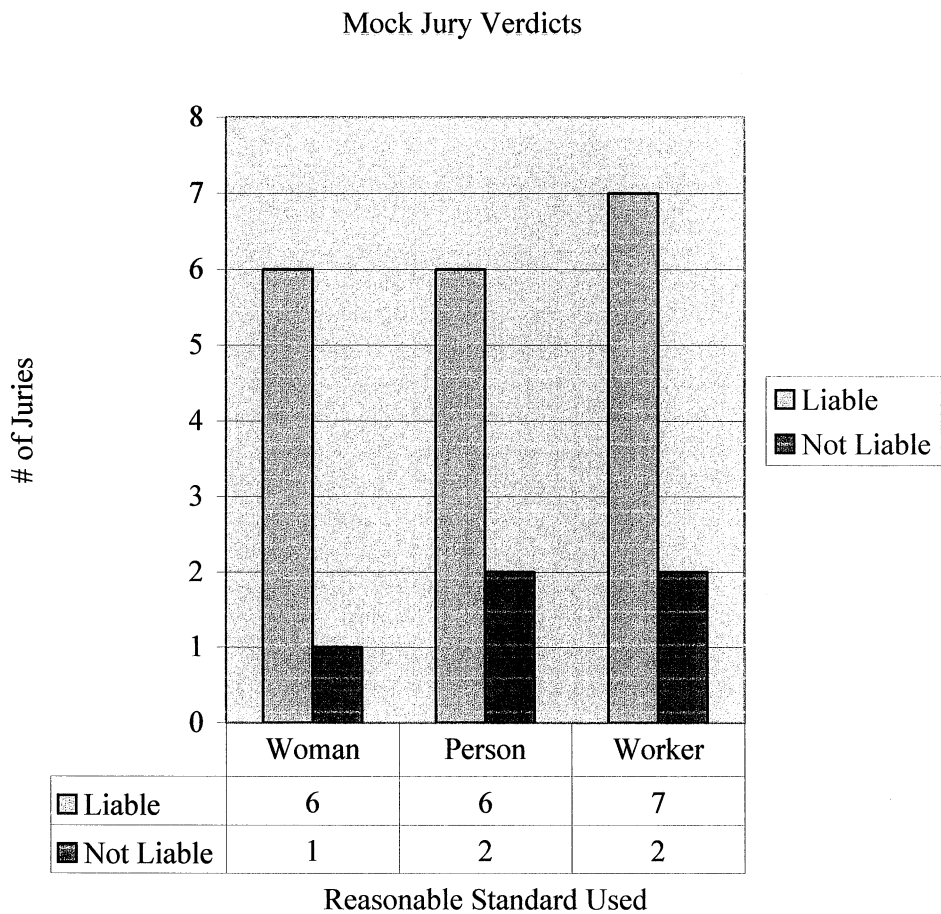
APPENDIX C

Figure 3. Pre- and Post Test Scores For an Interaction Between Hostile (Y) and Experienced Sexual Harassment (X)



APPENDIX D

Figure 4. Mock Jury Verdicts



APPENDIX E

Example of the Sexual Harassment Case Decided By Mock Juries

Please carefully read the following sexual harassment complaint described by the plaintiff.

Mary (Plaintiff) v. X Company and Joe (Defendant)

Mary worked as an agent for a large company. During training she met Joe, another trainee. The two co-workers never became friends, and they didn't work closely together. At this company agents often went to lunch in groups. When no one else was in the office, Joe asked Mary to lunch. She accepted. Mary claimed that after the lunch Joe started to pester her and hang around her desk. Four months later, Joe asked Mary out for a drink. She declined, but she suggested that they have lunch the following week. She did not want to have lunch alone with him, and she tried to stay away from the office during lunch time. One day, during the following week, Joe uncharacteristically dressed in a three-piece suit and asked Mary out for lunch. Again, she did not accept.

Two weeks later, Joe handed Mary a note, which read: "I cried over you last night and I'm totally drained today. I have never been in such constant turmoil. Thank you for talking with me. I could not stand to feel your hatred for another day." When Mary realized that Joe wrote the note, she became shocked and frightened and left the room. Joe followed her into the hallway and demanded that she talk to him, but she left the building. Mary later showed the note to a supervisor. The supervisor said that "this is sexual harassment." Mary asked the supervisor not to do anything about it. She wanted to try to handle it herself. Mary asked a male co-worker to talk to Joe and to tell him that she was not interested in him and to leave her alone. The next day, Joe called in sick.

Mary did not work on Friday, and on the following Monday, she started four weeks of training in another town. Joe mailed Mary a card and a typed, single-spaced, three-page letter, in which Joe wrote, in part: "I know that you are worth knowing with or without sex...Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style...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." Explaining her reaction, Mary stated: "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened."

