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The “Reasonable Lesbian” Standard: A Potential Deterrent Against Bias in Hostile Work Environment Cases

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I.	INTRODUCTION	338
II.	HOSTILE WORK ENVIRONMENT CLAIMS AND THE “REASONABLE WOMAN” STANDARD	340
	A. <i>Recognition of a Hostile Work Environment as a Form of Sexual Harassment</i>	340
	B. <i>Evolution of a “Reasonable Woman” Standard</i>	341
III.	PERCEPTIONS OF HOMOSEXUALITY THAT MAY LEAD TO ANTI-GAY HARASSMENT IN THE WORKPLACE.....	345
IV.	DATA WHICH DOES NOT CLEARLY SUPPORT OR UNDERMINE LESBIANS BEING CATEGORIZED SEPARATELY FROM HETEROSEXUAL WOMEN	350
	A. <i>Lesbian and Heterosexual Women’s Experiences with Violence and Harassment</i>	352
	B. <i>Levels of Sensitivity of Lesbian and Heterosexual Women to Behavior That May Constitute Evidence of a Hostile Work Environment</i>	354
V.	PROPOSED FACTORS FOR DETERMINING WHEN TO UTILIZE A “REASONABLE LESBIAN” STANDARD.....	356
	A. <i>Proposed Factor One: Whether the Plaintiff’s Sexual Orientation Significantly Impacted His or Her View of the Alleged Behavior</i>	357
	B. <i>Proposed Factor Two: Evaluating the Risks of Potential Juror Bias</i>	359
	C. <i>Implications for Employers</i>	360
VI.	CONCLUSION	361

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I. INTRODUCTION

Taken as a whole, state statutes prohibiting discrimination in the workplace based on one's sexual orientation are in a state of infancy.¹ While some states enacted legislation throughout the 1990s to prohibit discrimination in the area of employment based on sexual orientation, other states have repealed such legislation.² This type of state legislation provides a basis for relief for those who have been harassed or discriminated against in the workplace based on their sexual orientation. However, a basis for relief is unavailable under federal legislation, such as Title VII, which does not recognize sexual orientation as a protected class.³ Although courts have recognized the reprehensible nature of targeting individuals for harassment based on their actual or perceived sexual orientation, this has not altered the interpretation of federal legislation.⁴

Even if Title VII or the proposed Employment Non-Discrimination Act⁵ prohibited sexual orientation discrimination, it is not clear what

1. See Lambda Legal Def. & Educ. Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217> (last modified Jan. 6, 2003).

2. See *id.* The following states prohibit discrimination in the workplace in the private and public sectors based on one's sexual orientation: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. See CAL. GOV'T CODE §§ 12920-12921 (2001); CONN. GEN. STAT. § 46a-81(c) (2001); HAW. REV. STAT. § 378-2 (2001); MD. CODE ANN. 49B § 16 (2001); MASS. ANN. LAWS ch. 151B, § 4 (2002); MINN. STAT. § 363.03 (2000); NEV. REV. STAT. ANN. §§ 613.330, 610.020, 610.150 (2001); N.H. REV. STAT. ANN. § 354-A:7 (2000); N.J. STAT. ANN. § 10:5-12 (2001); N.Y. EXEC. LAW § 296 (McKinney 2002); R.I. GEN. LAWS § 28-5-3 (2001); VT. STAT. ANN., tit. 21, § 495 (2001); WIS. STAT. § 111.36 (2000). The District of Columbia also prohibits such discrimination. See D.C. CODE ANN. § 2-1402.11 (2001). Maine and Iowa have recently repealed legislation prohibiting discrimination in the workplace based on one's sexual orientation. See Lambda Legal Def. & Educ. Fund, *supra* note 1.

3. See 42 U.S.C. § 2000-e2(a) (2000).

4. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (holding the plaintiff had no cause of action under Title VII after allegedly enduring conduct from co-workers which included frequent anti-gay slurs, male dolls being left in his car, and the plaintiff's name being placed on the wall of the employees' restroom along with the names of celebrities that had died of AIDS). The court found:

There can be no doubt that the conduct allegedly engaged in by [the plaintiff's] co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace. Nevertheless, . . . [w]hen interpreting a statute, the role of a court is limited to discerning and adhering to legislative meaning. The law is well-settled in this circuit and in all others to have reached the question that [the plaintiff] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.

Id.

5. The Employment Non-Discrimination Act (ENDA) is proposed federal legislation that would prohibit sexual orientation discrimination in the workplace. See Human Rights

forms of harassment would be prohibited by federal law.⁶ For example, the United States Supreme Court has recognized hostile work environment claims as a form of sexual harassment under Title VII,⁷ but judicial interpretation has added to the ambiguity in determining what behavior is actionable.⁸ Aside from what conduct constitutes a valid claim of hostile work environment harassment, courts have differed on what type of standard should be utilized when evaluating these claims.⁹ Some courts have adopted a "reasonable person" standard, while other courts have adopted a "reasonable woman" standard.¹⁰

It is perhaps no surprise, then, that state courts drawing upon Title VII case law to interpret legislation prohibiting sexual orientation discrimination would encounter similar issues. For example, in a recent case, *Muzzy v. Cahillane Motors, Inc.*, the Supreme Judicial Court of Massachusetts upheld the trial court's use of a "reasonable woman of lesbian orientation" standard when evaluating a hostile work environment claim brought by a lesbian plaintiff against a lesbian defendant.¹¹ The court reasoned that plaintiff's counsel agreed to this instruction before it was read to the jury and that the instruction did not give "rise to any prejudice, bias, or unfairness."¹²

Campaign, *The Employment Non-Discrimination Act*, at http://www.hrc.org/issues/federal_leg/enda/index.asp (last visited Jan. 10, 2002). In 1996, ENDA failed to pass the Senate by only one vote. See George S. Peek, Comment, *Recent Legislation: Where Are We Going with Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537, 563-64 (2001).

6. See Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 795 (1993) (discussing how courts have not reached consensus on what types of behavior constitute successful hostile work environment claims).

7. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII).

8. See *Rabidue v. Osceola Refin. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (finding that workplace pornography and vulgar language had a "de minimis effect on the plaintiff's work environment"). But see *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525-26 (M.D. Fla. 1991) (holding that pornography in the workplace constituted a hostile work environment and reasoning that the display of pornography in the workplace "communicate[s] to male co-workers that it is acceptable to view women in a predominately sexual way").

9. See Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 205 (2001).

10. See *id.*; see also *infra* notes 20-58 and accompanying text.

11. 749 N.E.2d 691, 698 (Mass. 2001). The plaintiff, Susan Muzzy, brought a claim under Mass. Gen. Laws ch.151B § 4(16A) alleging she was subjected to a hostile work environment. See *id.* at 693. The plaintiff alleged the behavior encompassed "inappropriate physical touching, degrading sexual conversation and comments, and unwelcome invitations and advances imbued with sexual overtones." *Id.* at 694.

12. *Id.* at 696, 698.

