

## **SEXUAL HARASSMENT: DIFFERENT STANDARDS FOR DIFFERENT RACIAL AND ETHNIC GROUPS?**

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### **ABSTRACT**

To date, the courts have experienced considerable difficulty in determining what constitutes a sexually hostile work environment. Although the courts have not agreed on whether to use a reasonable-person or a reasonable-woman standard in deciding whether a sexually hostile work environment exists, our article raises a further complication: Should the courts also consider the ethnicity and race of the harassed person, because perceptions of sexual harassment also depend on these characteristics? Our article suggests that applying different standards based on the harassed person's race/ethnicity is neither legally effective nor socially desirable. We argue that the most legally appropriate and socially desirable standard by which to judge sexual harassment cases is a modified reasonable-person standard that takes into account the relevant individual and group characteristics of the person allegedly harassed.

To date, the courts have experienced considerable difficulty in determining what constitutes a sexually hostile work environment. The major issue the courts have faced in this regard is whether to use the "reasonable-person" or "reasonable-woman" standard when making this determination [1, 2]. In the case of *Ellison vs. Brady*, for example, the Ninth Circuit Court of Appeals said that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim" [3, at 626]. As the court continued, "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” [3, at 626].

The U.S. Supreme Court has, however, not embraced this gender-specific standard. In its decision in *Faragher vs. City of Boca Raton*, the Court held that “. . . in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or offensive” [4, at 341]. Although the courts have not agreed on whether to use a reasonable-person or a reasonable-woman standard in deciding whether a sexually hostile work environment exists, we are raising a further complication. If, as the advocates of the reasonable-woman standard argue, we need to take the differing perceptions of men and women into account, should the courts also consider the ethnicity and race of the harassed person, because perceptions also depend on these characteristics?

Although some courts have recognized the differing perceptions of various ethnic and racial groups in Title 7 cases, they have done so only in instances where they were determining the existence of ethnic or racial harassment. In such ethnic harassment cases, the courts have also faced the dilemma of whether to use a “reasonable-person” or “reasonable-ethnic-person” standard.

In the case of *Daemi vs. Church’s Fried Chicken*, a supervisor admitted that he disliked Iranians and Blacks and had referred to the plaintiff as a “damn Iranian” [5, at 1379]. In deciding this case, the 10th Circuit Court of Appeals applied a hostile environment standard that was ethnically neutral, attempting to ascertain whether the “. . . employer’s discriminatory conduct produced working conditions that a reasonable person would view as intolerable” [5, at 1379]. In a second case (*Duplessis vs. TDC*), however, a federal district court in Maine rejected this reasonable-person standard in favor of a yardstick that was ethnically specific [6]. In this instance, Steffan Duplessis claimed he had been harassed in his social-service job because of his French-Canadian heritage. In deciding this case, the court held that: “. . . because the fact finder must walk a mile in the victim’s shoes, the appropriate standard to be applied in determining whether Mr. Duplessis was subjected to hostile environment harassment is that of a ‘reasonable Franco-American’” [6, at 364].

This article addresses two issues. First, it analyzes whether in deciding sexual harassment cases, the courts should apply differing standards based on the harassed person’s race/ethnicity. Second, given our increasing labor force diversity, the article attempts to establish the most appropriate standard to use in deciding sexual harassment cases.

### LABOR FORCE CHANGES

One of the major reasons sexual harassment has become such a significant issue in the United States during the last 30 years is the tremendous increase of women in the labor force during this period. At present, the major changes in the labor

force are the increases in Hispanic- and Asian-American workers, and these changes also have implications for sexual harassment.

The Bureau of Labor Statistics identifies four racial/national origin groups: white, non-Hispanic origin; Black, non-Hispanic origin; Hispanic origin; and Asian origin and others [7]. Although in 1996 white, non-Hispanics constituted 74.8 percent of the labor force, they are the slowest growing of the four groups and are decreasing as a percentage of the labor force as a result. This decreasing “whiteness” of the labor force has progressed steadily in recent years, decreasing from 79.5 percent white, non-Hispanic in 1986 to a projected 71.7 percent in 2006. This relative decline for whites reflects both lower birth rates compared with other groups and significantly lower immigration.

