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Selective Sexual Harassment: Differential Treatment of Similar Groups of Women Workers

Elizabeth A. Hoffmann¹

If male workers categorize different groups of women coworkers and, subsequently, treat them differently, the experiences of women from one of these groups would not be indicative of the experiences of women from another group. When this different treatment involves hostile environment sexual harassment of one group, but not the other, then the law must recognize the possibility of “selective sexual harassment.” Without this understanding of the nuances of the workplace dynamics, a court could mistake the women of the unharassed group as representing “reasonable women” and the women of the harassed group as simply oversensitive. This paper draws on empirical data to demonstrate such a situation and advocates for a version of the “reasonable victim” standard to facilitate a closer analysis of hostile environment sexual harassment suits.

KEY WORDS: sexual harassment; token women; tax: cabs.

When groups of women employees are treated differently from other groups of women employees at the same worksite, determining which group is composed of “reasonable women” proves difficult. Workplace dynamics are more complex than a simple comparison to a hypothetical employee permits. The law assumes that a discriminating employer treats all women similarly (Crenshaw, 1988; Welsh, 1999). When the court is confronted with different groups of women who experience their shared workplace differently, it may privilege the understanding and experiences of one group over the other (Crenshaw, 1988; Welsh, Dawson, & Nierobisz, 2002). Various scholars have demonstrated that which group’s point of view is adopted greatly affects how a case will be decided (e.g., Schultz, 1998; Weiner et al., 2002; Welsh, 1999).

This paper draws on empirical data to illustrate how similar women workers on the same shifts at the same company might be treated very differently by their male coworkers and, thus, have different workplace experiences. At the particular worksite studied, men’s assignment of labels to different groups of women created radically different workplace experiences for each group of women. Some women

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were labeled “heterosexual” whereas others were labeled as “lesbian”—labels that did not perfectly match the reality of the women’s own self-definition. This differential treatment of groups of women resulted in one group being sexually harassed whereas the other group was not. This paper refers to this phenomena as “selective sexual harassment.”

This selective sexual harassment of only some of the women employees could be used and misconstrued by the defendant employer to counter legitimate claims of hostile environment sexual harassment. Sometimes employers counter claims of sexual harassment by presenting testimony from women who did not experience hostile environment sexual harassment at the same worksite with the same male coworkers as the women who brought the discrimination suit. To accurately address this situation, the court must comprehend the dynamics of the worksite in question and the effects of selective sexual harassment of differently labeled workers. Otherwise, without a more nuanced understanding of the workplace situation by the court, the nonharassed group of women could easily be presented as the standard for “reasonable women” at that worksite and plaintiff employees might seldom defeat this employer defense.

Therefore, this paper concludes by advocating a “reasonable victim” standard that will facilitate a closer examination of the workplace circumstances of the plaintiff employee. This level of examination would allow attorneys to distinguish between differently treated groups of women coworkers. This more nuanced understanding could enable the court to identify and comprehend selective sexual harassment.

TOKEN WOMEN AND WORKPLACE SEGREGATION

Kanter’s research demonstrates that differently labeled women in the same organization who work with the same male coworkers might be treated very differently. If the treatment of token women by male coworkers varies greatly between different categories of women, then women with alternate labels will report dissimilar, and possibly contradicting, accounts of their workplace experiences.

When the women of one of the groups experiences hostile sexual harassment, then this difference in treatment could have important consequences, should the harassed women bring their grievance to trial. This disparity in treatment means that the account of one woman cannot be assumed to represent the circumstances for other differently labeled women coworkers. The affect of these different labels means that the various groups of women experience their shared workplace differently.

It is particularly likely that groups of women coworkers may be differently labeled and treated very differently by their male coworkers when these women are in a numeric minority at their workplace, i.e., when they are “token” women employees, as is the situation for the women in this study. Kanter found that male colleagues rarely saw token women as individuals, but rather as gender stereotypes, often used to reinforce the dominant masculine subculture. As a result of their scarce numbers, Kanter found that token women often face “role encapsulation,” being assigned a

label based on stereotypes and assumptions and then being treated according to that label (Kanter, 1975).

The impact of different labels for similarly situated, but alternately labeled, women is that some women could suffer severe sexual harassment whereas others experience none at all—the phenomena here called “selective sexual harassment.” Thus, which group of women constitutes “reasonable women” and, therefore, which experience will be privileged by the court is crucial to plaintiffs receiving a fair and adequate hearing of their complaint.

Because the courts adopted the idea of hostile-environment sexual harassment (*Bundy v. Jackson*, 1981)—and, later, the Supreme Court (*Meritor Savings Bank v. Vinson*, 1986)—a primary challenge of sexual harassment law is to define when harassment becomes so severe and prevalent that it creates a hostile environment. The move from the “reasonable man” standard toward the use of a “reasonable person” standard in woman-plaintiff sexual harassment trials demonstrated the Court’s earlier attempts to move away from a male-oriented and, hence, perpetrator-biased perspective. Because the “reasonable person” standard is a perspective distinct from that of the actual plaintiff, it protects employers from oversensitive plaintiffs and idiosyncratic lawsuits by providing a neutral point of comparison that is accessible to any observer. However, the “reasonable person” standard did not acknowledge the gender differences in perspectives on what constituted sexual harassment (Cahn, 1992).

