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COMPARISON OF LEGAL STANDARDS IN
SEXUAL HARASSMENT HOSTILE WORK ENVIRONMENT

by
Jeanne M. O'Brien Rice

A Thesis

Submitted in partial fulfillment of the requirement of the
Master of Arts, Mental Health Counseling and Applied Psychology Degree
of
The Graduate School
at
Rowan University
May 1, 2008

Approved by _____
Advisor

Date Approved 4/30/08

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ABSTRACT

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COMPARISON OF LEGAL STANDARDS
IN SEXUAL HARASSMENT HOSTILE WORK ENVIRONMENT
2007/08
Dr. Eleanor Gaer
Master of Arts in Mental Health Counseling and Applied Psychology

This research compares the previously studied reasonable person and reasonable woman legal standards with a new reasonable employee standard on hostile work environment sexual harassment. Participants included 115 college students from a mid-Atlantic university. Measures were taken across genuine legal cases based on explicit, ambiguous, and non-traditional occupation fact patterns. No statistically significant difference was found among legal standards on measures of severity, hostile work environment, because of sex or conduct unwelcome. There was however a statistically significant difference between fact patterns on liability. Age, employment experience, and being a victim of sexual harassment produced statistically significant interactions with legal standards on several measures as well.

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CHAPTER I

Introduction

Statement of Problem

Sexual harassment, a form of sex discrimination, is prohibited by Title VII of the Civil Rights Act of 1964 and the Civil rights Act of 1991 (Perry, Kulik, & Bourhis, 2004). Due to the subjective element involved in sexual harassment, it is often difficult to actually define what sexual harassment is. The U.S. Equal Employment Opportunity Commission (EEOC) defines sexual harassment as requests for sexual favors, unwelcome sexual advances and other unwelcome verbal or physical conduct of a sexual nature that affects an individual's employment, interferes with their work performance or creates a hostile work environment (U.S. EEOC, 2007). By the 1990's, sexual harassment had become front page news due to high profile claims. The early nineties were ushered in with the Clarence Thomas Supreme Court nomination hearings in which Anita Hill, an assistant to Judge Thomas, testified that she had been subjected to sexual harassment from 1981 to 1983 while working for Judge Thomas (Black & Allen, 2001). The Thomas-Hill hearings were soon followed with sexual harassment accusations by Paula Jones against the then governor of Arkansas, Bill Clinton. Thomas and Clinton survived the allegations; however, the issue of sexual harassment had made its way into American living rooms. Prior to the nineties, sexual harassment

was prevalent in the workplace, albeit not yet a part of the American consciousness. Early research estimates indicate that sexual harassment in the workplace is experienced by 42% to 90% of women (Terpstra & Baker, 1987). Following the high-profile media cases, gender-based discrimination charges filed with the federal and local agencies continued to grow and by the end of 1999, sexual harassment claims accounted for 64% of the gender claims (Andrew & Andrew, 1997; Goodman-Delahunty, 1999). In Fiscal Year 2006, the EEOC resolved 11,936 of the 12,025 sexual harassment charges filed resulting in monetary benefits totaling \$48.8 million (U.S. EEOC, 2007). These monetary benefits did not include benefits from litigation.

Sexual harassment in the workplace is multifaceted and exacts an enormous toll on employees, employers and the legal system. Victims of sexual harassment experience depression, anxiety, increased stress and loss of motivation (Terpstra & Baker, 1987). Sexual harassment also results in feelings of humiliation and degradation, physical problems such as nervous tension, and economic repercussions for many women (Glidden, 1992). The target of sexual harassment may suffer financially due to changing jobs or being blocked from promotions within their current job in retaliation for filing sexual harassment complaints. Some women find it better to trade financial stability for a peaceful environment (Abrams, 1998). Similarly, businesses suffer negative outcomes as well in the form of absenteeism, low morale, decreased work effectiveness, litigation expenses and new employee training replacement costs (Perry, Kulik, & Bourhis, 2004; Terpstra & Baker, 1987). The Labor Department estimates the financial cost of sexual harassment to American businesses at \$1 billion annually (Perry, et al., 2004).

Changes in the make-up of the workforce have contributed to hostile work environment sexual harassment. Over the last few decades, increasing numbers of women have moved into the workplace. As this happened, men became anxious about what the influx of women into the workplace meant for them and met this change with resistance (Abrams, 1998). This resistance often presents in the form of degrading sexual harassment by men towards women which culminates in a hostile work environment. As a result, hostile work environment sexual harassment, which is more likely to occur in male-dominated environments, becomes a safeguard for male control in the workplace (Abrams, 1998; Glidden, 1992).

Research has implicated gender stereotyping as another factor in hostile work environment sexual harassment. Workplace discrimination surfaces when gender-stereotypic perceptions are incongruent with the attributes believed to be necessary for certain occupations (Fiske, Bersoff, Borgida, Deaux, & Heilman, 1991). In *White v. Burlington Northern* (2004), White, a female hired to work in a male-dominated maintenance department, filed a sex discrimination and retaliation suit with the EEOC. White's supervisor admitted that he treated White differently because he did not believe the railroad maintenance department was an appropriate place for a woman to work even though the evidence supported White's ability to perform her job. Women are generally believed to be nurturing and interpersonally skilled whereas men are generally believed to be strong, controlling and focused on achievements (Burgess & Borgida, 1999). Thus, a woman may be prevented from being selected for male-type occupations based on her gender. For example, a woman may be passed over for the position of military general because she is perceived in gender-stereotypic terms. Being female

may not fit with the perceived notion that a military general must be masculine. Empirical studies have found gender to be the strongest predictor of gender role attitudes with men manifesting more traditional gender role beliefs than women (as cited in Burgess & Borgida, 1999). Because discrimination based on gender stereotyping is more likely to be perpetrated by men, power inequities in society that favor men continue to exist (Burgess & Borgida, 1999). Studies show that women in male-dominated occupations are more likely to experience sexual harassment in the form of a hostile work environment compared to women in female-dominated occupations (Burgess & Borgida, 1999). Gender stereotyping has also been found to influence third party perceptions of sexual harassment and leadership styles. Women employed in male-dominated occupations are less likely to be viewed as sexually coerced compared to women employed in female-dominated occupations because they are less likely to be viewed in terms of the traditional stereotype of a powerless and defenseless woman (Burgess & Borgida, 1999). In a meta-analytic study examining male and female leaders, Eagly, Makhijani, and Klonsky (1992) found that female leaders were negatively evaluated compared to men when they behaved in an autocratic and directive manner and when they worked in traditionally male-dominated fields such as the military or as athletic coaches (Eagly et al., 1992). Research on gender role attitudes and perceptual differences has come to play an increasing role in sexual harassment litigation.

Sexual Harassment Law

Laws governing sexual harassment in the workplace developed gradually over the years. Although originally intended to include only the race, color, national origin,

and religion of individuals as categorically protected from discrimination, Title VII of the Civil Rights Act of 1964 inadvertently became the vehicle for addressing discrimination based on sex (Winter, 2007). The Equal Employment Opportunity Commission (EEOC) is the agency involved in Title VII cases. With specific powers granted by Congress in a variety of laws including the Civil Rights Act of 1964, the EEOC has the authority to issue guidelines, investigate complaints, mediate disputes and bring lawsuits to court (Levy & Paludi, 2002). Accordingly, the EEOC has had a strong influence in the development of sexual harassment law. Interestingly, even though Title VII of the Civil Rights Act prohibits harassment of an employee based on sex, actually addressing sexual harassment claims under Title VII through the legal system has not been an easy task (U.S. Equal Employment Opportunity Commission, n.d.). This was in part due to the lack of legislative history and guidelines for interpreting sexual harassment claims and the lack of established guidelines for dealing with ambiguous workplace behaviors (Winter, 2007). Following the passage of Title VII of the Civil Rights Act of 1964, the EEOC, the Civil Service Commission, the Office of Federal Contract Compliance Programs and the Justice Department worked to clarify the standards by which sexual harassment should be defined (Greenlaw, Kohl, & Lee, 1998). The EEOC Sexual Harassment Guidelines state:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an

intimidating, hostile, or offensive working environment.” (EEOC, 2006, p 198).

The totality of the circumstances is another factor that must be considered in determining whether conduct meets the sexual harassment guidelines. The courts provided two theories under which sexual harassment claims can be brought: “quid pro quo” and “hostile environment” sexual harassment (Andrew & Andrew, 1997). Quid pro quo harassment is generally agreed upon by all courts as constituting sexual harassment. Quid pro quo harassment occurs when a supervisor demands sexual favors in exchange for job benefits or the harassment has some other adverse tangible effect on the person’s employment (Andrew & Andrew, 1997). This type of harassment is fairly easy to identify because it results in something for something. Hostile work environment sexual harassment involves behavior by a supervisor or coworker that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” (Levy & Paludi, 2002, p 21). This type of harassment is also prohibited under the EEOC guidelines but it is not as easily identified because of the subjective element involved. Adler and Peirce (1993) and Childers (1993) suggest that hostile work environment harassment is more controversial than quid pro quo because the question of whether an environment is hostile is often a perceptual one (Perry et al., 2004). For many people there is a gray area in which behavior such as sexual jokes and sexual innuendoes by coworkers are not perceived as sexual harassment. Extreme vulgar language, sexual touching and other forms of sexual violence are however viewed as more universally agreed-upon forms of harassment (Childers, 1993).