Joe was transferred by the company but after six months requested to be transferred back. The transfer was granted with the stipulation that Joe did not attempt to contact Mary. Mary first learned of Joe's request in a letter from her supervisor. The letter indicated that management decided to resolve Mary's problem with Joe with a six-month separation, and that it would take additional action if the problem recurred. After receiving the company's letter, Mary was "frantic." She filed a formal complaint with the company. She also obtained permission to transfer temporarily when Joe returned. Joe wrote Mary another letter, which still sought to maintain the idea that he and Mary had some type of relationship.

Mary contacted the Equal Employment Opportunity Commission and filed a sexual harassment lawsuit against Joe and the company claiming, "hostile work environment."

APPENDIX F

Example of the Judge's Instructions to Jury

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that enters into employment decisions and/or conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

In "hostile work environment" complaints, the work environment must become so offensive as to adversely affect an employee's job performance.

A hallmark of a sexual harassment claim is that the advances are unwelcome.

"Unwelcome" means that the worker did not invite or solicit the advances. This is determined by an objective standard and not the claimant's subjective feelings. On the other hand, even voluntary participation in sexual activity does not mean that the advances were not unwelcome. One factor to consider is whether the worker indicated that the advances were unwelcome notwithstanding consent.

Hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a job benefit. Hostile work environment harassment does not require an impact on an economic benefit. It can involve coworkers, third parties, or supervisors. It is not limited to sexual advances; it can include hostile or offensive behavior based on the worker's sex. It can occur even when the conduct is not directed at the claimant but still impacts on his or her ability to perform the job. It typically involves a series of incidents rather than one incident (although a single offensive incident may constitute a hostile work environment).

Three criteria must be met in a claim of harassment based on a hostile work environment:

1. The conduct was unwelcome.
2. The conduct was severe, pervasive, and regarded by the claimant as so hostile or offensive as to alter his or her conditions of employment.
3. The conduct was such that a reasonable worker would find it hostile or offensive.

To decide plaintiff's claim of sexual harassment, you must decide three issues:

1. You must determine whether plaintiff has proved by a preponderance of the evidence (more than 50% in the plaintiff's favor) that the alleged conduct actually occurred.

2. If you find that some or all of the alleged conduct occurred, you must decide whether the plaintiff has proved by a preponderance of the evidence (more than 50% in the plaintiff's favor) that the conduct constitutes sexual harassment. This requires that you decide:

- (a) whether the conduct occurred because of plaintiff's sex, and if so, (b) whether the conduct was severe or pervasive enough to make a reasonable worker believe that the conditions of employment were altered and the working environment was intimidating, hostile or abusive.

Definition of Reasonable Worker - In deciding whether the conduct in this case is sufficiently severe or pervasive to create a hostile working environment, you must view the conduct from the perspective of a "reasonable worker," not from plaintiff's own subjective perspective. In other words, the issue you must decide is not whether plaintiff personally believed that their working environment was hostile. The issue you must

decide is whether a reasonable worker would find the working environment hostile. Thus, if only an overly-sensitive worker would view the conduct as sufficiently severe or pervasive to create a hostile working environment, but a reasonable worker would not, it is not harassing conduct for which the plaintiff can recover. By the same token, even if plaintiff personally did not find the alleged conduct to be severe or pervasive, but a reasonable worker would, it is harassing conduct for which the plaintiff can recover. You must use your own judgment in deciding whether a reasonable worker would consider the working environment hostile.

If, after applying these guidelines, you find that the plaintiff has not proven by a preponderance of the evidence that the alleged conduct constitutes sexual harassment, then you must return a verdict for the defendants on the plaintiff's claim of sexual harassment. If, on the other hand, you find that plaintiff has proven that the conduct constitutes sexual harassment, then you must return a verdict for the plaintiff.

In summary, you must decide whether plaintiff has proven by a preponderance of the evidence that the conduct constitutes sexual harassment. This requires that you decide

1. whether the conduct occurred because of the plaintiff's sex, and if so,
2. whether the conduct was severe or pervasive enough to make a reasonable worker believe that the conditions of employment were altered and the working environment was intimidating, hostile, or abusive.

APPENDIX G

Example of Individual Survey Given to Participants

Answer these questions after reading the case and the Judges

Instructions.

1. The defendant should be found liable for sexual harassment in this case.

_____ Yes _____ No

2. How severe did you find the behavior in this case to be?

1 2 3 4 5 6 7 8 9 10

Less severe

More severe

Respond to the following statements about the case: SD = strongly disagree, D = disagree, N = neutral,

A = agree, SA = strongly agree

3. There was a hostile work environment.

SD D N A SA

4. The conduct was severe or pervasive enough to make a reasonable worker

believe that the conditions of employment were altered and the working

environment was intimidating, hostile, or abusive.