The courts began moving from a “reasonable person” standard to a “reasonable woman” standard, beginning with Judge Keith’s dissent in *Rabidue* (*Rabidue v. Osceola Refining Co.*, 1986). In 1991, the Ninth Circuit Federal Appellate Court developed the reasonable woman standard (*Ellison v. Brady*, 1991): “conduct a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” However, the reasonable woman standard is problematic because it does not recognize that women in the same worksites might be treated very differently, with some being harassed whereas others are not (Goodman-Delahunt, 1999). In other words, different groups of “reasonable women” may have very contradictory workplace experiences.

SAMPLING AND METHODS

To illustrate the phenomena I call selective sexual harassment, I draw on interview and observation data from a cooperative taxicab company, “Coop Cab.”² Using open-ended interviews, I allowed interviewees to define their own terms and freely build on my initial questions. I was careful to sample a diverse mix of interviewees to capture a range of perspectives. The labeling and selective sexual harassment that I discuss here were described by both men and women—including women with both labels, thus, strengthening the validity of these findings. This research was conducted in accord with prevailing ethical principles.

²The name of the company, Coop Cab, is an alias as are all names I use to refer to interviewees.

Sampling

Coop Cab employs approximately 150 workers, 16.3% of whom are women. Even though some of the women had been involved in the founding of the organization and had tenure meeting and surpassing many male coworkers, these women often had the less desirable shift and were less frequently promoted. Women were more represented on the night shifts and were substantially less likely to have the most lucrative rush-hour shifts. Additionally, no women were dispatchers, a highly valued position because it commanded more authority as the person who sent drivers their fares, provided a consistent wage that was higher than many—especially night-shift drivers—might regularly earn, and was performed in the comfort of the dispatch office with ready access bathroom, refrigerator, and co-worker companionship. Furthermore, only one woman was a manager. This woman was in charge of the business office and managed only the handful of workers who did the office work.

The company's location in a university town, Jefferson City, affects whom it employs. Coop Cab is known as having well-educated drivers, many with advanced degrees and often ideologically progressive. The company handbook includes an official statement against sexual harassment. New member training also includes information about this policy.

I interviewed 20 workers at Coop Cab: 10 women and 10 men, two of the interviewees were no longer working at the company at the time of the interview. To include a variety of perspectives, I interviewed various groups of workers from the company: men workers and men managers, workers from different shifts, recent and longtime employees, and workers who had left the company.

Methods

Although the interviews were structured, all interviews were open-ended. The interviews averaged 2.5 hr; the shortest one ran just under an hour, and the longest duration was nearly 5 hr. I used a set of predetermined questions as initial probes on a wide variety of work-related topics. Follow-up questions were based on each interviewee's response. With each structured set of questions, I encouraged the informants to tell me "anything they thought applied." Most of the interviews were conducted in public places, such as coffee houses and restaurants, and at the companies themselves, in the parking lots and the breakrooms. All of the interviews were taped and transcribed, so the quotes included in this paper are direct quotes rather than paraphrases. I asked for the permission of each interviewee before I began taping, and explained that even if they would not let me tape them I still would be interested in conducting the interview. No one objected to my taping.

The quotations presented in this paper have been edited for confidentiality, brevity, and readability. Most of the quotations presented here appear without ellipses and with few diacritical marks to preserve the flow of the text. Great care was taken to maintain the substance and tone of interviewees' remarks, while eliminating some of the more awkward constructions of impromptu responses. These alterations are very minor and never change the content of the quotes. The alterations are often with regard to the removal of filler words (ah, um, like, etc.), repeated phrases

(e.g., “We had a lot of, um, we had a lot of women working for us”), and actual names of people at the company (e.g., “[A particular dispatcher] has a real bawdy sense of humor”).

In addition to interviews, I also observed meetings, attended formal grievance meetings, “hung out” in the break room, and read several years’ worth of back issues of the company newsletter. Although these are not specifically cited in this paper, they contributed to my knowledge of the cab company.

Because a key aspect of this research involved people’s perceptions of sexual harassment, I had the interviewees themselves define “sexual harassment.” In many interviews, the term sexual harassment was brought up by the interviewees themselves. I deliberately chose not to offer the legal definition of harassment on the basis of sex as defined in Section 703 of Title VII of the Civil Rights Act (1964), because I feared this official definition would inhibit the interviewees from using their own definitions of “sexual harassment.” This was essential to encourage unconstrained discussion by the interviewees. Following the law and society and legal consciousness approaches of focusing on how ordinary citizens understand the law in their everyday life, this research prioritized exploration of these women’s concepts of sexual harassment, as they feel attacked by it, regardless of whether the actual behavior met a strict legal definition. These women’s categorizing of behavior as sexual harassment is important because they are using the label of “sexual harassment” to identify sexualized behavior that they feel is harmful to them. With this understanding, regardless of whether or not the various behaviors described in this research all meet the precise legal definition of sexual harassment, these behaviors, nevertheless, are unwanted, harmful, and can cause many of the emotional injuries that victims of “true” sexual harassment incur (Welsh & Gruber, 1999). The phenomena of some women receiving specific mistreatment that another group of similar-seeming coworkers do not receive is the important empirical finding. Whether all of this mistreatment meets a legal standard for sexual harassment does not diminish the argument (see e.g., Welsh, 2003).

