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Reasonable Men?

ANN C. MCGINLEY

After the Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII, lower courts used the reasonable person standard to measure whether the behavior was sufficiently severe or pervasive to constitute a hostile working environment. Cultural and radical feminists objected to the reasonable person measure, and many supported a reasonable woman standard, which the Ninth Circuit adopted. Because of its tendency to essentialize how women would react, many feminists soon abandoned their support for the standard. A number of circuits, however, continue to use the reasonable woman or reasonable victim standards.

Most of the scholarship concerning the proper standard of reasonableness assumes male perpetrators and female victims. There is no legal scholarship that deals with the question of a male victim of a female perpetrator. A recent Ninth Circuit female-on-male harassment case raises important issues concerning the reasonable woman standard.

This Article develops multidimensional masculinities, a new legal theory, to reconsider sexual harassment law as it relates to male victims. Through an examination of the recent Ninth Circuit case, it demonstrates that applying a reasonable man standard to male victims would establish a preferred standard of masculinity that may harm men, women, and society in general. Most likely, the Article proposes, the standard would mimic the concept of "hegemonic masculinity," the most powerful ideal form of masculinity in society. This ideal form of masculinity would judge too harshly those men who may be most vulnerable to other-sex and same-sex harassment: men who do not live up to gender stereotypes.

This Article proposes a shift to a new universal standard for determining whether workplace behavior is sufficiently severe or pervasive to create a hostile working environment. This standard inquires whether the victim's response is a reasonable one considering not only the various identity factors of the victim, but also the workplace, and the social and individual context in which the harassing behavior occurs.

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Reasonable Men?

ANN C. MCGINLEY*

I. INTRODUCTION

The law in the United States uses the reasonable person standard in a variety of disciplines, including constitutional law, torts, criminal law, commercial law, and employment discrimination.¹ Depending on the area and the particular case, the standard plays different roles. In negligence

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¹ See Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234 (2010) (discussing the different aspects of the law that utilize the reasonable person standard); see also Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537 (2010) (discussing the Supreme Court's new "reasonable observer" test in determining whether the government had violated the Establishment Clause); Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1457 (2010) (discussing the cultural influences on fact-finders' views of what a "reasonable person" would do when faced with perceived threats); Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1352 (2010) (discussing the prominence of the objective "reasonable person" standard in tort law); Caroline Forell, *What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401 (2010) (discussing the use of the "reasonable person" standard in tort and criminal law); Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's Miranda and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1499 (2010) (discussing the Court's differential treatment of police officers and lay persons in determining whether they acted as reasonable persons); Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435 (2010) (discussing the "reasonable person" standard in criminal law); Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285, 1286-87 (2010) (discussing the "reasonable person" standard in economic transactions).

and criminal law, for example, it determines the culpability of the defendant, including the availability of a justification or defense.² In Title VII law, it has a different purpose: it examines the *plaintiff's* story in light of community norms to determine whether the defendant's (or its agent's) alleged behavior creates a hostile working environment. A plaintiff in these cases must prove that the plaintiff subjectively experienced a hostile working environment and that the gender or sex-based behavior was sufficiently severe or pervasive to alter the terms or conditions of employment³ of a reasonable person.⁴

Thus, the reasonable person standard in hostile work environment law plays a perspectival rather than a culpability-determining function.⁵ Unlike in negligence law, where the reasonable person standard measures whether the defendant acted tortiously by breaching its duty of care to the plaintiff, in employment discrimination hostile work environment law, the reasonable person standard analyzes whether the *victim's* reaction to the environment was reasonable. While this standard indirectly establishes whether the defendant's alleged behavior is culpable, the primary focus is on the alleged victim's perception of the behavior, and whether a reasonable person under the circumstances would have a similar reaction.⁶

² Moran, *supra* note 1, at 1238, 1250. Where the defense of comparative negligence or comparative fault exists, the fact-finder will examine the reasonableness of the plaintiff's behavior. This is different from the perspectival approach in sexual harassment cases because it measures how the plaintiff's behavior contributed to the injury, not whether the plaintiff's *reaction* to the behavior was reasonable. More similar to sexual harassment claims are the intentional infliction of emotional distress cases where the victim's response is relevant. If there is sufficient notice to the defendant about a person's vulnerability to emotional injury, the defendant may be liable for intentional infliction of emotional distress. Where there is an allegation of sexual assault, the plaintiff's consent to the behavior is usually a defense, but inadequate consent will nullify the defense. There are two parts to proving inadequate defense: (1) abnormality of the victim making her unable to consent effectively; and (2) notice of the abnormality to the defendant. *See, e.g.,* Reavis v. Solminski, 551 N.W.2d 528, 538 (Neb. 1996) (noting the two types of effective consent). While this latter situation resembles an examination of reasonableness in sexual harassment law, it is more similar to an examination of unwelcomeness in a sexual harassment case than the reasonableness of the reaction of the plaintiff.

³ *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (using sexual harassment as an example to explain how the abuse must have altered the conditions of employment in order for it to be actionable).

⁴ *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining the application of the reasonable person standard).

⁵ *See* Moran, *supra* note 1, at 1259 (discussing the origins of the perspectival use of the reasonable person standard).

⁶ Although reasonableness of the plaintiff's behavior in responding to the defendant's alleged harassment is considered—along with the reasonableness of the employer's behavior—at a later stage if the defendant employer asserts an affirmative defense in a case of supervisor harassment of a subordinate, *see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), that is not the examination of the plaintiff that I am discussing here. Rather, I discuss whether a reasonable person would view the behavior as creating a hostile working environment itself, not whether the plaintiff could have corrected or avoided the environment if she had reported it to her employer.

Not all jurisdictions use the reasonable *person* standard, however. After the Supreme Court recognized sexual harassment as a form of discrimination under Title VII in *Meritor Savings Bank, FSB v. Vinson*,⁷ many lower courts used the reasonable person standard to measure the presence of a hostile working environment.⁸ Both cultural and radical feminists objected to the reasonable person measure in hostile working environment cases,⁹ however, because in their view the reasonable person standard was, in reality, based on what a reasonable *man* would do.¹⁰ Cultural feminists argued that the standard did not take into account the biological and social differences between women and men; radical feminists concluded that the use of a male norm ignored the power advantages that men had over women.¹¹ These concerns led many feminists to support a reasonable woman standard, which the Ninth Circuit adopted in *Ellison v. Brady*.¹² A number of other courts followed.¹³ But feminists soon became dissatisfied with the new reasonable woman test; they argued that the reasonable woman standard essentializes women by not taking into account the differences among women based on race, class, national origin, sexual orientation, and other identity factors.¹⁴ Some

⁷ 477 U.S. at 73.

⁸ Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 49 VAND. L. REV. 1183, 1202 (1989) (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986)); see also *Trotta v. Mobil Oil Corp.*, 788 F. Supp. 1336, 1350, 1350, n.3 (S.D.N.Y. 1992) (applying the reasonable person standard but stating that courts take into account “gender-based differences” in using this standard).

⁹ Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, Winter 1995, at 48–49.

¹⁰ See *id.* at 49 (“Both groups bridled at the possibility that women’s perspectives would be described in terms simultaneously applicable to men.”); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992) (“[T]he standard purports to be universal, to include all ‘mankind,’ and in practice courts have applied it to women as well as men.”).

¹¹ Abrams, *supra* note 9, at 49.

¹² 924 F.2d 872, 879 (9th Cir. 1991).

¹³ See, e.g., *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 137–38 (1st Cir. 2002) (applying the reasonable woman standard under Massachusetts law); *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 116 (3d Cir. 1999) (applying the reasonable woman standard under New Jersey law); *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (using the reasonable woman standard in a Title VII suit); cf. *Brennan v. Metro. Opera Ass’n*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (arguing that *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), permits taking into account identity characteristics of the victim). But see *Brennan*, 192 F.3d at 318 (using the reasonable person standard in majority opinion).

¹⁴ See MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 276–81 (2003) (discussing the evolution of the reasonable woman standard and the subsequent challenges to this notion by feminists); Cahn, *supra* note 10, at 1405–06 (noting that feminists also challenged the concept of reasonableness as gendered because it is based on rationality and excludes emotion); *id.* at 1415–17 (noting that the reasonable woman standard is problematic because it establishes women as victims, cannot accommodate the experiences of all women, and focuses on the victim rather than the actions of the perpetrator).

feminists also condemned the standard because they believed that it reinforces the view that women are marginal workers by assuming that women are different from, and inferior to, men.¹⁵ Others argued that although using a gendered standard may give some victories to women, the reasonable woman standard is problematic because it leaves intact a system of male privilege.¹⁶ Another believed that the reasonableness aspect of the test would itself preserve male power, and that adding women to the test did not resolve the tendency of the test to confirm the status quo.¹⁷

All of these debates assume male perpetrators and female victims. Subsequently, in *Oncala v. Sundowner Offshore Services, Inc.*,¹⁸ the Supreme Court held that male (and presumably, female) victims of same-sex harassment have a cause of action under Title VII if they prove that the harassment is severe or pervasive and occurs “because of . . . sex.”¹⁹ Scholars and courts have paid almost no attention, however, to the situation of a male victim of a female coworker’s sexual advances.

A recent Ninth Circuit female-on-male harassment case, *EEOC v. Prospect Airport Services, Inc.*,²⁰ raises important issues concerning the standard for female-on-male harassment, and for that matter, male-on-female and same-sex harassment. In *Prospect Airport Services*, a man alleged that a female coworker sexually harassed him over a number of months, and that their employer did virtually nothing to stop it. When the plaintiff brought suit, the federal district court commented that the plaintiff himself had admitted that most men would welcome this type of behavior and the court granted summary judgment to the defendant employer.²¹ The Ninth Circuit panel reversed, chiding the district court for its attitude toward the male defendant.²²

¹⁵ See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 469 (1997) (“As Guido Calabresi and others argue, this asymmetry means that the reasonableness inquiry reinforces majority dominance. Implicitly it posits a norm in which men and majority groups occupy the center and others the periphery.” (citing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 22–23 (1985))).

¹⁶ Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1806 (2000) (reviewing CAROLINE A. FORRELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000)).

¹⁷ Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990) (concluding that the reasonable person or reasonable woman tests “create a false sense of security . . . reinforcing the idea that legal analysis can be neutral and objective”).

¹⁸ 523 U.S. 75 (1998).

¹⁹ *Id.* at 80–81.

²⁰ 621 F.3d 991 (9th Cir. 2010).

²¹ *EEOC v. Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904, at *16, *22 (D. Nev. Sept. 27, 2007), *rev’d*, 621 F.3d 991 (9th Cir. 2010).

²² *Prospect Airport Servs., Inc.*, 621 F.3d at 997 (“[T]he district court decision noted that [the plaintiff] ‘admits that most men in his circumstances would have ‘welcomed’ [the female coworker’s] advances. But that is a stereotype and welcomeness is inherently subjective . . .”).

