However, this is only a generalization and in specific situations, the type of language used may be more offensive than the type of physical touching. Second, a court should consider the frequency of the offensive encounters. It is less likely that a hostile work environment exists when, for instance, the offensive encounters occur once every year than if the encounters occur once every week. Third, the court would consider the total number of days over which all the offensive meetings occur. Lastly, the court should consider the context in which the sexually harassing conduct occurred. The court emphasizes that none of these factors should be given more weight than others. In addition, the nonexistence of one of these factors does not, in and of itself, prevent a Title VII claim. The trier of fact must consider the totality of the circumstances.

Because of its importance in this case, the court chooses to elaborate on the reasons why a short duration of sexual harassment does not prohibit a Title VII claim. The courts are looking for a pattern of sexual harassment inflicted upon an employee because of her gender because this type of activity is a pattern of behavior that inflicts disparate treatment upon a member of one gender with respect to terms, conditions, or privileges of employment. Sexual harassment need not exist over a long period for it to be considered a pattern. If the sexual harassment is frequent and/or intensely offensive, a pattern can be established over a short period of time.

The court finds that the acts and communications perpetrated against Ross at Double Diamond are sufficiently severe or pervasive to alter the conditions of Ross's employment and create an abusive work environment.

This is not so with Stroudenmire. Title VII is not a shield which protects people from all sexual discrimination. The type of conduct listed above does not rise to the level of harassment which is actionable. It is not sufficiently severe and pervasive to alter the conditions of employment or create an abusive work environment. JUDGMENT for ROSS.

Case Questions

1. Do you agree with the court's decision about Stroudenmire? Ross? Explain.
2. As the manager, what would you have done about Womack?
3. Do you agree that there was sufficient severity and pervasiveness in the two-day period here? Specifically what makes you reach your conclusion?

Ellison v. Brady *924 F.2d 872 (9th Cir. 1991)*

An employee brought a sexual harassment suit because, among other things, her co-worker, whom she barely knew, kept sending her personal letters. The court found that while some may think it only a small matter, viewed from the employee's perspective as a female in a society in which females are often the victims of violence, the action was offensive and a violation of Title VII.

Beezer, J.

The case presents the important issue of 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.

Ellison worked as a revenue agent for the IRS in San Mateo, California. During her initial training in 1984 she met Sterling Gray, another trainee also assigned to that office. The two never became friends and did not work closely together. Gray's desk was twenty feet from Ellison's, two rows behind and one row over.

In June of 1986 when no one else was in the office, Gray asked Ellison to go to lunch. She accepted. They went past Gray's house to pick up his son's forgotten lunch and Gray gave Ellison a tour of his house. Ellison alleges that after that June lunch, Gray began to pester her with unnecessary questions and hang around her desk.

On October 9, when Gray asked Ellison out for a drink after work, she declined, but suggested lunch the following week. Ellison did not want to have lunch alone with him and she tried to stay away from the office during lunch time. The next week Gray asked her out to lunch and she did not go.

On October 22, 1986 Gray handed Ellison a note written 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 termoil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day." Ellison was shocked at the note, became frightened and left the room. Gray followed Ellison into the hallway and demanded that she talk to him. Ellison left the building. While Gray reported this to her supervisor and asked to try to handle it herself, she asked a male co-worker to talk to Gray and tell him she was not interested in him and to leave her alone. The next day, Gray called in sick. Ellison did not work the following day, Friday, and on Monday started a four-week training session in Missouri.

While Ellison was at the training session, Gray mailed her a card and a three-page, typed, single spaced letter. Ellison described the letter as "twenty times, a hundred times weirder" than the prior note. In part, Gray wrote:

> 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.

Ellison stated that she thought Gray was "crazy. I thought he was nuts. I didn't know what he would do next. I was frightened." Ellison immediately called her supervisor and reported this and told her she was frightened and wanted one of them transferred. Gray was told many times over the next few weeks not to contact Ellison in any way. On November 24 Gray transferred to the San Francisco office. Ellison returned from Missouri in late November. After three weeks in San Francisco, Gray filed a grievance to return to San Mateo and as part of the settlement in Gray's favor, he agreed to be transferred back provided he spend four more months (a total of six months) in San Francisco and promise not to bother Ellison. When Ellison learned of Gray's request to return in a letter from her supervisor indicating Gray would return after a six-month separation, she said she was "frantic" and filed a formal sexual harassment complaint with IRS. The letter to Ellison also said that they could revisit the issue if there was further need.

Gray sought joint counseling. He wrote another letter to Ellison seeking to maintain the idea that he and Ellison had a relationship.

We do not agree with the standard set forth in *Rabidue.* We believe that Gray's conduct was sufficiently severe and pervasive to alter the conditions of Ellison's employment and create an abusive working environment. We believe that, in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we 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, 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 realize that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have stronger incentives 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 hypersensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. 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.

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

We note that the reasonable woman 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 gender as plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment. That is because Title VII is not a fault-based tort scheme. Title VII is aimed at the consequences or effects of an employment practice and not the motivation of co-workers or employers.

The facts of this case illustrate the importance of considering the victim's perspective. Analyzing the facts from the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words. There is no evidence that Gray harbored ill-will toward Ellison. He even offered in his "love letter" to leave her alone if she wished [though he said he would not be able to forget her]. Examined in this light, it is not difficult to see why the district court characterized Gray's conduct as isolated and trivial.

Ellison, however, did not consider the acts to be trivial. Gray's first note shocked and frightened her. After receiving the three-page letter, she became really upset and frightened again. She immediately requested that she or Gray be transferred. Her supervisor's prompt response suggests that she too did not consider the conduct trivial. When Ellison learned that Gray arranged to return to San Mateo, she immediately asked to transfer and she immediately filed an official complaint.

We cannot say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive. We believe that a reasonable woman could have had a similar reaction. After receiving the first bizarre note from Gray, a person she barely knew, Ellison asked a co-worker to tell Gray to leave her alone. Despite her request, Gray sent her a long, passionate, disturbing letter. He told her he had been "watching" and "experiencing" her; he made repeated references to sex; and he said he would write again. Ellison had no way of knowing what Gray would do next. A reasonable woman could consider Gray's conduct, as alleged by Ellison, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment.

Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not "sustain ingrained notions of reasonable behavior fashioned by the offenders." Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women." We hope that over time both men and women will learn what conduct offends reasonable members of the other gender. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the genders will be bridged. REVERSED and REMANDED.

Case Questions

1. Do you agree with the court's use of the "reasonable victim" standard? Explain.
2. Do you think the standard creates problems for management? If so, what are they? If not, why not?
3. Do you think Ellison was being "overly sensitive"? What would you have done if you had been the supervisor to whom she reported the incidents?