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# **Sexual Harassment Litigation**

## **The Effects of Legal Standard And the Abuse Defense on Juror Decision Making**

By Dorothy K. Kagehiro, Ph.D.

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**TRIAL** GRAPHIX.

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*“Sexual harassment in the workplace is not a thing of the past ... it continues to be a serious problem for working women”*

Cari M. Dominguez, EEOC Chair,  
in a press release dated April 9, 2003

Sexual harassment in the workplace is a serious and costly problem for corporate employers as well. Based on reports by women, an estimated 40%-90% of working women have experienced on-the-job sexual harassment. The U.S. Equal Employment Opportunity Commission (EEOC) and state and local agencies have received over 14,000 sexual harassment charges every year since 1992. In April 2003, the EEOC announced its largest sexual harassment settlement ever in the State of New York for \$5.4 million, plus remedial relief on behalf of female hospital workers. In 1998, Mitsubishi Motor Manufacturing settled a sexual harassment complaint, brought on behalf of 300 female employees, for \$34 million. A 1999 EEOC-brokered settlement with Ford Motor Co. – \$7.5 million in compensation, \$10 million to train managers and male workers to stop offensive behavior, an agreement to triple the number of female supervisors in plants and to withhold raises and promotions from managers at any Ford plant who failed to stop harassment from occurring – did not persuade a federal district judge to deny an attempt by 14 Ford female workers to convert their lawsuits into a class action. There are also indirect costs. The U.S. Department of Labor estimates that American businesses lose almost \$1 billion annually from absenteeism, low morale, and new employee training replacement costs due to sexual harassment.

This article reviews the psychological research literature on the legal standard applied in sexual harassment cases and on the abuse defense sometimes used in those cases.

## **The Reasonable Woman Standard Versus the Reasonable Person Standard**

Title VII of the Civil Rights Act of 1964, amended in 1991, prohibits employers from discriminating against workers on the basis of race, color, religion,

sex, or national origin. Title VII's prohibition against discrimination on the basis of sex has been applied in cases concerning sexual harassment: quid pro quo sexual harassment, or sexual favors in exchange for compensation or career advancement; and hostile work environment sexual harassment. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the United States Supreme Court authorized a four-part test for determining whether sexual harassment had occurred in hostile environment discrimination claims: 1) The alleged conduct must be sexual in nature; 2) The alleged conduct is unwelcome; 3) The unwelcome conduct must be sufficiently severe or pervasive to alter the victim's conditions of employment; and 4) The employer knew or should have known of the alleged conduct. Most courts applied the reasonable person standard of *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), i.e., whether a reasonable person in a similar work environment under similar circumstances would find the unwelcome social-sexual behavior so pervasive and severe that it would create a hostile work environment. The reasonable woman standard developed from the premise that assuming the perspective of the alleged victim (who was most commonly a woman) could best help in deciding whether sexual harassment had occurred. According to research findings, the legal standard has less impact on juror decision-making than other factors, such as gender of juror or juror predisposition.

## **Decision-Making Factors**

In several studies, male and female surrogate jurors were more likely to perceive hostile work environment sexual harassment when applying the reasonable woman standard. Males attributed less responsibility to the plaintiff for what had happened if they received a reasonable woman standard.

Under the reasonable woman standard, judgments by surrogate jurors of the workplace circumstances at issue were more likely to involve the three factors of unwelcomeness, severity, and pervasiveness. Under the reasonable person standard, surrogate jurors were more likely to focus on defendant conduct (unwelcomeness and severity).

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The reasonable woman standard was more effective in overcoming hostile sexist predispositions of surrogate jurors (sexist antipathy, or the endorsement of male dominance). The reasonable person standard was more effective in overcoming benevolent sexist predispositions of surrogate jurors (stereotypic views of women in restricted roles, but with a motivation of protectiveness). However, the difference in the influence of legal standard on juror decision-making occurred only if jurors could correctly recall what the applicable legal standard was. And male surrogate jurors had more difficulty than did female surrogate jurors in recalling the reasonable woman standard.

Research on judges' verdicts parallels the general findings of the jury research – the reasonable woman standard is more favorable to the plaintiff than the reasonable person standard. A post-Meritor study was conducted of cases of hostile environment sexual harassment heard in U.S. district courts (1986 to 1996). Of the initial sample, the researchers eliminated cases filed under state law, cases that did not result in trial, cases tried to juries, and cases in which the plaintiff was male. This left a subsample of 124 cases. Judges were more likely to favor the defendants (64%). The probability of a plaintiff winning her case under the reasonable woman standard was 50%. The probability of a plaintiff winning her case without a reasonable woman standard was 24%. There were an insufficient number of female judges to assess the effect, if any, of judge's gender.

In summary, plaintiff attorneys will find it somewhat easier and defense attorneys will find it somewhat more difficult in venues with a reasonable woman standard. It would behoove employers to incorporate a reasonable woman perspective in their internal investigations of harassment complaints. For example, if they have not already done so, they should make an effort to include female managers in their review and/or mediation procedures.

