Must We Maintain a Friendly Workplace?

Sexual Harassment on the Job

Questions to Keep in Mind

1. Concerning the facts of Rena Weeks's court case: Which facts are not disputed and which are? What role does an accurate account play in making an ethical judgment about this case?

2. How costly is sexual harassment for American business?

3. In what sense is this case of sexual harassment a matter of individual responsibility? In what sense is it a matter of corporate responsibility?

4. In Baker & McKenzie's experience in investigating complaints of sexual harassment, what is the primary reason so few complaints result in convictions?

5. What are the chief points pertaining to sexual harassment of Title VII of the Civil Rights Act of 1964 and the 1990 Equal Employment Opportunity Commission (EEOC) definition of harassment?

6. Identify, compare, and contrast the two broad types of sexual harassment, as defined by the EEOC guidelines.

7. What is the "reasonable person standard" and how is it supposed to help deal with differences of perception about harassing behavior? How is a "reasonable woman standard" different?
By any standards, the complaints coming from men working at Long Prairie Packing Company (LPP) were very disturbing. One worker said in court documents that he was attacked by groups of men who pinned him down, sometimes in a bin of raw meat or a trough of blood. They then simulated sex acts on him. He claimed that this mistreatment occurred repeatedly, sometimes daily. He also claimed that a supervisor was involved, and another threatened to terminate his employment when he complained. A federal lawsuit followed, in which LPP employees claimed that their workplace was characterized by a pervasive atmosphere of sexual intimidation. Some men complained that their faces were repeatedly shoved into other men’s crotches. Allegedly, steel rods were thrust between men’s legs while they were working. In an article about the suit from the January 2000 issue of Minnesota Monthly, a former employee commented about the suit, saying, “You don’t feel like a person, but more like the meat on the conveyor belts and in the bims.”

In August 1999 the U.S. Equal Employment Opportunity Commission (EEOC) settled the first male-on-male sexual harassment class action. It announced that it had reached a voluntary $1.9 million settlement with LLP, which employs about 235 people. This settlement resolved all claims in an EEOC lawsuit filed on behalf of a class of current and former male LPP employees who claimed that they had experienced a pattern of sexual harassment at the company. These men also claimed that when they tried to oppose the same-sex harassment, other men in the company retaliated against them.

The agreement between the EEOC and LLP followed a precedent-setting decision from the U.S. Supreme Court in March 1998, in Oakes v. Sundowner Offshore Services. In that case, the Supreme Court held that same-sex harassment is actionable under Title VII of the Civil Rights Act of 1964, which bans sex discrimination in employment. The settlement with LLP was the result of the EEOC’s first class action that challenged a pattern of harassment by men against men.

The settlement did not represent any admission of wrongdoing by LPP, nor did it involve any judicial findings of a violation of law. However, the settlement was significant as a clear and tangible step in the evolution of what counts as sexual harassment at work. In the preceding two decades, a number of court decisions had developed and refined what constitutes harassment at work. By the year 2000, it was generally accepted without argument by most workers that sexual harassment does not belong at work. There was also widespread consensus about what constitutes sexual harassment, especially in cases of so-called quid pro quo harassment that involve unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.

But as the 1990s drew to a close, there were clear signs that harassment was not going away. According to the EEOC, it saw during that decade the largest increase in harassment charges in its entire history. Thirty-eight percent of these harassment charges were race discrimination. Sex harassment was the next highest form of discrimination—constituting 30 percent of all charges filed in the 1990s. In fact, the charges of sexual harassment in that decade were three times the charges brought forward in the 1980s.
When computer interaction was once considered in terms of limited dimensions (e.g., gender, age), sex was one of the key dimensions addressed through the EEOC's "computer sex discrimination" case. The recent addition of "sex" discrimination as a protected category in the EEOC's rulemaking process has led to a more complex workplace environment. However, the recent cases involving sex discrimination in the workplace highlight the need for a more comprehensive understanding of sexual harassment's legal implications. The EEOC's recent cases have underscored the importance of recognizing the multifaceted nature of sexual harassment and the need for ongoing education and training for all employees. The role of the employer in preventing and addressing sexual harassment is critical. Employers must take proactive steps to create a safe and respectful workplace culture. This includes implementing clear policies, providing training for employees, and ensuring access to confidential reporting mechanisms. By addressing sexual harassment, employers can help create a more inclusive and respectful work environment for all employees.
Supreme court. Today, we can read the case of Rena Weeks to remind us how harassment principles were developed and to sensitize us to new and emerging forms of harassment that inevitably crop up in the workplace.