This Article examines when courts should utilize a “reasonable lesbian” standard in hostile work environment cases. Part II of this Article provides a brief background on the recognition of hostile work environment claims as a form of sexual harassment and the evolution of the “reasonable woman” standard to explain in detail why “reasonable victim” standards have created problems under Title VII. Part III of this Article explains why a “reasonable lesbian” or a “reasonable gay man” standard may be appropriate in some cases. It provides an overview of society’s attitudes and perceptions of lesbians and gay men. It will also discuss how these perceptions may lead to anti-gay harassment in the workplace. Part IV of this Article explains why the use of a “reasonable lesbian” standard is inappropriate in other cases. It provides an analysis of the similarities and differences in violence experienced by lesbian and heterosexual women. It also analyzes the sensitivity levels of lesbians and heterosexual women to certain conduct, specifically the display of pornography, which may constitute evidence of a hostile work environment.

This Article concludes, in Part V, by asserting that courts should include a plaintiff’s sexual orientation as part of a jury instruction for hostile work environment cases only in limited situations, in which (1) the plaintiff’s actual or perceived sexual orientation is significantly relevant to his or her perspective of the alleged behavior of the defendant and (2) when the benefits of including a plaintiff’s sexual orientation outweigh the risks of potential juror bias. It discusses how, in certain situations, the inclusion of a plaintiff’s sexual orientation in a jury instruction may assist in overcoming prejudicial attitudes of homosexuality.

II. HOSTILE WORK ENVIRONMENT CLAIMS AND THE “REASONABLE WOMAN” STANDARD

A. *Recognition of a Hostile Work Environment as a Form of Sexual Harassment*

In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that a claim of hostile environment/sexual harassment is a form of sex discrimination, actionable under Title VII.¹³ In order to

13. 477 U.S. 57, 73 (1986). One may also bring a hostile work environment claim based on other protected classes such as: race, religion, color, or national origin. See Penny Nathan Kahan & Lori L. Deem, *Current Developments*, in EMPLOYMENT LAW: SEX AND RACE HARASSMENT UPDATE 1229, 1268 (PLI Litig. & Admin. Practice Course, Handbook Series No. 664, 2001).

constitute a hostile work environment, the unwelcome conduct must be severe or pervasive enough to “alter the conditions of the [the victim’s] employment and create an abusive working environment.”¹⁴ Courts may find a hostile work environment when one’s workplace includes sexual propositions, pornography, or sexual comments and jokes.¹⁵

It is easier for courts to recognize other forms of sexual harassment, such as *quid pro quo* harassment, in which the employee’s rejection of the harasser’s demands results in a tangible economic loss or negative employment action.¹⁶ Hostile work environment harassment, based on psychological aspects, is not as obvious as *quid pro quo* harassment and is usually subtle and personal to the victim.¹⁷ Thus, a hostile work environment may more often be overlooked.¹⁸ Therefore, the standard used in hostile work environment cases will assist in determining what conduct constitutes a hostile work environment.¹⁹

B. Evolution of a “Reasonable Woman” Standard

Following the Supreme Court’s recognition of a hostile work environment as actionable sexual harassment, the circuit courts split over whether to adopt a “reasonable person” or “reasonable woman” standard.²⁰ The Sixth Circuit, in *Rabidue v. Osceola Refining Co.*, utilized a “reasonable person” standard to judge whether the environment was hostile.²¹ The majority in *Rabidue* found the defendant’s behavior did not constitute a hostile work environment under a “reasonable person” standard.²² However, the dissent advocated for the application of a “reasonable woman” standard, under which the dissent found the defendant’s behavior constituted a hostile work environment.²³ Other

14. *Meritor*, 477 U.S. at 67.

15. Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 277 (1996).

16. *See* Kerns, *supra* note 9, at 200, 204.

17. *See id.* at 204.

18. *See id.*

19. *See id.* at 204-05.

20. *See id.* at 205.

21. *See* 805 F.2d 611, 620 (6th Cir. 1986). The behavior in *Rabidue* consisted of verbal obscenities coupled with the display of sexually oriented material. *See id.* at 622.

22. *See id.* at 622.

23. *See id.* at 626-27 (Keith, J., dissenting).

[T]he reasonable person perspective fails to account for the wide divergence between most women’s views of appropriate sexual conduct and those of men . . . [U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders.

Id. at 626 (Keith, J., dissenting).

circuits rejected the “reasonable person” standard used in the majority opinion of *Rabidue* because it could not accurately reflect the perceptions and fears experienced by female victims.²⁴

The Ninth Circuit, in *Ellison v. Brady*, adopted a “reasonable woman” standard:²⁵

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. . . . [A] gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.²⁶

Statistical data reporting the extent of crimes against women provided support to the court’s decision.²⁷ In particular, the data on which the court relied showed that women are more often the victims of sexual assault and rape.²⁸ The court opined that a “reasonable person” standard reflects a male perspective and does not take into account experiences undergone solely by women.²⁹ Thus, a “reasonable person” standard may not take into account what workplace behaviors women find offensive.³⁰

Since the *Rabidue-Ellison* split, supporters of a “reasonable woman” standard have espoused its use because it contemplates the unique experiences of women.³¹ The “reasonable person” standard may not properly measure a hostile work environment because it may not account for what women view as objectionable.³² In addition, unwelcome behavior may not be viewed the same way by men.³³ As the court reasoned in *Ellison*, these differences may be related to the fact that women are more often the victims of sexual assault and rape than men.³⁴

Women live with the significant threat of sex-related violence.³⁵ They have a twenty-five percent chance of being raped and a forty-six percent chance of being sexually assaulted throughout their lives.³⁶

24. See Kerns, *supra* note 9, at 206.

25. 924 F.2d 872, 879 (9th Cir. 1991).

26. *Id.*

27. See *id.* at 879 n.10. The court used statistical data reported by the U.S. Department of Justice and the Federal Bureau of Investigation. See *id.*

28. See *id.* (noting that, in 1988, an estimated 73 out of every 100,000 females in the country were reported rape victims).

29. See *id.*

30. See *id.* at 878.

31. See Kerns, *supra* note 9, at 220-21.

32. See *id.*

33. See *id.* at 215.

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

35. See Kerns, *supra* note 9, at 215.

36. See *id.* at 215-16.

While men may view certain types of sexual behavior in the workplace as harmless, women may view the same behavior as offensive.³⁷ Empirical studies indicate that women feel more threatened than men by behavior constituting hostile work environment harassment.³⁸ Specifically, women are more likely to view numerous requests for dates and jokes based on sexual stereotypes as threatening while men may view the same behavior as “innocent acts.”³⁹ Thus, when women encounter sexual overtures in the workplace, they may see this behavior as a potential prelude to sexual violence.⁴⁰

However, opponents of the “reasonable woman” standard fear that it might not support feminist objectives because it emphasizes differences in workplace gender perspectives.⁴¹ Specifically, opponents of this standard worry that it may provide support to those who believe that women do not belong in certain positions within the workforce.⁴² Furthermore, a gender-specific standard could result in a backlash towards women by reinforcing conventional gender roles.⁴³

In addition, opponents of a “reasonable woman” standard see it as limiting and argue that it fails to encompass the experiences of all women.⁴⁴ Opponents believe this standard may be fixed and inflexible, thus promoting traditional gender stereotypes about women.⁴⁵ Moreover, they are concerned this standard may come to represent only the experiences of dominant group members, “namely, white, affluent, heterosexual women.”⁴⁶

While it appeared that the Supreme Court’s decision in *Harris v. Forklift Systems Inc.*⁴⁷ would resolve the issue of what standard courts should use, the Court’s opinion did not settle the dispute.⁴⁸ In *Harris*, the Supreme Court adopted a two-part subjective/objective test, which resolved the issue of what evidence a plaintiff must present to have an

37. *See id.* at 217.