Non-Hispanic Blacks comprised 11 percent of the labor force in 1996, but this figure is projected to decrease to 10.7 percent by 2006. Although Blacks have higher birth and immigration rates than whites, their rates of increase are lower than those of Hispanics. In addition, their rate of immigration is significantly lower than that of Asians and others. This results in Black labor force growth that is greater than that of whites, but lower than Hispanics and Asians.

In 1996, Hispanics of all races were the third largest labor force group, representing 9.5 percent of the labor force. By 2006, this group is projected to increase to 11.7 percent, making it larger than that of Black, non-Hispanics. This increase of Hispanics in the labor force derives from four main sources: 1) Hispanics have a higher birth rate than the three other categories in the labor force; 2) they also have very high rates of immigration; 3) because Hispanics currently in the labor force are relatively young, few will be leaving the labor force due to retirement or death; and 4) the relatively low labor force participation rates of Hispanic women compared with white, Black, and Asian women suggests that, as they adopt the American norm deeming it appropriate for women to work outside the home, their participation in the labor force will increase dramatically.

“Asians and others” is also a group that is growing quickly. Constituting 2.8 percent of the labor force in 1986, this group is expected to increase to 4.9 percent by 2006. Although this increase over a short period is dramatic, in 2006 this group will remain the smallest of the four groups in the labor force. A prime reason for the growth of Asians in the labor force is their high rates of immigration. In addition, they also tend to be relatively young. Thus, the new entrants into the labor force are not offset by a relatively equal number who are leaving as they get older [7].

### **DIFFERENT GROUPS: DIFFERENT PERCEPTIONS AND RESPONSES**

Over the past few decades, considerable research has focused on sexual harassment, and most of the research assumes that men and women have a propensity to harass, or react to being harassed, as a result of their gender, psychological

makeup, or previous life experiences. More recently, however, research on sexual harassment has broadened its focus to analyze sexual harassment from a group perspective [8-10]. This line of research suggests that, in addition to individual factors, the culture in which individuals are raised will significantly affect their likelihood of engaging in harassing behavior and their response.

Because of their recent increase in the labor force, the following discussion will primarily focus on Hispanics and Asian-Americans. Although each of these groups is fairly heterogeneous because they represent individuals from a number of different countries, there is still a considerable degree of coherence in the way the groups defined as Hispanics and Asian-Americans view sex-related issues. While individuals may primarily consider themselves as Chinese-Americans, Japanese-Americans, or Korean-Americans rather than as Asian-Americans, ethnicity researchers nevertheless view them as sharing a very similar cultural background and attitudes [11, 12].

Research clearly indicates that women of different racial or ethnic backgrounds perceive identical actions differently. What one group may consider a hostile environment may be considered perfectly acceptable behavior by a woman of a different background. Hispanics and individuals of Asian background, for example, have very different attitudes about the appropriateness of casual physical contact.

Hispanics often greet others with a kiss and view touching as being not only proper, but actually expected. In one study, Munter observed the number of times people in cafes touched each other over a period of one hour [13]. In San Juan, Puerto Rico, there were 180 touches; in Gainesville, Florida, one. Among Japanese, public physical contact between men and women is considered totally inappropriate. As Locke wrote, "Young teenagers might hold hands, but hugging and kissing are considered to be in poor taste. After childhood, there is no body contact with others except that between husband and wife which occurs only in total privacy" [14, p. 68].

Gowan and Zimmerman specifically compared how Hispanics and Anglos view sexual harassment [15]. Although they found that a respondent's ethnicity was not as significant as his/her gender or previous experience with sexual harassment in shaping attitudes, it did make a difference. When presented with potentially offensive scenarios in research experiments, Hispanic women tended to view them as more offensive than Anglo women. In these experiments, subjects were asked to read brief descriptions of interactions between men and women. A scene, for example, might describe a man pressuring a woman for a date, or giving a back rub to a co-worker. On average, Hispanic women said they would be more offended by the situations than Anglo women said they would be [15].