I. A COSTLY COMPLAINT

Rena Weeks, a legal secretary, was suing her boss, attorney Martin R. Greenstein, for alleged sexual harassment. She was also suing the law firm where they had worked, Baker & McKenzie, for not responding adequately to her complaints about Greenstein. Only a few summers before, in 1991, the Anita Hill-Clarence Thomas hearings had forced Americans to confront sexual harassment as a burning public issue. The nation was still coming to terms with the trauma of that televised sexual battlefield. And now, in the late summer of 1994, it seemed to be happening all over again.

Rena Weeks’s case, which was being heard by Judge John Munter at the San Francisco Superior Court, was covered closely in newspapers across the country. On top of that, cable television’s Court TV aired much of the courtroom proceedings to a spellbound national audience. Soon everyone was talking about the “David and Goliath” story of little Rena Weeks standing up to the largest law firm in the world. Businesses everywhere held their breath, waiting for the court decision that could have a wide-ranging impact on their accountability for sexual harassment in the workplace.

The sexual harassment stakes for American business are not trivial. Sexual harassment was first recognized as a type of illegal sex discrimination in 1976. Since then, 90 percent of Fortune 500 companies have dealt with sexual harassment complaints. More than a third of them have been sued at least once for sexual harassment; 25 percent have been sued multiple times. According to Bettina Pleven, an attorney who specializes in defending companies against sexual harassment lawsuits, employers spend an average of $200,000 for each harassment complaint that they investigate and find to be valid—regardless of whether the complaint ever gets all the way to court.

The essential facts of the Weeks harassment case are fairly straightforward. Rena Weeks joined Baker & McKenzie as Martin Greenstein’s secretary in July 1991. She was transferred a month later. She left Baker & McKenzie in September 1991, less than three months after starting at the firm. The reason given for Weeks’s abrupt transfer and departure, and the basis for her lawsuit, was that Greenstein allegedly had sexually harassed her. Weeks claimed that Greenstein had groped her hips and breasts on different occasions when she worked for him at Baker & McKenzie’s California offices in Palo Alto. Weeks sued for compensation for unspecified damages due to emotional distress and for punitive damages for the twenty-day period she had worked for Greenstein.

Weeks also claimed that her law firm had done nothing to stop Greenstein from harassing her. Part of her case claimed that there was a broader pattern of sanctioned abuse at Baker & McKenzie. According to Philip Kay (Weeks’s lead
attorney in the trial), Weeks was not the only one at Baker & McKenzie to complain to the firm about Greenstein. Thus Baker & McKenzie faced a possible multimillion-dollar judgment for allegedly covering up Greenstein's offensive behavior. It is likely that Baker & McKenzie had expected to settle with Weeks out of court, a common way corporations deal with sexual harassment suits. Instead, Weeks pressed her case all the way to trial, which started in late July 1994.

Weeks's case is significant because it involved a prominent lawyer at Baker & McKenzie, the world's biggest law firm with 1,700 lawyers and offices around the world. In 1993 Baker & McKenzie had pulled in $512 million in revenue. It certainly had deep pockets. The case is also significant precisely because it involved a law firm, which many assumed should know better when it comes to dealing with sexual harassment issues. However, in the opinion of many legal experts, law firms as a whole have been slow to establish their own sexual harassment policies, even while they were advising clients about this evolving area of law! Baker & McKenzie did have a recently implemented policy on sexual harassment; it was not clear, however, how closely the members of this firm practiced what it preached. Of the Weeks–Baker & McKenzie dispute, one labor lawyer said, "This is a wake-up call about what can happen if you don't have your act together."12

In this chapter, we will summarize three important aspects of this sexual harassment case: Weeks's charges, Greenstein's defense, and Baker & McKenzie's defense. To understand the significance of this case as a sexual harassment wake-up call, we will also review the legislative history pertaining to sexual harassment, chiefly Title VII and the Equal Employment Opportunity Guidelines on Sexual Harassment. Important concepts that bear on the Weeks case will be considered—including the notions of "quid pro quo" and "hostile environment." To understand why sexual harassment continues to be such a troubling issue, we will note how the Weeks case and others like it entail differences of perception among people about just what constitutes sexual harassment. Finally, we will underscore that sexual harassment is not really so much about sex as it is about power. With these concepts in mind, we will then be in a position to understand the complex dynamics contributing to the court's judgment against Greenstein and Baker & McKenzie.