Deciphering whether specific behaviors meet the threshold for hostile work environment sexual harassment has been difficult for the court as well. Many courts have not uniformly recognized the EEOC interpretation of quid pro quo and hostile workplace sexual harassment resulting in several interpretations of sexual harassment law by various legal jurisdictions (Cohen & Cohen, 1998). To determine hostile work environment, the Supreme Court outlined a four-part test in which the conduct must be sexual in nature, that behavior was unwelcome, conduct must be severe and whether the employer knew or should have known of the conduct (Goodman-Delahunty, 1999). The courts also use a two-prong test that includes both a subjective and objective component (Gutek et al., 1999). The court considers the subjective component by determining if the victim perceived the conduct as severe. It also applies the objective component using a reasonableness standard to determine if the conduct was severe enough to create an objectively hostile environment. The objective component is intended to protect employers and individuals accused of sexual harassment from hypersensitive employees (Gutek et al., 1999).

Sexual harassment law has evolved as legal cases have come before various courts. Cases resulting in significant Supreme Court sexual harassment law include *Meritor Savings Bank v. Vinson* (1986), *Harris v. Forklift Systems, Inc.* (1993), *Oncale v. Sundowner Offshore Services, Inc.* (1998) and *Burlington Industries, Inc. v. Ellerth* (1998). In 1986, the matter of sexual harassment as a violation of Title VII came before the Supreme Court in *Meritor Savings Bank v. Vinson* (*Meritor Savings Bank v. Vinson*, 1986; EEOC, 1990; Childers, 1993). In this case which involved both quid pro quo and hostile workplace environment claims, the U.S. Supreme Court acknowledged sexual

harassment as a form of prohibited gender discrimination under Title VII and distinguished quid pro quo cases from those in which a hostile work workplace environment was created (Goodman-Delahunt, 1999; Gutek et al., 1999). In *Harris v. Forklift Systems, Inc.* (1993), the Supreme Court determined that so long as the environment is reasonably perceived as hostile or abusive, psychological injury to the plaintiff is not required to prove violation of Title VII. Furthermore, in *Harris v. Forklift Systems, Inc.* (1993), the Supreme Court required that for behaviors to be sexually harassing, the fact finders must find the behavior objectively offensive to the reasonable person and subjectively offensive to the actual victim (Winter, 2007). In *Oncale v. Sundowner* (1998), Joseph Oncale brought legal action against Sundowner Offshore Services claiming that he had been forcibly subjected to humiliating sex-related actions against him by male coworkers. This 1998 U.S. Supreme Court decision found same-sex sexual harassment in the workplace actionable as sex discrimination under provision of Title VII of the Civil Rights Act of 1964 (Gutek et al., 1999; *Oncale v. Sundowner*, 1998). In *Burlington Industries v. Ellerth* (1998), the 1998 U.S. Supreme Court decision found that the employer can be held liable for the actions of its supervisor's creation of a hostile work environment under Title VII (Gutek et al., 1999).

Another area of continuing development in sexual harassment law is the appropriate use of reasonableness standards. In deciding whether sexual harassment conduct is severe or pervasive enough to establish a hostile work environment, the judge or jury must apply an objective reasonableness standard. This reasonableness standard defines a minimum standard of behavior expected by society (Perry et al., 2004). The debate

now centers on whose point of view in society should determine whether a hostile environment has been created. Two legal standards at the forefront of the debate are the reasonable person standard and the reasonable woman standard. The pros and cons for each standard have been reviewed by legal scholars for use in the courts. Additionally, research studies have addressed the question of whether there are significant perceptual differences between genders to warrant gender specific legal standards.

Legal Standards

Reasonable person standard. The traditional legal standard for determining whether a hostile work environment was created was the reasonable man standard which has transitioned over the years to a more gender neutral reasonable person standard (Gutek & O'Connor, 1995). This standard as defined by the EEOC emphasizes that "the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior" (EEOC, 1994). The reasonable person standard, seen as sufficiently flexible to allow for certain individual differences, indicates that the trier of fact should consider a *reasonable person* in the same circumstances when deciding a case (Gutek et al., 1999). Court cases recognizing the reasonable person standard include *Meritor Savings Bank, FSB v. Vinson* (1986), *Rabidue v. Osceola* (1986), and *Harris v. Forklift Systems, Inc.* (1993). In outlining the four-part test for determining hostile environment discrimination claims, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* (1986) adopted the reasonable person standard which was traditionally used in tort law (Goodman-Delahunty, 1999). In *Rabidue v. Osceola* (1986), the Sixth Circuit Court's position is that to accord protection to both plaintiffs and defendants in sexual harassment cases, the trier of fact

must adopt a reasonable person's reaction to a similar environment when judging the totality of the circumstances. The *Harris v. Forklift Systems, Inc.* (1993) court also used the reasonable person standard although it did not elaborate on its reasons.

Although the reasonable person standard has been sufficient for most legal cases, there has been considerable controversy over whether this standard is appropriate in hostile work environment sexual harassment cases. Supporters of the reasonable person standard suggest that this standard is gender free. Critics of this standard however suggest that it permits gender biases that are prevalent in society to be tolerated in the workplace and may permit a harasser to continue harassing because the practice is common (*Ellison v. Brady*, 1991; Goodman-Delahunty, 1999). Their position is that in practice, the reasonable person standard equates to a reasonable man which is a barrier for women trying to prove a case of hostile work environment sexual harassment (Gutek et al., 1999). Evidence of differing views between men and women of what constitutes appropriate sexual conduct has led to concern that the reasonable person standard may even result in the reinforcement of the discriminatory practices from which women are seeking protection (Childers, 1993). This controversy has led courts to consider gender-specific standards for sexual harassment cases.

Reasonable woman standard. The reasonable woman standard was first recognized in *Rabidue v. Osceola Refining Company* (1986) in the dissenting opinion of Judge Keith (Adler & Peirce, 1993; Goodman-Delahunty, 1999; Perry et al., 2004). Judge Keith disagreed with the reasonable person standard, stating in his opinion it failed to account for the wide range of differences between women's and men's views of appropriate sexual conduct. He suggested that unless the reasonable woman standard is

adopted, reasonable behavior would be decided by the offenders which in most cases are men (*Rabidue v. Osceola*, 1986). Since 1991, some courts have determined that the *reasonable woman* perspective does offer a more objective standard in hostile environment sexual harassment cases because it forces judges and juries to look at the case from the victim's perspective (Gutek & O'Connor, 1995). Although the EEOC did not recommend an explicit reasonable woman standard, it did suggest that the courts consider the victim's perspective when evaluating the severity and pervasiveness of sexual harassment and not stereotyped notions of acceptable behavior (*Ellison v. Brady*, 1991; Gutek et al., 1999). In *Ellison v. Brady* (1991), the Ninth Circuit Court of Appeals adopted the reasonable woman standard. This standard suggests that a work environment is hostile if a reasonable woman finds the conduct in question sufficiently severe to affect employment conditions (Goodman-Delahunty, 1999; Winter, 2007). In keeping with EEOC recommendations to keep the focus on the perspective of the victim, the Ninth Circuit Court of Appeals stated:

“Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive... We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.” (*Ellison v. Brady*, 1991, p. 879).

Thus, the decision to use the reasonable woman standard is based on the assumption that men and women evaluate incidents of potential sexual harassment differently and that the standards by which sexual harassment is judged should reflect these experiences (Gutek & O'Connor, 1995; Winter, 2007). It should be noted that the Ninth Circuit

court in *Ellison v. Brady* (1991) did not cite any research studies to support its theory about sex differences in perceptions of sexual harassment (Gutek et al., 1999).

The reasonable woman standard does have its critics. It has been suggested that the reasonable woman standard has drawbacks and negative long-term consequences (Childers, 1993). It has also been scrutinized as being counterproductive by reinforcing sex differences rather than promoting an equal footing in the workplace (Dragel, 1992; Goodman-Delahunty, 1999). Ashraf (1992) suggests that while the use of the reasonable woman standard would force judges and jurors to take the women's perceptions and experiences into account, it would ultimately interfere with the elimination of discrimination in the workplace. The three main criticisms of the reasonable woman standard proposed by feminists suggest that the reasonable woman standard does not reflect the interests of all women, men cannot apply the reasonable woman standard objectively, and it characterizes women as weak in the eyes of the law (Kerns, 2001). Childers (1993) suggests that a gender-specific legal standard works against the goal of creating a standard of conduct in the workplace that is mutually acceptable to men and women. Unikel (1992) points out that the use of a gender-specific standard may be the beginning of a slippery slope from which other reasonableness standards are created. In *Garcia v. Andrews* (1993), the Texas Court of Appeals declined to use the reasonable woman standard in determining what constitutes a hostile environment stating that fairness dictates a general societal standard (Marmo & Queneau, 2000-2001). The Michigan Supreme Court found that standards based on gender would result in excessive fragmentation inappropriate de-emphasize the

society's need for uniform standards of conduct (Marmo & Queneau, 2000-2001; *Radtke v. Everett*, 1993).