38. *See* Jenette Restivo, *Your Webster’s or Mine? Men and Women Apply Different Definitions When It Comes to Sexual Harassment* (Nov. 5, 2001), at http://more.abcnews.go.com/sections/living/dailynews/011105_sexharass.html (last visited Dec. 14, 2001).

39. *See id.*

40. *See* Kerns, *supra* note 9, at 217.

41. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 244 (1999).

42. *See id.*

43. *See id.*

44. *See id.* at 98.

45. *See id.*

46. *Id.*

47. *See generally* 510 U.S. 17 (1993).

48. *See* Kerns, *supra* note 9, at 206-07.

actionable hostile work environment claim.⁴⁹ However, the Court did not indicate whether a “reasonable person” or a “reasonable woman” standard should be used to determine if the alleged conduct constituted a hostile work environment.⁵⁰ While the Court’s opinion may be interpreted as supporting the “reasonable person” standard because it held that “the conduct must be severe or pervasive enough that a reasonable person would find the environment hostile,” the opinion may also be interpreted as supporting the “reasonable woman” standard because it held that the “subjective viewpoint of the female victim” must also be considered.⁵¹

Therefore, the question of which standard should be used in hostile work environment cases remains unanswered.⁵² Although the dicta in *Harris* suggests a “reasonable person” standard,⁵³ the Ninth Circuit still uses a “reasonable woman” standard.⁵⁴ Furthermore, some state courts have also adopted a “reasonable woman” standard.⁵⁵

Finally, the Court in *Oncale v. Sundowner Offshore Services, Inc.* perpetuated the controversy over the appropriate standard to be utilized in hostile work environment cases.⁵⁶ In *Oncale*, the male plaintiff was forcibly subjected by male coworkers to degrading acts that were sexual in nature and was threatened with rape.⁵⁷ In this same-sex harassment case, the Court set forth the following standard: “The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position considering ‘all the circumstances.’”⁵⁸ Thus, the issue over what is the appropriate standard to be used in hostile work environment cases is still open to interpretation.

49. See *id.* at 208. The subjective part of the test considers the subjective perspective of the victim; while the objective part of the test considers whether the victim should have been offended. See *id.* at 207.

50. See *id.* at 208.

51. *Id.*

52. See CHAMALLAS, *supra* note 41, at 244.

53. See *id.*

54. See *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001) (following *Ellison* and adopting a “reasonable woman” standard to evaluate the plaintiff’s claim).

55. See, e.g., *Steinberg v. Hoshijo*, 960 P.2d 1218, 1226 (Haw. 1998) (adopting a “reasonable woman” standard); *Woods-Pirozzi v. Nabisco Foods*, 675 A.2d 684, 685 (N.J. Super. Ct. App. Div. 1996) (stating “when the plaintiff is a woman, a court should not apply the perspective of a reasonable male who is more likely to view sexual conduct as a harmless joke.”)

56. See 523 U.S. 75 (1998).

57. *Id.* at 77.

58. *Id.* at 81 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

III. PERCEPTIONS OF HOMOSEXUALITY THAT MAY LEAD TO ANTI-GAY HARASSMENT IN THE WORKPLACE

State legislation prohibiting discrimination based on sexual orientation has encountered unique obstacles.⁵⁹ Opponents of such legislation argue that sexual orientation is different from other protected classes such as gender, race, and national origin.⁶⁰ One argument made by opponents of gay rights is that lesbians and gay men are a privileged group, not disadvantaged like other protected classes.⁶¹ Another argument recognizes that lesbians and gay men may be the victims of discrimination, but insists that such discrimination is appropriate based on the view that homosexuality is a "chosen" behavior.⁶²

The claim that lesbians and gay men are not disadvantaged characterizes lesbian and gay communities as highly affluent and powerful.⁶³ Opponents of gay rights distinguish the experiences of other minority groups, such as African Americans, from the experiences of lesbians and gay men in an effort to support the argument that they are seeking "special rights."⁶⁴ This notion of "special rights" has become central to the anti-gay movement.⁶⁵

An alternative argument opposing legislation protecting lesbians and gay men from discrimination is that homosexuality is a "chosen" behavior, therefore, unique from other protected classes and not warranting civil rights protection.⁶⁶ This argument focuses on the sexual behavior of homosexuals as opposed to viewing homosexuality as part of one's identity.⁶⁷ These opponents do not view homosexuality as innate,

59. See Jane S. Schacter, *The Gay Civil Rights Debates in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994).

60. See *id.* at 291.

61. See *id.*

62. See *id.*

63. See *id.* at 292.

64. See *id.* A video created by a conservative group entitled "Gay Rights/Special Rights" shows the heading "Ever denied the right to vote?" and the answers "Homosexuals: NO;" "African Americans: Yes." *Id.*

65. See *id.* at 293. The notion of "special rights" was used by an organization in an effort to oppose Maryland's Anti-discrimination Act of 2001 (barring discrimination based on sexual orientation in public and private employment), "Homosexuality is not innate, and therefore the inclusion of people who consider themselves to be homosexual in anti-discrimination legislation amounts to special status." Lawrence Morahan, *Opposition to Maryland Homosexual Rights Bill Grows* (June 13, 2001), at <http://www.takebackmaryland.org/ASP/XcNewsPlus/XCNewsPlus.asp?cmd=DETAIL> (last visited Dec. 19, 2001). Maryland's anti-discrimination law recently overcame opposition and went into effect on November 21, 2001. See Daniel Leduc, *Md. Law on Gay Bias Goes into Effect; Foes Drop Effort for Statewide Vote*, WASH. POST, Nov. 22, 2001, at B1.

66. See Schacter, *supra* note 59, at 294.

67. See *id.*

but instead argue that it is simply a lifestyle choice.⁶⁸ Thus, hostile work environment claims brought under state legislation prohibiting discrimination based on sexual orientation must not only deal with the ambiguity of judicial interpretation found in Title VII cases, but also must overcome the obstacles unique to legislation protecting lesbians and gay men. Furthermore, even if a state passes legislation prohibiting discrimination against lesbians and gay men in the workplace, consensus as to what constitutes a hostile work environment is not apparent, given the various perceptions of homosexuality.⁶⁹

While recent statistics indicate that the public supports equality in the workplace for lesbians and gay men,⁷⁰ empirical data also suggests that employment discrimination based on one's sexual orientation is prevalent.⁷¹ This discrimination of lesbians and gay men in the workplace may be due to society's perception of homosexuality.⁷²

68. *See id.* at 295.

69. *See infra* text accompanying notes 70, 77 (discussing statistical data indicating that while most people support legislation protecting lesbians and gay men from discrimination in the workplace, the view that homosexuality is immoral is still prevalent).

70. *See* KAISER FAMILY FOUND., INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 8 (2001), available at <http://www.kff.org/content/2001/3193> (last visited Mar. 17, 2002) [hereinafter INSIDE-OUT REPORT]. A study conducted by the Kaiser Family Foundation in February-September 2000 surveyed, via telephone, 2283 randomly selected adults. *See id.* at 11. Seventy-six percent of the respondents thought there should be legislation to protect lesbians and gay men from prejudice and discrimination in employment opportunities. *See id.* at 8. In addition, seventy-eight percent of the respondents stated they would be comfortable working with a lesbian or a gay man. *See id.* at 6.