The women in this study often began certain anecdotes by categorizing the behavior as sexual harassment, although some would occasionally begin a story not using the label of harassment and then affix this label towards the story’s end or during their discussion of the story. Men were less likely to label their own behavior as “sexual harassment,” although three men, when describing the behaviors of other men, categorized the other men’s behaviors as sexual harassment. More commonly, in describing similar behavior as that labeled by the women as harassment—sometimes even in describing the very same stories—the men used words like “teasing,” “having some fun with,” “messaging with,” and other terms which implied that they saw little harm in their behavior.

Because I am interested in men’s treatment of their women coworkers, I was careful to triangulate my data on this phenomenon. “Triangulation” refers to collecting stories of the same phenomena from interviewees with very different perspectives. This allows the researcher to explore a given phenomenon—such as sexual harassment—from a variety of standpoints, thus, substantiating that the researcher’s evolving understanding of the phenomenon is accurate and not simply reflecting the bias of an insular group of friends. By triangulating, I was able to confirm the dynamics

the interviewees described, thus, heightening the validity of the data. To gather this information, I asked about men's accounts of themselves, men's accounts of other men's behavior, and women's accounts of men's behavior. Each way of gathering this data produced similarly accurate accounts.

The women at Coop Cab were aware of which label the men had attached to the individual women. During the interviews, the women discussed what label they believed they and others had; they were well aware of whom the men perceived as heterosexuals or lesbians. Even though the men's labels sometimes did not match the women's own self-definitions, the women could discern that one particular woman was labeled "heterosexual" whereas another particular woman was labeled "lesbian." The women's actual sexual orientation was sometimes correlated with the men's labels. Often, women who did self-define as heterosexual were labeled "heterosexual" and women who self-defined as lesbian were labeled as "lesbian." However, the labels did not completely match the self-labeling. Sometimes self-defined heterosexual women were labeled as "lesbian" and vice versa. Moreover, women who defined as bisexual were always categorized as either "heterosexual" or "lesbian."

I also spoke in depth with some men about how they labeled and who had which label; the men, in their own interviews, confirmed the women's understandings of the labels' applications. Also, during these discussions, although usually at separate times during the interview, the men talked about how they interacted with various women coworkers. Thus, although I learned a great deal about the impact of labeling from the women, I confirmed this information with the men's reports. In the following sections, I do not provide each woman's assessments and the confirmation of these by her male coworkers. Because this would be lengthy and cumbersome without adding sufficiently to the discussion, I generally provide only the most illustrative quotations.

RESULTS

At the worksite studied here, men divided their women coworkers into two groups and assigned different labels to each group. On the basis of these labels, men sexually harassed some women, but left others alone. The label each woman received did not necessarily reflect the woman's self-identity, but rather reflected how her male coworkers perceived her and chose to treat her. In this section, I present the data that illustrate this selective sexual harassment of one of these groups of women.

Men's Labeling and Differential Treatment of Women Coworkers

Men subcategorized the women at Coop Cab based on their perceptions or assumptions about these women's sexual orientation. Each woman was placed into one of two categories: heterosexual or lesbian. The labels were distinct from women's own identities—sometimes the labels correlated with the woman's own self-identification, but other times they did not. Yet, in either situation, the labels had powerful effects on how the men treated their women coworkers and how these women experienced their workplace environment. Thus, the labels are important because they constitute an essential first step in engaging in differential treatment.

Importantly, the labels had nothing to do with sexual orientation per se; the phenomena of selective sexual harassment could have occurred with any other labels. Nevertheless, the labels were not random or meaningless classifications. The labels “heterosexual” and “lesbian” implied certain types or stereotypes of women. Women whom the men labeled “heterosexual” were perceived by the men as inherently and always interested in romantic or sexual relationships with them. In contrast, the women whom the men labeled “lesbian” were seen as not only disinterested in intimate relations with the men coworkers, but as disdainful of all male contact. The perceptions of these labels greatly affected the nature of interactions between men and women within the company and, specifically, the likelihood of sexual harassment of individual women. Although the particular names of the labels has importance and meaning outside their use for differential treatment, this paper focuses specifically on how the labels were used to harass some women whereas others were not harassed.

All interviewed workers—heterosexual, bisexual, and lesbian women and heterosexual men—described the company as having a workplace culture in which (heterosexual) men would treat different groups of women differently, based on which label a woman had—“lesbian” or “heterosexual.” Men’s statements support this assessment that their labeling was binary. This labeling produced dissimilar workplace experiences for these two groups of women: men often targeted women labeled “heterosexual,” but rarely harassed women labeled “lesbian,” as is discussed further below.