While it seems to make sense to consider the identity characteristics of the victim in assessing whether a reasonable victim would find the harassing behavior severe or pervasive, it also seems odd to hold individual male victims to a higher standard than that applied to individual female victims. The reasonable woman standard was established to assure that courts and juries would not impose male sensibilities (or the lack thereof) on female employees who are alleged victims of sexual harassment in the workplace.²³ When the Ninth Circuit adopted the reasonable woman standard in *Ellison v. Brady*, and other courts followed, courts and commentators assumed that sexual harassment victims were exclusively women. For this reason, no one advocating for the reasonable woman standard anticipated the standard that would apply to future male victims.²⁴ Because of this failure of forethought, it would be odd to apply a reasonable man standard reflexively to a male victim without considering the potential repercussions of doing so.

A major concern about applying a reasonable man standard to male victims is that the law would establish a preferred standard of masculinity that may harm men, women, and society in general. Most likely, the standard would mimic the concept of “hegemonic masculinity,” the most powerful ideal form of masculinity in society.²⁵ This ideal form of masculinity is often unachievable and would therefore judge too harshly those men who may be most vulnerable to other-sex and same-sex harassment: men who do not live up to male gender stereotypes.²⁶ Moreover, masculinities research demonstrates that aggressive and competitive masculine norms harm not only men but also women who are compared to the male standard.²⁷

By the same token, the reasonable woman standard has serious drawbacks when assessing harassment of many women: it assumes only one proper response from women, but there is no question that different women, depending on the myriad axes of their identities, experiences, and

²³ See *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991) (concluding that if the court did not take into account the perspective of the victim, the law would reinforce the current levels of discrimination, noting a number of sources that demonstrate that women generally react differently from men to sexual advances, and adopting the reasonable woman standard to protect female employees from harassment and employers from hyper-sensitive employees).

²⁴ See MORAN, *supra* note 14, at 276–81 (discussing the literature on sexual harassment, which deals exclusively with female victims).

²⁵ Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 184 (Peter F. Murphy ed., 2004). For a more thorough discussion of masculinities research, see Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 364–78, 380–83 (2004).

²⁶ See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1163 (2008) (“Our culture . . . exclude[s] men from power who do not live up to the normative definition of masculinity.”).

²⁷ See *id.* (“Our culture . . . exclude[s] women from power because they lack masculinity . . .”).

the context of the situation, have varying responses to the same harassing behavior. Many of these responses are reasonable.

Prospect Airport Services raises a number of other questions: whether it is possible to have a fair standard that applies uniformly to male-on-female, female-on-male, and same-sex harassment; whether an *objective* standard should consider identities and experiences of the alleged victims together with context of the work situation; and whether the standard applied in these cases makes a difference to the outcome. *Prospect Airport Services* allows us to consider all of these questions. Because *Prospect Airport Services* features the atypical situation of a man alleging that a female co-worker's behavior created a sexually hostile work environment, it is an excellent vehicle for reexamining the standard for determining whether a hostile working environment exists under Title VII.

To be clear, this is not a case comment; the case itself is not that important or groundbreaking. Rather, I use the case because its unusual fact pattern allows us to examine a problem in sexual harassment law through a different lens and to use the newly acquired perspective to solve a legal problem.

In doing so, I am developing multidimensional masculinities theory ("MMT"). Frank Rudy Cooper and I introduced the concept of MMT and coined the term in *Masculinities and the Law: A Multidimensional Approach*.²⁸ Multidimensional masculinities theory is both substantive and methodological. Its theoretical foundations derive from feminist legal theory, critical race theory, queer theory, intersectionality theory, and multidimensionality theory.²⁹ As a substantive matter, MMT combines research on masculinities with multidimensionality theory. Multidimensional masculinities theory draws on intersectionality theory's insight that persons often have more than one identity that affects their treatment. For example, black women are treated differently than white women and black men. Black women belong to two identity groups that are subordinated, and their treatment is not merely the composite of these two types of subordination. The combination of racism and sexism makes black women's experience qualitatively different from that of white women or black men.³⁰ Multidimensionality theory accepts this premise, and additionally explores a person's identities combined with the context of the situation. It allows us to go beyond the intersections of gender with

²⁸ Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 1, 1 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

²⁹ *Id.* at 2.

³⁰ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1243–44 (1991) (explaining that women of color are a product of both race and gender and that their experiences do not appear in the discourses of feminism or antiracism).

other identity factors such as race and sexuality, and to consider the context in which the behavior occurs.³¹ For example, while black women may be members of two subordinated groups and, as a result, may suffer more discriminatory treatment in many workplaces than black men,³² the reverse is true in law enforcement. Even though black men belong to one subordinated group—blacks—and one non-subordinated group—men—when walking in a dark alley at night and faced with law enforcement, black men occupy a worse position than black women. Black men, unlike black women, are considered dangerous, and are often stopped by police and/or arrested merely because they are black men.³³

As to methodology, MMT enables us to “shift the lens” through which we examine the law and its effects.³⁴ Ordinarily, we shift the lens by examining a case or situation through a different identity category such as race or gender. *Prospect Airport Services* permits a lens shift to reconsider sexual harassment law, a law ordinarily applied to protect women, as it relates to male victims.³⁵ The lens shift offers a fresh view of the stereotypes underlying the behaviors of men and women in the workplace and reveals the gendered notions incorporated in the judges’ opinions and in the legal standards themselves. This new perspective provides valuable insights that clarify the law’s effects on male and female victims of other-sex and same-sex harassment, and can lead to the proposal of new theories, justifications for, and interpretations of the law.³⁶

³¹ Athena D. Mutua, *The Multidimensional Turn: Revealing Progressive Black Masculinities*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, *supra* note 28, at 78, 83–84.

³² See, e.g., Ann C. McGinley, *Ricci v. DeStefano*, *A Masculinities Theory Analysis*, 33 *HARV. J.L. & GENDER* 581, 603–10 (2010) (explaining the hierarchy of race, class, and gender in fire departments); Janice D. Yoder & Patricia Aniakudo, “*Outsider Within*” *the Fire House: Subordination and Difference in the Social Interactions of African American Women Firefighters*, 11 *GENDER & SOC’Y* 324, 334–36 (1997); Janice D. Yoder & Lynne L. Berendsen, “*Outsider Within*” *the Firehouse: African American and White Women Firefighters*, 25 *PSYCHOL. WOMEN Q.* 27, 30–32 (2001).

³³ See Athena Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, *supra* note 28, at 78, 79; Frank Rudy Cooper, *Against Bipolar Black Masculinities: Intersectionality, Assimilation, Identity Performance and Hierarchy*, 39 *U.C. DAVIS. L. REV.* 853, 875–79 (2006) (describing the myth of the “bad black male”). The example of Trayvon Martin who was gunned down while walking home from the store in Florida is instructive. If it is true that he was shot, at least in part, because he was black, it seems that it was not only his race that caused his demise. It was the combination of his race and his gender that put him at risk. See Charles M. Blow, *From O.J. to Trayvon*, *N.Y. TIMES*, Apr. 7, 2012, at A17 (detailing the dangers of being a black youth).

³⁴ See Nancy E. Dowd et al., *Feminist Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, *supra* note 28, at 25, 40 (advocating the use of masculinities theory to “shift the lens” to see the law’s assumptions and its effects more clearly).

³⁵ See *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 993 (9th Cir. 2010) (“This is a sexual harassment case in which a male employee was a victim of a female co-worker.”).

³⁶ See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 1 (2010) (urging feminists to “ask ‘the man question’” to reveal “how gender functions to subordinate some or

This Article proceeds as follows. Part II analyzes the court opinions in *Prospect Airport Services*, explains MMT further, and considers how MMT may contribute to an understanding of Title VII sexual harassment law. Part III examines the history of the “reasonable person” and “reasonable woman” standards and proposes a shift to a new universal standard for determining whether workplace behavior is sufficiently severe or pervasive to create a hostile working environment. This standard, which derives in large part from MMT’s focus on context, inquires whether the victim’s response is a reasonable one considering not only the various identity factors of the victim, but also the workplace and the social and individual context in which the harassing behavior occurs.

The Article concludes that using MMT to shift the lens in sexual harassment cases facilitates the development of a better substantive foundation to justify Title VII sexual harassment law regardless of whether the perpetrators and the victims are men or women, of different sexes, or of the same sex. An MMT approach leads to the development of a new, more universal standard to determine objective and subjective reasonableness that takes into account gender, race, and other identity factors in the context of organizational and social power, as well as individual experiences and vulnerabilities.

II. HOSTILE WORK ENVIRONMENTS AND MULTIDIMENSIONAL MASCULINITIES THEORY

A. *Shifting the Lens: A Case Study of EEOC v. Prospect Airport Services, Inc.*

Rudolpho Lamas began work as a passenger service assistant for Prospect Airport Services at McCarran International Airport in Las Vegas, Nevada in April 2002, and was soon promoted to lead passenger service assistant.³⁷ His job was to assist passengers with disabilities by pushing them in wheelchairs to the gates. Lamas, a religious man and a recent widower, testified that soon after he began the job, a married female co-worker, Sylvia Munoz, began to make sexual advances toward him. Over a period of the next few months, Munoz gave Lamas three love notes and a partially nude photograph of herself. Her notes invited a sexual relationship with Lamas; one note stated that Munoz was having “crazy dreams” about Lamas and Munoz in the bathtub, offered to do a body

all of most men, as well as how men consciously and unconsciously accept privilege with its patriarchal dividend as well as its costs”).

³⁷ The facts of the case described in this section, *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991 (9th Cir. 2010), are described in the light most favorable to the employee, Lamas, because they are recited in response to a motion for summary judgment by the employer. *See id.* at 993.

massage and stated, “I do want you sexually and romantically!”³⁸

From the beginning, Lamas told Munoz that he was not interested, and he asked her to stop her advances. He also reported his discomfort on many occasions to supervisory personnel at Prospect Airport Services, including the Assistant General Manager and the General Manager. His supervisors made some efforts to stop Munoz’s advances; his immediate supervisor, Ronda Thompson, and the General Manager, Dennis Mitchell, evidently had a meeting with Sylvia Munoz to tell her to stop harassing Lamas.³⁹ But to no avail. Munoz continued to solicit Lamas sexually; she made comments to him such as “hey, hey” or “whew, whew,” when he walked by or licked her lips or simulated a “blow job.” Once she kissed him on the cheek.⁴⁰

Munoz began to harass Lamas every day, and had co-workers deliver messages asking Lamas for dates and stating that Munoz was “going to get” Lamas eventually.⁴¹ Because of his failure to respond, co-workers began to speculate about Lamas’s sexual orientation and they teased him, asking if he was gay.⁴²

Lamas testified that he felt “constant pressure” as a result of Munoz’s and his other coworkers’ antics.⁴³ Lamas began to see a psychologist about his distress; he felt helpless and cried a great deal.⁴⁴ His employer noticed a decline in his work. Months earlier, Prospect had promoted Lamas and had assigned him to the Southwest concourse in an attempt to save the company’s contract with Southwest Airlines because Prospect considered him to be the best performer; now Prospect demoted him.⁴⁵ Finally, in June 2003, Prospect Airport Services fired Lamas, citing his poor attitude and unwillingness to give quality customer service.⁴⁶

³⁸ *Id.* at 994.

³⁹ See Deposition of Dennis Mitchell at 77–86, Exhibit C to Defendant’s Motion for Summary Judgment, *EEOC v. Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904 (D. Nev. Sept. 27, 2007), ECF No. 31-5; Affidavit of Ronda Thompson, Exhibit 8 to Declaration of Wilfredo Tungol in Support of Plaintiff EEOC’s Opposition to Defendant Prospect’s Motion for Summary Judgment, *Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, ECF No. 50-4, 2007 U.S. Dist. LEXIS 72904.