71. *See* KAISER FAMILY FOUND., CHARTPACK-INSIDE OUT-A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION Chart 4 (2001), available at <http://www.kff.org/content/2001/3193> (last visited Mar. 17, 2002) [hereinafter CHARTPACK-INSIDE OUT]. The study conducted by the Kaiser Family Foundation also surveyed, via telephone, 405 randomly selected self-identified lesbian, gay, and bisexual adults from fifteen major metropolitan areas in the United States. *See* INSIDE-OUT REPORT, *supra* note 70, at 12. Fifty-five percent of the respondents stated that they experienced discrimination or knew someone who experienced discrimination based on their sexual orientation in applying for or keeping a job. *See* CHARTPACK-INSIDE OUT, *supra*. The prevalence of discrimination based on sexual orientation in applying for or keeping a job surpassed the levels of discrimination in all other areas surveyed, such as buying a house or joining or serving in the United States military. *See id.* Thirty-four percent of the respondents stated that they were discriminated against, or someone they knew was discriminated against, based on sexual orientation, while renting an apartment or buying a house; and thirty-three percent of the respondents indicated this type of discrimination in joining or serving in the military. *See id.*

72. *See* LIZ WINFELD & SUSAN SPIELMAN, STRAIGHT TALK ABOUT GAYS IN THE WORKPLACE-CREATING AN INCLUSIVE, PRODUCTIVE ENVIRONMENT FOR EVERYONE IN YOUR ORGANIZATION 25 (1995).

Negative stereotypes of lesbians and gay men have a long history and continue to persist.⁷³ In the 1960s, a report published by the Florida Legislature portrayed homosexuals as “uncontrolled sexual predator[s] who molest the young.”⁷⁴ In the 1970s, in an effort to repeal a gay civil rights ordinance, Anita Bryant, an anti-gay rights crusader, ran an ad stating that homosexuals “engaged in ‘a hair-raising pattern of recruitment and outright seductions and molestations.’”⁷⁵ As recently as the 1990s, anti-gay ballot initiatives compared homosexuals to child molesters.⁷⁶ Other perceptions include that homosexuality is immoral,⁷⁷ that lesbians and gay men are hypersexual and define themselves through sexual behavior, the “sex as a lifestyle assumption,” and that issues involving them are inappropriate matters for public discussion.⁷⁸

The “sex as a lifestyle assumption” is a belief that lesbians and gay men are obsessed with sex and this obsession forms the core of their identity.⁷⁹ For example, a statement from a man that all a lesbian needs is a good sexual encounter with a man to “turn” her into a heterosexual woman reduces lesbianism to one element, sex.⁸⁰ This assumption also seems to deny the possibility that same-sex couples can have long-term relationships.⁸¹ In fact, long-term same-sex relationships are increasing in number,⁸² although society has been slow to recognize the existence of same-sex couples.⁸³

Another negative perception is that gay issues are inappropriate for public discussion. As one lesbian states, “[a]s long as we don’t mention

73. See Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military’s Anti-Gay Policy*, 80 IOWA L. REV. 979, 1008 (1995).

74. *Id.*

75. *Id.*

76. See *id.* Oregon’s Initiative 9, provided that “homosexuality, pedophilia, sadism, and masochism [are] abnormal, wrong, unnatural, and perverse.” *Id.*

77. See INSIDE-OUT REPORT, *supra* note 70, at 6. Fifty-one percent of the respondents surveyed indicated that they thought homosexuality was morally wrong. See *id.*

78. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 515 (1992).

79. See *id.* at 537.

80. See *id.* at 539-40.

81. See *id.* at 542. “A corollary to gay people’s supposed obsession with sex is the belief that same-sex long-term relationships are impossible.” *Id.* at 542.

82. Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 773 (1999).

83. See R.E. Blake Evans, *Census Scandal*, BUILDER, Sept. 1, 2001, available at 2001 WL 25779991 (discussing how Census Bureau officials in 1990 changed responses of same-sex couples who declared themselves as married by altering the sex of one of the household members in order to make them heterosexual couples.) In 2000, when the Census Bureau halted this practice, the figures indicated a significant increase in same-sex couples. See David Whelan, *Do Ask, Do Tell (Same-sex Households)*, FORECAST, Sept. 17, 2001, available at 2001 WL 15624147.

anything explicitly, 'the outside world' is willing to tolerate us.'⁸⁴ Lesbians and gay men most often encounter discrimination after some type of public act.⁸⁵ For example, Ron Woods, a Chrysler employee, stated he became the victim of harassment in the workplace after a newspaper reported his participation in a gay rights demonstration.⁸⁶

A public act that may receive harassment is not limited to gay advocacy, but may simply be a same-sex couple being open about their relationship.⁸⁷ Empirical findings show that the frequency of anti-lesbian and anti-gay violence in the workplace is related to the degree lesbians and gay men disclose their sexual orientation.⁸⁸ While it is commonplace for heterosexuals to be open about their sexuality in the workplace in various ways, such as taking spouses or opposite-sex partners to business functions and displaying photos of them in their work areas, the same behavior by lesbians and gay men may be viewed as "flaunting" their sexuality.⁸⁹ For example, a gay professor writes:

One of my students complained in a teaching evaluation that I should not have discussed my sexual orientation with the class. 'I don't go around telling people I'm straight,' he said. I doubt that he is correct; he is simply not aware of the number of commonplace statements he makes that reveal his sexual orientation. Moreover, I doubt seriously he complains about my non-gay colleagues who mention their spouses, and therefore their heterosexuality, in the course of their teaching.⁹⁰

84. Fajer, *supra* note 78, at 591.

85. *See id.* at 571.

86. *See* Videotape: *Out at Work: America Undercover* (Andersongold Films 1998) (on file with Hofstra University Library). The Chrysler employee alleged that the harassment surpassed verbal abuse and turned physical on several occasions. *See id.* Verbal harassment in the workplace based on one's actual or perceived sexual orientation may escalate into physical violence. *See infra* text accompanying notes 92-97.

87. *See* Fajer, *supra* note 78, at 575.

88. *See* GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN*, 53 (1991). One study's findings showed that thirty-four percent of the respondents who were open about their sexuality to a select few in the workplace had experienced anti-lesbian/gay violence, compared to forty-three percent of the respondents who were open to everyone in the workplace. *See id.*

89. *See* WINFELD & SPIELMAN, *supra* note 72, at 22. A lesbian social worker in Mississippi brought in a photo album when a co-worker asked to see photos of her partner. *See* HUMAN RIGHTS CAMPAIGN, *DOCUMENTING DISCRIMINATION* 31 (2001), available at <http://www.hrc.org/worknet/docdis/index.asp> (last visited Mar. 17, 2001). She was eventually fired and told by her supervisor that it was not because she was a lesbian but because she brought in photos of her partner. *See id.*; *see also* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446, 450 (6th Cir. 1984) (holding that the termination of a bisexual plaintiff (a guidance counselor) was appropriate since she made general statements regarding her sexual orientation and had breached two of her clients' confidentiality with respect to their sexual orientation).