II. CHARGES AND DEFENSES

First we will present in more detail the charges that Rena Weeks brought against Martin Greenstein and Baker & McKenzie. Weeks was forty years old when she was hired by Baker & McKenzie in July 1991 to work for Greenstein. In less than a month she was transferred out of his office. Why?13

According to Weeks, the trouble all started when she and Greenstein had attended a departmental lunch at a Sizzler restaurant near their Palo Alto offices. Upon leaving the lunch, Greenstein allegedly grabbed her breast while
dropping M&M candies in the front pocket of her blouse. Weeks further testified that Greenstein then proceeded to pin her arms behind her back, thrusting her chest forward, saying “Let’s see which one [of your breasts] is bigger.” When testifying in court about the M&M incident, a tearful Weeks said, “I didn’t believe what happened. I was in shock. This is a guy that is a supervisor in a big department in this firm, and this shouldn’t be going on.”

Weeks also testified that the M&M incident was not an isolated instance of harassment. She claimed that Greenstein had made her uncomfortable at work, once lunging at her breasts in a hallway.

It was also part of Weeks’s charge against Greenstein and the firm that she was not the only woman harassed at work by Greenstein. According to her lawyers, Greenstein had a history of harassing women and his behavior had become more brazen over time. They claimed that he had harassed at least ten women in two Baker & McKenzie offices over six and a half years. For example, according to Weeks’s attorney Philip Kay, Greenstein had made sexual passes at Baker & McKenzie attorney Donna Blow while at the firm’s Chicago headquarters. Blow had rebuffed Greenstein because she was a lesbian, telling Greenstein, “Marty, if you were a married woman, I might consider it.”

Weeks’s attorneys argued that Greenstein was able to get away with his harassing behavior only because his firm tolerated it and sometimes covered it up. Even before Weeks had filed her complaint against Greenstein, others had protested his actions. There was a Baker & McKenzie associate who said Greenstein had tickled her feet beneath a library table and there was also a receptionist from a “temp” agency who had refused to go back to work at Baker & McKenzie because Greenstein had invited her to share a hot tub with him.

At the trial, Vicki Gardner (a “temp” hired by Baker & McKenzie in 1989 to work for Greenstein), described other examples of harassment by Greenstein. Gardner testified that Greenstein had told her that he liked her high-collared blouses because they reminded him of his first wife. But, Gardner said, Greenstein went on to add that he liked her low-cut blouses even more. Describing her reaction to this comment, Gardner testified, “I felt stripped and shocked.”

At the trial, Greenstein denied these charges of sexual harassment. Forty-nine years old, he had the reputation of being “a swaggering bear of a man with a gift for attracting lucrative clients and a standard of perfection that admitted few mistakes.” He admitted that he gave Weeks some M&Ms after the departmental lunch at Sizzlers, but he denied the rest of her version of the story. Testifying about that incident, Greenstein matter-of-factly explained that he had dropped the candies into Weeks’s breast pocket at her invitation. He said, “She held out her pocket, and I dropped the M&Ms in it.”

Greenstein’s attorneys said that Weeks had not written about the alleged M&M incident in her diary. Furthermore, they claimed, Weeks had been “braless” on the day of the departmental lunch. As if that weren’t enough, according to Greenstein’s attorneys, Weeks had willingly given Greenstein a neck massage at the office, following his alleged lunge for her breasts.
Why would Weeks fabricate a harassment story against Greenstein? In his defense, Greenstein testified that Weeks was doing it to save her job. In his judgment, she was a disgruntled employee who didn’t have the basic secretarial skills necessary to perform in a high-pressure job. “I gave her chance after chance to learn,” he said. “She was just a slow learner.” Also, according to Greenstein, “She had numerous problems. Each time, she explained to me she was new on the job and really wanted the job.” Greenstein argued that Weeks was overwhelmed by her new position at Baker & McKenzie, she feared for her job, and so she used her position with him to fabricate a sexual harassment case in order to profit financially.