⁴⁰ Deposition of Rudolpho A. Lamas at 70, 109, 113, Exhibit A to Defendant’s Motion for Summary Judgment, *Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, ECF Nos. 31-1 to 31-2.

⁴¹ *Id.* at 44, 50–51, 53, 100–01.

⁴² *Id.* at 167.

⁴³ *Id.*

⁴⁴ *Id.* at 167–68.

⁴⁵ Deposition of Dennis Mitchell, *supra* note 39, at 97–98. The case brought by the EEOC is limited to a hostile work environment claim and does not include a cause of action for his demotion and firings in retaliation for reporting harassment. Deposition of Rudolpho A. Lamas, *supra* note 40, at 18–19.

⁴⁶ Exhibit 19 to the Deposition of Rudolpho Lamas, Exhibit B to Defendant’s Motion for Summary Judgment, *Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, ECF No. 31-4, 2007 U.S. Dist. LEXIS 72904. In her deposition testimony in this suit, Sylvia Munoz denied many of the

Lamas filed a charge with the Equal Employment Opportunity Commission (“EEOC”), alleging that defendant Prospect Airport Services had tolerated a sexually hostile work environment, in violation of Title VII of the 1964 Civil Rights Act.⁴⁷ In response to the charge, the EEOC concluded that Lamas had been subjected to a sexually hostile work environment, and it filed a complaint in the U.S. District Court for the District of Nevada. After discovery, the defendant filed a motion for summary judgment and the federal district court granted the motion.⁴⁸ Concluding that the behavior failed to create a hostile work environment, the district court stated, “Lamas admits that most men in his circumstances would have ‘welcomed’ the behavior he alleged was discriminatory, but that due to his Christian background he was ‘embarrassed.’”⁴⁹ By judging Lamas’s reaction in comparison to that of “most men,” the court apparently equated the “reasonable man’s” reaction to that of “most men in [Lamas’s] circumstances.” In other words, Lamas’s reaction was unreasonable because it did not conform to that of “most men.”

In the alternative, the district court announced that the employer was not liable for the harassing behavior because even though the plaintiff complained on many occasions to his supervisors, Lamas never filed a formal complaint of sexual harassment.⁵⁰ Moreover, the court noted that Lamas did not complain further to his employer about the continuing harassment after Lamas’s supervisor and the General Manager met with Sylvia Munoz to warn her to stop harassing Lamas.⁵¹ Thus, according to the district court, even if the harassing behavior continued to occur, the employer was not liable because it had no notice of the alleged acts creating the hostile work environment that occurred after the meeting with Munoz.⁵² The court, therefore, effectively disregarded Lamas’s testimony concerning the harassing acts occurring after the date of the supervisors’ meeting with Munoz.

Lamas’s deposition testimony raised the question of ongoing, pervasive behavior by both Sylvia Munoz and their co-workers. He testified that the harassment escalated to daily activities by Munoz and by other coworkers, that he complained on numerous occasions to the supervisor, his Assistant Manager and the General Manager, and that he

facts alleged by Rudolph Lamas and claimed that Lamas was interested in a sexual relationship with her. See generally Deposition of Sylvia Munoz, Exhibit D to Defendant's Motion for Summary Judgment, *Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, ECF No. 31-6, 2007 U.S. Dist. LEXIS 72904.

⁴⁷ 42 U.S.C. § 2000e-2(a)(1) (2006).

⁴⁸ *Prospect Airport Servs., Inc.*, 2007 U.S. Dist. LEXIS 72904, at *22.

⁴⁹ *Id.* at *16.

⁵⁰ *Id.* at *17.

⁵¹ *Id.* at *20.

⁵² *Id.* at *20–21.

sent a letter to the General Manager complaining about a number of problems at work, including continuing harassment.⁵³ While the defendant testified that there were no further complaints, the court declined to decide the factual question but then later drew inferences in favor of the defendant's position. At that time, the court concluded that Lamas's letter to the General Manager did not refer to continuing harassment—even though the letter states, "I still feel harassed in many ways and the past problems continue[]"—because the plaintiff's testimony that he complained frequently was not sufficiently specific.⁵⁴

The district court decision was problematic. Once Mitchell, the General Manager, and Thompson, Lamas's immediate supervisor, were on notice that Munoz was harassing Lamas and that the behavior was unwelcome, they should have investigated the situation and remained vigilant about further harassment. It is the employer's responsibility, once it has notice of the harassing behavior, to stop the harassment and promptly remedy the situation.⁵⁵

While the defendant argued below that the employer should not be liable because Lamas made no *formal* sexual harassment complaint to his employer, and the district court agreed, the district court's conclusion is clearly wrong. There is no question that Lamas informed at least three company managers on four separate occasions about Munoz's ongoing sexual advances and asked them to correct the situation. Despite this notice, the company made little effort to fix the problem. The one meeting between Lamas's supervisors and Munoz resulted in little or no change, and Munoz continued to harass the plaintiff on a daily basis, as he testified at his deposition. Moreover, as Lamas resisted Munoz's advances, many of their co-workers, at Munoz's direction, approached Lamas to encourage him to take Munoz up on her offers. Lamas testified that as he continued to resist, his co-workers began to ridicule him and question whether he was gay.⁵⁶ This evidence, if credited, as the court must do on a motion for summary judgment, raises genuine issues of material fact concerning whether the employer's response to Lamas's complaint was adequate to stop and remedy the harassment.

On appeal, a panel of the Ninth Circuit reversed.⁵⁷ It concluded that "a jury could reasonably find that Prospect knew about the harassment, and that its response was inadequate."⁵⁸ Moreover, the Ninth Circuit was

⁵³ Deposition of Rudolpho A. Lamas, *supra* note 40, at 70–75.

⁵⁴ *Prospect Airport Servs., Inc.*, 2007 U.S. Dist. LEXIS 72904, at *22.

⁵⁵ *See id.* at *13 ("In order for an employer to be liable for the conduct of an employee-coworker . . . the plaintiff must prove that . . . the employer knew or should have known of the harassment but did not take adequate steps to address it." (internal quotation marks omitted)).

⁵⁶ *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 995 (9th Cir. 2010).

⁵⁷ *Id.* at 1001.

⁵⁸ *Id.*

critical of the district court's stereotypes and assumptions about men who face sexual harassment at work. The Ninth Circuit concluded that female and male sexual harassment victims should be treated equally, and that stereotypes that men desire women to make sexual advances toward them have no place in analyzing sexual harassment law.⁵⁹

Both courts in *Prospect Airport Services* addressed the substantive requirements of a hostile work environment suit in the context of a man who alleges that the behavior of a female co-worker created a hostile working environment that altered the terms or conditions of his employment. The hostile work environment law requires that the plaintiff prove that the behavior: (1) was unwelcome; (2) occurred because of the plaintiff's sex; and (3) was subjectively and objectively sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment.⁶⁰ Both courts discussed, especially with reference to the alleged victim's status as a man alleging a hostile work environment, the unwelcomeness requirement, and the severe or pervasive requirement. Neither court discussed the "because of sex" requirement at length.

1. EEOC v. Prospect Services, Inc. and *Unwelcomeness*

Unwelcomeness is a subjective standard, but in situations where it may be ambiguous whether the plaintiff welcomes the behavior of the harasser, courts often require some notice to the alleged harasser. Notice may be as simple as saying "no" to invitations or, in some cases, ignoring the harasser's advances.⁶¹ There was at least a question of fact whether Lamas welcomed Munoz's behavior. He testified at his deposition that her advances were unwelcome and that he told her to stop on numerous occasions. Moreover, it is undisputed that Lamas told his supervisors at least four times about Munoz's advances and asked that they be stopped. The district court noted, however, that Lamas admitted that most men would welcome the behavior.⁶² While it appears that the lower court made this statement to support its view that Munoz's behavior did not rise to the level of objectively severe or pervasive, the EEOC cleverly argued that the district court's statement revealed its belief that, as a matter of law, the behavior was welcome. On appeal, the EEOC essentially argued that the lower court used an objective, rather than a subjective standard of

⁵⁹ See *id.* at 997 ("It cannot be assumed that because a man receives sexual advances from a woman that those advances are welcome.").

⁶⁰ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

⁶¹ See Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 751 (2002) ("[W]here the subject of the harassment either attempts to ignore the conduct or declines to specifically address it, the rule seems to leave the default solution—that the conduct is not unwelcome—undisturbed.").

⁶² *EEOC v. Prospect Airport Servs.*, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904, at *16 (D. Nev. Sept. 27, 2007), *rev'd*, 621 F.3d 991, 993 (9th Cir. 2010).

unwelcomeness. The EEOC claimed error because there was significant evidence in the record that Lamas did not welcome Munoz's advances.

On appeal, the Ninth Circuit took its cue from the EEOC and gently chided the district court for its discussion of the unwelcomeness requirement.⁶³ Explaining that unwelcomeness is "inherently subjective," the Ninth Circuit stated that it is irrelevant whether most men would welcome sexual advances from a woman.⁶⁴ In a colorful (and perhaps unconsciously misogynistic statement), the Ninth Circuit stated:

It would not make sense to try to treat welcomeness as objective, because whether one person welcomes another's sexual proposition depends on the invitee's individual circumstances and feelings. Title VII is not a beauty contest, and even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her, for all sorts of possible reasons. He might feel that fornication is wrong, and that adultery is wrong as is supported by his remark about being a Christian. He might fear her husband. He might fear a sexual harassment complaint or other accusation if her feelings about him changed. He might fear complication in his workday. He might fear that his preoccupation with his deceased wife would take any pleasure out of it. He might just not be attracted to her. He may fear eighteen years of child support payments. He might feel that something was mentally off about a woman that sexually aggressive toward him. Some men might feel that chivalry obligates a man to say yes, but the law does not.⁶⁵

The Ninth Circuit concluded that Lamas "unquestionably established a genuine issue of fact regarding whether the conduct was welcome."⁶⁶ The court noted that Lamas testified that Munoz's advances were unwelcome, that they made him cry, that he sought medical help to deal with his anxiety caused by her advances, that he had no prior romantic or sexual relationship with Munoz, that he never approached her, and that he told her that he did not want a relationship with her. He explained his response by referring to the recent death of his wife and his Christian beliefs.⁶⁷

2. *Severe or Pervasive*

As noted above, Title VII requires that a sexually hostile working

⁶³ *Prospect Airport Servs., Inc.*, 621 F.3d at 998.

⁶⁴ *Id.* at 997.

⁶⁵ *Id.* at 998.