For example, Helen stated that if a woman was understood to be (i.e., labeled) heterosexual, she would experience quite a bit of harassment.

Helen: I’ve hung out with a lot of people, men and women. Sometimes after work. I mean, if you’re all hanging around at Coop Cab, having a drink or just laughing, it’s pretty much everyone. I think, a lot the lesbians don’t get the type of harassment that heterosexual women do. The men don’t see them as a pick up line.

Jo, who had been at the company for about 7 years, preferred the men at the cab company to label her as a lesbian because she felt she was treated better by them when thus defined.

Jo: Sometimes I get treated like a lesbian, sometimes I get treated like a straight woman. I don’t like being treated like a straight woman. I actually think there is [a difference in treatment]. Generally speaking, I prefer people think of me as a lesbian . . . I find people approach me with just a lot more ease if they perceive that I’m straight. The men have learned their lessons with the lesbians, to be a little more stand-offish. If they’re single men, they treat the straight women like potential dates, someone to fuck, and that *is* different.

This “strategy” for avoiding sexual harassment by actively trying to be labeled lesbian is a strategy that several other women discussed. The experience reported by Jo and other women at Coop Cab—that lesbians workers were harassed less and that the women often preferred a label of “lesbian” to “heterosexual”—is contrary to the findings of other researchers who document virulent harassment of lesbian workers at other businesses (e.g., Schneider, 1982; Welsh, 1999).

Some “testing” of this assertion about Coop Cab’s selective sexual harassment was provided by the experiences of Mimi and Melody. These data are particularly instructive, because they demonstrate that the labels had little to do with women’s own identities and more to do with their male coworkers’ perceptions and treatment

of the women. The labels of Mimi and Melody changed, Mimi's through "coming out" and Melody's by switching to a male partner. They both reported that how they were treated changed when their labels changed.

Mimi, who had come out to only some of her coworkers at the time of the interview, discussed how men's reactions to, and interactions with, her changed as she came out to more and more people at the cab company. Below, Mimi describes an incident in which she stood up to her harasser who had labeled her "heterosexual." In this occasion, a male co-worker, in front of other drivers, asked her to meet him at the airport to have sex with him.

Mimi: I've had a couple of guys hit on me, harass me [make sexual, inappropriate inquiries] . . . I can remember one of the guys was telling me, like, we're in the office in the afternoon. A bunch of us were getting ready to go and drive and this one guy had gotten the van, which is 59. You know, big deal, Cab 59. It's a van and we all know that. He was saying, "Mimi, why don't you meet me out at the airport, I got 59." "I'm like, what's up with that?" He says, "You know, it's so romantic, wouldn't it be fun if we could get in the back of the cab." And all this stuff. The other drivers kind of look at me and I said, "Dude, you'd better shut up now while you're ahead because you're coming close." You know? I kind of pointed my finger at him and told him, "You're really coming close to harassing me," and he said, "Well wouldn't you like it, blah-blah-blah?" and I'm like, "Stop, stop while you're ahead or there's gonna be a problem."

Mimi believed that sexual harassment had been an issue because she was not completely out to everyone at the cab company and was labeled by some men as heterosexual and by others as lesbian.

Melody related experiences in which she felt that sometimes men labeled her as heterosexual and treated her one way, and other times categorized her as lesbian and treated her another way. When labeled as heterosexual by the men, these coworkers interacted with Melody more regularly, although the interactions were not always pleasant. However, when she was labeled as lesbian, she had significantly less interaction with the men at work but avoided sexual harassment. For example, Melody observed different behaviors from male coworkers depending on the sex of her current partner—and, hence, the label ascribed to her.

Melody: When I just started working here I was going out with a woman and then I started seeing a man . . . If you're kind of established as a lesbian you don't get harassed by the men at work. Once it got out [that I then was dating a man], it's kind of open for question, some of them will try and make passes. I just don't like it. It's like if I was looking, believe me you'd know. It's not like you have to find it out.

Melody concluded that when she first joined Coop Cab she received much less harassment and less attention from men at the cab company because they labeled her as lesbian. Melody's experience is particularly illustrative when juxtaposed with the comments from Helen, below, which stated that new women employees receive especially trenchant sexual harassment.

Selective Sexual Harassment of Heterosexual-Labeled Women

Consistently, the women who reported sexual harassment as an on-going problem had been labeled as heterosexual. This was true regardless of whether these women self-identified as either heterosexual, bisexual, or lesbian. Helen, who was

labeled heterosexual, felt that the harassing behavior could at times be quite aggressive. She viewed this behavior as an on-going dynamic of the company culture.

Helen: When I first started working at Coop Cab, I'll tell you, I kind of felt like meat on the hoof. We had a lot of women working for us³ but still it's a very much male-dominated profession and women put up with a lot of shit on the job and off. . . . So I had these guys really pressing on me hard. . . . These guys are dogging us constantly. I see it happen every time a cute, new woman comes to work at the cab company. The women are not the same way. (They're) just like, I want to make some real money, screw this. No, that's not necessarily true. It's not that there aren't women who are wild sexually who've worked at Coop Cab. They're very aggressive about their sexuality. It's not the same kind, bordering on sexual harassment.