Reasonable employee standard. Hostile environment sexual harassment as outlined by the EEOC is concerned with protecting employees from unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. The reasonable person and reasonable woman standards have offered valid reasons for their use. These standards have also come under fire as well. A *reasonable employee standard* may offer a way to address the concerns of both the employer and the victim of hostile environment sexual harassment. Such a standard might provide the objectivity needed to guard against hypersensitive employees while giving consideration to the subjective nature of hostile work environment sexual harassment and how it affects the victim. The First Circuit required the trier of fact to adopt the perspective of a reasonable employee in *Shrout v. The Black Clawson Company* (1988) to determine whether harassment interfered with the plaintiff's work performance creating a hostile or offensive environment that seriously affected the plaintiff's psychological well-being. The court concluded that the plaintiff's work performance suffered as a result of the harassment, an example of how hostile work environment sexual harassment affects the victim. In *Alvey v. Rayovac* (1996), the court found that the conduct experienced by the plaintiff did not add up to an environment that a reasonable employee would find abusive or hostile. This decision exemplifies the protection an employer may need from employees who might be hypersensitive. The reasonable employee standard has not been used by most courts.

CHAPTER II

Literature Review

Research on sexual harassment started in the late 1970s and early 1980s (Gutek, 1995). The bulk of the research that has been conducted has used vignette studies and convenience-sample surveys in which common rater characteristics such as rater gender, status, experiences and personality are investigated (Gutek, 1995). Research involving gender perspectives and legal standards for reasonableness, as they pertain to hostile work environment sexual harassment, have become increasingly important. The results of gender perspectives are significant because they contribute to legal standards employed by the courts. Likewise, research studies comparing legal standards have become increasingly important as the courts work to apply the appropriate standard to hostile work environment sexual harassment cases.

Gender Perspectives

The reasonable woman standard developed out of the need to address hostile work environment sexual harassment in a way that was fair to women. A review of the research investigating differences in perspectives between men and women does show that men and women do have different perspectives when it comes to sexual harassment. Fitzgerald and Ormerod (1991) examined the effect of two context variables (student level and faculty power over the student) and two person variables (gender and status) on perceptions of five types of sexually harassing situations (gender harassment, seductive behavior, sexual bribery, sexual coercion and sexual imposition). Results indicated that perceptions of sexual harassment are influenced by gender with

women rating situations significantly more harassing than men. Gender differences were not uniform across the various types of harassment, however, as participants perceived the various types of situations as significantly different from one another. Perceptions of gender harassment, seductive behavior and sexual imposition resulted in gender differences whereas perceptions of explicit sexual bribery and threats of retaliation did not. These findings indicate that women are more likely than men to perceive even subtle types of behavior as sexual harassment. Many harassment behaviors are, in fact, implicit in nature. For example, compliments or touching behaviors can be open to interpretation. In a study assessing gender responses in evaluating ambiguous instructor behaviors, Garlick (1994) found that women students reported more discomfort and rated more of the behaviors as inappropriate than men students (Wiener, Hurt, Russell, Mannen & Gasper, 1997). Ambiguous behaviors in this study included items such as “a professor asks you about your weekend plans” and “a professor asks you about the things you do in your spare time (p 144).” Males rated 12 of 19 behaviors to be significantly more appropriate than females. Males also indicated significantly greater comfort with 14 of the 19 behaviors. Studies by Gutek (1985) and Gutek , Nakamura, Gahart, Handschumacher and Russell (1980) found that the perceptual gap between the sexes closes when the harassment is either severe or if the behavior is so benign that it is clearly not harassment.

Sexual harassment research routinely uses university students as the sample pool with the assumption that the student perspective is comparable to the employee in the workplace. In a study of full-time undergraduate students and full-time employees, Hendrix, Rueb, and Steel (1998) found that full-time employees saw various situations

as more sexually harassing than full-time students, thus not supporting the assumption that the student perspective is comparable to the employee in the workplace.

Comparing perceptions of sexual harassment between USAF Academy cadets, full-time employees and undergraduate students, Hendrix (2000) found that full-time employees perceived events as more sexually harassing than both undergraduate students and USAF Academy cadets. These studies suggest that differences in status can be as important as differences between male and female perspectives. In a study exploring two competing hypotheses about social-sexual behavior at work, Gutek, Cohen and Konrad (1990) found that women are more likely to find experiences of social-sexual behavior as harassing even when both genders report experiencing an equal amount of social-sexual behavior on the job. There are some studies however that question the significance of the gender effects. In a study investigating perceived severity of social-sexual behaviors, Terpstra and Baker (1987) failed to find sex differences in the definition of harassment. Of the 18 behaviors taken from sexual harassment cases, coarse language was the only behavior in which there was a significant gender difference with women finding this behavior sexually harassing. Kenig and Ryan (1986) found that if the sexual harassment was not severe or if the scenario is ambiguous, the within-sex variation can be as large as or larger than the between-sex variation. Overall, the empirical literature does support the EEOC's view that men and women workers have different perspectives concerning what constitutes hostile work environment harassment (Wiener et al. 1997). Some studies however question whether these gender effects are enough to support a separate reasonable woman standard (Wiener et al. 1997).

Legal Standards

The two common legal standards studied in hostile work environment sexual harassment are the *reasonable person standard* and the *reasonable woman standard*. In an investigation of hostile work environments, Wiener, Watts, Goldkamp and Gasper (1995) analyzed hostile work environment sexual harassment law utilizing the reasonable person and reasonable woman standards. Fact patterns were summarized from *Ellison v. Brady* (1991) and *Rabidue v. Osceola Refining Co.* (1986) for this study. Results of the study found that gender did not interact with either legal standard. Although there was evidence that in some cases the standard may influence the manner in which judgments of harassment are reached, there was no evidence that the standard influenced the conclusion. This study confirms that there are consistent differences in how men and women make harassment judgments but questions the effectiveness of the reasonable woman standard to offset the differences (Wiener et al. 1995). In a review of the empirical basis for the reasonable woman standard, Gutek and O'Conner (1995) found that the reasonable woman standard may not be helpful because the differences between men and women in defining sexual harassment are small and affected by many factors. They raise concerns that the justification for the reasonable woman standard is not met. Gutek et al. (1999), examined the effects of legal standard and sex of rater on judgments of sexual harassment in a replication of five studies. The principal question was the extent to which legal standard affects judgments of hostile work environment sexual harassment. The results of the study indicate that the legal standard had very little impact on judgments. Interaction effects were small and inconsistent across the

studies offering little evidence that the reasonable woman standard affected men more than women.

In a study using the reasonable person standard investigating mock juror decisions in same- and cross-gender cases, Wayne, Riordan and Thomas (2001) found that in cross-gender cases, female jurors found the harasser liable more than the male jurors. Male mock jurors assigned significantly more liable verdicts in the female-harasser-male target condition than in the male harasser-female target condition. Interestingly, female mock jurors also found the female harasser more liable than the male harasser. This study indicates that male and female jurors differed in their verdicts even though they were given the legal definition of sexual harassment and a detailed, unambiguous scenario. Research by Wiener and Hurt (2000) tested a psycholegal model of how people evaluate sexual conduct at work using the reasonable person and reasonable woman standard. This study utilized the Ambivalent Sexism Inventory to measure hostile and benevolent sexism as well. Fact patterns for this study were taken from two important sexual harassment cases: *Ellison v. Brady* (1991) and *Rabidue v. Osceola Refining Co.* (1986). Results indicate that in both cases, participants in the reasonable woman condition rated the conduct as more likely to constitute sexual harassment than those in the reasonable person condition. Perry et al. (2004) analyzed the impact of the reasonable woman standard on the outcomes of federal district-level cases of hostile environment sexual harassment. The results suggested that cases utilizing the reasonable woman standard were more likely to be decided for the plaintiff than cases that did not use this standard. Research has found that the attitudes a person holds about women often influence whether he or she will find evidence of sexual

harassment (Wiener & Hurt 2000; Wiener et al., 1997). Wiener et al. (1997) investigated the possibility that the reasonable woman standard acts to activate protectionist attitudes that both sexes hold toward women who complain of hostile work environment harassment. The study found that those high in hostile sexism and women found more evidence of harassment. This study is indicative of the various attitudes that one can experience when judging hostile work environment sexual harassment cases. Research using the reasonable employee standard in hostile work environment sexual harassment is either non-existent or unpublished.