⁶⁶ *Id.*

⁶⁷ *Id.*

environment be sufficiently severe or pervasive to alter the terms or conditions of employment. This standard is both subjective and objective: it requires a showing that the individual plaintiff subjectively experienced the environment as severe or pervasive and that a reasonable plaintiff would similarly so experience the environment.⁶⁸ There is considerable debate over what constitutes a “reasonable plaintiff.” In negligence law, some conclude that a “reasonable person” should track the behavior of an average person while others argue that a “reasonable person” indicates an ideal person in the same exterior circumstances.⁶⁹ In most situations in negligence law, the reasonable person standard does not take into account the identity factors of the victim but it does consider the surrounding circumstances in determining what a reasonable person would do.⁷⁰ In employment discrimination law, however, because sexual harassment is a tort suffered most commonly by women, and research demonstrates that men and women often react differently to harassing behavior,⁷¹ a number of courts consider the identity of the victim in determining whether he or she reacted reasonably.⁷²

Noting that the Ninth Circuit has in the past established the “reasonable woman” standard in *Ellison v. Brady*,⁷³ the district court in *Prospect Airport Services* explained that more recent Ninth Circuit cases used the “reasonable person with the same fundamental characteristics” standard to determine whether a particular environment is objectively hostile.⁷⁴ The district court noted that Lamas “admits that most men in his circumstances would have welcomed” the woman’s advances and ruled that a reasonable jury could not conclude that a reasonable person with the

⁶⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

⁶⁹ See Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1314 (2010) (“[T]he law constructs an ideal reasonable person as a standard by which to gauge the propriety of a party’s conduct.”); Moran, *supra* note 1, at 1236 (“[T]he reasonable person . . . is most often the common or ordinary man.”).

⁷⁰ There are two exceptions in negligence law: (1) a person with a physical disability will be expected to act as a reasonable person with the same disability; and (2) a child who is not engaging in adult or dangerous activities will be expected to act as a reasonable child would under the circumstances. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 10(a), 11(a) (2010); Chamallas, *supra* note 1, at 1358.

⁷¹ See Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151, 155, 159–63 (1995) (concluding that there are small gender differences in reactions to sexual harassment, but also concluding that the reasonable woman standard is not helpful); Maureen O’Connor et al., *Explaining Sexual Harassment Judgments: Looking Beyond Gender of the Rater*, 28 LAW & HUM. BEHAV. 69, 90–91 (2004) (finding a small differential based on the gender of the rater, but concluding that findings of sexual harassment are more complicated than the gender of the rater).

⁷² See *infra* notes 119–26 and accompanying text.

⁷³ 924 F.2d 872 (9th Cir. 1991).

⁷⁴ *EEOC v. Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904, at *13 (D. Nev. Sept. 27, 2007).

same “fundamental characteristics” as the plaintiff would find the harassment sufficiently severe or pervasive⁷⁵ to alter the terms or conditions of Lamas’s employment.⁷⁶

Next, the Ninth Circuit dealt with the question of whether the facts evidenced a working environment that was sufficiently severe or pervasive from the perspective of “a reasonable victim” to alter the terms or conditions of employment.⁷⁷ The court acknowledged that not all romantic proposals are illegal sexual harassment, and that merely offensive conduct is not sufficient to create a hostile working environment. Here, the court concluded that Munoz’s advances were not severe, but stated that “[t]he required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.”⁷⁸ Munoz’s repeated advances combined with the employer’s failure to stop the conduct led the court to conclude that Lamas had presented sufficient evidence to go to the jury on the question of severity or pervasiveness.

3. *Because of Sex*

Because the behavior involved was sexually explicit and the alleged harassment occurred between people of different sexes, both the district court and the Ninth Circuit assumed that the harassing behavior occurred because of Lamas’s sex. Courts follow a common route in Title VII sexual harassment cases. In male-on-female harassment, courts assume that the harasser’s purpose is to engage in a romantic or sexual relationship with the alleged victim; they conclude that if the victim were not female, the male harasser would not have harassed the victim. Thus, they conclude, the behavior occurred because of sex.⁷⁹

While in *Prospect Airport Services* the harasser’s true motives were unclear, the facts suggest that the motive was sexual attraction. Following the lead of the male-on-female harassment cases, both the district court and the Ninth Circuit assumed that both harasser and victim were heterosexual and that Sylvia Munoz would not have harassed Rudolpho Lamas had he

⁷⁵ *Id.* at *13–16. The court mistakenly uses the term “severe *and* pervasive,” which is not the correct standard, but it seems to consider severity and pervasiveness separately. The Supreme Court has made clear that a hostile work environment exists if it is either severe *or* pervasive. Thus, one incident, such as a rape or a grabbing of one’s crotch may be sufficient to meet the severity test, but absent severity, a work environment can be hostile as a result of pervasive joking, sexual comments, or the like. The less severe the behavior, the more pervasive it should be in order for it to constitute a hostile work environment.

⁷⁶ *Id.* at *16.

⁷⁷ EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 1000 (9th Cir. 2010).

⁷⁸ *Id.* (quoting Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 872 (9th Cir. 2001)).

⁷⁹ See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998) (stating that in male-female sexual harassment situations when the conduct involves implicit or explicit proposals of sexual activity, juries and courts are reasonable to conclude that the proposals would not have been made to someone of the same sex).

been a woman because her motive was to engage in a sexual relationship with him. Of course, these assumptions ignore the possibility that the harasser was bisexual or that Munoz engaged in sexual advances in order to ridicule him. The assumptions also may misunderstand the coworkers' motives in harassing Lamas. The facts suggest that at least the coworkers' harassment of Lamas was based on Lamas's failure to live up to gender stereotypes of how a "real man" would respond to sexual advances of a female coworker. But under the standard assumptions of the courts, there was sufficient evidence that the behavior occurred because of sex for the case to go to the jury on this issue. Whether these standard assumptions adequately support a theory of sexual harassment as sex discrimination is a different question that I discuss in a separate article.⁸⁰

B. *Multidimensional Masculinities: Methodology and Substance*

1. *Theoretical Background*

Masculinities research has recently received attention from feminist legal scholars and critical race scholars because it explains why men engage in behaviors that are harmful to women and how competitive behaviors among men of different races, classes, and sexual orientations may also be gendered and may harm both men and women.⁸¹ Masculinities theorists use the term "masculinities" in the plural to denote that masculinity is not a fixed, natural result of a person's biological sex.⁸² In contrast, masculinities scholars posit that masculinity is socially constructed and that men achieve their masculinity through performances, or interaction with others (especially other men), and that there are varying ways to perform masculinity.⁸³

Masculinities theory recognizes that certain practices we identify as "masculine" are normative. Masculinity prescriptions affect men and women of different races, ethnic backgrounds, classes, and sexual orientations in different ways. For many men, defining oneself as "masculine" requires proof of two negatives: that one is not feminine or a

⁸⁰ Ann C. McGinley, *Because of Sex* (forthcoming 2013) (on file with author).

⁸¹ See DOWD, *supra* note 36, at 57–71 (describing the relationship between feminist legal theory and masculinities scholarship). Over the past five years, at least twenty significant masculinities and law articles have been published; a comprehensive list of the scholarship regarding law and masculinities scholarship through 2009 can be found in Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 672–74 & n.7 (2009). See also Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 798–99 (2000); McGinley, *supra* note 26 (using masculinities theory to analyze workplace harassment occurring "because of sex").

⁸² See, e.g., Ethel Spector Person, *Masculinities, Plural*, 54 J. AM. PSYCHOANALYTIC ASSOC. 1165 (2006) (explaining that masculinity cannot be regarded as a single entity).

⁸³ See DOWD, *supra* note 36, at 26.

girl, and that one is not gay.⁸⁴ Most men, however, cannot achieve the hegemonic masculinity ideal,⁸⁵ and they respond by constantly struggling toward achieving the ideal⁸⁶ or by reacting to the ideal by engaging in subversive or alternative forms of masculinity.⁸⁷ Whatever form their ideal masculinity takes, while men as a group are powerful, individual men see themselves as powerless because of the constant competition to prove themselves to other men. Men attempt to gain control, a struggle that is rife with fear, shame, and emotional isolation.⁸⁸ These performances are homosocial—men engage in them to prove to other men that they are masculine.⁸⁹ The performances often involve mistreatment of nonconforming men and of women. These behaviors are particularly evident in exclusively male environments or workplaces that are traditionally dominated by men.⁹⁰ Men engage in masculine behaviors to construct and perform their masculinity at work.⁹¹

The term “masculinities” also refers to masculine structures. In the workplace, these structures create barriers to entry and promotion and also affect the terms and conditions of employment based on gender, as well as race, national origin, class, and other individual characteristics. Law is a masculine structure that creates opportunities for those exhibiting the preferred masculinity performances and barriers for those who do not. The federal district court in *Prospect Airport Services*, for example, interpreted legal requirements such as severity or pervasiveness in keeping with social attitudes about the proper masculine performance in response to sexual advances by women.⁹² This interpretation undermined the plaintiff in this

⁸⁴ See *id.* at 62. As Kenneth Karst states, “The main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy’s need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don’t be a girl.” Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).

⁸⁵ See Cliff Cheng, *Marginalized Masculinities and Hegemonic Masculinity: An Introduction*, 1 J. MEN’S STUD. 295 (1999); R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 838 (2005) (discussing ambiguities in the concept of hegemonic masculinity and associated embodiments of it).

⁸⁶ See Kimmel, *supra* note 25, at 186–87 (discussing how men seek to prove their manhood to other men).

⁸⁷ See, e.g., David L. Collinson, ‘Engineering Humor’: *Masculinity, Joking and Conflict in Shop-floor Relations*, 9 ORG. STUD. 181, 185 (1988) (observing masculinities displayed by blue collar workers in shop culture).

⁸⁸ DOWD, *supra* note 36, at 31; see John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 496 (2010) (explaining that “manliness” is forced upon men in the military and that men are punished for being shameful and cowardly).

⁸⁹ Kimmel, *supra* note 25, at 186–87.

⁹⁰ See McGinley, *supra* note 26, at 1184 (describing hazing and gang rape in fraternities).

⁹¹ *Id.* at 1223–24, 1229.

⁹² *EEOC v. Prospect Airport Servs., Inc.*, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904, at *6 (D. Nev. Sept. 27, 2007) (dismissing the workplace sexual harassment claim of a male

case, reinforced other men's superior masculinity, and set the standard for performance of masculinity for "real men."

As Cooper and I explain in *Masculinities and the Law: A Multidimensional Approach*, MMT considers how masculinities combine with race, sexual orientation, class and gender in different contexts, and uses multiple lenses to demonstrate how identity concepts are embedded in the law and how the law furthers identity hierarchies.⁹³ Multidimensionality theory (absent masculinities) is rooted in intersectionality theory's insight that unique identities form at the intersection of categories of identities.⁹⁴ When combining multidimensionality theory with masculinities theory to create MMT, Cooper and I rely on two main concepts: (1) identities are co-constituted; and (2) identities are context-dependent.⁹⁵ Because identities are co-constituted, race, gender, class, sexual identity, and other identities are inextricably intertwined, and identity is a product and result of these relationships. Moreover, the meaning of co-constituted identities differs depending on the settings or the context. The same individual, for example, will discover that different aspects of his identity will be "more or less salient over time, in different settings, and depending on what other identities are in the mix."⁹⁶ Thus, persons with the same combination of identities will be treated differently depending on the cultural context.⁹⁷ Perhaps most important, none of these identities or contexts is fixed or static. Rather, identity performance is just that: a performance that changes depending on the context of the situation.⁹⁸ Numerous examples abound. A black man will be treated differently and will react differently if he is walking in a white neighborhood on a dark night than if he is going to a bar in a predominantly black neighborhood. A white gay male will be treated differently at a gay bar in a gay section of a major U.S. city than if he enters a conservative Christian church in the deep South. And, the differential treatment in different contexts will also affect the person's

employee against his female co-worker because "most men in [the employee's] circumstance would have 'welcomed' the behavior"), *rev'd*, 621 F.3d 991, 1001 (9th Cir. 2010).