90. Fajer, *supra* note 78, at 602.

The "sex as a lifestyle assumption" and the opinion that gay issues should not be discussed in public may have implications in determining what constitutes a hostile work environment in sexual harassment cases involving a lesbian plaintiff. Specifically, if lesbians are viewed as being defined and obsessed with sex by a jury, they may automatically believe lesbians should have a higher tolerance for certain behavior such as sexual comments and jokes. In addition, individuals who believe that gay issues are inappropriate for public discussion may believe that lesbians who simply mention their same-sex partners in the workplace are "asking" for trouble or bringing on the harassment themselves.⁹¹

Verbal harassment in the workplace, which is primarily anti-gay or anti-lesbian in nature, may evolve into physical violence.⁹² A lesbian employee of a grocery store in Colorado was not only subjected to nonphysical ridicule, including the words "Debbie is a dyke" inscribed in the employees' bathroom, but also physically assaulted with a pallet by a co-worker.⁹³ The harassment of Ron Woods also turned physical on several occasions.⁹⁴

In another case of verbal harassment turning physically violent, Ernest Dillion, a United States postal worker, was called "fag" by co-workers and had his work area covered with "lewd" graffiti.⁹⁵ The harassment eventually escalated until Dillion was beaten unconscious by a co-worker.⁹⁶ Dillion resigned and stated before a congressional committee, "[i]n America, I am not entitled to work without fearing for my life."⁹⁷ These experiences demonstrate how anti-gay harassment in the workplace may escalate into physical violence.

Additionally, statistics indicate that a majority of gay, lesbian, and bisexual people worry that they will be subjected to physical violence

91. See WINFELD & SPIELMAN, *supra* note 72, at 19. The following is a statement from the 1992 Regional Civil Rights Committee of the National Forest Service:

A female Forest Service employee was murdered by her husband, also a Forest Service employee; given a minimal sentence, he was subsequently hired back by the Forest Service. When the District Ranger who hired him was questioned about the rehire, he stated that the murder was insignificant, because after all she (the victim) was a lesbian.

Id.

92. See Erin Emery, *Grocer Sued in Sexual Taunting Lesbian Employee Blames City Market*, DENV. POST, Feb. 11, 2000, at B-05.

93. See *id.*

94. See *Out at Work: America Undercover*, *supra* note 86.

95. See HUMAN RIGHTS CAMPAIGN, *supra* note 89, at 19.

96. See *id.*

97. *Id.*

because of their sexual orientation.⁹⁸ Empirical data suggests that these perceptions are not unfounded.⁹⁹ The results from a recent study showed that one in ten young adults committed physical violence or made threats against individuals that were presumed to be homosexuals.¹⁰⁰ Additionally, another twenty-four percent of the respondents admitted to using demeaning names towards homosexuals.¹⁰¹ The high prevalence of anti-gay behavior suggests that many young adults consider harassment and violence based on one's homosexuality as acceptable.¹⁰²

Hostile work environment harassment cases provide an additional challenge as compared to *quid pro quo* harassment cases. While some people may interpret particular behavior as offensive, others may view it as mere horseplay.¹⁰³ Mark Anderson, a former employee of Cantor Fitzgerald, was subjected to various acts of humiliation, including a video shown at a company meeting of co-workers taking his car to a body shop to have anti-gay slogans printed on it.¹⁰⁴ This behavior was characterized as simple immaturity; specifically, a managing director of the company stated that this behavior was "an example of the sophomoric behavior that existed . . . it was not in any way a situation of harassment."¹⁰⁵

IV. DATA WHICH DOES NOT CLEARLY SUPPORT OR UNDERMINE LESBIANS BEING CATEGORIZED SEPARATELY FROM HETEROSEXUAL WOMEN

A "reasonable lesbian" standard may not be appropriate when the alleged harassment seems to be based on a variety of factors. Lesbians, for example, may be harassed not only for their sexual orientation, but also because of their sex.¹⁰⁶ In contrast, data suggests that men do not

98. See CHARTPACK-INSIDE OUT, *supra* note 71 (chart 7). Seventy-eight percent of the respondents surveyed stated that they were worried to some degree that someone who disliked gays would physically assault them. See *id.* Eight percent of the respondents said they were very worried about being physically assaulted, thirty-one percent were somewhat worried, and thirty-nine percent were not too worried. See *id.*

99. See Karen Franklin, *Antigay Behaviors Among Young Adults: Prevalence, Patterns, and Motivators in a Noncriminal Population*, 15 J. INTERPERSONAL VIOLENCE 339 (Apr. 2000).

100. See *id.* This study was based on the survey responses of 484 students at community colleges in Northern California. See *id.* at 341.

101. See *id.* at 339.

102. See *id.*

103. See Stuart Silverstein, *Sexual Harassment Ruling Charts New Legal Frontier*, L.A. TIMES, Mar. 6, 1998 at A1.

104. *Id.*

105. *Id.* Mark Anderson settled the suit against Cantor Fitzgerald. See Megan Rosenfeld, *Outing Discrimination, HBO's Harsh Light on Workplace Abuse*, WASH. POST, Jan. 6, 1999 at C01.

106. See *infra* notes 121-132 and accompanying text.

experience sexual harassment nearly as often as women.¹⁰⁷ Thus, harassment of and discrimination toward lesbians may be a uniquely complex situation.

The complexity of the lesbian experience may be due to the difficulty in determining the differences and similarities between lesbian and heterosexual women. This may be the result of the ongoing process of lesbians discovering their commonalities with heterosexual women.¹⁰⁸ Lesbians have had difficulty gaining the acceptance of the two groups with which they share a connection, heterosexual women and gay men.¹⁰⁹ Lesbians were not always accepted by heterosexual women in the Women’s Movement of the 1960s¹¹⁰ and were also not fully embraced by the gay liberation movement.¹¹¹ Some feminists were insensitive to lesbian concerns, “view[ing] lesbianism as a bedroom issue rather than a political one.”¹¹² While some lesbians became active participants in the gay liberation movement, others felt the movement, while “wonderful for male homosexuals, . . . ha[d] no bearing on lesbians. . . . ‘Lesbian’ was still a silent category, a sub-category of ‘gay.’”¹¹³ Thus, lesbians have only recently begun to construct a positive collective identity.¹¹⁴ Although it may be difficult to decipher commonalities within the lesbian community,¹¹⁵ this does not mean that they do not exist nor that courts should not strive to identify them. Core experiences within the lesbian community may exist despite differences in race, class, or ethnic background.¹¹⁶

107. See SOC’Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 5 (1999) (citing the following statistics: Eighty-one percent of 1200 sexual harassment complaints registered by survey respondents, 496 human resource professionals, involved women accusing men).

108. See Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL’Y & L. 43, 61 (1994).

109. See *id.* at 60.

110. See *id.* In 1970, the meeting of the National Organization of Women (NOW) was “scuttled” when lesbian members asserted that their concerns and interests deserved the same attention as heterosexual members. Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN’S STUD. 183, 188 (1994).

111. See Cain, *supra* note 108, at 60.

112. *Id.* at 60 n.63.