Females in Male-dominated Workplace

Hostile work environment sexual harassment often involves women in nontraditional occupations. Women are believed to be nurturing and interpersonally skilled whereas men are believed to be strong and achievement oriented (Burgess & Borgida, 1999). Several gender role models suggest women are rewarded when they act within socially and culturally approved roles (Gutek, 1985). Woman who do not act within socially approved roles are subject to hostility from those who support the subservient role of women (Welsh, 1999). Women who do not conform to the stereotypical female gender roles may be discriminated against as was found to be the case in *Hopkins v. Price Waterhouse* (1980) (Fiske et al., 1991). Women entering male-dominated occupations are often treated in a hostile manner by men who resent them entering into their domain (Burgess & Borgida, 1999). Engaging in sexually aggressive harassment may represent an act of resistance that demonstrates opposition to the female in a traditionally male job (Welsh, 1999). Harassment of this type serves to maintain inequities in society that favor men (Burgess & Borgida, 1999). The

discrimination that women face when working in male-dominated occupations becomes an issue in hostile work environment sexual harassment cases because women in these occupations are less likely to be viewed as sexually harassed because they are not perceived in terms of the traditional stereotypical woman needing protection (Burgess & Borgida, 1999). The more contact that a female has with males, as in male-dominated occupations; the more she will experience harassment than women working in integrated workplaces or places dominated by females (Welsh, 1999). Research has confirmed the increase in hostile work environment sexual harassment for women in non-traditional gender roles. Eagly, et al. (1992) meta-analysis of studies examining the evaluation of male and female leaders found that female leaders were devalued relative to men when they behaved in a directive manner and when they worked in a male-dominated field such as the military. Glick and Fiske (1996) found that women who fit traditional gender roles receive the benevolent sexist's protection; women who do not fit traditional gender roles are subjected to hostility and scorn.

Another important component in sexual harassment research is an appreciation for the perspective that the third party brings to the situation. Without explicit direction, the judge or juror may bring his or her own life experiences when determining whether sexual harassment has occurred. For example, being accused of sexual harassment, being the victim of sexual harassment, or personal attitudes towards females in traditionally male roles may interfere with making an unbiased judgment in sexual harassment cases. To avoid the possible arbitrary assignment of personal perceptions to sexual harassment determinations, the use of legal standards are employed.

The question remains though as to which legal standard makes the most sense in providing a fair and balanced approach for both the plaintiff and the defendant. Research studies comparing legal standards for use in sexual harassment cases have produced mixed results and although gender differences are prevalent, the effect sizes do not particularly warrant a gender-specific standard. Critics also worry that a reasonable woman standard will trivialize sexual harassment by defining it as a problem experienced by women only or that it will open the door to other types of preference systems (the slippery slope). Gender perspectives, legal standards, attitudes towards gender role stereotypes and most likely individual experiences of jurors and judges are all involved. Although it is difficult to change perspectives and attitudes, it is possible and most likely worthwhile to move toward a more consistent approach using one legal standard. Deciding which legal standard is the most appropriate for sexual harassment cases can be complicated. There are many variables that must be considered. For example, in the legal realm, legal jurisdiction and case precedence must be addressed. Additionally, research that supports (or does not support) the use of one standard over the other should be considered. All three standards, reasonable person, reasonable woman and reasonable employee have positive and negative points to consider.

The complexity in trying to decide which legal standard to use, however, would suggest that using one standard that meets the needs of all plaintiffs in all jurisdictions makes sense. The implementation of a single reasonableness standard for use across all types of hostile work environment claims would simplify the task of courts and fact finders (Goodman-Delahunty, 1999). But is there such a standard? The reasonable person standard might suggest that the woman's view is not appreciated in the situation.

The reasonable woman standard might suggest that defendants would not be given a fair opportunity in the court. A reasonable employee standard would meet the needs of plaintiffs and defendants by providing a fair way to protect employees from hostile environment sexual harassment and protecting defendants from hypersensitive employees. The reasonable employee standard would focus on reasonableness from everyone's perspective, favoring no one. The reasonable employee standard eliminates the slippery slope and concerns that the reasonable woman standard is counterproductive. Additionally, the reasonable employee standard focuses on the employee rather than the reasonable person which many continue to perceive as the reasonable man. Converging legal and psychological perspectives may provide the answer.

CHAPTER III

Present Study

Purpose of Study

The present study will focus on legal standards as related to hostile work environment sexual harassment. Previous research examining legal standards pertaining to hostile work environment sexual harassment claims have involved the use of the reasonable person and reasonable woman standards. As discussed, the reasonable person and reasonable woman standards have found support as well as critics. This study will examine the reasonable person and reasonable woman standards to see if there have been any changes in what previous research has found. This study will also include a reasonable employee standard which may help to close the gap between the reasonable person and reasonable woman standards. The reasonable employee standard could provide the *one single standard* that all courts could utilize while keeping the necessary balance between men and women when deciding such cases. Additionally, this study will investigate juror decisions of hostile work environment sexual harassment cases in which the plaintiff is a woman working in a non-traditional occupation. This information is particularly important in light of previous research of the 1980s and 1990s which suggests that women in non-traditional occupations are not given the same protection as women in traditional stereotyped occupations (Burgess & Borgida, 1999; Gutek, 1985; Welsh, 1999). Vignettes will include a hostile work environment case that is explicit in nature, a hostile work environment case that is ambiguous in nature and a hostile work environment case in which the woman is in a non-traditional occupations. Measures will be taken on

liability of the defendant, severity of the case, whether a hostile work environment existed, whether the conduct occurred because of the plaintiff's sex, and whether the plaintiff found the conduct unwelcome.

Hypotheses

As previously discussed, prior studies have not found significant differences between legal standards in sexual harassment hostile work environment. This study, however, includes measures across explicit, ambiguous, and non-traditional occupations. Thus, it is hypothesized that there will be a statistically significant difference between legal standards on liability across fact patterns. Literature does support the view that men and women have different perspectives concerning what constitutes hostile work environment sexual harassment. Accordingly, it is hypothesized that there will be a statistically significant difference between legal standards in determining the severity of the case, a statistically significant difference between legal standards in determining hostile work environment, and a statistically significant difference between legal standards in determining whether the defendant's conduct was unwelcome. It is also hypothesized that there will be no statistically significant difference between legal standards in determining whether the conduct occurred because of the plaintiff's sex.

CHAPTER IV

Methodology

Participants

The study included a total of 115 student participants recruited from a mid-Atlantic east coast university. The sample included 69 undergraduate and 46 graduate level students. Graduate students were included because it was believed that they were more likely to have experience in the work force and are more representative of the jury pool used in legal cases. Of the total sample, 55 were male; 60 were female.

Participants included 26 psychology majors, 10 criminal justice majors, 8 education majors, 23 business majors, 4 sociology majors, 23 engineering majors, and 21 other majors. Recruitment for the study included use of the university's electronic sign-up system and permission from professors to solicit participants from course classrooms. All participation was voluntary. Undergraduates participated as part of a course requirement. There was no other compensation for participation in the study. All participants signed an informed consent form (Appendix A) prior to participation.

Students recruited through the university's electronic system signed up to participate on specific dates. The students completed the study and returned all the study packets back to the study investigator before leaving. Students recruited from individual classrooms were given the study packet to complete at home. These participants were instructed to complete the study packet on their own without any discussion of the study with others. After completing the study, they placed the study information in a sealed envelope and returned it to the study investigator at the next class from which they received the packet.

Instrumentation

Participants were told that they were going to be acting as a jury member in three sexual harassment cases. The study was a 3 (legal standard) x 3 (fact pattern) factorial design with the last factor repeated measures. A non-parametric statistic was used to measure the liability of sexual harassment. An analysis of variance (ANOVA) was used to measure all other variables. The dependent variables followed case law: whether the defendant should be found liable for sexual harassment, severity of the conduct, whether a hostile work environment existed, if the conduct occurred because of the plaintiff's sex and whether the conduct was unwelcome.