⁹³ McGinley & Cooper, *supra* note 28, at 6–7.

⁹⁴ See Crenshaw, *supra* note 30, at 1241–42 (1991) (discussing how recognition of social problems, such as battery and rape, as systematic has characterized the political identities of minority groups).

⁹⁵ See McGinley & Cooper, *supra* note 28, at 8 (referring to Athena D. Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 78, 78–79 (Frank Rudy Cooper & Ann C. McGinley eds., 2012)).

⁹⁶ *Id.* at 8–9.

⁹⁷ *Id.* (citing Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002)).

⁹⁸ See Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1268–76 (2000) (discussing how members of outsider groups must perform their identities in workplaces depending on what qualities the culture values).

behavior in the different contexts.

This ever-moving concept of identity is, of course, hard to define, but it is helpful in understanding workplaces. Workplaces are dynamic locations where organizational power interacts with sociocultural power and power derived from interpersonal relationships. These power differentials, in turn, interact with identity performances of individuals that change depending on group, context, and culture. If the law governing workplaces remains static, without accommodating these rapidly changing differences in understanding of identity and performance within context, it will rely on outdated and imperfect notions of human behavior.

2. *Applying MMT to Prospect Airport Services*

Multidimensional masculinities theory may also help explain Rudolpho Lamas's reaction to Sylvia Munoz and his other coworkers' harassment. As noted above, masculinities theorists explain that although men are powerful as a group, individual men often feel powerless and vulnerable as a result of the pressure placed on them for their perceived failures to live up to the hegemonic ideal of masculinity.⁹⁹ As a result of Munoz's advances and Lamas's lack of interest in engaging in a sexual relationship with her, other coworkers ridiculed Lamas and questioned his sexuality.¹⁰⁰ Lamas testified that he felt helpless and began crying frequently.¹⁰¹ What was unusual about Lamas's response is that he admitted his vulnerability to himself, his managers and a psychologist by telling them about Munoz's advances and his negative reactions to them.¹⁰² His employers and the district court compounded these feelings of vulnerability by downplaying the importance of his complaints. These feelings of vulnerability result from the necessity to prove one's masculinity continuously, and the fear and shame resulting from a belief that one is not a "real man."

But Lamas is not only a man. He also belongs to a number of identity groups that, along with the context of the workplace, likely affected his response and the behavior of others. Lamas is a dark-skinned Hispanic, fundamentalist Christian man who, at the time of the harassing behavior, had been recently widowed.¹⁰³ Lamas was lonely and sad, and he did not want to hurt anyone by complaining to management.¹⁰⁴ This is hardly the profile of a typical masculine man. Even assuming that Munoz was initially sexually attracted to Lamas, once he showed his unwillingness to

⁹⁹ See *supra* notes 88–90 and accompanying text.

¹⁰⁰ *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 995 (9th Cir. 2010).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 998.

¹⁰⁴ *Id.* at 994.

engage in a sexual relationship, Lamas's superiors and coworkers treated him as if he were not a "real man." His immediate supervisor, Ronda Thompson, never spoke to Munoz about her behavior and the General Manager, Dennis Mitchell, did nothing more than tell Munoz that he did not want to get involved in a personal situation. This admonition did not stop the harassment. The Assistant General Manager told Lamas that he should sing to himself, "I'm too sexy for my shirt."¹⁰⁵ In other words, Lamas should have been flattered by Munoz's advances. All signs were that Lamas was not acting like a real man. A real man would have enjoyed the sexual advance and taken Munoz up on it. A real man, even if he did not enjoy it, would have handled the situation himself. He would not have complained ("whined") to his supervisors.

At Munoz's encouragement, coworkers urged Lamas to go out with her, and when he rebuffed her advances, they turned on him, questioned whether he was gay, and questioned his masculinity.¹⁰⁶ The coworkers' behavior attempted to enforce a gender regime—that a man should accede to a woman's sexual advances, and that if he does not, he is not a real man. Their mistreatment of Lamas occurred because of his sex—they pressured him to act like a man, and when in their view he did not, they ridiculed him for not being a real man. Although this behavior was not as severe as in many cases, it was pervasive and, combined with Munoz's advances and the employer's refusal to take the complaints seriously, caused Lamas harm because of his failure to prove himself a real man.

Masculinities theory explains why the workplace environment was problematic. It acknowledges that men as a group have power. But it also recognizes that because of the pressure to prove masculinity and the competition among men to perform and prove their masculinity, often individual men feel powerless.¹⁰⁷ This feeling of powerlessness appears to describe Lamas's predicament. Munoz marshaled the power of her coworkers and employer to create a situation for Lamas that called into question his very manhood. Given the pressure in society to conform to gender roles, this pressure occurred because of Lamas's sex and his failure to live up to stereotypical gender norms of masculinity.

Prospect Airport Services demonstrates that we need to take into account the complicated multidimensional identities of the plaintiff, his individual vulnerabilities, his status at work, the workplace context, and the location of organizational and social power in determining whether Lamas's reaction was reasonable. With the facts of *Prospect Airport Services* in mind, the next Part discusses the proper standard for

¹⁰⁵ *Id.* at 995.

¹⁰⁶ *Id.*

¹⁰⁷ See DOWD, *supra* note 36, at 30–31 (describing work by masculinities theorist Michael Kimmel).

determining whether behavior creates an objectively severe or pervasive hostile working environment.

III. REASONABLE MAN? WOMAN? PERSON? A REASONABLE RESPONSE

This Part begins with a short description of the reasonable person standard in negligence law and moves to a brief history of the reasonable person standard in Title VII. It then looks to recent Supreme Court cases that encourage a contextual approach to Title VII law and adopts a multidimensional masculinities analysis of the case study of *Prospect Airport Services* to help determine a fair and workable standard in the Title VII context. It then proposes a new standard for deciding whether a hostile working environment exists.

A. *Brief History of the Reasonable Person: Negligence and Title VII*

The reasonable person standard, which was the “reasonable man” standard in early common law negligence cases, has endured while suffering intense criticism.¹⁰⁸ While it “forms the centerpiece of the standard of care in negligence and is at the heart of many of the criminal law defenses,” it “is characterized by a lack of clarity about the exact nature of the subjective and objective characteristics of the reasonable person.”¹⁰⁹ Despite significant speculation about whether the “reasonable person” represents an ideal or the ordinary or common person, Mayo Moran argues that it refers to the common or ordinary man.¹¹⁰ The *Restatement (Second) of Torts* of 1965 used the term “reasonable man” to define negligence, while the proposed final draft of the *Restatement (Third) of Torts* shifted from reasonable man to reasonable person to avoid the gendered term.¹¹¹ Martha Chamallas believes, however, that gender has once again become invisible because there is no explanation for the shift from “reasonable man” to “reasonable person” and younger lawyers may be unaware of the gendered history of the term.¹¹² The *Restatement (Third)* adheres strictly to the reasonable person standard and permits deviance only for children and persons with physical disabilities.¹¹³ Thus, there is little or no room, according to Chamallas, for a perspectival approach to the reasonable person standard under the *Restatement (Third)*.

¹⁰⁸ See Moran, *supra* note 1, at 1235.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1236.

¹¹¹ See Chamallas, *supra* note 1, at 1357 (“[T]he *Restatement (Second)* used explicitly gendered language, defining negligence as the failure to act as a ‘reasonable man under the circumstances’ In contrast to its predecessor, the *Restatement (Third)* scrupulously uses gender-neutral language throughout, relying on inclusive terms such as ‘person’ and ‘actor.’”).

¹¹² *Id.* at 1357–58.

¹¹³ *Id.* at 1358.

Certainly, it does not appear that one of the “circumstances” that juries and judges should consider in determining whether the person was negligent is his or her gender, race, national origin, or other similar identifying characteristics. Nonetheless, Chamallas notes that critical theory has argued for varying perspectives in tort law, but the research is complicated about how gender affects tort law historically, and points to neither the abandonment nor the retention of the reasonable person standard in tort law.¹¹⁴

As Chamallas notes, there is slightly more opportunity for a perspectival approach in the civil rights cases.¹¹⁵ Soon after courts began to recognize sexual harassment as a cause of action under Title VII, it was clear that courts would reject a unitary subjective standard; feminists debated whether the objective test should be of a reasonable woman or a reasonable person.¹¹⁶ Many argued that because a reasonable person merely reflected the experiences of a reasonable *man*, courts should employ a reasonable woman standard so that fact-finders would consider women’s experiences in assessing whether a hostile working environment existed.¹¹⁷ Other feminists disagreed. They argued that a reasonable woman standard essentializes women’s experiences regardless of age, disability, race, class, color, and experience. Thus, the standard would become that of the most powerful woman—a reasonable able-bodied white woman.¹¹⁸

The Ninth Circuit, in *Ellison v. Brady*,¹¹⁹ adopted the reasonable *woman (or victim)* standard, concluding, “If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”¹²⁰ Soon thereafter, the Supreme Court used the reasonable *person* standard, without explanation, in *Harris v. Forklift Systems, Inc.*¹²¹ Although the issue of the proper standard was before the *Harris* Court in amicus briefs, the Court did not refer to the amicus briefs or explain whether or not it was rejecting the reasonable woman standard. It merely used the term “reasonable person” in passing. After *Harris*, federal courts

¹¹⁴ *Id.* at 1371.

¹¹⁵ *Id.* at 1354.

¹¹⁶ See *supra* notes 7–16 and accompanying text.

¹¹⁷ See *supra* notes 9–12 and accompanying text.

¹¹⁸ See *supra* note 13 and accompanying text.

¹¹⁹ 924 F.2d 872 (9th Cir. 1991).

¹²⁰ *Id.* at 878.

¹²¹ 510 U.S. 17, 21 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”).

of appeals have continued to use a variety of standards, including the reasonable person under the circumstances, the reasonable victim, and the reasonable woman standard.¹²² The Ninth Circuit sometimes uses a reasonable woman standard.¹²³ At other times, courts in the Ninth Circuit use a “reasonable person with the same fundamental characteristics” or a “reasonable person under the circumstances” standard.¹²⁴ Some courts in other circuits have also used the reasonable woman standard.¹²⁵ In mixed race and gender cases, a number of courts have held that the standard is determined by the race and gender of the individual.¹²⁶

Mayo Moran emphasizes that the reasonable person standard in sexual harassment does not play a culpability-determining function, but rather a perspectival function. She believes that this difference is important, and she argues that in the context of sexual harassment, the reasonable person standard, as adjusted to consider at least some of the individual characteristics of the victim, plays a “corrective” function.¹²⁷ Because most judges are privileged and tend not to have experienced sexual harassment from the perspective of the victim, a reasonable woman standard, Moran argues, makes the judge think twice about his initial reactions.¹²⁸ Moran states:

¹²² See *supra* notes 12–14, 119–21 and accompanying text.