## **The Abuse Defense**

A defense sometimes attempted in sexual harassment cases is one referred to as the abuse or hypersensitivity defense. According to this argument,

the plaintiff could not have been made a victim of the defendant's conduct because she was already a victim [of variously: childhood sexual abuse, sexual assault, domestic abuse, etc.]. In other words, the emotional distress attributed by the plaintiff to her workplace experiences can be better explained by her prior history of trauma. This defense is based on the rationale that a history of childhood sexual abuse, sexual assault, domestic abuse, etc. makes a woman particularly vulnerable to various forms of re-victimization, such as sexual harassment, and also affects her personality so that she elicits behaviors from others that she perceives to be harassment. The defense bears on issues such as the reasonable woman standard, welcomeness, plaintiff credibility, and alternative causation of damages.

We recommend that this defense not be attempted. First, the psychological research literature offers weak support for the underlying assumptions of the defense. In general, sexual harassment plaintiffs are not more sensitive in their reactions than are non-abused plaintiffs. Abused and non-abused women do not differ significantly in their perceptions of harassment situations.

A study was conducted on a sample of 56 women involved in sexual harassment litigation. The plaintiffs were drawn from various regions of the country, and they ranged widely in occupations (waitresses, factory workers, miners, police officers, attorneys, executives, college professors). The sample was administered structured diagnostic interviews and standardized psychological inventories. Twenty-four of the plaintiffs had experienced some type of prior sexual victimization. The diagnostic and psychological profiles of previously abused plaintiffs and non-abused plaintiffs were similar for the most part. In a review of the relevant psychological research literature, there was no support for a relationship between prior sexual abuse and greater likelihood of perceived sexual harassment. The researchers also conducted five empirical studies of their own. Three of their studies involved college undergraduates, one study involved prospective jurors of a state venue, and one study involved male and female supervisory employees of a transportation company. Overall, research participants who had histories of

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sexual abuse/harassment were not more likely than were non-abused/non-harassed participants to label the stimulus incident as an instance of sexual harassment. However, focusing solely on the sample of prospective jurors, prior sexual harassment among the female participants was correlated with perceptions of sexual harassment in the stimulus case (there was an insufficient number of males reporting prior sexual harassment in this sample to draw any conclusions).

There is another reason why the abuse defense is not recommended. The reported prevalence rates for at least one sexually abusive incident prior to age 18 among the general adult population have ranged from 6% to 62% for women and 3% to 31% for men; most experts in the field of sexual abuse agree that reported incidence vastly under estimates actual incidence, especially among male victims. While it is difficult to generalize from research populations to jury pools, we think it is safe to say that: 1) The incidence of sexual traumas among prospective jurors (female and male) could be higher than defense attorneys' options for elimination via peremptory challenges or challenges for cause; and 2) What the court rules as prior experience relevant as a basis for dismissal may not cover types of sexual trauma that would still make a prospective juror plaintiff-oriented (e.g., a study found a correlation between prior non-workplace sexual trauma and perceptions of workplace sexual harassment). If the abuse defense is raised, it might play out at trial as follows. A plaintiff expert will counter whatever is said by the defense expert. Jurors are generally more skeptical of psychiatric or psychological diagnoses than they are of medical diagnoses. The experts are likely to cancel each other's testimony, and the jurors will fall back on an assessment of the circumstances surrounding the workplace events, just as they would have in the absence of the abuse defense. Thus in most instances, nothing is likely to be gained by the defense attorneys in raising the argument – at considerable risk of alienating jurors predisposed to identify with the plaintiff on the basis of similar traumatic experiences.

We can cite an example of unsuccessful defense from post-trial juror telephone interviews conducted

for a client after verdicts were brought against a male employee and the employer-entity (no jury research or consultation occurred prior to the trial). The alleged sexual harassment stemmed from office pranks by a male employee that had targeted the female plaintiff (e.g., he undid the drawstring of his pants and poked out the plaintiff's pen). The defense focus on the plaintiff's pre-existing emotional problems, with the goal of reducing damages, backfired as far as the jurors had been concerned. The perception of the plaintiff evoked by the defense was of a meek, vulnerable woman – not the type of person that the jurors believed would be inclined to make trouble or to call attention to herself. It also increased the perceived onus that jurors placed on the employer to have addressed her complaints.

## Conclusion

Based on the research evidence thus far, legal standard had less impact on juror decision-making than other factors, such as juror attitudes, but the reasonable woman standard was more likely to neutralize juror gender effects and effects of hostile sexist attitudes held by jurors. However, the effect of the reasonable woman standard applied only if jurors were able to recall the standard to be applied – and male jurors had more difficulty in recalling the reasonable woman standard. The published psychological research offered weak support for the underlying assumptions of the abuse defense sometimes used in sexual harassment cases. We suggest the risks of alienating some jurors if it is used outweigh its intended benefits.

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