Participants each received a packet which contained instructions to the participants (Appendix B), judge's instructions (Appendix C) to the jury (taken from actual New Jersey jury instructions), and materials with three case summaries followed by a series of legal judgments and a demographic questionnaire. Three vignettes representing explicit, ambiguous, and non-traditional occupation sexual harassment legal cases were presented to participants in counterbalanced order. The explicit vignette fact pattern (Appendix D) was taken from the *Bundy v. Jackson* (1981) legal case, the ambiguous fact pattern (Appendix E) vignette was taken from the *Harris v. Forklift Systems* (1990) legal case, and the non-traditional occupation fact pattern (Appendix F) vignette was taken from the *White v. Burlington Northern & Santa Fe Railway Co.* (2004) legal case. The names of the actual cases were changed in the vignettes to prevent participants from recognizing the cases. Participants received the same explicit, ambiguous, and non-traditional occupation fact pattern vignettes. Participants received one of three randomly assigned legal standards of hostile work

environment sexual harassment. The legal standards included reasonable person, reasonable woman, and reasonable employee. In the reasonable person condition, participants were instructed that they must view the conduct from the perspective of a reasonable person, not from plaintiff's own subjective perspective. In the reasonable woman condition, participants were instructed that they must view the conduct from the perspective of a reasonable woman, not from plaintiff's own subjective perspective. In the reasonable employee condition, participants were instructed that they must view the conduct from the perspective of a reasonable employee, not from plaintiff's own subjective perspective. Legal standards in the instructions were emphasized with boldface type. After reading each vignette, participants answered a set of questions (Appendix G) determining whether they would find the defendant liable of sexual harassment, the severity of the case, whether a hostile work environment existed, whether the conduct occurred because of the plaintiff's sex and whether the conduct was unwelcome. A 10-point scale was used in determining the severity of the case. A rating scale of *strongly agree*, *agree*, *neutral*, *disagree*, and *strongly disagree* was used to rate whether a *hostile work environment* existed, whether the *conduct occurred because of sex*, and whether the *conduct was unwelcome*. A demographic questionnaire (Appendix H) was also completed by participants. All participants were provided with a debriefing statement (Appendix I) after completing the study.

CHAPTER V

Results

Data analysis in determining liability of defendant was completed using a Cochran's Q. Using an alpha level of .05, analysis revealed a statistically significant difference on liability (Cochran's $Q = 5.818$, 1 df , $N = 115$, $p = .016$) between fact patterns. In the explicit case, 108 participants found the defendant liable. In the non-traditional occupation case, 96 of the participants found the defendant liable. In the ambiguous case, however, only 80 participants found the defendant liable, suggesting the difference resides in how jurors perceive marginal behaviors. Seven of the participants found no liability for the defendant in the explicit case, 35 of the participants found no liability in the ambiguous case, and 19 of the participants found no liability in the non-traditional occupation case. There was no statistically significant difference found between legal standards on liability.

A repeated measures analysis of variance statistical test did not result in a statistically significant difference between legal standard and severity of case $F(4,130) = 1.429$, $p = .228$, thus not supporting the study hypothesis. However, a statistically significant difference in severity of case across explicit, ambiguous and non-traditional occupation cases was found $F(2,64) = 10.787$, $p \leq .001$. Data show that severity of case was higher in the explicit case ($M = 7.922$), followed by the non-traditional occupation case ($M = 5.941$), then the ambiguous case ($M = 5.895$). A statistically significant interaction between scenario (fact pattern) and age also resulted, $F(6,130) = 2.375$, $p = .033$ with the explicit and ambiguous cases increasing in severity as participant age increased (see Figure 1). Additionally, a three way interaction between standard, sex

and victim of sexual harassment was also statistically significant $F(2,64) = 3.399, p = .040$ on measures of severity. Three way interactions can be difficult to interpret; however, results indicate that females who have been victims of sexual harassment ($N=22$) scored consistently higher than females who have not been victims of sexual harassment ($N=38$) in determining severity in the ambiguous case.

Analyses revealed no statistically significant difference between legal standards and determination of hostile work environment $F(4, 130) = .303, p = .875$, thus not supporting the study hypothesis. However, data revealed a statistically significant interaction between legal standard, employment experience and victim of sexual harassment $F(1, 65) = 5.018, p = .029$ on determining hostile work environment (see Figure 2). Determination of hostile work environment increases in the reasonable employee standard as employment experience increases for both victims ($N=29$) and non-victims ($N=86$) of sexual harassment. Interestingly, the reasonable person and reasonable woman standards show opposite inverted trends in determining hostile work environment. For victims of sexual harassment ($N=29$), the reasonable woman standard shows a decrease in determining hostile work environment during the 6-15 year employment experience range while the reasonable person standard shows an increase during the same employment experience range. For non-victims of sexual harassment ($N=86$), the reasonable woman standard shows an increase in determining hostile work environment during the 6-15 year employment experience range while the reasonable person standard shows a decrease during the same employment experience range. Although the differences are small, the trends suggest that there may be other factors

involved in hostile work environment determinations, particularly during the 6-15 year employment experience range.

Results indicate no statistically significant difference between legal standard and determination of whether the defendant's conduct occurred because of the sex of the plaintiff $F(4,130) = .189, p = .944$, thus supporting the study hypothesis. Analyses did reveal a statistically significant main effect for employment experience $F(2,65) = 3.654, p = .031$ in determining whether the defendant's conduct occurred because of the plaintiff's sex. The less than 5 years employment experience group ($N=63$) ($M=4.430$) scored significantly lower than the 6-15 years employment experience group ($N=40$) ($M=4.665$) ($p = .044$). The 16 or more year's employment experience group ($N=12$) was not statistically significantly different from the other two groups on determining because of sex.

The results of the study did not support the hypothesis of a statistically significant difference between legal standards in determining whether the defendant's conduct was unwelcome $F(4,130) = .216, p = .929$. The data show that there is a statistically significant difference across cases on conduct unwelcome $F(2,64) = 4.094, p = .021$ with the participants finding the explicit case ($M=4.677$) conduct unwelcome more than the ambiguous case ($M=4.087$), and the non-traditional occupation case ($M=4.266$). Pairwise comparisons indicate a statistically significant difference between the explicit and ambiguous cases ($p < .001$), and the explicit and non-traditional occupation cases ($p < .001$). A statistically significant main effect for victim of sexual harassment was revealed $F(1,65) = 4.898, p = .030$ with victims of sexual harassment ($N=29$) finding the conduct unwelcome more ($M=4.468$) than participants who had not

been victims of sexual harassment ($N=86$) ($M=4.267$). The data revealed a statistically significant interaction between legal standard and age $F(4,65) = 4.190, p = .004$ for conduct unwelcome (see Figure 3). The mean in the reasonable person and reasonable employee legal standard groups decreased as age increased, however, the mean in the reasonable woman legal standard group increased as age increased. Additionally, legal standards and employment experience revealed a statistically significant interaction for conduct unwelcome $F(4,65) = 5.27, p = .001$ as well as age and employment experience $F(1,65) = 9.677, p = .003$ on conduct unwelcome (see Figure 4). The interaction between legal standard and employment experience revealed that participants utilizing the reasonable woman standard in the 6-15 years employment experience group ($N=16$) scored considerably lower ($M=4.059$) than participants using the same standard in the less than 5 years experience group ($N=23$) ($M=4.431$) and the 16 or more years group ($N=5$) ($M=4.580$). The interaction between age and employment experience revealed that participants 22 years and younger ($N=65$) rated the conduct unwelcome ($M=4.432$) more than the 23-35 year age group ($N=32$) ($M=4.106$). The 22 years and younger group in the 6-15 years employment experience ($N=15$) ($M=3.996$) rated the conduct unwelcome less than the 23-35 year age group ($N=19$) ($M=4.564$). An alpha level of .05 was used for all analysis of variance statistical tests.

CHAPTER VI

Discussion

Although statistically significant differences exist across fact patterns in deciding liability, differences between legal standards alone in deciding liability, severity, hostile work environment, because of sex, and conduct unwelcome in sexual harassment hostile work environment are not significant. As we try to take gender out of decisions in the workplace, it does not make sense to add gender back in when making critical judgments about behavior in the workplace. Critics of the reasonable person standard suggest that the woman's view is not appreciated in hostile work environment situations while critics of the reasonable woman standard suggest that defendants are not given a fair opportunity in the court. This research supports the use of a reasonable employee standard which is gender neutral. The reasonable employee standard would meet the needs of plaintiffs and defendants by providing a fair way to protect employees from hostile environment sexual harassment and protecting defendants from hypersensitive employees. The use of the reasonable employee standard would also help jurors to focus on the environment of the workplace.

It is clear that differences in fact patterns have an effect on deciding the severity of the case. This study shows that explicit and non-traditional occupation cases are rated as more severe than ambiguous cases. The question then becomes are ambiguous behaviors rated less severe because hostile work environment sexual harassment in and of itself is difficult to define? Employers are faced with implementing policies to guard against sexual harassment in the workplace. This has been easy to do with *qui pro quo* sexual harassment. However, hostile work environment sexual harassment in many

ways is still subjective. Without a clear definition of behaviors that constitute hostile work environment sexual harassment, are jurors left to rely on their own personal attitudes towards what constitutes severity in sexual harassment behaviors? If so, this could be an even more slippery slope than using personal attributes such as sex to define legal standards to determine one's liability. Research to explore how workers view and define behaviors in the workplace is needed.