Helen distinguished between people being “wildly sexual” and sexually harassing other coworkers. To her, the former was fine, but sexual harassment was part of “a lot of shit on the job” that she resented. Other women made similar distinctions between appropriate sexual or romantic inquiries and unwanted, unpleasant sexual harassment.

The effect of sexual harassment was not always initially obvious to the women experiencing it. Although they acknowledged it immediately as unpleasant, sometimes they only later realized how their reaction to this harassment affected their own behavior. For example, Nancy, who was labeled heterosexual, described her experience when she initially tried to train for a dispatcher position, which would have been a promotion, one of the positions in the cab company with more responsibility and status. She recounted being driven out of the dispatch office, forfeiting her opportunity to gain the necessary training.

Nancy: If you go and sit in the [dispatch] office when it's slow, that's called “slumming.” So I kind of got in this habit. There would be other people slumming in there and people would be sitting around joking because it was pretty slow; dispatcher's not stressed out. I started to notice that these three guys in particular in the office sort of had these inside jokes going on while I was there. It took me awhile to figure out that they decided that I was hanging out there because I had a crush on the dispatcher. When I got there, [one day] one of the other guys who was in there said, “Jake's not here today, he's in New York.” Jake was the dispatcher. I don't remember what I said to them, but I remember I was pissed. I said something real nasty to him though, and he said, “Well just tell me. Don't you like Jake?” I said, “Yeah, I think Jake's a great guy. I think he's really smart and I think he's really witty. How come you don't think Frank has a thing for Jake. Frank is in the office all the time.” And he said ‘Frank who? The only Frank I know is a guy.’ I go, “Exactly.” I got really mad and I stopped hanging out in the dispatch office; I stopped slumming. What I didn't realize at the time was that this was the way that you started to work in the dispatch office. There was no training. When you were slumming in the office, if it got busy, you picked up the phone. Then the dispatcher would tell you what you were doing wrong, what other information they needed on the call, and you learned to answer the phones. Then when a shift became available, you became the phone answerer. And then a dispatcher. Essentially, although they were just “joking,” it was really harassing me out of this opportunity. [It turns out, the person] who was hired 2 weeks after I was, was dispatching within the year, because he kept on slumming in the office.

While Nancy described her experience with sexual harassment as one which drove her out of the dispatch office and prevented her from receiving the necessary training to become a dispatcher, Laura, below, discussed how her fear of harassment forced her to curtail her after-hours activities. Specifically, she described her reluctance to go out with male coworkers after work to avoid sending a message that

³Actually, women at Coop Cab comprise 16.3% of the workers at the cab company.

some would read as availability. Laura expressed her belief that these precautions and concerns would not be necessary if she were labeled “lesbian.”

Laura: I did feel intimidated, sometimes. There was one situation that I thought was really out of hand. In that, one of the dispatchers [wouldn't stop harassing her]. Well, a lot of times if you're just nice, and you're thought of as straight, you open yourself up to being harassed. Sometimes I'm very reluctant to [go out with male coworkers after work], because I don't want it to be interpreted the wrong way.

Thus, to avoid sexual harassment, Laura would seldom go out after work with her male coworkers.

Less Harassment of, But Also Less Contact With, Lesbian-Labeled Workers

In contrast to the heterosexual-labeled women discussed above, the women who were labeled as lesbian did not perceive sexual harassment as an issue at Coop Cab. Sarah's statement is characteristic of women who were labeled “lesbian.”

Sarah: I mostly feel that there's pretty much respect for women at Coop Cab. My experience for the most part has been fine. People showed me respect, were courteous. Stuff like that . . . I feel we have a good place in terms of harassment and discrimination. It depends on the person and the events . . . I think the incidents are few and far between and I think the incidents are dealt with very quickly and fairly. Men and women get along pretty ok, I mean, we're not working in a utopia.

Like the other lesbian-labeled women, Sarah did not feel that she had been the target of sexual harassment.

In addition to the consensus on the lower rate of sexual harassment toward lesbian-labeled workers, all women interviewed indicated that men had noticeably less contact of any kind with those women they labeled lesbian. Shirley, for example, believed that merely deciding how to relate to their lesbian-labeled coworkers was difficult for many men.

Shirley: I think it's a challenge for a lot of the men at work to figure out how to interact with me. I would imagine that the way that they feel weird about it is a little less exhausting to them than it was to me when I started working there and I was trying figure out how to deal with being with all these men.

Perhaps as a result of this difficulty, many men at the cab company opted to avoid contact with their lesbian-labeled coworkers.

When the men interviewed (all of whom self-identified as heterosexual) discussed their interactions with the coworkers they labeled as lesbian, they all described having very limited contact with them. Some of the men's comments merely alluded to a gender split in the socializing at the cab company, such as Bob's comment that the cab company seemed to be informally sex segregated, “In general, I guess they (women) hang around with members of their own sex, although there are some couples that eschew the balance.”

However, other men, like Tom, discussed actively avoiding these women. He believed it was somehow better if the women he labeled as lesbian could be avoided. Like all but two men in this study, Tom expressed fear of inadvertently offending others at the Coop Cab. He believed that by avoiding lesbian-labeled women altogether

he could avoid the risk of giving offense.