Women from different cultural backgrounds differ considerably in their responses to sexual harassment. Although women from different backgrounds may be equally offended by certain actions, some groups are more prone to voice their discomfort than others. Hispanics and Asian-American women tend to share the belief that it is inappropriate to complain if they are sexually harassed.

Espin argued that Hispanic women “are socialized to feel that they are inferior and that suffering and being a martyr are characteristics of a good woman” [16, p. 168]. As Locke added: “To the Mexican American, direct argument or contradiction appears rude and disrespectful. On the surface one may seem agreeable, manners dictating that one not reveal genuine opinions openly, unless one knows the other well and unless there is time to differ tactfully” [14, p. 140]. Speaking specifically about Mexican immigrants to the United States, DeForest wrote:

. . . they are hard workers and do not complain about the kinds of things that Americans complain about. In general, they are not given to filing grievances or protesting working conditions. That they do not complain is due to the fact that native Mexicans are accustomed to working under very difficult conditions. They have not had any experience with the idea that a worker has the right to complain to a supervisor [17, p. 16].

Asian-Americans are also more likely to suffer sexual harassment in silence. “Shyness, speech anxiety, conformity to authority figures and reserve,” according to Morishima, “are frequently attributable to Asian/Pacific Americans” [18, p. 387]. Morishima cited a study of Hawaiian college students, which found that this overwhelmingly Asian- and Pacific-American group was less verbal than its Anglo counterparts, particularly in the presence of authority figures [18]. Locke attributed this unwillingness to speak, particularly to those in positions of authority, to the Japanese concept of *enryo*: “The concept originally referred to the deferential way in which ‘inferiors’ were to act toward ‘superiors’” [14, p. 74]. One manifestation of *enryo* is the use of silence as a safe response to an embarrassing or ambiguous situation. Japanese-Americans often adapt *enryo* to their interactions with members of the dominant culture. Finally, in a society in which suffering is considered a necessary part of character building, complaining seems particularly inappropriate.

The tendency of Asian-Americans to turn inward, rather than confronting those creating difficulties for them, is related to the need to “save face.” Speaking of Chinese-American culture, Locke observed:

The welfare and integrity of the family is of the utmost importance. Individual family members are expected to put the welfare of the family and its reputation before their own individual needs. The behavior of each family member is considered to reflect on the entire family. Therefore, there is much cultural pressure to behave in a manner that will not embarrass or shame one’s family and cause them to “lose face” [14, p. 72].

This reticence in dealing with problems is so strong, in fact, that mental health professionals dealing with Asian-Americans are aware that “shame and interpersonal relationships within the family may prevent them from . . . seeking help” [14, p. 73]. Faced with such extreme sanctions, it is not surprising that a Chinese-American woman who has been sexually harassed on the job would be

reluctant to make waves. Although the research focused on the sexual abuse of children, a study discussed by Lee and Stone is instructive [19]. It found that Asian-American victims were “less likely to show anger and more likely to express suicidal ideation, and that mothers were less likely to believe reports of sexual abuse or to talk to authorities regarding the abuse compared to African-Americans, Hispanic-Americans, and Euro-Americans” [19, p. 511]. As a result, if Asian-Americans are sexually harassed, their culture makes it difficult for them to confront the harasser or approach an authority to complain. Although they are the victims, the fear of Asian-Americans is that they will be perceived as doing something wrong, and thereby bringing shame to the whole family. Asian-Americans are also less likely to complain about sexual harassment because it would disrupt the functioning of the business entity. The needs of the individual are not considered as important as those of the group:

Selflessness is one of the oldest values in China. The selfless person is always willing to subordinate his or her own interest or the interest of a small group to the interest of a larger social group. . . . Obedience to authority is taken as a sign of selflessness, since the leaders of an organization are understood to be working on behalf of the interest of the whole [19, p. 513].

How is this unwillingness to complain about sexual harassment related to the standards the courts use in determining the existence of a hostile environment? It is well-established that the percentage of sexually harassed women who file formal complaints is very low, somewhere in the range of 5 percent to 10 percent of those actually harassed [20]. In addition, Hispanic and Asian-American women are significantly less likely to complain of harassment than white and African-American women.