113. *Id.*

114. See *id.* at 61.

115. See *id.*

116. See *id.* at 62.

A. *Lesbian and Heterosexual Women's Experiences with Violence and Harassment*

While the Ninth Circuit, in *Ellison v. Brady*, utilized data showing statistical differences in the violence experienced between men and women,¹¹⁷ the available data analyzing differences between the violence experienced by lesbians and heterosexual women is not conclusive that lesbians experience hostility in a completely unique manner. For example, while a recent study¹¹⁸ showed that significantly more lesbians than heterosexual women had experienced nonsexual physical violence,¹¹⁹ there was no significant difference in the prevalence of sexual violence between lesbian and heterosexual women.¹²⁰

Moreover, violence directed against women, based on their gender, may be difficult to distinguish from violence directed against women because of their sexual orientation.¹²¹ For example, while some verbal attacks may specifically focus on a woman's lesbianism, others fall somewhere along the continuum between anti-woman and anti-lesbian.¹²² Some attacks begin as anti-woman and evolve into anti-lesbian.¹²³ Therefore, it is not be appropriate to examine the issue of violence against lesbians strictly in terms of sexual orientation.¹²⁴

117. See 924 F.2d 872, 879 n.10 (9th Cir. 1991) (citing statistics from the United States Department of Justice and the FBI).

118. See Linda A. Bernhard, *Physical and Sexual Violence Experienced by Lesbian and Heterosexual Women*, 6 VIOLENCE AGAINST WOMEN 68 (2000). A sample of 215 women (136 lesbian and 79 heterosexual women) from an urban area in the Midwest participated in the study. See *id.* at 71.

119. See *id.* at 70. Fifty-one percent of the lesbians in the study had experienced nonsexual violence as compared to thirty-three percent of heterosexual women. See *id.* The higher rate of nonsexual violence for lesbians may be attributed to the hate crimes experienced by them based solely on their sexual orientation. See *id.* at 76. However, the survey utilized in the study did not contain an explicit item on hate crimes. See *id.* If such an item were included, the rate of nonsexual physical violence may have been even higher for lesbians. See *id.* at 76-77.

120. See *id.* at 73. But see HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS-VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 51 (2001), available at <http://www.hrw.org/reports/2001/uslgbt/toc.htm> (last visited Mar. 17, 2002) (discussing a study conducted in 2000 in which twenty-three percent of the lesbian and bisexual girls had experienced rape or attempted rape by their peers compared to six percent of the heterosexual girls surveyed).

121. See Beatrice von Schultess, *Anti-Lesbian Violence*, in WOMEN'S HEALTH 503, 506 (Sheryl Burt Ruzek et al. eds., 1997).

122. See *id.* at 507.

123. See *id.* at 506.

124. See *id.* at 507.

A recent study¹²⁵ exploring the incidence of violence and harassment against lesbian and gay students also indicates that harassment of lesbians may not be clearly defined by their sexual orientation.¹²⁶ Lesbian students may not experience sexism and homophobia separately.¹²⁷ The majority of female students are being sexually harassed regardless of their sexual orientation.¹²⁸ Thus, many girls who are lesbians are likely accustomed to hearing sexually harassing comments.¹²⁹ One lesbian student stated: “Girls in my school expect to be harassed. The boys mess with us all the time—I don’t even think most of the time that I get it worse because I am a lesbian.”¹³⁰ However, another lesbian student’s experiences suggest that differences in the harassment experienced by lesbian and heterosexual women exists, even though these differences may be difficult to detect.¹³¹ She asserts: “Sometimes you get harassed just because you’re a woman, but lesbians get harassed more. It’s degrading. Not necessarily that they’re calling me a lesbian or a dyke—but it’s the simple fact they want to give you hell. It’s every day.”¹³²

While there may at times be differences in the way in which lesbian and heterosexual girls and women are harassed, there may also be differences in the way lesbians are harassed based upon whether they conform with gender stereotypes.¹³³ Michael Ferrera, clinical director of group homes for Gay and Lesbian Adolescent Social Services in Los Angeles, stated: “The lipstick lesbians are objectified, but the butch girls get challenged all the time. The butch lesbians have the hardest time.”¹³⁴ A “butch” lesbian may be targeted for harassment because she is viewed as dominant and as not conforming to traditional gender roles.¹³⁵

125. See HUMAN RIGHTS WATCH, *supra* note 120. For this study, 140 youth, between the ages of twelve and twenty-one, were interviewed, as well as 130 adults encompassing youth service providers, teachers, administrators, counselors, and parents. See *id.* at 5.

126. See *id.* at 53.

127. See *id.* at 50.

128. See *id.* at 51.

129. See *id.*

130. *Id.* at 51-52.

131. See *id.* at 50.

132. *Id.*

133. See *id.* at 55.

134. *Id.* at 50.

135. See *id.* at 50-51, 53. This view of “butch” lesbians being attacked for “daring or wanting to be like a man” is analogous to “femme” gay men being harassed for being effeminate. See *id.* at 53. In addition, heterosexual individuals who do not conform to traditional stereotypes may be targeted for harassment for being perceived as a lesbian or gay man. See *id.* at 55.

The harassment experienced by individuals who do not conform to traditional gender roles also occurs in the workplace.¹³⁶ Many occupations are structured based on gender, and positions may be viewed either as a woman's job or a man's job, given their alleged correlation with traits traditionally seen as masculine or feminine.¹³⁷ Men and women who exhibit more nontraditional gender characteristics may be ostracized and denied appropriate employment actions, such as promotions.¹³⁸

B. Levels of Sensitivity of Lesbian and Heterosexual Women to Behavior That May Constitute Evidence of a Hostile Work Environment

Pornography in the workplace may reinforce notions that women are to be viewed as sexual objects and are to be dominated by men.¹³⁹ Moreover, it is important to examine lesbian and heterosexual women's perceptions of pornography because its presence in the workplace may constitute a hostile work environment.¹⁴⁰ Empirical data indicates that lesbian and bisexual women watch more pornography than women in general.¹⁴¹ This higher rate among lesbian women may relate to the role pornography plays in some lesbians' lives.¹⁴²

Pornography may be a critical method by which lesbians educate, liberate, and empower themselves.¹⁴³ Chris Bearchell, a Canadian lesbian feminist writer and activist, describes the positive role erotica played in her life: "My erotic 'habit' began when I was coming out in a small Canadian city in the late 60's. It was hard admitting that I was sexually attracted to other women, but it got easier when I saw pictures of women having sex."¹⁴⁴

In addition, lesbians may have more to lose than heterosexual women by the restriction and censorship of pornography and society's

136. See Bennet Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1173 (1991).

137. See *id.* at 1171-72.

138. See *id.* at 1173.

139. See *infra* text accompanying notes 155-157.

140. See *infra* text accompanying note 154.

141. Janet Lever, *Lesbian Sex Survey*, THE ADVOCATE 23, 29 (Aug. 22, 1995). One study showed that fifty-four percent of lesbian and bisexual women watched an x-rated video within the past year as compared to another study showing twelve percent of United States women in general. See *id.* at 29.

142. NADINE STROSSEN, DEFENDING PORNOGRAPHY—FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 167 (1995).

143. See *id.*

144. *Id.*

failure to recognize it as a form of sexual expression.¹⁴⁵ In the Canadian Supreme Court case *Butler v. Her Majesty the Queen*,¹⁴⁶ the Court upheld Canada's obscenity statute, which criminalizes the publication and distribution of obscene materials, defined as those materials having as a "dominant characteristic" the "undue exploitation of sex."¹⁴⁷ The *Butler* decision was used primarily against feminist or lesbian publications,¹⁴⁸ therefore, some lesbians may not only view pornography as a way to liberate and empower themselves, but also may be less reluctant to support its restriction due to the possible discriminatory conduct that may follow.