Tom: Well, so many women are lesbians that you really have to be careful. If you're not used to dealing with lesbians, you have to watch yourself. Sort of keep your distance. "Cause you don't want to get them all upset with you, you know? I mean, who they are is ok and everything, and so you don't want to do something that would be misunderstood. "Cause, I mean, that's a lot of women who'd be mad at you.

Tom's "solution" of simply avoiding lesbian coworkers was shared by many men at the company. This strategy of avoidance meant that one portion of the female workforce at the cab company, those women labeled lesbian, had less interaction with the majority group of the coop: the men. This could put these women workers at a definite disadvantage because less interaction with the men of the company resulted not simply in less sexual harassment but also less casual contact with the managers and dispatchers (all but one of whom were male) and the reduced possibility of male mentorship.

However, the other portion of the women workers, those women labeled heterosexual, also did not generally have positive access to the men at the company. These women were not avoided by their male coworkers in the way the lesbian-labeled workers were, but, instead, were sometimes sexually harassed. This harassment may have caused these (heterosexual-labeled) women, themselves, to deliberately avoid some or all of the men at the company, or at least would have strained interactions between them and their male coworkers, including the more powerful groups of workers at the company: the male managers.

Thus, both groups of women, whether labeled lesbian or heterosexual, might have encountered difficulties with their male coworkers as a group. Yet, only one group—the heterosexual-labeled women—experienced hostile environment sexual harassment: the dynamic of selective sexual harassment.

DISCUSSION

The focus of the paper is on men's behaviors and their labeling of female coworkers, not merely on the women's perceptions of their male coworkers' actions. This is an important distinction. Well-triangulated data strongly indicate that the dynamics at this company were a result of the men treating different groups of women differently based on labels, rather than of differently labeled women having different interpretations of men's actions.

On the basis of which label was attached to each woman—lesbian or heterosexual—she either experienced little interaction with her male coworkers, or she faced unwanted sexual harassment. The phenomena of selective sexual harassment could have important consequences for those women experiencing hostile sexual harassment, regardless of what particular labels are used to divide women coworkers—not only heterosexual-labeled women or lesbian-labeled women. Indeed, actual labels—"lesbian" and "heterosexual"—are not important in themselves for the purposes of this discussion. The labels could have been "striped" and "starred" or "red" and "blue" and be as meaningful, because, in the instant analysis, the labels are only important for their role in dividing women so that only some experience selective sex-

ual harassment. Selective sexual harassment at other worksites will certainly involve other labels, with women being divided based on different classifications, evoking different reasons why certain groups of women are deemed “fair game” by sexually harassing male coworkers.

Thus, these data illustrate how similar women in the same company with the same coworkers could experience very different levels of harassment—in fact, could have very different workplace experiences overall—depending on how they are labeled by their male coworkers. Although this phenomenon of seemingly similarly-situated women being treated differently is, in itself, worthy of discussion and further exploration, this paper focuses on its implications for sex discrimination suits. Specifically, this selective sexual harassment of some women but not others in the same workplace poses problems for the prosecution of hostile environment sexual harassment cases in that the nonharassed coworkers could potentially offer counter examples that could bolster an employer’s defense. These nonharassed workers could be called on by their employers to demonstrate that they, as “reasonable women,” did not experience a hostile environment, thus questioning whether the plaintiffs qualify as “reasonable women” with worthy grievances.

This dynamic of selective sexual harassment (in the case of Coop Cab, male harassment of only heterosexual-labeled women coworkers) provides an important addition to the extant theory on hostile environment sexual harassment. This differential treatment of women workers—regardless of which particular labels are used to create this split—is rarely discussed in the cases and literature on sexual harassment. However, it poses an important issue regarding sexual harassment discrimination and, especially, the use of the reasonable woman standard.

Hostile Environment Sexual Harassment—Who Is “Reasonable”?

One defense of a defendant employer facing a hostile environment sexual harassment charge would be to argue that the plaintiff is hypersensitive and is reacting unreasonably; if the plaintiff’s reaction is truly unwarranted, then the employer should not be held responsible to placate such an oversensitive person (Welsh, 1999). The employer could demonstrate the plaintiff’s unreasonableness by showing that a typical “reasonable person” or “reasonable woman” would not have the same reaction as the “extreme” stance of the plaintiff (Cahn, 1992).

However, a more powerful defense than using a hypothetical reasonable woman would be to provide testimony from the plaintiff’s female coworkers who were exposed to the same environment with the same male coworkers at the same time who state that they did not experience a hostile environment (Burns, 1995). Such testimony could be persuasive evidence that the plaintiff misunderstood or was overly sensitive to the “harmless” actions of her male coworkers. Sometimes this is a sufficient defense, but other times it is not successful (e.g., *Harris v. Forklift Sys.*, 1993 in which the defense lost even though other employees testified that the defendant was offensive but did not create a hostile work environment).