This study reveals that other variables must be taken into account when comparing legal standards. A juror's age and being a victim of sexual harassment increase ratings of severity. Although an increase in judgments of severity by victims of sexual harassment is not really surprising, it is certainly a factor for consideration in picking jurors. As age increases, severity increases in the explicit and ambiguous scenarios. This makes sense because as we age, our awareness of the importance of our livelihood becomes evident. Severity, however, decreases in non-traditional occupations as age increases. Why would hostile work environment sexual harassment be rated less severe for people working in non-traditional roles? Generational factors such as socialization of role expectations may account for some of the trend; however, the decrease in severity becomes evident in the 23-35 year age group as well. Significant life changes such as marriage and career decisions take place as people move from the 18-22 year age group to the 23-35 year age group. Do these factors somehow influence their opinion of those working in non-traditional occupations? Exploring attitudes towards people working in non-traditional occupations across age groups may reveal biases that could be challenged, with the ultimate goal of educating the workforce. A longitudinal study to explore attitudes towards hostile work

environment sexual harassment would be helpful in identifying variables that impact changing attitudes of young people towards individuals working in non-traditional occupations.

The interaction of legal standard, employment experience and being a victim of sexual harassment is also evident in judgments on hostile work environment.

Participants who have been victims of sexual harassment, and for the purposes of this study assigned to different legal standards, do not show the same pattern in judgments at the 6-15 year employment level. Participants assigned the reasonable person and reasonable employee legal standards who have experienced sexual harassment reveal an increase in making judgments of hostile work environment at the 6-15 year employment experience level. Scores for participants who have been victims of sexual harassment and assigned the reasonable woman standard, however, trended downward on judgments of hostile work environment at the same 6-15 year employment experience. Although the 6-15 years employment experience group had approximately one-third less participants than the ≤ 5 years employment experience group, which may explain some of the trend differences, the ratio of participants and employment experience was the same across all three legal standards. The results of the study did not find a significant difference between legal standard alone on hostile work environment. It is also easy to understand how victimization can influence one's view on making judgments, whether male or female. The question then becomes what is happening in the 6-15 year employment experience range for victims of sexual harassment utilizing the reasonable woman standard that makes them score lower on determinations of hostile work environment. Most individuals hit their 6-15 year employment experience

range during their mid twenties too early thirties. As discussed previously, this is a significant period in a woman's life during which women are making family and career decisions. For many women, juggling a career and family can be very tough. Concerns about being able to keep employment positions often arise for women when they have to go out on maternity leave or need time off to take care of sick children. At first thought, it would appear that women in this employment experience level are more willing to tolerate hostile work environment because of their career and family concerns. Supporting this idea would be that at the 16 years and above employment experience level, the determination of hostile work environment using the reasonable woman standard increases. The 16 years and above employment experience level is also a time that women are generally refocused back to their careers and may feel more confident about their positions in the employment sector. However, if it is simply a concern about job security during this employment experience level, the same trend would appear for participants who have not been a victim of sexual harassment. Could it be that negative experiences in addressing sexual harassment cause women's views in the 6-15 year employment experience level to trend downward on determinations of hostile work environment situations? Likewise, could positive experiences in addressing hostile work environment account for the trend upwards in determining hostile work environment in the 16 years and above employment experience level? Clearly, the trends on judgments of hostile work environment for the reasonable woman standard produce more questions than it answers. These findings are intriguing and worthy of more follow-up.

The increase in judgments on conduct unwelcome between the reasonable woman legal standard and age is also interesting. Both the reasonable person and reasonable employee standard show a continuous decrease in judgment on conduct unwelcome while the reasonable woman standard shows a continuous increase. It is interesting that the legal standards and age interact within the 23-35 year age span on judgments of conduct unwelcome. This age span would occur at approximately the 6-15 years employment experience span on judgments of hostile work environment which trended downward. Differences may be related to the lack of other variables such as employment experience and being a victim of sexual harassment in judgments of conduct unwelcome. It may also suggest that differences in perception of conduct are more problematic for views about women, particularly as people mature.

As with the 6-15 year employment experience span on judgments of hostile work environment in the reasonable woman standard, judgments on conduct unwelcome in the reasonable woman standard showed a remarkable decline during the same employment experience span. Although hostile work environment and conduct unwelcome trend in the opposite direction during the same employment experience span, it is clear that something significant is happening during this time period. This something appears to be more than determinations between hostile work environment and conduct unwelcome. More women are entering the workforce warranting an in-depth evaluation of possible factors supporting these trends.

Limitations of this study include the size of the population and convenience sampling. The use of a larger population comparing the reasonable person, reasonable woman, and reasonable employee legal standards is needed to support the current study.

Although this study used both graduate and undergraduate students from various majors to best reflect a potential jury pool, sampling from the general population would increase its reliability. Additionally, conducting this research using groups of jurors (rather than individually), and obtaining a more balanced population with regards to ethnicity would be more reflective of the real world jury system.

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Appendix A

Informed Consent Form

I agree to participate in a study entitled "Investigation of Legal Standards In Hostile Work Environment Sexual Harassment" being conducted by Jeanne Rice, Graduate Student in the M.A. of Mental Health Counseling and Applied Psychology program of Rowan University.

The purpose of this study is to evaluate the legal standards used in hostile work environment sexual harassment. The data collected in this study may be submitted for publication in a research journal.

I understand that I will be required to act as a jury member in three sexual harassment cases. I understand that I will have to follow the judge's instructions following the cases and carefully answer the questions about each case followed by some general questions. My participation in the study should not exceed one hour.

I understand that my responses will be anonymous and that all the data gathered will be confidential. I agree that any information obtained from this study may be used in any way thought best for publication or education provided that I am in no way identified and my name is not used.

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

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

If I have any questions or problems concerning my participation in this study I may contact Jeanne Rice at (609) 202-7371 or Dr. Gaer at (856) 256- 4872.

(Signature of Participant)

(Date)

(Signature of Investigator)

(Date)

Appendix B

Instructions for Participants

You are going to be acting as a jury member in three sexual harassment cases. In a court case, the plaintiff is the person who brings the case and the defendant is the person the case is against. You will first read each case carefully. After reading the first case, you will read to the Judge's Instructions to the Jury carefully and then answer the questions about that case which are after the case. When you have completed answering the questions for the first case, you will read the second case, read the judge's Instructions carefully and answer the questions about that case. You will do the same for the third case. After evaluating each case, you will answer some more general questions.

Consider each case carefully and make your decisions as if you were actually sitting on a jury and your decision will affect the lives of the plaintiff and the defendant.

Appendix C

Judge's Instructions to the Jury

1. Overview of Issues to be Decided

Plaintiff claims that she was subjected to sexual harassment. Sexual harassment is a form of discrimination based on sex and is prohibited by the New Jersey Law Against Discrimination. To resolve plaintiff's sexual harassment claim, you must decide one issue:

You must decide whether the complained about conduct constitutes sexual harassment.

2. Does the Conduct Constitute Sexual Harassment?

The issue you must decide is whether the conduct that you find has occurred constitutes sexual harassment as defined by law. To prove that the conduct constitutes sexual harassment, plaintiff must prove two elements by a preponderance of the evidence: First, plaintiff must prove that the conduct occurred *because of her sex*. Second, plaintiff must prove that the conduct was *severe or pervasive* enough to make a *reasonable person* believe that the conditions of employment were altered and that the working environment was intimidating, hostile or abusive.

I will explain each of these two elements in more detail

a. Did the Conduct occur "*Because Of*" Plaintiff's Sex?

First, plaintiff must prove that the conduct occurred *because of her sex*.

When the harassing conduct is sexual or sexist in nature, the "because of" sex element is automatically satisfied. Thus, for example, if plaintiff alleges that she has been subjected to sexual touchings or comments, or if she alleges that she has been subject to harassing comments about the lesser abilities, capacities, or the "proper role" of

members of her sex, she has established that the harassment occurred “because of” her sex.

Even conduct that is not sexual or sexist in nature can constitute sexual harassment.

However, when the conduct is not sexual or sexist in nature, the plaintiff must produce some evidence to show that such harassment was accompanied by harassment that was sexual or sexist in nature. Or, she might show that only women suffered the harassment. All that is required is showing that it is more likely than not that the harassment occurred because of the plaintiff’s sex.

To prove that the conduct occurred because of her sex, the plaintiff does not have to prove that the employer or supervisor intended to harass her or intended to create a hostile working environment. The employee’s or supervisor’s intent is not at issue.

The issue is simply whether the conduct occurred because of plaintiff’s sex.

If you find that the conduct would have occurred regardless of plaintiff’s sex, then there has been no unlawful sexual harassment. For example, if a supervisor is equally crude or vulgar to all employees, regardless of their sex, no basis exists for a sexual harassment claim and you must return a verdict for defendants on the plaintiff’s claim of sexual harassment.

If, on the other hand, you find that the conduct did occur because of plaintiff’s sex, then you must decide the second element.

b. Was the Conduct Sufficiently *Severe or Pervasive*?