Baker & McKenzie had a slightly different take on the issue at Weeks’s trial. The law firm acknowledged that Greenstein had displayed “clearly unfortunate behavior” with women at work. The firm also maintained that it had investigated prior harassment complaints against Greenstein. But in every instance, it claimed, the alleged victims were not willing to come forward publicly with their complaints and so it had not been possible to produce strong evidence against Greenstein.

According to John Bartko, lead counsel for Baker & McKenzie, in his trial brief, “Baker does not deny that Greenstein has had a history of boorish and childish behavior.” But Baker & McKenzie’s Chicago home office had warned its West Coast representatives to “keep an eye” on Greenstein when he moved to Palo Alto office in 1989. Also, the firm had indeed put a stop to a “foot tickling” consensual relationship Greenstein had with the firm’s Chicago office manager.

Under the terms of the firm’s sexual harassment policy, Baker & McKenzie transferred Weeks to another department after she made her complaint against Greenstein. They had then investigated her allegations. As a result, they had required Greenstein to seek psychological counseling. And, Baker & McKenzie eventually did fire Greenstein in 1993 (although the defense pointed out that this was fully six years after the firm had first received a harassment complaint against Greenstein).

Baker & McKenzie’s defense was, therefore, that if Weeks did have a legitimate complaint against Greenstein, she did not have a case against the firm, which had done all it should have done to investigate and deal with her harassment complaint.

**III. SEXUAL HARASSMENT:**
**THE LEGISLATIVE HISTORY**

Current laws concerning sexual harassment have their basis in Title VII of the Civil Rights Act of 1964. Congress’s primary purpose in proposing Title VII was to protect disadvantaged minorities from employment discrimination. Matters of race, religion, color, and national origin were the primary considerations in the debate at that time; gender was included as a protected class only
at the last minute, by opponents who sought to use the issue of sex to kill the proposed legislation.\textsuperscript{23} The bill passed, despite the opponents’ efforts, unexpectedly providing the nation with a law protecting a majority group: women.

While Title VII protected against \textit{discrimination} on the basis of sex, it was not until 1986, when the Supreme Court ruled in \textit{Meritor Savings Bank v. Vinson}, that sexual harassment was clearly established to be a violation of Title VII. Prior to that time, sexual harassment was not a specific violation of federal law. But in this case the Supreme Court ruled that the creation of a “hostile environment” through sexual harassment violates Title VII, even in the absence of economic harm to the employee or a demand for sexual favors in exchange for benefits, such as promotions or raises. Victims of sexual harassment were entitled to compensation including back pay, damages for emotional stress, and attorney’s fees.\textsuperscript{26}

In 1990 the EEOC defined sexual harassment in the following terms:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) submission to or rejection of this conduct explicitly or implicitly affects an individual's employment,

(2) unreasonably interferes with an individual's work performance, or

(3) creates an intimidating, hostile, or offensive work environment.

Moreover, the EEOC cited the following as circumstances that could constitute sexual harassment:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a coworker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

While the EEOC’s guidelines went a long way to clarify what behaviors in principle count as sexual harassment, they by no means ended debate about actual harassment in the workplace. Confusion abounds over what is “safe” conduct among men and women at work. As one commentator put it, “It will be a sad day, if it ever comes, when people [at work] are too nervous to ask a pal out for a drink.”\textsuperscript{27}

To clarify the applicability of the EEOC guidelines on sexual harassment for the Rena Weeks case, it is important to explain two key concepts upon which the guidelines rest: \textit{quid pro quo} and \textit{hostile environment}.\textsuperscript{28}
IV. QUID PRO QUO AND HOSTILE WORK ENVIRONMENT

The EEOC guidelines on sexual harassment presuppose two broad types of sexual harassment: “quid pro quo” harassment and “hostile work environment” harassment. First we will consider what constitutes quid pro quo harassment and whether it applies to Rena Weeks’s complaint. Then we will consider what is meant by “hostile work environment” and whether this type of harassment applies to Rena Weeks.