¹²³ See *Alvarado v. Fed. Express Corp.*, 384 F. App’x 585, 588 (9th Cir. 2010) (holding that the reasonable woman instruction was not erroneous); *Manzo v. Laborers Int’l Union of N. Am.*, 348 F. App’x 267, 268 (9th Cir. 2009) (applying the reasonable woman standard); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (same); *Conklin v. City of Reno*, No. 3:08-cv-00452-LRH-RAM, 2010 U.S. Dist. LEXIS 10735, at *7 (D. Nev. Feb. 5, 2010) (same); *Spina v. Maricopa Cnty. Dep’t Transp.*, No. CV-05-0712-PHX-SMM, 2010 U.S. Dist. LEXIS 10153, at *7 (D. Ariz. Feb. 5, 2010) (same).

¹²⁴ *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055, 1056 (9th Cir. 2007) (using both the reasonable person with the same characteristics as the victim and the reasonable woman standard interchangeably); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (using the perspective of a reasonable person with the plaintiff’s same fundamental characteristics).

¹²⁵ See, e.g., *Stephenson v. City of Phila.*, 293 F. App’x 123, 124 (3d Cir. 2008) (using the reasonable woman standard); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1089 (10th Cir. 2007) (same); *Ivan v. Cnty. of Middlesex*, 595 F. Supp. 2d 425, 450 (D.N.J. 2009) (same when applying New Jersey’s Law Against Discrimination); *Kimber-Anderson v. City of Newark*, No. 08-6309, 2011 U.S. Dist. LEXIS 19720, at *9 (D.N.J. Feb. 25, 2011) (same); *Mitchel v. Holder*, No. C08-00205MEJ, 2010 U.S. Dist. LEXIS 21088, at *3 (N.D. Cal. Mar. 9, 2010) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), but replacing the term “person” with “woman” to demonstrate that it considered the reasonable person standard to permit an examination of gender).

¹²⁶ See, e.g., *Caldwell v. Washington*, 278 F. App’x 773, 776 (9th Cir. 2008) (using the “reasonable African American woman” test); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (using the “reasonable African-American [wo]man” test); *Woods v. Washington*, No. C10-117RSM, 2011 U.S. Dist. LEXIS 5423, at *2 (W.D. Wash. Jan. 19, 2011) (using the “reasonable man in the plaintiff’s circumstances” test); *Picouto v. W. Star Truck Plant Portland LLC*, No. CV-08-807-ST, 2010 U.S. Dist. LEXIS 95355, at *28 (D. Or. May 27, 2010) (using the “reasonable Hispanic man in [the plaintiff’s] position” test).

¹²⁷ Moran, *supra* note 1, at 1273–74.

¹²⁸ *Id.* at 1274.

[I]t seems plausible to understand the invocation of the reasonable person, with its emphasis on the subjective attributes of the individual claiming discrimination, as a kind of corrective to the structural inequality that inevitably plagues the adjudication of such claims. If understood in this way, a deeper acquaintance with the experience of a “reasonable person” in the position of the claimant may well be the vehicle to encourage judges to be more reflective about the implications of difference and disadvantage in the meaning of events and to be accordingly more thoughtful about the limits of their own experiences and intuitions in such cases.¹²⁹

Moran notes that the problem with the reasonable person standard, without taking individual characteristics into account, is that it defines a privileged person, rather than a disadvantaged one.¹³⁰ To the extent that the law should use the reasonable person standard to play a corrective function with judges who are themselves privileged, it is necessary to look at individual characteristics in defining the reasonable person. The concern, Moran concludes, is that if the reasonable person is identified as one who has the exact characteristics of the alleged victim, it may appear that sexual harassment victims are making a plea for special treatment.¹³¹ Moran nonetheless concludes that in the context of cases such as sexual harassment, where equality concerns are at issue, the reasonable person standard is proper only if it takes into account characteristics of the victim. In other words, Moran advocates a reasonable victim or a reasonable woman standard. In so concluding, Moran relies on Kathryn Abrams’s approach which views the reasonable victim standard as an opportunity to educate the judge and the jury about what it is like for women in the workplace.¹³² In this way, the reasonable woman standard encourages the fact-finder to take the perspective of the victim and to act as a reasonable fact-finder with all of the necessary information.¹³³ Abrams claims that fact-finders should have four different types of information to assess sexual harassment claims: (1) barriers that women have faced and continue to face at work; (2) the role that sexualization plays in thwarting women in the workplace; (3) the ways in which harassment can cause harm to women in the workplace absent severe psychological damage; and (4) women workers’ responses to sexual harassment.¹³⁴

¹²⁹ *Id.*

¹³⁰ *Id.* at 1276.

¹³¹ *Id.*

¹³² *Id.* at 1264.

¹³³ *Id.*

¹³⁴ *See* Abrams, *supra* note 9, at 52–54

Abrams explains, and I agree, that reasonableness itself is not necessarily a problem. While reasonableness may encourage juries to eschew considerations of emotion, a proper reasonableness standard does not have to play this role. Instead, it can guide employers and forestall remedies for “pretextual” or “idiosyncratic” responses,¹³⁵ thereby lending greater force and predictability to the law.

While I agree with Moran and Abrams that fact-finders should consider individual characteristics, I have two concerns about their analysis. First, while their proposals take into account identity characteristics and context because they talk of the reasonable victim or the reasonable woman, they suggest that there is only one reasonable response to a particular combination of characteristics and context. Second, because they discuss the typical situation of the reasonable woman, their discussion tends to ignore how their proposal would affect male victims of other-sex harassment and all same-sex victims. My view is that only if we can find a workable standard for *all* types of victims will women—the most common victims of sexual harassment—be fully protected. Moran, Abrams, and other feminist scholars’ exclusive focus on women as victims ignores the blind spots that many have regarding gender norms. For example, Abrams’s list of four types of information specifically deals with women’s newcomer status in the workplace and the difficulty that women have in the traditionally male environment of the workplace. These types of information would not help a judge or jury to understand how male victims in the workplace may suffer from the imposition of norms of masculinity.

Masculinities theories, however, may help judges and juries to understand why certain men are vulnerable to harassment by coworkers or supervisors. Male and some female coworkers harass gender nonconforming men for their failure to live up to masculinity norms.¹³⁶ These masculinity norms hurt not only the men who are judged by the norms. They often exclude women from the workplace or result in their harassment as well. Moreover, harassment based on masculinity norms is often invisible to men.¹³⁷ Thus, if judges (especially male judges) attempt to use their own “common sense” or to allow the juries to use “common sense” without permitting expert testimony on social facts concerning gender norms, they may actually reinforce the very gender norms that cause the harassment. Judges should permit expert testimony to explain to

¹³⁵ Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210 (1989).

¹³⁶ See Margaret S. Stockdale et al., *Perceptions of the Sexual Harassment of Men*, 5 PSYCHOL. MEN & MASCULINITY 158, 164 (2004) (finding that men, as well as women who supported hypermasculinity, were less likely than others to view certain workplace behaviors as sexual harassment).

¹³⁷ *Id.*

the fact-finders how groups enforce gender norms at work (in the context of the case before the jury). This evidence differs from the social frameworks evidence rejected by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*.¹³⁸ Social frameworks evidence is the application of expert testimony to a case for background and giving an opinion as to the relevance of the social science evidence to the case at issue. Unlike the social frameworks evidence condemned by the Court in *Wal-Mart*, social facts evidence uses the same scientific principles used by scientists outside of the litigation process. Professors Mitchell, Walker, and Monahan explain social facts evidence:

[T]he expert applies scientific principles and methods to case-specific data in the same way that the expert would use scientific principles and methods to analyze data outside the litigation context. When social scientific principles and methods are used to develop opinions about the parties, practices, or behaviors involved in a particular case, such evidence has been referred to as “social facts.”¹³⁹

This social facts evidence is admissible as adjudicative fact and will help jurors to make their decisions using social science data rather than mere common sense.¹⁴⁰

Another problem of the proposed standards is that they create a monolithic picture of the reasonable woman (or man, or person) and assume that there is only one reasonable way to respond to a set of harassing circumstances.¹⁴¹ While in negligence law it may make sense to describe what a reasonable person should do in order to avoid harming others or oneself, it is odd to assume that there is only one reasonable reaction to others’ potentially discriminatory behavior. Moreover, many factors, among them identity factors and context, will influence how different people respond to similar behavior. Many of these varying

¹³⁸ 131 S. Ct. 2541, 2554 (2011).

¹³⁹ Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109, 1113 (2011) (citation omitted) (distinguishing social facts evidence from social framework evidence and arguing that social facts evidence should be admissible as adjudicative fact).

¹⁴⁰ See *id.* at 1117–18 (explaining that social facts differ from social authority and social frameworks in two respects: “(1) social facts involve case-specific descriptive or causal claims, whereas social authority and social frameworks involve general propositions about causation or about the prevalence of certain behaviors, characteristics, or outcomes in the aggregate; and (2) because social facts involve case-specific claims, social facts require the application of sound methods and principles to case-specific data to reach descriptive and causal conclusions about the case at hand.”).

¹⁴¹ In the Ninth Circuit, for example, some panels use the reasonable woman standard while others use a reasonable person under the circumstances standard. Still others use the reasonable person with the same fundamental characteristics standards. Other courts of appeals use the reasonable person under the circumstances or the reasonable victim standard. See *supra* notes 119–21 and accompanying text.

responses are reasonable.

B. *Context Matters*

In cases decided after *Harris*, moreover, the Supreme Court has hinted at a broader standard and has advocated the consideration of context, a context that may include the victim's identity.¹⁴² In a number of recent Title VII cases, the Court has emphasized the importance of context in determining whether a violation has occurred.¹⁴³ This acknowledgement that "context matters" suggests that the Court's "reasonable person" standard in *Harris* may permit consideration of the victim's identity as one factor among many in determining whether the victim's reaction was reasonable. Certainly, the Court encourages an understanding of context, which multidimensional masculinities theory would also encourage.

For example, in *Oncale v. Sundowner Offshore Services, Inc.*,¹⁴⁴ the Court expressly noted the importance of context in determining whether the behavior is actionable; it contrasted the situation of a football coach who pats his player on the buttocks for encouragement as he goes out onto the field (which is not sexual harassment) with a coach who pats his female secretary's buttocks (which is likely sexual harassment).¹⁴⁵ The same behavior, given the context and the identity of the potential victim, will likely have different legal effect. The Court states that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts

¹⁴² See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (stating that the significance of a retaliatory act must be read in its context); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (finding that the meaning of words depends on their context); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (finding that courts must evaluate the context of an action to determine if it constitutes sexual harassment); see also Chamallas, *supra* note 1, at 1367–69 (providing an overview of how the Supreme Court has permitted courts to use context to interpret what constitutes "reasonable"). Although the Supreme Court has not addressed the issue directly, in *Harris v. Forklift Systems, Inc.*, the Court defined an objectively hostile work environment as one that a reasonable person would find hostile or abusive. 510 U.S. at 21. It declined to address the question of the validity of recently proposed EEOC regulations that specifically adopted both a reasonable person standard and a victim's perspective standard. *Id.* at 22–23 (citing 58 Fed. Reg. 51,266 (proposed 29 C.F.R. 1609.19(c)) (1993)). The proposed EEOC regulation which was later withdrawn stated, "The reasonable person standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability." 59 Fed. Reg. 51,396 (proposed 29 C.F.R. 1609.19(c)) (1993).