But what if only a specific group of women—only those labeled in certain ways by their male coworkers—are the subject of sexual harassment? This would mean that other women at the worksite did not experience such harassment. The data of this study show that women at Coop Cab who were labeled as lesbian were less likely

to be subjected to a hostile environment sexual harassment whereas those labeled as heterosexual were more likely to experience harassment.

The question, which group constitutes “reasonable women,” thus becomes a crucial part of the suit (Goodman-Delahunty, 1999; Schultz, 1998; Weiner et al., 2002). The implications of selective sexual harassment are that women who raise hostile environment sexual harassment claims might have to confront testimony from other similar-seeming women coworkers stating that they did not experience any sexual harassment (Schultz, 1998; Welsh et al., 2002). The courts’ reluctance in acknowledging the contrary experiences of different groups of similar-seeming women has important legal significance for cases that try to demonstrate employer discrimination based on the sexual harassment of a hostile environment (Crenshaw, 1988; Goodman-Delahunty, 1999; Welsh et al., 2002). In circumstances like those at Coop Cab, a woman with one label (such as those labeled heterosexual) may be subjected to a severely hostile environment, and yet may have great difficulty showing that her job environment was sufficiently hostile because the experience of women with *either* her label *or* a “nonharassed” label could be equally understood to represent the workplace’s “reasonable women.”

When the law denies the presence of differently treated groups of women employees, the court assumes that the woman has been treated in a way that she has not and subsequently bases its decisions on incorrect understandings of the plaintiff’s experiences (Goodman-Delahunty, 1999; Welsh et al., 2002). Moreover, if the plaintiff belongs to a *smaller* subgroup of women, which experiences very different treatment than the *larger* group of women, she will have even greater difficulty winning her suit (Crenshaw, 1988).

The Difficulty of Disparate Experiences of the Same Environment

Other scholars have documented the difficulty of fighting discrimination that affects only those plaintiffs who comprise a subgroup of the category under which the law classifies them. For example, Crenshaw has explained that women of color sometime faced the “intersectionality” of both racism and sexism which not only obfuscates the circumstances of victims of such discrimination, but it also creates great legal hurdles for these women (Crenshaw, 1988). Because race and gender are perceived by the law as being exclusive categories, these women must bring a suit based either on their non-White status or on their status as women. However, because their experiences are unique to women of color, others in both of these groups—White women and men of color—will not report the same experiences with discrimination. By assuming exclusive categories, race discrimination is defined in terms of men of color and sex discrimination in terms of White women, leaving women of color forced to either deny employer racism or sexism to bring their discrimination suits. Crenshaw argues that “(a)ccording to the dominant view, a discriminator treats all people within a race or sex category similarly. Any significant experiential or statistical variation within this group suggests either that the group is not being discriminated against or that conflicting interests exist which defeat any attempts to bring a common claim” (1988). Thus, if women of color exclusively have experienced discrimination because of their “intersectional status,” an employer can rebut their claim by demonstrating that other (White) women did not experience discrimination or that other (male)

people of color did not experience discrimination. The fatal problem is that group intersectional categories are not traditionally recognized under discrimination law (Crenshaw, 1988).

However, the categories that Crenshaw and others have examined under this problem of intersectionality are each legally recognized categories. The law prohibits discrimination based on both race and sex. The problem is simply when they intersect, such as discrimination against only certain women who belong to a specific race or races. Crenshaw asks the law simply to view both protected categories at once.

In contrast, the situation illustrated by Coop Cab in this paper is more complex. The labels by which the men distinguished their female coworkers are not necessarily legally protected in many states. Although some places do include sexual orientation among their protected statuses, the labels used in other companies to selectively harass one group of women might not be as clear as “lesbian” versus “heterosexual,” but could be divisional labels that hold no protection anywhere, such as “county” versus “city,” “tall” versus “short,” or “blond” versus “brunette.” Thus, for sufficient and appropriate consideration of the claims a subgroup of harassed women, the law needs to not only acknowledge that different groups of women could be treated differently within seemingly similar circumstances, but also needs to understand that the divisions and labels used by men workers might not be easily discerned or historically protected. In observing the plaintiffs in the race/sex intersectionality cases that Crenshaw discusses, many outsiders would be able to identify these women and recognize that they were singled out because of their statuses of being female and African American. However, an outside observer of Coop Cab might not be able to discern the divisions the male workers used and understand why some women experienced sexual harassment whereas their female coworkers did not.

A Reasonable Victim Standard

One way to address this problem would be by adopting a “reasonable victim” standard. This is somewhat similar to the “reasonable-person-in-the-plaintiff’s-position standard applied by some courts; however, this reasonable victim standard goes beyond consideration of the plaintiff’s “fundamental characteristics” and general status, to also consider all relevant dynamics of the victim’s workplace and differential treatment. (See *Brown v. Hot, Sexy, & Safety Prods. Inc.*, 1995; *West v. Phila. Eliec. Co.*, 1995).

This “reasonable victim” standard circumvents many of the concerns over the reasonable woman standard, but, most importantly, focuses the attention on the circumstances of the specific plaintiff in her particular situation. In operationalizing a true “reasonable victim” standard, the court would address the entirety of the plaintiff’s workplace situation. This level of analysis would demand consideration of any group’s selective sexual harassment.