Thus, while it is difficult to ascertain whether lesbian and heterosexual women experience violence in a significantly different manner, it is also unclear whether lesbians view only certain types of pornography as playing a liberating role in their lives.¹⁴⁹ Lesbians, for example, may feel the most comfortable with "lesbian pornography,"¹⁵⁰ "sexually explicit material made by and for women who have erotic interest in other women."¹⁵¹ Lesbian pornography may allow lesbians to create their own images of sexuality while at the same time deconstructing negative stereotypes and myths of lesbianism.¹⁵² Thus, lesbian pornography may serve as a method of uniting and creating a cohesive lesbian community.¹⁵³

Pornography in the workplace, however, may create a hostile work environment.¹⁵⁴ Yet, data is lacking as to whether lesbians who do have a positive view of pornography would maintain the same view of

145. See *id.* at 232.

146. 1 S.C.R. 452 (1992).

147. Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1079-80 (1993). The Canadian government later used this ruling in a discriminatory manner. STROSSEN, *supra* note 142, at 232.

148. See STROSSEN, *supra* note 142, at 235. *Bad Attitude*, a lesbian pornographic magazine, was the first publication the police seized after *Butler*. See Tamara Packard & Melissa Schraubman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN'S L.J. 299, 325 (1994). Criminal charges were brought against Toronto's Glad Day Bookshop (a bookstore specializing in lesbian and gay publications) for selling the publication. See *id.* In 1993, the largest exporter, in the United States, of lesbian and gay literature to Canada, Inland Books, had seventy-three percent of its shipments detained. STROSSEN, *supra* note 142, at 234.

149. See Packard & Schraubman, *supra* note 148, at 303-04.

150. *Id.* at 303.

151. *Id.* at 302.

152. See *id.* at 314. While men have used images of lesbian sex for their pornography, lesbian pornography may provide an opportunity for lesbians to reclaim the manner in which their sexuality is portrayed. See *id.* at 314-15.

153. See *id.* at 313-14.

154. See Roberts & Mann, *supra* note 15, at 277.

pornography when it is displayed in the workplace. While pornographic images may be pleasing to some women when viewed in private, they may be injurious to them in the workplace, where seeking to be viewed as professionals.¹⁵⁵

Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. Depending upon the material in question, it may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual.¹⁵⁶

Additionally, pornography in the workplace may deter women out of work environments that have been traditionally male dominated.¹⁵⁷

V. PROPOSED FACTORS FOR DETERMINING WHEN TO UTILIZE A "REASONABLE LESBIAN" STANDARD

Certain incidents of harassment in the workplace may be based solely on an employee's sexual orientation.¹⁵⁸ However, other situations of harassment may be based on a combination of various attributes of the employee, such as sex and sexual orientation.¹⁵⁹ In addition, relevant data does not clearly support or undermine the view that lesbians experience violence and harassment in a substantially different manner than heterosexual women.¹⁶⁰ Finally, it is not clear whether lesbians have significantly different perspectives, as compared to heterosexual women, on behavior in the workplace that may be deemed abusive and hostile.¹⁶¹ Thus, courts should not adopt one standard when determining whether to include information regarding a plaintiff's sexual orientation in a jury instruction in a hostile work environment case.¹⁶²

Courts should consider the following in determining whether to include a plaintiff's sexual orientation in a jury instruction in hostile work environment cases: (1) whether the plaintiff's actual or perceived

155. See Note, *supra* note 147, at 1086.

156. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991).

157. See Note, *supra* note 147, at 1087.

158. See *supra* notes 72-102 and accompanying text.

159. See *supra* notes 121-132 and accompanying text.

160. See *id.*

161. See *supra* notes 141-156 and accompanying text.

162. The plaintiff in *Muzzy* also did not advocate for a "one-size-fits-all rule." Brief of Amici Curiae Gay and Lesbian Advocates and Defenders et al. at 10; *Muzzy v. Cahillane Motors, Inc.*, 749 N.E.2d 691 (Mass. 2001) (No. SJC-08483) [hereinafter *Muzzy* Brief].

sexual orientation¹⁶³ is significantly relevant to his or her perspective of the defendant’s alleged behavior and (2) whether the benefits of including the plaintiff’s sexual orientation outweigh the potential risks of juror bias.¹⁶⁴ The court in *Muzzy* provided the following guidance for determining whether to incorporate attributes of plaintiffs in hostile work environment cases beyond the standard utilized in *Oncala v. Sundowner Offshore Servs., Inc.*:¹⁶⁵

(1) any further refinement to the standard must not reduce it to a subjective standard; (2) the judge’s instruction should not include any characteristics of the plaintiff that are not relevant to the claim; and (3) the judge should give serious consideration to a plaintiff’s objection to an instruction that references particulars to the plaintiff’s race, gender, sex, ethnicity, or sexual orientation.¹⁶⁶

A. *Proposed Factor One: Whether the Plaintiff’s Sexual Orientation Significantly Impacted His or Her View of the Alleged Behavior*

The second guideline offered by the Supreme Judicial Court of Massachusetts in *Muzzy*, stating that the sexual orientation of the plaintiff must be relevant to the claim, lacks appropriate boundaries. For example, if both parties are lesbians and the alleged behavior consists of physical advances and numerous requests for dates, under the standard outlined in *Muzzy*, a court may include a plaintiff’s sexual orientation. A court may reason that orientation is relevant to the claim because the defendant lesbian sought out the plaintiff hoping her advances would be returned.¹⁶⁷ However, the factor proposed would appropriately shift the focus from the defendant’s motivation to whether the plaintiff’s lesbianism impacted her perception of the alleged behavior.¹⁶⁸ The importance of the plaintiff’s perspective in reference to the alleged behavior has been recognized in the context of a race-based hostile work

163. A plaintiff’s perceived sexual orientation is included in the proposed standard because an individual may be the victim of harassment based on others’ perception of the individual’s sexual orientation—or for not adhering to traditional gender norms. See discussion, *supra* note 135.

164. The proposed factors are similar to two of the factors which were advocated by the plaintiff in *Muzzy*. See *Muzzy* Brief, *supra* note 162, at 11.

165. See 523 U.S. 75 (1998) (utilizing the following standard in a same-sex harassment case: “a reasonable person in the plaintiff’s position, considering ‘all the circumstances’”).

166. *Muzzy v. Cahillane Motors Inc.*, 749 N.E. 2d 691, 696 (Mass. 2001).

167. See *id.* at 698.

168. The importance of the plaintiff’s perspective was also recognized in the development of the “reasonable woman” standard. See *supra* notes 20-40 and accompanying text.

environment claim.¹⁶⁹ In *Harris v. International Paper Co.*, the court adopted a “reasonable black person” standard.¹⁷⁰ The court reasoned:

Black Americans are regularly faced with negative racial attitudes . . . As a result, instances of racial violence or threatened violence that might appear to white observers as mere ‘pranks’ are, to black observers, evidence of threatening, pervasive attitudes . . . [E]xperiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive.¹⁷¹

Focusing on the plaintiff’s perspective would also prevent a jury instruction based upon a defendant’s prejudicial stereotypes of homosexuality. For example, if a harasser perceives lesbians as being obsessed with sex, he or she may seek inclusion of the plaintiff’s sexual orientation in a jury instruction, and argue that lesbians should have a higher tolerance for sexual innuendos and comments. However, the standard proposed would, once again, effectively shift the focus away from the defendant’s motivation and possible prejudicial attitudes toward the plaintiff’s perception of the defendant’s behavior.