The second element plaintiff must prove to establish that the conduct constituted sexual harassment is that the conduct was *severe or pervasive* enough to make a *reasonable*

person believe that the working conditions were altered and that the working environment was intimidating, hostile or abusive.

When deciding whether plaintiff has proved this element, you should consider the following:

- (1) The law does not require that the workplace be free of all vulgarity or sexually-laced speech or conduct. Occasional, isolated and/or trivial remarks or conduct of a sexual nature are generally insufficient to constitute sexual harassment. Rather, only speech or conduct that is sufficiently severe or pervasive to create a hostile or intimidating working environment can constitute sexual harassment.
- (2) In determining whether the conduct was severe or pervasive, keep in mind that the conduct does not have to be both severe and pervasive; the conduct need only be severe or pervasive. The conduct can consist of a single severe incident or an accumulation of incidents, although it will be a rare and extreme case in which a single incident will be so severe that it would make the working environment hostile. When the conduct consists of multiple incidents, you should not consider each incident individually, but should consider the totality of the incidents. Numerous incidents that would not be sufficient if considered individually may be sufficient when considered together.
- (3) The plaintiff need not personally have been the target of each or any instance of offensive or harassing conduct for you to find that the working environment was sexually hostile. You may consider evidence of offensive or harassing conduct directed toward other workers if plaintiff personally witnessed that conduct.
- (4) In deciding whether the conduct in this case is sufficiently severe or pervasive to create a hostile working environment, you must view the conduct from the perspective

of a *reasonable person*, not from plaintiff's own subjective perspective. In other words, the issue you must decide is not whether plaintiff personally believed that her working environment was hostile. The issue you must decide is whether a *reasonable person* would find the working environment hostile. Thus, if only an overly-sensitive person would view the conduct as sufficiently severe or pervasive to create a hostile working environment, but a *reasonable person* would not, it is not harassing conduct for which the plaintiff can recover. By the same token, even if plaintiff personally did not find the alleged conduct to be severe or pervasive, but a *reasonable person* would, it is harassing conduct for which the plaintiff can recover. You must use your own judgment in deciding whether a *reasonable person* would consider the working environment hostile. Finally, it is not necessary that the plaintiff show that she has actually been psychologically harmed by the conduct, or that she has suffered any economic loss as a consequence of the conduct. Those issues may be relevant to the damages plaintiff can recover, but they are not relevant to the issue of whether the conduct constitutes unlawful sexual harassment.

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

If, on the other hand, you find that plaintiff has proved that the conduct constitutes sexual harassment, then you must return a verdict for the plaintiff.

d. Summary of Sexual Harassment Elements

I will now summarize all of this for you. To decide plaintiff's claim of sexual harassment you must decide this issue:

You must decide whether plaintiff has proved by a preponderance of the evidence that the conduct constitutes sexual harassment. This requires that you decide (1) whether the conduct occurred *because of plaintiff's sex*, and if so, (2) whether the conduct was *severe or pervasive* enough to make a *reasonable person* believe that the conditions of employment were altered and the working environment was intimidating, hostile or abusive.

Appendix D

Jones v. Hoffman

Ms. Jones worked as a Vocational Rehabilitation Specialist for six years. After approximately two years on the job, Ms. Jones' supervisor, Mr. Hoffman, began to question her about her sexual desires. Mr. Hoffman continually called her into his office to request that she spend the workday at his apartment. He also asked her to join him at a motel and on a trip to the Bahamas. When she complained to his supervisor, Mr. Thomas, Mr. Thomas' response was "any man in his right mind would want to rape you." Mr. Thomas then proceeded to request that she begin a sexual relationship with him in his apartment. Ms. Jones rejected his request. On another occasion her supervisor, Mr. Hoffman, called her into his office to ask about her weekend activities and, in particular, whether she like horses. When she responded that she indeed rode horses, he said that he had heard that women rode horses to obtain sexual relief. He told her he had books and pictures at home to support this theory and suggested that she come to his apartment to see them. Mr. Hoffman specifically asked her to come to his apartment to look at the books and pictures during the workday afternoon instead of performing her job-related field activities. He repeated this request by telephone after obtaining Ms. Jones' unlisted home number.

Appendix E

Scott v. Hydro Systems, Inc.

Ms. Scott worked as a rental manager for Hydro Systems, Inc. with the responsibility of managing leased equipment and sales coordinator for the sales department. Mr. Taylor was the president. Ms. Scott was directed by Mr. Taylor to bring coffee into a meeting, a request he did not make of male managers. Ms. Scott reports that Mr. Taylor on a number of occasions during her employment stated “you’re a woman, what do you know.” He also stated on at least one occasion “you’re a dumb ass woman.” Mr. Taylor stated to Ms. Scott in the presence of other employees “we need a man as the rental manager.” In front of a group of other employees Mr. Taylor stated to Ms. Scott “Let’s go to the Holiday Inn to negotiate your raise.” Ms. Scott knew the Holiday Inn comment was meant as a joke and treated it as a joke at the time. Mr. Taylor asked Ms. Scott and other female employees to retrieve coins from his front pants pocket. Mr. Taylor threw objects on the ground in front of Ms. Scott and other female employees and asked them to pick the objects up, thereafter making comments about their attire. When Ms. Scott met with Mr. Taylor to complain about the treatment towards her, she secretly taped a portion of the meeting. The tape indicated that Mr. Taylor had no prior knowledge that she was offended by any of his conduct. He apologized and promised that his offensive behavior would cease. Based on his assurances, Ms. Scott continued to work for the company.

Appendix F

Simpson v. Tanner Rail Systems, Inc.

Ms. Simpson worked as a forklift operator for the maintenance department of a railroad. Ms. Simpson had no problems performing her job or getting along with her fellow workers. In an orientation meeting, Mr. McDonald stated to Ms. Simpson that she should let him know when she came on her period so that he could lighten her workload. While working on a job, Mr. McDonald requested that Ms. Simpson hold a flashlight on him while he urinated. Mr. McDonald intentionally failed to offer overtime work to Ms. Simpson even though he had offered it to male workers, failed to provide her with a raincoat when raincoats were provided to her male co-workers, and required her to provide a doctor's statement if she missed work although he did not require doctor's statements from her male co-workers.

Mr. McDonald, Ms. Simpson's supervisor, admitted that he did not believe that the railroad was an appropriate place for women to work. Ms. Simpson stated that Mr. McDonald repeatedly expressed this belief to her while she was working under his supervision. According to Mr. McDonald, several other Tanner Rail Systems employees also expressed the belief that women should not work on a railroad. Tanner Rail Systems employees agreed that there was "a general anti-woman feeling" among the employees at the yard.

Ms. Simpson complained to company officials about Mr. McDonald's comments and behavior for which he was subsequently suspended. After Ms. Simpson filed the complaint on Mr. McDonald, she was informed that she was being removed from her forklift position and being assigned to a standard track laborer position

because of coworker's complaints. Company officials said they heard complaints from other employees about Ms. Simpson being allowed to work the forklift prior to her complaints about Mr. McDonald's behavior.

Appendix G

Questionnaire

The defendant should be found liable for sexual harassment.

_____ Yes

_____ No

How severe did you find this case to be.

1 2 3 4 5 6 7 8 9 10

Less Severe

More Severe

Respond to the following statements about the case.

SA=strongly agree, A=agree, N=neutral, D=disagree, SD=strongly disagree

There was a hostile work environment.

SA A N D SD

The conduct occurred because of the plaintiff's sex.

SA A N D SD

The conduct was unwelcome.

SA A N D SD

Appendix H

Demographic Questionnaire

Please answer the following questions:

Age: _____

Sex: _____M _____F

Ethnicity: _____Asian

_____Black or African American

_____Hispanic or Latino

_____White

_____Other

Year in school: _____Freshman

_____Sophomore

_____Junior

_____Senior

_____Graduate

Major: _____

Have you ever served on a jury?

_____No

_____Yes

Employment experience:

_____Years _____Months

Type of Job _____

Have you ever been a victim of sexual harassment in the workplace?