Some scholars have argued in favor of a reasonable victim standard as part of a more conservative agenda, as an attempt to shift the focus of sexual harassment law toward a gender-neutral standard and away from the very gender inequalities which permit sexual harassment. This conservatism is not the motivation behind my suggestion, nor must such a shift necessarily accompany adopting a reasonable victim

standard. In fact, focusing on the victim's perspective emphasizes that sexual harassment is primarily about exploitation and power (Blumenthal, 1998). By focusing on the plaintiff's status as "victim" rather than as "woman," other important factors of the victim's situation, in addition to gender, will be considered, including the divisional dynamics of the victim's workplace that can lead to selective sexual harassment.

Just as the reasonable woman standard acknowledges differences in men's and women's experiences and perceptions that the reasonable person standard ignores, a reasonable victim standard can acknowledge experiential differences among different groups of women. In the same way that the reasonable person standard was not "purely objective" but instead privileged a male perspective (Hoon, 2001), the reasonable woman standard overlooks experiences of differently treated women. By using gender-neutral language and supporting community norms, the reasonable person standard was criticized as "mask[ing] women's lack of power over what norm is adopted and what aspects of life fit into that norm" (Hoon, 2001, p. 228). Similarly, the reasonable woman standard purports an underlying assumption that all women will be treated similarly, masking the divisions behind selective sexual harassment of only some female workers in a given workplace. In this way, a reasonable victim standard can recognize the reaction of a victim of selective sexual harassment better than a more general reasonable woman standard—just as the reasonable woman standard recognizes the experiences of female victims of sexual harassment, even when their reactions would not be shared by similarly situated men (Crenshaw, 1988; Goodman-Delahunty, 1999; Welsh et al., 2002).

Such changes in the legal standard must be introduced and argued by lawyers and embraced by the judiciary. Attorneys need to change the way they plead their cases to incorporate the theories of selective sexual harassment and the reasonable victim standard presented in this paper. Additionally, lawyers must introduce additional kinds of evidence to enable the court or the jury to make the highly nuanced analysis that would be necessary for a rigorous inquiry into the possibility of selective sexual harassment. Researchers have documented the difficulties experienced by jurors in evaluating evidence (e.g., Kovera, 2002). This underlines the importance of attorneys' presentation of thorough, clearly explained evidence to enable jurors to understand and consider the possibility of selective sexual harassment. Jurors could have difficulty discerning the divisions and labels used by male workers used and understanding why some women experienced sexual harassment whereas their female coworkers did not. Although it falls to attorneys to raise these arguments and offer the necessary evidence regarding selective sexual harassment and reasonable victims, the courts must be open to embracing these arguments when they have been well presented. Indeed, a new legal standard does not exist outside of what judges say the standard is.

CONCLUSION

The precise way that the men at this company divided, labeled, and selectively harassed their women coworkers might not be the same at other companies. The treatment of women workers will vary among worksites based on those in power, with possible variation in how the women are divided, what sort of labels are used,

and which group or groups are selectively harassed. It is also possible that worksites exist where all women have similar workplace experiences. However, the phenomena of differential treatment and selective sexual harassment, illustrated here, raises serious concerns regarding the use of the reasonable woman standard and hostile environment sexual harassment suits.

Drawing on empirical data, this paper examined the issue of selective sexual harassment. At Coop Cab, men's labeling of their female coworkers as lesbian and heterosexual and subsequently treating the groups of women differently based on these labels, harassing only members of one group, illustrate the problems of subgroups of women who encounter different treatment by male coworkers. In the case of Coop Cab, both groups of these differently labeled and, hence, differently treated workers would have been viewed by a court simply as "women." The nonharassed group alone could have been counted as "reasonable women" because differently labeled and, hence, differently treated categories of women are not acknowledged under discrimination law.

What does this mean for the women of one category—be it within the lesbian/heterosexual binary seen at Coop Cab or some other set of labels elsewhere—who feel that they are targets of hostile environment sexual harassment? An employer could respond to the plaintiff's evidence of harassment of (certain) women workers by showing that other women worked in the same environment with the same coworkers and managers as the plaintiff but did not experience sexual harassment. Such a showing could present the plaintiff as "oversensitive" rather than truly sexually harassed. If subgroups of workers truly experience disparate treatment, then the law must recognize this employment dynamic and discuss the possibility of selective sexual harassment when considering such claims.

Many praise the courts' movement from a male-biased though seemingly-objective "reasonable person" standard to a "reasonable woman" standard that acknowledges the gendered nature of sexual harassment. However, if a defendant-company employs groups of women who are subjected to different treatment yet work in the same environment, a court's investigation into the work environment may not probe deep enough to help the plaintiff. In such cases, the courts' analyses must be sufficiently thorough to acknowledge the different treatment of women employees based on labels applied by male coworkers to accept the plaintiff's claim of sexual harassment as legitimate. A version of the "reasonable victim" standard could address this deficiency by forcing the courts to thoroughly explore the workplace dynamics of the plaintiff's situation.

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