To satisfy the first factor, plaintiffs would need to demonstrate that their sexual orientation significantly impacted their view of the alleged harassing behavior. This may be accomplished through qualitative and/or quantitative data. For example, in a case involving anti-lesbian slurs, a plaintiff could demonstrate that her sexual orientation significantly impacted her perspective of the behavior by providing examples of situations in which anti-gay comments have escalated to physical violence. She could also provide statistical data on how lesbians and gay men fear physical violence based on their sexual orientation.

Therefore, if the alleged behavior is primarily anti-gay in nature, the inclusion of a plaintiff’s sexual orientation may serve as a deterrent against gay prejudice by allowing jurors to consider how lesbian and gay employees may perceive certain comments. Its inclusion may also allow jurors to determine whether the alleged behavior creates an intimidating and threatening workplace, even though heterosexuals may view the same behavior as simple horseplay. The use of a “reasonable lesbian” standard in this case is similar to the use of a “reasonable woman” standard in cases in which women may perceive sexual jokes and comments as creating a hostile environment, while men may perceive the same behavior as wholly innocent.

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

170. See *id.*

171. *Id.* at 1515-16.

B. Proposed Factor Two: Evaluating the Risks of Potential Juror Bias

The second proposed factor suggests that courts consider potential juror bias that may occur by including a plaintiff's actual or perceived sexual orientation. Empirical data suggests that prejudicial attitudes against lesbians and gay men exist within the judicial system.¹⁷² Lesbians and gay men may be treated unfavorably when their sexual orientation "becomes an issue" in a court setting.¹⁷³ Thus, courts need to carefully consider potential bias prior to incorporating a plaintiff's sexual orientation in a jury instruction.

If the alleged harassment is anti-gay in nature, the plaintiff's sexual orientation or perceived sexual orientation will likely not be introduced to the jury for the first time if included in a jury instruction. In these cases, the defendant's alleged behavior has likely been introduced throughout the trial, thus identifying the plaintiff's sexual orientation or perceived sexual orientation. Therefore, the concern for juror bias in these cases should not be extraordinarily high since the plaintiff's actual or perceived sexual orientation is already an element of the case.

In cases in which the alleged harassment is directed solely at another nonorientation attribute of the plaintiff, the risk of potential juror bias due to inclusion of the plaintiff's actual or perceived sexual orientation may be higher than in anti-gay harassment cases. While it may not be uncommon to incorporate a party's sexual orientation into a court proceeding even when it is not relevant,¹⁷⁴ courts should be cautious, considering the possibility of bias. While, in anti-gay

172. See JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS—FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE 4 (2001), http://www.courtinfo.ca.gov/reference/4_reports.htm (last visited Mar. 17, 2002). A study exploring the experiences as well as the perceptions of lesbians and gay men in the California court system contained two survey groups: (1) lesbian and gay court users and (2) employees of the court, regardless of sexual orientation. See *id.* at 1. Some 1255 court users and 1525 court employees completed the survey. See *id.* at 1-2. Twenty percent of the court employee respondents heard derogatory remarks and comments made about lesbians and gay men in open court. See *id.* at 4. These remarks were most often made by judges, lawyers, or court employees. See *id.*

173. See *id.* at 3. While most lesbians and gay court users felt they were treated fairly, fifty-six percent of the lesbian and gay court user respondents observed or experienced a negative comment towards lesbians or gay men when sexual orientation became an issue. See *id.* at 19. In addition, lesbians and gay men also perceived a less accepting environment when their sexual orientation became an issue. See *id.* at 21. While twenty-two percent of lesbian and gay court users felt threatened during their experience with the court system because of their sexual orientation, thirty-eight percent felt threatened when their sexual orientation became an issue. See *id.*

174. See JUDICIAL COUNCIL OF CAL., *supra* note 172, at 21. One study showed that lesbian and gay court users stated that their sexual orientation became an issue when it was not relevant to the court proceeding almost as often as when it was relevant to the proceeding. See *id.*

harassment cases, a plaintiff's sexual orientation will likely be introduced prior to the jury instruction, the instruction in cases without anti-gay harassment may introduce the plaintiff's sexual orientation for the first time. Additionally, if the alleged behavior contains no reference to the plaintiff's sexual orientation, it will likely be difficult for plaintiffs to prove that their sexual orientation significantly impacts their perspective of the alleged behavior. Furthermore, incorporating the plaintiff's sexual orientation in these cases may even go against the standard that the court advocates in *Muzzy*, that the plaintiff's sexual orientation be relevant to the claim.

In cases in which the alleged behavior targets various attributes of the plaintiff, such as gender and sexual orientation, it will likely be more challenging to determine the impact of potential juror bias. For example, when the alleged harassment encompasses anti-woman and anti-lesbian behavior, the plaintiff may be able to demonstrate that her sexual orientation significantly impacted her perspective of the alleged behavior. However, when the alleged behavior is presented at trial, the focus may not be on the anti-lesbian comments or behavior. Thus, the inclusion of the plaintiff's sexual orientation as part of the jury instruction in these cases may emphasize the plaintiff's sexual orientation and elicit prejudicial attitudes from the jury. Therefore, courts need to use extra caution when determining whether to include a plaintiff's sexual orientation in these cases.

C. *Implications for Employers*

While there are substantial considerations in the legal field for the inclusion of a plaintiff's sexual orientation in a jury instruction, there are also implications for employers who may be held liable under a "reasonable lesbian" or "reasonable gay man" standard. While many employees have instituted sexual harassment prevention training in an effort to curb sexual harassment and protect themselves from liability,¹⁷⁵ many employers lack programs concerning harassment based on one's sexual orientation.¹⁷⁶ However, sexual orientation is a topic many employees would like to see covered in workplace educational programs.¹⁷⁷ This type of workplace education may not only serve as a

175. See SOCIETY FOR HUMAN RES. MGMT., *supra* note 107, at 9. One survey showed that sixty-two percent of employers offered sexual harassment prevention programs. *See id.* at 4. This survey was based on the responses of 496 human resource professionals. *See id.* at 3.

176. See LIZ WINFELD & SUSAN SPIELMAN, STRAIGHT TALK ABOUT GAYS IN THE WORKPLACE 83 (2d ed. 2001).

177. *See id.*

mechanism to curb harassment but may also increase productivity in the workplace, because homophobia can result in absenteeism and employee turnover.¹⁷⁸ Therefore, educational programs on sexual orientation may be useful for all employers, regardless of whether they are located in a state that prohibits discrimination in the workplace based on sexual orientation.

VI. CONCLUSION

The use of a "reasonable lesbian" or "reasonable gay man" standard, in some cases, allows jurors to consider how lesbians and gay men may perceive certain comments and behavior in the workplace as a prelude to physical and/or sexual violence. Such a standard or jury instruction that includes a plaintiff's sexual orientation may assist lesbians and gay men, in certain situations, by providing a deterrent against juror bias. It is still legal, however, for employers to discriminate against employees based on their sexual orientation in a majority of states.¹⁷⁹ Thus, the "decision" of whether to "come out" at work involves potentially painful options. Lesbian and gay men who "come out" at work risk not only losing their financial stability, but also a job that provides them with personal fulfillment, while lesbian and gay employees who do not "come out" are faced with the daily task of having to deny part of who they are and possibly the person whom they love.

178. *See id.* at 40-41.

179. *See supra* note 2.