

924 F.2d 872

United States Court of Appeals,
Ninth Circuit.

Kerry ELLISON, Plaintiff-Appellant,
v.

Nicholas F. BRADY, Secretary of the Treasury,
Defendant-Appellee.

No. 89-15248.

Argued and Submitted April 19, 1990.

Decided Jan. 23, 1991.

Dissent Amended Feb. 5, 1991.

BEEZER, Circuit Judge:

Kerry Ellison appeals the district court's order granting summary judgment to the Secretary of the Treasury on her sexual harassment action brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1982). This appeal presents two important issues: (1) what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment, and (2) what remedial actions can shield employers from liability for sexual harassment by co-workers. The district court held that Ellison did not state a prima facie case of hostile environment sexual harassment. We reverse and remand.

Both issues require a detailed analysis of the facts, which we consider in the light most favorable to Ellison, the non-moving party. *Sierra Club v. Penfold*, 857 F.2d 1307, 1320 (9th Cir.1988). We review summary judgments de novo. *Id.*

I

Kerry Ellison worked as a revenue agent for the Internal Revenue Service in San Mateo, California. During her initial training in 1984 she met Sterling Gray, another trainee, who was also assigned to the San Mateo office. The two co-workers never became friends, and they did not work closely together.

Gray's desk was twenty feet from Ellison's desk, two rows behind and one row over. Revenue agents in the San Mateo office often went to lunch in groups. In June of 1986 when no one else was in the office, Gray

asked Ellison to lunch. She accepted. Gray had to pick up his son's forgotten lunch, so they stopped by Gray's house. He gave Ellison a tour of his house.

Ellison alleges that after the June lunch Gray started to pester her with unnecessary questions and hang around her desk. On October 9, 1986, Gray asked Ellison out for a drink after work. She declined, but she suggested that they have lunch the following week. She did not want to have lunch alone with him, and she tried to stay away from the office during lunch time. One day during the following week, Gray uncharacteristically dressed in a three-piece suit and asked Ellison out for lunch. Again, she did not accept.

On October 22, 1986 Gray handed Ellison a note he wrote on a telephone message slip which read:

I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.

When Ellison realized that Gray wrote the note, she became shocked and frightened and left the room. Gray followed her into the hallway and demanded that she talk to him, but she left the building.

Ellison later showed the note to Bonnie Miller, who supervised both Ellison and Gray. Miller said "this is sexual harassment." Ellison asked Miller not to do anything about it. She wanted to try to handle it herself. Ellison asked a male co-worker to talk to Gray, to tell him that she was not interested in him and to leave her alone. The next day, Thursday, Gray called in sick.

Ellison did not work on Friday, and on the following Monday, she started four weeks of training in St. Louis, Missouri. Gray mailed her a card and a typed, single-spaced, three-page letter. She describes this letter as "twenty times, a hundred times weirder" than the prior note. Gray wrote, in part:

I know that you are worth knowing with or without sex.... Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan.... Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks ... I will

[write] another letter in the near future.¹

Explaining her reaction, Ellison stated: "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened."

She immediately telephoned Miller. Ellison told her supervisor that she was frightened and really upset. She requested that Miller transfer either her or Gray because she would not be comfortable working in the same office with him. Miller asked Ellison to send a copy of the card and letter to San Mateo.

Miller then telephoned her supervisor, Joe Benton, and discussed the problem. That same day she had a counseling session with Gray. She informed him that he was entitled to union representation. During this meeting, she told Gray to leave Ellison alone.

At Benton's request, Miller apprised the labor relations department of the situation. She also reminded Gray many times over the next few weeks that he must not contact Ellison in any way. Gray subsequently transferred to the San Francisco office on November 24, 1986. Ellison returned from St. Louis in late November and did not discuss the matter further with Miller.

After three weeks in San Francisco, Gray filed union grievances requesting a return to the San Mateo office. The IRS and the union settled the grievances in Gray's favor, agreeing to allow him to transfer back to the San Mateo office provided that he spend four more months in San Francisco and promise not to bother Ellison. On January 28, 1987, Ellison first learned of Gray's request in a letter from Miller explaining that Gray would return to the San Mateo office. The letter indicated that management decided to resolve Ellison's problem with a six-month separation, and that it would take additional action if the problem recurred.

After receiving the letter, Ellison was "frantic." She filed a formal complaint alleging sexual harassment on January 30, 1987 with the IRS. She also obtained

¹ In the middle of the long letter Gray did say "I am obligated to you so much that if you want me to leave you alone I will.... If you want me to forget you entirely, I can not do that."

permission to transfer to San Francisco temporarily when Gray returned.

Gray sought joint counseling. He wrote Ellison another letter which still sought to maintain the idea that he and Ellison had some type of relationship.

Ellison filed a complaint in September of 1987 in federal district court. The court granted the government's motion for summary judgment on the ground that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment. Ellison appeals.

III

The parties ask us to determine if Gray's conduct, as alleged by Ellison, was sufficiently severe or pervasive to alter the conditions of Ellison's employment and create an abusive working environment. The district court, with little Ninth Circuit case law to look to for guidance, held that Ellison did not state a prima facie case of sexual harassment due to a hostile working environment. It believed that Gray's conduct was "isolated and genuinely trivial." We disagree.

Although Meritor and our previous cases establish the framework for the resolution of hostile environment cases, they do not dictate the outcome of this case. Gray's conduct falls somewhere between forcible rape and the mere utterance of an epithet. 477 U.S. at 60, 67, 106 S.Ct. at 2402, 2405-06. His conduct was not as pervasive as the sexual comments and sexual advances in Hacienda Hotel, which we held created an unlawfully hostile working environment. 881 F.2d 1504.

Next, we believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. King, 898 F.2d at 537; EEOC Compliance Manual (CCH) § 615, § 3112, C at 3242 (1988) (courts "should consider the victim's perspective and not stereotyped notions of

acceptable behavior.") If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. *See, e.g.,* *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir.1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive"); *Yates*, 819 F.2d at 637, n. 2 ("men and women are vulnerable in different ways and offended by different behavior"). *See also* Ehrenreich, *879 Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 Yale L.J. 1177, 1207-1208 (1990) (men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object"); Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand.L.Rev. 1183, 1203 (1989) (the characteristically male view depicts sexual harassment as comparatively harmless amusement).

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share.² For example, because women are

² One writer explains: "While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of

disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. 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.

In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman³ would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.⁴

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased

relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand.L.Rev. 1183, 1205 (1989).

³ Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man.

⁴ We realize that the reasonable woman standard will not address conduct which some women find offensive. Conduct considered harmless by many today may be considered discriminatory in the future. *Rogers*, 454 F.2d at 238. Fortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior.

and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1982).

We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.