In a quid pro quo situation, something is given or received in exchange for something else. For example, a boss might communicate to a subordinate (explicitly or implicitly) that a promotion or raise will be forthcoming in exchange for sexual favors. According to business law professor Terry Morehead Dworkin, quid pro quo harassment must meet the following conditions:29

1. Harassment must be committed by a supervisor or other employee who has power or control over a job benefit.
2. The supervisor or other employee must expressly or implicitly threaten to exercise his power to deny the benefit if the desired behavior does not ensue.
3. Because the employer has empowered the supervisor with the control of the job benefit, traditional agency theory holds the employer strictly liable when the power is abused.
4. In addition, because an abuse of power in this context is seen as especially egregious, the behavior need occur only once to hold the employer liable.

According to Dworkin:

The touchstone of proving a sexual harassment case is that the request from the supervisor was unwelcome. Acceding to the request, however, does not show that it was welcome. Because the employee lacks realistic power to refuse the request because of a fear of losing the job, a promotion, a raise, and so forth, additional evidence of the request’s being unwelcome must be presented. Proving that the advance is unwelcome when “yes” is not enough can be quite difficult.

The right to sue in spite of saying “yes” has caused much confusion and consternation from those who do not understand the theoretical basis of sexual harassment. Anita Hill may not have quit her job, but it did not mean that Thomas’s alleged behavior was welcome.30

Dworkin also claims that, in quid pro quo harassment, the threat or denial of a job benefit need not be direct or explicit. She suggests that a supervisor’s suggestion to a female subordinate that they go out to dinner to discuss her upcoming promotion could be seen as quid pro quo sexual harassment.

If we apply these considerations to Rena Weeks’s case, we may discern some aspects of her situation that fall under quid pro quo. For example,
Greenstein and Weeks both agree that he dropped M&Ms into the breast pocket of her blouse. Greenstein claimed that she let him do this, without protest. But Weeks testified that she was made extremely uncomfortable by his actions. From her perspective, the behavior was unwelcome.

But was Greenstein’s behavior part of an overture on his part to obtain sexual favors from Weeks, in exchange for some kind of benefit? This feature of quid pro quo does not seem to apply as neatly to Weeks; there was no indication in the trial that Greenstein was threatening Weeks, or offering her some kind of benefit, in order to obtain some kind of sexual response. A classic quid pro quo situation would have had Greenstein saying something like, “If you want to keep your job here, then you are going to have to do the following things.” In any event, the reported interaction between Greenstein and Weeks does not emphasize the feature of his trying to strike some sort of bargain with her.

Next to consider is the “hostile work environment” type of sexual harassment. Unlike a quid pro quo situation, here there is no specific exchange between two people. Rather, an employee perceives that his or her workplace environment is threatening or hostile overall, due to uninvited sexually oriented materials or behaviors in the workplace. An example might be sexually suggestive photographs on view in a person’s office, or the widespread telling of sexual jokes at work.

Justice Sandra Day O’Connor’s November 1993 opinion in Harris v. Forklift Systems reaffirmed what constitutes a sexually hostile workplace environment. The details of that case were straightforward: Teresa Harris, a manager with a Tennessee truck leasing company, alleged that the company president, Charles Hardy, used vulgar language in her presence, that he proposed to discuss her salary at a local motel, and that he suggested in front of others that she had sex with a customer in order to bring in more business. Harris quit and sued her company, but lower courts found Hardy’s behavior merely offensive but not sufficiently injurious. By the time the case reached the Supreme Court, the facts were no longer in dispute; the only question concerned their legal significance. What would be the standard of the Supreme Court for determining whether Hardy’s behavior constituted sexual harassment?

The relevant case was the 1986 Meritor Savings Bank v. Vinson, which affirmed the EEOC guidelines that established unwelcome conduct of a sexual nature as an illegal barrier to equal employment opportunity. Reaffirming the definition of sexual harassment set out in that case, Justice O’Connor articulated a two-fold test to determine if a sexually hostile environment exists at work. First, would a reasonable person find the conduct severe enough to create an environment that is objectively hostile or abusive? Second, does the victim perceive the environment to be hostile or abusive? This two-fold test goes against an earlier standard requiring plaintiffs to show that they suffered severe psychological injury as a result of an overly hostile work environment. In-
stead, the Supreme Court now holds that other factors must be considered, such as whether the defendant’s behavior could be considered threatening or humiliating or if it unreasonably interfered with the employee’s work. The significance of this opinion is that it will make it easier for a plaintiff to win a sexual harassment claim based on “hostile work environment.”