¹⁴³ See *infra* notes 144–55 and accompanying text (illustrating the examples where the Supreme Court demonstrates such an approach).

¹⁴⁴ 523 U.S. 75 (1998).

¹⁴⁵ *Id.* at 81–82 (1998). The football coach example may be an unfortunate one given the recent scandals in men's sports at Penn State and Syracuse Universities. E.g., Pete Thamel, *Syracuse's Boenheim Stands by Assistant Accused of Abuse*, N.Y. TIMES, Nov. 18, 2011, at B13; Mark Viera, *A Sex Abuse Scandal Rattles Penn State's Football Program*, N.Y. TIMES, Nov. 6, 2011, at A1.

performed.”¹⁴⁶ It encourages courts and juries to use “[c]ommon sense and an appropriate sensitivity to social context” to distinguish between legal and illegal behavior.¹⁴⁷

In *Burlington Northern & Santa Fe Railway Co. v. White*,¹⁴⁸ the Court defines what behavior amounts to a sufficient adverse employment action to constitute retaliation. Here again, the Court adopts a context-rich approach. The Court announced that an adverse employment action exists if “a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁴⁹ The test is an objective one: how a reasonable person would react. But, the Court notes that “[c]ontext matters,”¹⁵⁰ and gives a number of examples to illustrate its point. Those examples encourage the fact-finder to consider the subjective situations of the individual plaintiffs involved. For example, the Court states that changing an employee’s work schedule “may make little difference to many workers, but may matter enormously to a young mother with school-age children.”¹⁵¹ It suggests that such a schedule change would be materially adverse to the young mother with children. This conclusion relies on the victim’s identity as well as the context of her situation at home.

In a third recent case, *Ash v. Tyson Foods, Inc.*,¹⁵² the Supreme Court again emphasized the importance of context. In *Ash*, the lower court had held *as a matter of law* that an Alabama employer’s use of the term “boy” denoted no discriminatory racial animus toward the two black men who were denied promotions.¹⁵³ The Supreme Court disagreed with the lower court’s conclusion that use of the term “boy” alone, without the qualifier “black” or “white,” could never prove discriminatory animus and was insufficient evidence to go to the jury.¹⁵⁴ The Supreme Court stated, “The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”¹⁵⁵

These cases suggest that the Supreme Court would not only permit, but would also encourage a more nuanced approach to determining whether an alleged sexual harassment victim’s reaction to harassing behavior was reasonable. One concern, however, is the Court’s statement that fact-

¹⁴⁶ *Oncale*, 523 U.S. at 81–82.

¹⁴⁷ *Id.* at 82.

¹⁴⁸ 548 U.S. 53 (2006).

¹⁴⁹ *Id.* at 68 (citation omitted) (internal quotation marks omitted).

¹⁵⁰ *Id.* at 69.

¹⁵¹ *Id.*

¹⁵² 546 U.S. 454 (2006).

¹⁵³ *Id.* at 455–56.

¹⁵⁴ *Id.* at 456.

¹⁵⁵ *Id.*

finders should use their common sense to decide these cases. While juries ordinarily use common sense to make decisions, use of common sense in an area where social gender norms are involved may lead to discriminatory results. Social norms can lead to erroneous assumptions and misunderstandings concerning the motivations behind employees' behaviors and the reactions they produce in other employees. This may be particularly true where the person judged is a member of a less powerful or outsider group.¹⁵⁶ Research shows that where men are subject to harassment, views vary as to its severity based on the identity of the harasser, the type of harassment, and the gender of the judge. For example, psychological studies show that male participants generally perceive female-on-male sexual harassment as less harassing than male-on-female sexual harassment. Female participants, however, perceive both types of harassment to be equal.¹⁵⁷ Moreover, studies show that male participants view different types of male-on-male harassment differently.¹⁵⁸ They consider negative, hostile harassing behaviors by men directed at other men less serious.¹⁵⁹ These behaviors are coined "rejection-based" sexual harassment.¹⁶⁰ In contrast, male participants find sexual advances by men toward other men more harassing and serious.¹⁶¹ These harassing behaviors are deemed "approach-based" male-on-male harassment.¹⁶²

Multidimensional masculinities theory's instruction to use varying lenses to view the situation may aid in understanding the dynamics. Multidimensionality theory, like intersectionality theory, urges an anti-essentialist look at identity and recognizes that multiple strands of our identity interact to form the person, and that additionally, the individual's experiences vary as the context varies.¹⁶³ Use of MMT should be explicit in the courtroom. Judges should encourage juries to consider context, but warn them that their first response may be a discriminatory one. Social gender norms are very strongly held and often invisible to those who believe in the norms. The judge should permit expert testimony of social

¹⁵⁶ See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1132 (2008) (noting that many outsiders have learned that performing at work exactly as white men does not shield them from discrimination, and that outsiders are often penalized for the same minor deficiencies for which insiders receive no penalty because the outsiders are much more visible and are the object of stereotypes).

¹⁵⁷ See Roger C. Katz et al., *Effects of Gender and Situation on the Perception of Sexual Harassment*, 34 SEX ROLES 35, 38–40 (1996) (discussing the results of a statistical analysis on harassment ratings as a function of group and situation); Stockdale et al., *supra* note 136, at 164–65 (discussing the results of a study on sexual harassment).

¹⁵⁸ Stockdale et al., *supra* note 136, at 164–65.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 159.

¹⁶¹ *Id.* at 164–65.

¹⁶² *Id.* at 159.

¹⁶³ See *supra* notes 29–33 and accompanying text (discussing and explaining MMT).

facts based on social science research specifically applied to the case so that the jury can make an informed decision.¹⁶⁴

Prospect Airport Services demonstrates the problem with using a “reasonable woman” or “reasonable man” standard.¹⁶⁵ Both standards tend to rely on stereotypical views of how men and women should or would react in response to a potentially harassing environment. The law, however, should not enforce a gender regime based on stereotypes by labeling particular male or female behavior “reasonable” based on how men and women conform to societal gender norms. There is a wide array of reasonable reactions to the same behaviors in the workplaces. While biological sex and gender may to some extent affect an employee’s reaction to behaviors in the workplace, other contextual factors such as organizational power, social power, workplace dynamics, and an individual victim’s vulnerabilities may determine whether the individual’s response is a reasonable one.

Prospect Airport Services provides a good example. A “typical” male coworker may not have been troubled by Sylvia Munoz’s behavior.¹⁶⁶ Even if most men may not have welcomed the behavior, it is not likely that they would have been intimidated by Sylvia Munoz’s advances. If bothered by Sylvia’s advances, a “typical” man would likely have stopped the behavior by responding in a forceful manner. Rudolpho Lamas, however, was unable successfully to rebuff Munoz’s advances.¹⁶⁷ Even though he told Munoz to stop a number of times, she did not heed his plea.¹⁶⁸

Understanding the context of Lamas’s home life and the workplace dynamics at Prospect would help explain to the jury why Lamas reacted to Munoz’s advances as he did. Lamas attributed his discomfort with Munoz’s behavior to his fundamentalist religion and his status as a recent widower.¹⁶⁹ This information alone explains in part why Munoz’s behavior was difficult for him, but issues surrounding Lamas’s identity and the context of the workplace dynamics could have been developed even further. After Lamas refused to involve himself with Munoz, a number of coworkers began to pressure him to go out with Munoz and began to question his masculinity and his sexual orientation.¹⁷⁰ His coworkers’

¹⁶⁴ Mitchell et al., *supra* note 139, at 1154–55 (explaining the benefits of expert witnesses carrying out empirical social research to support social facts).

¹⁶⁵ *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 996 (9th Cir. 2010) (illustrating how the “reasonable man” standard relies on stereotypical views of men).

¹⁶⁶ *See id.* at 995 (discussing how Lamas’s coworkers made remarks that he was gay because of his reaction to Munoz’s advances).

¹⁶⁷ *Id.* at 994.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 998.

¹⁷⁰ *Id.* at 995.

teasing and his supervisors' reaction to Lamas may have resulted from beliefs that Lamas did not live up to masculine stereotypes. In other words, they may have believed that Lamas should have handled the situation himself, accepted Munoz's advances, or shut up because only non-masculine men complain about sexual harassment. Another possible contextual reason for Munoz's ability to harass Lamas is racial. Lamas, a dark-skinned Latino male, may have had less power socially than Munoz, a light-skinned Latina, and Munoz's and others' attitudes toward Lamas may have related in part to his color.

Prospect Airport Services demonstrates that the problem with the standard lies in its conclusion that there is only one reasonable reaction to a set of harassing circumstances. The standard should not measure a "reasonable man" or a "reasonable woman" or even a "reasonable person." Rather, it should consider the context of the situation, including identity factors of the victim, the fluid organizational and social power differentials, and the various personal vulnerabilities of the victims to determine whether the victim's response in viewing the behavior as harassing was reasonable. This should not be an onerous test. Once the victim's response is deemed potentially reasonable given the contextual and identity factors at play, the focus should be on the employer's response to the behavior. Here, again, *Prospect Airport Services* is instructive. The fact-finder should consider not only that Lamas was a man, but also that he was a fundamentalist Christian who found Munoz's behavior particularly threatening, and that he was a recent widower who was still mourning his wife's death. But an understanding of the facts in *Prospect Airport Services* reveals more. It appears that the injury to Rudolpho Lamas occurred not only at the hands of his female coworker, Sylvia Munoz, but also as a result of his employer's refusal to stop the behavior, combined with his fellow coworkers' questioning of his failure to live up to their standards of masculinity.

Courts have traditionally analyzed whether a hostile work environment exists before analyzing the separate question of whether the employer is liable for the environment, but in this case this approach was inadequate. In fact, the employer's refusal to step in and stop both Munoz's and the coworkers' harassing behavior, and its attitude that Lamas should not take the behavior seriously actually enhanced the seriousness of the behavior. In essence, the employer's behavior was an important part of the hostile work environment itself. This behavior, therefore, is part and parcel of the context of the situation that the fact-finder should consider in determining whether Lamas's working environment was hostile. In this case, the fact-finder should have considered the employer's reaction in determining whether the behavior was sufficiently severe or pervasive to alter the terms or conditions of the employee's employment. Here, perhaps because the employer believed that sexual harassment by a female coworker on a male

coworker was less serious than the more common harassment by a male on a female coworker, the employer failed to act and even ridiculed Lamas's reports of sexual harassment. His supervisor told him that he should be singing, "I'm too sexy for my shirt,"¹⁷¹ and did not take Lamas's report seriously. This behavior, combined with the employer's failure to stop the harassment by Munoz and by fellow coworkers who questioned Lamas's sexual orientation, added to the severity and the pervasiveness of the problem.

C. Proposal: A Reasonable Response

1. The Proposal

In determining the proper objective standard for a hostile working environment, it is important to assure that we do not use men as a measuring stick of how a reasonable person would react, and that we do not engage in stereotyping when determining how men or women should or do react to a harassing environment. To avoid these problems, the law should allow fact-finders to consider variations in the context of the workplace, it should take into account different lived experiences of the victims, and it should reflect on power differentials at work and in society. But, most importantly, a new standard should recognize that there is a range of reasonable responses to the same set of behaviors. The standard, rather than considering what a reasonable person, reasonable woman, or reasonable victim would have thought, should look at whether the plaintiff's response was *a reasonable one*, given a number of factors. This test is a totality of the circumstances test. It is important for judges and juries to understand that the factors listed below are not elements and that not all factors need be present for a hostile work environment to exist.