SD D N A SA

5. The conduct occurred because of the plaintiff's sex

SD D N A SA

6. I judged this case from the point of view of the:

_____ the plaintiff

_____ an objective observer

_____ both the plaintiff and an objective observer

STOP HERE; When you are ready the researcher will push record on the tape recorded and you can discuss the case with the other jury members. Decide the case as a jury. You must have a unanimous decision. You have 20 minutes to discuss. When you have arrived at a decision, turn the page.

Answer this question for the entire jury after the jury's discussion.

Jury's decision. The defendant should be found liable for sexual harassment in this case.

_____ Yes

_____ No

Stop here. Do not turn the page until the group has indicated its' decision.

After the group has indicated its' decision, answer the following questions with your own opinion at the present time. Do not refer to your previous answers or follow jury member's opinions, but give only your personal current opinion.

1. The defendant should be found liable for sexual harassment in this case.

_____ Yes _____ No

2. How severe did you find the behavior in this case to be?

1 2 3 4 5 6 7 8 9 10

Less severe

More severe

Respond to the following statements about the case: SD = strongly disagree, D = disagree, N = neutral,

A = agree, SA = strongly agree

3. There was a hostile work environment.

SD D N A SA

4. The conduct was severe or pervasive enough to make a reasonable worker believe that the conditions of employment were altered and the working environment was intimidating, hostile, or abusive.

SD D N A SA

5. The conduct occurred because of the plaintiff's sex.

SD D N A SA

6. I based my decision on how I would have reacted to the events described in the case summary.

SD D N A SA

7. I judged this case from the point of view of the:

_____ the plaintiff

_____ an objective observer

_____ both the plaintiff and an objective observer

8. I have personally experienced what I believed to constitute sexual harassment at my work place.

SD D N A SA

9. I have personally been involved in a sexual harassment case.

SD D N A SA

10. I felt pressured by the other jury members to go against my personal verdict in this case.

SD D N A SA

Answer the following questions about yourself.

Gender

M _____ F _____

Age _____

Year in School

Freshman _____

Sophomore _____

Junior _____

Senior _____

Graduate Student _____

Major _____

Work Experience

Type of Job(s) _____

How long have you been employed in this field? _____ Years

_____ Months

Have you ever served on a jury?

Yes _____ No _____

APPENDIX H

Example of Consent Form

Informed Consent Form

I agree to participate in a study entitled, “The Effect of Jury Instructions on a Sexual Harassment Case” which is being conducted by Karen Matsinger of the Psychology Department, Rowan University. The purpose of this study is to examine the factors that enter into legal decisions in sexual harassment cases. The data from this study will be submitted for presentation at a research conference and will be submitted for publication in a research journal.

I understand that I will be required to read a summary of a sexual harassment case, read jury instructions, discuss the case with other participants, arrive at a decision, and answer questions about the case. My participation in the study should not exceed one hour. I understand that my responses will be anonymous and that all the data gathered will be confidential. I agree that any information obtained from this study may be used in any way thought best for publication or education provided that I am in no way identified and my name is not used.

I understand that there are no physical or psychological risks involved in this study, and that I am free to withdraw my participation at any time without penalty.

I understand that my participation does not imply employment with the state of New Jersey, Rowan University, the principal investigator, or any other facilitator.

If I have any questions or problems concerning my participation in this study I may contact Karen Matsinger at karenmatsinger@yahoo.com or (609)-884-6172) or Dr. Eleanor Gaer at (856)-256-4872.

Dr. Eleanor Gaer

(Professor's Name)

(Signature of Participant)

(Date)

(Signature of Investigator)

(Date)

APPENDIX I

Example of Debriefing Form Given to Participants After the Completed the Survey

Study Debriefing

This study is concerned with the comparison of three different versions of the reasonable standard (person, worker, and woman) and the effect each statement has on the outcome of the jury's verdict in a hostile environment sexual harassment lawsuit. Previous studies have found that, over-all, women rated scenarios in the work environment as more harassing than men (and both men and women viewed behavior by male perpetrators as more likely to qualify as harassment), therefore, it may be unfair to use a "reasonable person" standard, an average of men's and women's interpretation of harassment.

Why is this important to study?

Since the Supreme Court enactment of sexual harassment laws under Title VII in 1964, the courts have established, articulated and altered the field of sexual harassment law. The legal standard of "reasonableness," which is used by the courts to determine liability in sexual harassment cases has particularly been a source of question among the legal community.

Strong arguments have been made for the support or rejection of a "reasonable women" standard. This study intends to explore the use of alternative reasonableness standards by comparing the reasonable woman standard to the reasonable person and reasonable worker standard.

What if I want to know more?

If you would like to receive a report of this research when it is completed (or a summary of the findings), please contact Karen Matsinger at 609-884-6172 or

karenmatsinger@yahoo.com.

If you have concerns about your rights as a participant in this research, please contact

Professor Gaer at gaer@rowan.edu.

Thank you again for your participation.