Even though the Supreme Court was unanimous in its judgment on _Harris v. Forklift System_, it has triggered widely different responses from the public. Consider the following excerpts from two leading public opinion pages, the first from _The New York Times_:

A victim of sexual harassment need not suffer a nervous breakdown to sue an employer for discrimination. A worker has suffered enough, the Supreme Court asserts, if the employer has so polluted the workplace with sexual improprieties that a reasonable person would find it hostile and abusive, a disagreeable, unpromising place to work.

Seems elementary, doesn’t it? Yet since 1986, when the high court held that sexual harassment on the job amounted to job discrimination, several Federal courts have contrived to make it more complicated. Justice Sandra Day O’Connor’s plain-spoken opinion for a unanimous Court brings a refreshing end to the legalese and resistance to change the lower courts have indulged in.32

Contrast that appraisal with the following, taken from _The Wall Street Journal_:

Barely touched [by _Harris v. Forklift System_] were important and troubling questions now being grappled with in the lower courts and in the regulatory arena, questions that arise as notions of political correctness invade the workplace as they have the academy. The court left to another day a number of important questions: If speech harasses and that harassment is in the eyes of the beholder, how can we draw a predictable line between what is permissible and what is illegal? Should a different line be drawn in other forms of harassment? What about the First Amendment issues making their way through the lower courts? Those questions indicate just how much heavy lifting we are asking of our employment discrimination laws. Small wonder the court demurred.

The opinion in _Harris_ was handed down with astonishing speed and brevity—four weeks from the date of oral argument and mercifully devoid of footnotes, arcane legal arguments, or political and sociological posturing. One wonders if the enthusiasm with which the decision was greeted from all sides of the political spectrum was prompted by relief that so little was decided.33

Clearly, _Harris_ has not settled every question that might be raised about what constitutes “hostile work environment.” But the two-fold test provided by the Supreme Court does make it easier for persons in the kind of situation depicted by Weeks to charge their employers with sexual harassment.
V. DIFFERENCES IN PERCEPTION

Some behaviors are widely viewed by both men and women as sexual harassment. Rena Weeks claims that Greenstein pinned her arms behind her back in order to see which of her breasts was bigger. It is hard to imagine anyone failing to see that such behavior is harassment and so does not belong in the workplace (or any place, for that matter). The issue with this alleged behavior is not about how to characterize it; the issue is whether the alleged behavior took place at all. Weeks said Greenstein really did it; Greenstein denies doing it.

While some forms of harassment are not disputed, there is a vast range of behavior that is more open to interpretation. As prevailing values and norms concerning appropriate workplace conduct evolve, the task of correctly interpreting behavior becomes more and more difficult. “But what does sexual harassment really mean? Managers of both sexes are sifting through the past and fretting about next week. Was it all right to say I liked her dress? Is it okay to ask him out to lunch to talk about that project? Should I just stop touching anybody, even if it’s only a congratulatory pat on the back? For that big client meeting Houston, wouldn’t it be less risky to fly out with Frank than with Francine? Or, for female managers, vice versa?”

The workplace now feels like a minefield to many people; nobody knows for certain whether the next step will set off an explosion. In this kind of ambiguous situation, it is hard to map the terrain because different people can interpret the same behavior quite differently. It is easy to point out where there is a “gender gap” causing different perceptions among men and women. But it is also true that women disagree with other women (just as men disagree with men) about what counts as sexual harassment.

The traditional legal standard for sorting through problems of interpretation is known as the “reasonable person” standard; Would a reasonable person find the behavior sufficiently intimidating, hostile, or offensive to warrant calling it sexual harassment? The problem with the “reasonable person” standard is that, in the hands of mostly male judges, it inevitably contains a gender-based bias. For example, in a particular case one court held that a secretary was not harassed by her boss, even though he escorted her to and from the bathroom, standing guard while she used the toilet; even though he had the habit of dropping by her home unexpectedly, going to her bedroom, massaging her hands while waiting for her husband to return home.