_____ No

_____ Yes

Appendix I

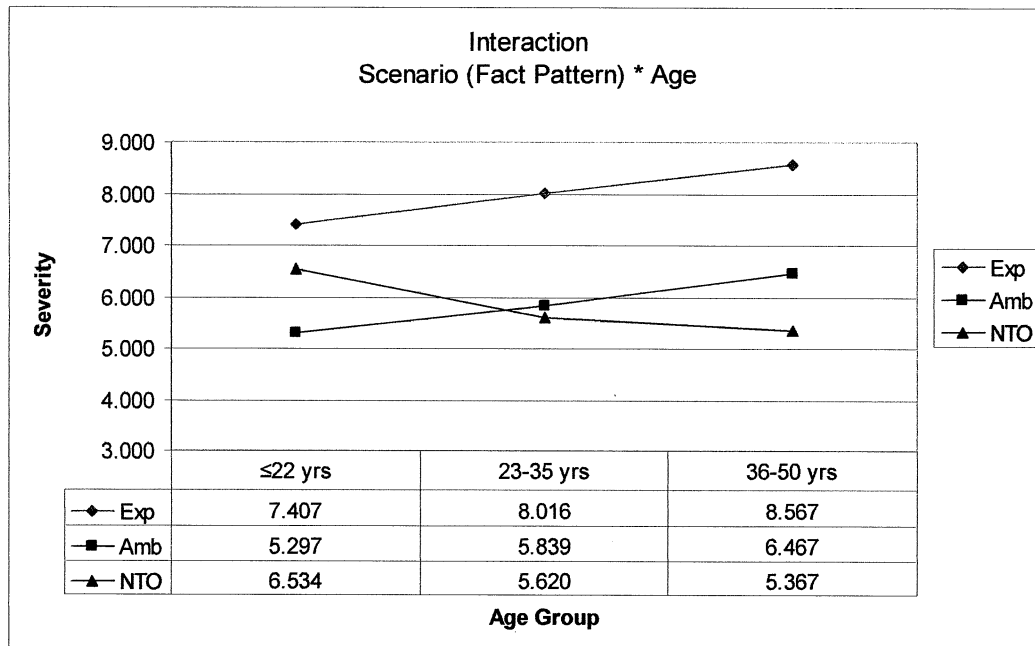
Debriefing Statement

Thank you for being a participant in this Sexual Harassment/Work Environment research study. This study has been designed to explore whether differences in the specific language used in jury instructions impacts findings of liability. Sexual harassment in the workplace is multifaceted and exacts an enormous toll on employees, employers and the legal system. Laws governing sexual harassment in the workplace developed gradually over the years. This has resulted in the application of different standards for different courts. This research provides valuable information as to whether the language used in jury instructions can be streamlined while providing fairness to both the plaintiff and defendant.

The results of this study will be available at the end of the Spring 2008 semester. If you are interested in obtaining the results of this study, please contact Jeanne Rice at jeanne.rice@comcast.net.

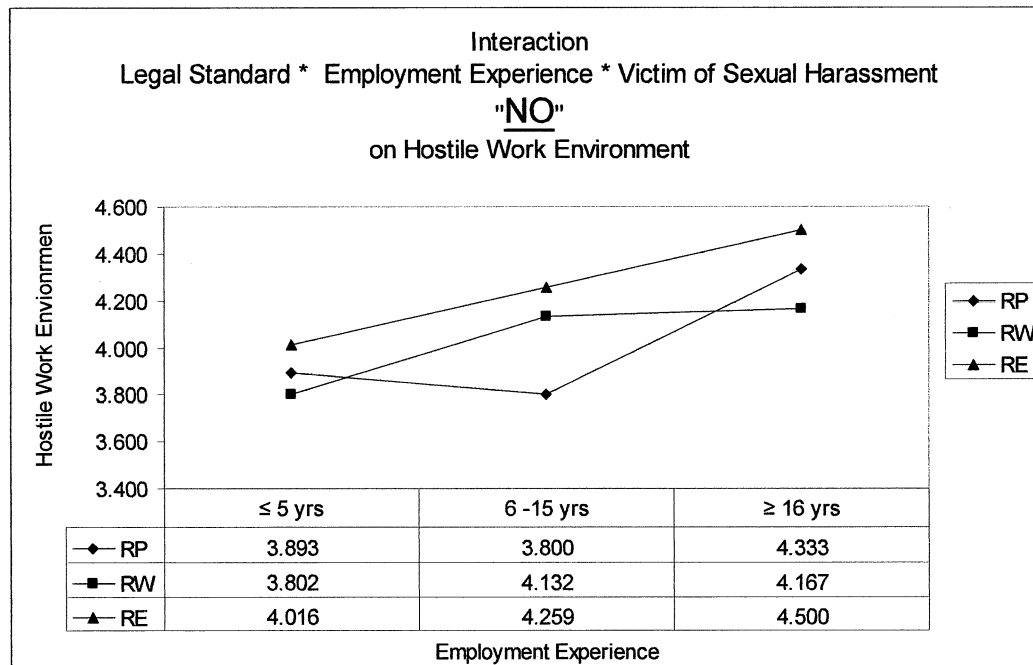
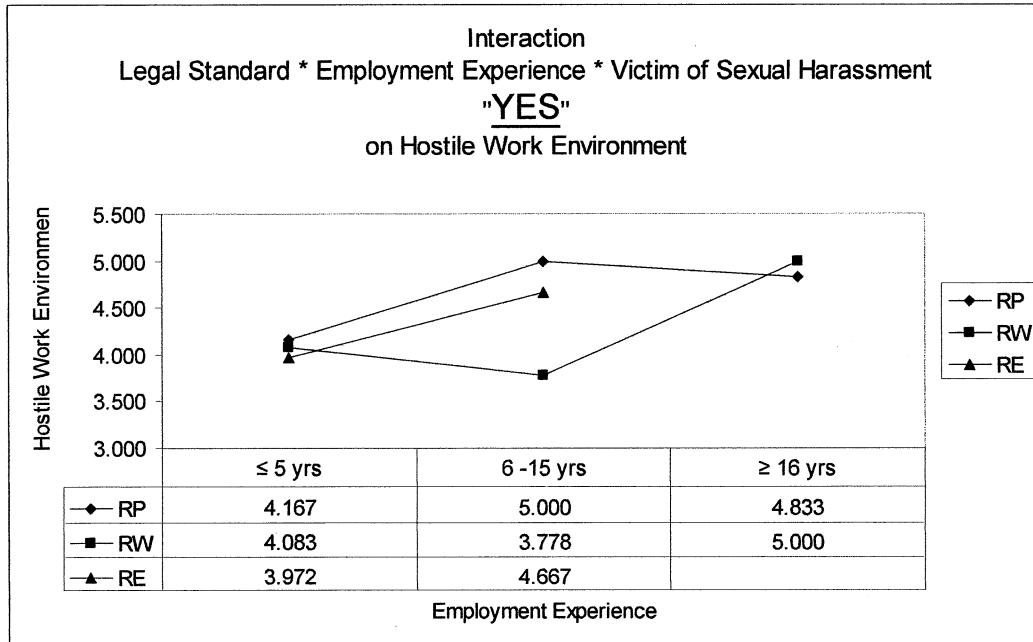
APPENDIX J

Figure 1. Interaction between scenario and age.



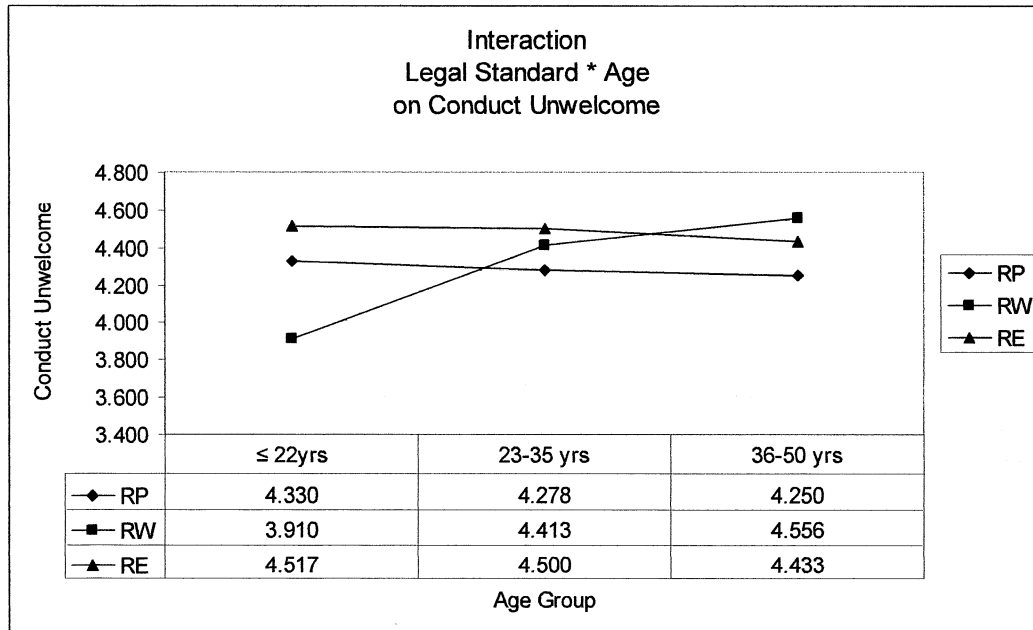
APPENDIX K

Figure 2. Interaction between legal standard, employment experience, and victim of sexual harassment on hostile work environment.



APPENDIX L

Figure 3. Interaction between legal standard and age on conduct unwelcome.



APPENDIX M

Figure 4. Interaction between age and employment experience on conduct unwelcome.