In determining whether the plaintiff's response was reasonable, there should be a two-part test, as there currently is.¹⁷² The first question, which goes to the subjective element, would remain the same: whether the behavior created a hostile work environment for the plaintiff as a subjective matter.¹⁷³ If the answer to this question is yes, the second question is whether the plaintiff's reaction was a reasonable one when taking into account the workplace dynamics, the harassing behaviors, and the plaintiff's identity, experiences, and position at the workplace.¹⁷⁴

Under the law as it currently stands, when considering this second question, fact-finders focus only on the conduct itself. They consider the

¹⁷¹ *Id.* at 1001.

¹⁷² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (discussing the factors and circumstances that the courts must consider).

¹⁷³ *Id.* at 22–23.

¹⁷⁴ *Id.*

following:

- Frequency of conduct;
- Severity of conduct;
- Whether the conduct is physically threatening or humiliating or a mere offensive utterance; and
- Whether the conduct unreasonably interfered with the plaintiff's work.¹⁷⁵

These are all important factors that help determine how serious or severe or pervasive the conduct is, but they disregard the context of the workplace, how power operates, and the victim's identity and experiences. Under the new proposed standard, the fact-finder should also consider the following:

- The personal identity of the plaintiff;
- Circumstances at work or outside of work that make the alleged victim vulnerable;
- Relative power of the harasser(s) based on position at work and/or social power;
- Relative powerlessness of the harassee(s) based on position at work and/or lack of social power;
- Whether the individual alleging harassment is a social outsider;
- Workplace dynamics; and
- Workplace context.

This test has a number of advantages. First, it is flexible enough to permit a uniform standard for all types of harassment, no matter who the perpetrators and the victims are, but also to allow consideration of variable factors in particular cases that go to whether an objectively hostile work environment existed. The proposal has the benefit of retaining the objective test, but also permitting the consideration of important surrounding circumstances in determining whether a hostile working environment existed.

2. Will the Proposal Make a Difference?

The final question is whether a "reasonable response" standard would make a difference. Although there is no research on whether this new standard would affect a fact-finder's determinations, we can learn

¹⁷⁵ *Id.*

something from existing research on the reasonable woman standard. Psychological studies demonstrate that women judge harassing behaviors, at least those that are more ambiguous, as more severe or harassing than men do.¹⁷⁶ The difference between women and men is small, but fairly consistent, and it does not exist where there is very extreme behavior.¹⁷⁷ This differential of perspective, along with men's superior social and organizational power and the reality that women represent the vast majority of sexual harassment victims, led to the use of the reasonable woman standard in some courts. But a question still remains as to whether the use of the reasonable woman standard actually affects the results. Research into whether the reasonable woman standard makes a difference to the outcome remains inconclusive. A number of studies find that, when clearly instructed on the different standards, those applying a reasonable woman standard to a male-on-female harassment situation are slightly more likely to find that sexual harassment occurred.¹⁷⁸

But even these studies are not determinative. A number of the studies use students as subjects;¹⁷⁹ others use both students and adults;¹⁸⁰ others study court opinions to evaluate the effect of the reasonable woman standard.¹⁸¹ But none of the studies accounts for all of the possible variables that could affect the results in a real case. To evaluate these studies, we must consider the effect of pre-trial and post-trial motions decided by judges and the effect of deliberation on individual jurors' decisions. Judges faced with motions for summary judgment and for judgment as a matter of law regularly consider the standard and the facts to determine the sufficiency of the evidence. Thus, the judge's view of how the facts relate to the standard is very important to the result, and is often

¹⁷⁶ Gutek & O'Connor, *supra* note 71, at 154–55.

¹⁷⁷ *Id.* at 155.

¹⁷⁸ See, e.g., Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 623 (1999) (finding a two percent increase in sexual harassment findings using the reasonable woman standard); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 592–93 (2001) (finding the success rate of cases studied for a ten year period was slightly higher using a reasonable woman standard, but the sample and results were too small to be statistically significant); Elissa L. Perry et al., *The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions*, 28 LAW & HUMAN BEHAV. 9, 22 (2004) (finding that using the reasonable woman standard had a “positive, but weak, impact” on court decisions in a circuit with a reasonable woman precedent); Richard L. Wiener & Linda E. Hurt, *How Do People Evaluate Social Sexual Conduct at Work? A Psycholegal Model*, 85 J. APPLIED PSYCHOL. 75, 75 (2000) (studying how men and women determine whether social sexual interactions reach the level of harassment proscribed in state and federal statutes).

¹⁷⁹ See, e.g., Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 664 (2002) (finding that the standard made no difference).

¹⁸⁰ See Gutek et al., *supra* note 178, at 623.

¹⁸¹ See Perry et al., *supra* note 178, at 22.

determinative. During trial, where the jury is the fact-finder, the verdict is not an individual determination, but rather the result of a group deliberative process. When viewed in this light, we see that the empirical studies do not necessarily reflect how decisions would be made in a real case. First, the psychological studies measure the standard only in male-on-female cases so, at most, they can predict how the reasonable woman standard affects the typical male-on-female harassment case. Second, many of the studies use undergraduate students as test subjects, and offer them a very short description of the possible scenario. These studies give the students a short description of the behavior and then instruct different groups of students to use the reasonable person and the reasonable woman standards. The individual students then rate whether they would find that the particular behavior created a hostile work environment. The test subjects—individual undergraduate students—differ widely from both the judge and the jury. Like the judge, the undergraduates act alone in making their determinations, but unlike the judge, they are not well informed about the law and have no experience with these types of cases.¹⁸² Like the jury, the students have little or no experience with the law, but, unlike a jury, the students are not diverse in age and personal experience and they make their own individual determinations without a deliberative process. The undergraduate students' responses, therefore, may not accurately reflect whether an individual judge would conclude that a particular scenario is sufficiently severe or pervasive to constitute a hostile work environment or whether a jury, after deliberation, would conclude that it is.¹⁸³

Other studies correct for some of these deficiencies by using both students and adults as participants, and different means of communicating the information to the test subjects. These studies, which use videotapes and longer descriptions of cases that are taken from testimony in real cases, are much improved over earlier studies and yield important results.¹⁸⁴ Nonetheless, these studies still do not account for the role of the judge in the decision or the role of the jury's deliberative process in decision making. There are a few studies that consider judicial opinions to determine whether the reasonable woman standard makes a difference in

¹⁸² See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879–80 (2009) (discussing the finding that an individual's view of the facts depends heavily on personal characteristics).

¹⁸³ Jury deliberations can have an effect on the outcome of trials. Research demonstrates that the identity of the foreperson, the frequency of the polling of jurors, and other factors may affect the outcome. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690, 694–97 (2001); see also Mary R. Rose et al., *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310, 322 (2010) (discussing "offstage" comments made by jurors about parties, at least one of which likely affected the outcome).

¹⁸⁴ Gutek et al., *supra* note 178, at 604–07.

the cases,¹⁸⁵ but these studies, too, have difficulty replicating the trial process. The Perry study, for example, looks only at published decisions (including those published on Lexis-Nexis), does not consider any opinions decided on pre-trial motions, and looks only at federal district court cases where the judges served as fact-finders at trial.¹⁸⁶ The Juliano-Schwab study is broader in that it looks at both federal district court and federal court of appeals opinions,¹⁸⁷ and does not exclude opinions written in response to pre-trial motions, but it does not control for the severity or pervasiveness of the behavior. Both studies of judicial opinions necessarily omit the vast majority of cases that are resolved without filing a claim, or are settled without a judicial opinion.¹⁸⁸ Moreover, in both studies of judicial opinions, it is difficult to tell whether the reasonable woman standard causes the positive effect or whether the circuits using the reasonable woman standard are more liberal in their approach to sexual harassment cases.

Given this research and the lack of research on my proposed standard, it is unclear whether a new “reasonable response” standard would have a significant effect on the results in sexual harassment cases. At the very least, however, the new approach should provide a corrective effect on the judges. Because the new standard emphasizes that there are numerous reasonable responses, it will take the focus off of the reasonableness of the particular victim’s reaction, and place it more on the employer’s response. Moreover, because it encourages a more contextualized approach, it would encourage judges to use humility in relying on their own “common sense” and would lead to admission of expert testimony providing social facts testimony. Furthermore, it should encourage employers who are creating policies to understand that their policies should anticipate that there is more than one reasonable response to a particular set of behaviors. Finally, it will provide an opportunity for further research into a more complex understanding of how judges and juries interact and how those interactions affect results in the context of a hostile work environment claim.

IV. CONCLUSION: FROM “THE MAN QUESTION” TO “THE WOMAN QUESTION”¹⁸⁹

Prospect Airport Services, combined with an understanding of MMT,

¹⁸⁵ Perry et al., *supra* note 178, at 22.

¹⁸⁶ *Id.* at 15.

¹⁸⁷ Juliano & Schwab, *supra* note 178, at 556.

¹⁸⁸ *Id.*

¹⁸⁹ See DOWD, *supra* note 36, at 1 (urging feminists to “ask the man question” in order to reveal “how gender functions to subordinate some or all or most men, as well as how men consciously and unconsciously accept privilege with its patriarchal dividend as well as its costs” (internal quotation marks omitted)).

permits us to reconsider both the underlying theory of sex discrimination in a hostile work environment case and the proper standard for determining whether a hostile work environment exists. Using MMT to shift the lens in sexual harassment cases encourages development of a better theory to support Title VII sexual harassment law, regardless of the sex of the perpetrator and victim. Essential to a theory of illegal sex discrimination in a hostile work environment case is the use of organizational and/or social power to create a sexually hostile or gender-hostile environment. A multidimensional masculinities approach permits development of a new, more universal standard to determine objective and subjective reasonableness, a standard that takes into account gender, race, and other identity characteristics of the victim, and the victim's personal vulnerabilities in the context of organizational and social power. The fact-finder should also consider the employer's response to the victim's complaints in determining whether a hostile work environment existed because of the plaintiff's sex. Clearly, the employer's response plays an important role in the implementation of organizational power to the ends of creating a hostile work environment.

But this case tells us even more. After shifting the lens to ask "the man question" we need once more to shift back to examine the woman question. That is, masculinities theory is particularly useful in helping us to understand our blind spots. It permits us to consider varying possibilities where vulnerable men receive unequal treatment. It also allows us to consider why groups of men (or men and women) may engage in behavior that scapegoats less masculine men.

Shifting the lens and applying a multidimensional view helps us to understand why women are still subject to serious workplace harassment. If men and/or women cannot tolerate a workforce where some men are not masculine in the traditional sense, there will be no room in those jobs for women as equals either. Worshipping hegemonic forms of masculinity has a flip side: besides harming men who do not live up to the ideal, worshipping masculinity denigrates working women.¹⁹⁰

¹⁹⁰ Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 18 (1995) (stating that characteristics that are seen as masculine are more highly valued and that characteristics seen as feminine are devalued and are unacceptable in males).