To counter the problems inherent in the supposedly neutral “reasonable person” standard, in 1991 several courts started to try a new standard known as the “reasonable woman” standard. According to the reasoning of the Ninth Circuit Court of Appeals:

Because women are 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 vio-
lent 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. We adopt the perspective of a reasonable woman 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.  

The question of interpretation was raised explicitly at the Weeks trial by Greenstein’s lead lawyer Thomas Gosselin, who characterized sexual harassment as a “moving target.” By this he meant that sexual harassment is not a well-defined idea. Moreover, he argued that many of the claims against Greenstein actually reflected the fact that men and women view the same action from different perspectives.

VI. THE JURY DECIDES

On August 27, 1994, after a month-long trial, the jury of the San Francisco Superior Court decided that Baker & McKenzie had turned a “blind eye” to Rena Weeks’s complaints about Martin Greenstein. The jury, consisting of six men and six women, had deliberated for two and a half days before reaching its verdict. They ruled that Baker & McKenzie had failed to take appropriate steps to stop Greenstein from harassing Weeks. They awarded Weeks $50,000 from Baker & McKenzie, to compensate her for emotional distress.

One week later, the jury returned and assessed $6.9 million in punitive damages against Baker & McKenzie and $225,000 against Greenstein. Punitive damages are intended to punish and to deter especially outrageous behavior. This amount was the largest ever awarded in a sexual harassment case. However, in November 1994 a state judge in California effectively reduced by more than half the amount of the penalty, reducing the punitive damages against Baker & McKenzie to $3.5 million. The award against Greenstein was not reduced. According to Judge John Munter of San Francisco County Superior Court, there was ample evidence that Greenstein had harassed numerous women, including Weeks, at Baker & McKenzie over a fourteen-year period and that the law firm “continued to employ him with a conscious disregard of the rights” of these women. But in explaining the reduced punitive damages against Baker & McKenzie, Judge Munter explained that the $3.5 million was 5 percent of the firm’s net worth, the sum requested from the jury by Weeks’s lawyer, who told the jurors that the law would not allow $6.9 million. Moreover, according to Judge Munter, while Baker & McKenzie had failed to take reasonable steps to protect Weeks and other women at the firm, its conduct “was not the product of a deliberate and purposeful policy aimed at violating the rights of anyone.”
Despite the firm’s insistence that it did all it could, many experts in sexual harassment and employment law say Baker & McKenzie had ample opportunity to see a pattern of abuse and failed to do so, perhaps because Greenstein was a so-called rainmaker, one of its top income-producing partners. “If I had that many complaints, even if somebody denied it every time, I’d be very suspicious,” said Alan Berkowitz, a labor and employment lawyer at Schachter, Kristoff, Orenstein & Berkowitz in San Francisco. “It’s too much of a coincidence. But there’s a tension about dealing with a partner who controls a large amount of business. There’s a tendency to shuffle it under the rug.” Paul Salvatore, a labor and employment partner at Proskauer, Rose, Goetz & Mendelsohn in New York, agreed. “Personalities are allowed to dominate and idiosyncrasies are tolerated if you’re a major rainmaker,” he said. “And if your idiosyncrasy is liking women, everybody says, ‘That’s the way he is.’”

QUESTIONS FOR REFLECTION

1. Is sexual harassment a problem that can be dealt with adequately with legislation and/or corporate policy statements?
2. Will men and women ever agree on what counts as “safe” social conduct at work?
3. Concerning matters of sexual harassment, do men and women naturally have differences in perception? Or are these differences learned through their socialization? How can men and women best reach a shared perception of what counts as sexual harassment?

SUGGESTIONS FOR FURTHER READING


ENDNOTES


13. Unless otherwise noted, the following account of Rena Weeke’s charges is based on Chiang, "Sexual Harassment Charges," op. cit., and Gross, "Law Firms Grapple," op. cit.


16. Ibid.


29. Ibid., p. 53.


34. Fisher, op. cit., p. 84.

35. Dworkin op. cit., p. 54.