Unless the courts develop a standard for determining the presence of a hostile environment that to some degree recognizes cultural differences, it appears that Hispanic and Asian-American women will be much less likely than other women to file a formal harassment complaint. If we intend the law to offer more than symbolic protection, it would be very helpful to create a climate in which it is possible for all groups to avail themselves of that legal protection.

## **DIFFERENT GROUPS, DIFFERENT STANDARDS?**

### **Reluctance in the Courts**

As the labor force is becoming increasingly diverse and since cultural factors affect the likelihood of sexual harassment, one could argue that the Court’s interpretation of Title 7 should be changed to take into account the race/ethnicity of an alleged victim of sexual harassment. While such an approach would fully recognize our increasing diversity as a society, in practice we argue that it would create a chaotic situation. What are the problems with such an approach?

First, given the difficulty of determining a reasonable-woman standard, the courts are unlikely to be sympathetic to incorporating ethnic/racial considerations into their decisions. As the Texas Court of Appeals reasoned in *Garcia vs. Andrews*, when it declined to use a reasonable-woman standard in determining what constitutes a hostile environment:

Existing policy is concerned . . . with the even-handed disposition of all claims without regard to whether the plaintiff is a woman or a man, is young or old, or is a member of any of numerous and varied sub-groups in our society, each possibly with its own standard of decency. Fairness dictates a general societal standard [21, at 320].

The Michigan Supreme Court in *Radtke vs. Everett* also found the use of a reasonable-woman standard would result in excessive fragmentation:

The gender-conscious standard . . . places undue emphasis on gender and the particular plaintiff while it inappropriately de-emphasizes society's need for uniform standards of conduct. Hence, a gender-conscious standard eliminates community standards and replaces them with standards formulated by a subset of the community. . . . After all, the diversity that is Michigan—a multitude of ethnic groups, national origins, religions, races, cultures, as well as divergences in wealth and education—would demand as many standards [22, at 664-665].

Since most courts, including the U.S. Supreme Court, have not yet concluded that a reasonable-woman standard should replace the reasonable-person standard, it is unlikely that they would be receptive to an approach that would also take account of a plaintiff's race/ethnicity.

### **Nebulous Groupings**

Second, it would be legally difficult to deal with the fact that racial and ethnic identity is extremely nebulous, and racial and ethnic groupings include a very heterogeneous group of individuals. For instance, Hispanics in the United States represent an extremely heterogeneous group that has origins in many countries (Mexico, Puerto Rico, the Dominican Republic, El Salvador, Colombia, Guatemala, Nicaragua, Ecuador, Peru, or Honduras). There are also significant differences in attitudes between recent immigrants from a particular country and those whose families may have left that country several generations earlier [23, 24].

### **Myriad of Standards**

Third, there would be a myriad of standards to gauge the offensiveness of sexually harassing behaviors. Using a shifting set of legal standards in which identical behaviors would be differentially judged according to the racial and ethnic backgrounds of the involved parties would create fairness and consistency



problems. The use of varying standards based on the harassed person's race/ethnicity could eventually lead to a "balkanization" of the American system of jurisprudence. This "balkanization" would be both inconsistent with the fundamental legal principle of formal equality and detrimental to racial and ethnic harmony in U.S. society. Such an approach would reinforce racial and ethnic stereotypes by institutionalizing the differential treatment of such groups. In addition, this approach creates the possibility of a "tyranny of the minority," in which the most sensitive segment of society would essentially dictate what constitutes acceptable behavior.

### **Other Issues**

Fourth, it appears discriminatory to take into account the cultural background of the harasser, but not the harassee. Why should the legal system recognize that women with an Asian background would find a greater range of actions to constitute a hostile environment, but not also recognize that a Hispanic man may be engaging in behavior his culture considers appropriate?

Fifth, if the courts use different standards to judge sexual harassment depending on the race/ethnicity of the person harassed, there would be considerable incentives for employers to refrain from hiring individuals from "sexually sensitive" populations. Why would employers put themselves at risk by hiring a Muslim, for example, when such a hire might create considerable legal exposure?

Finally, why stop at using the filters of gender, race, and ethnicity? Why not add other filters such as religion and age as well? Such a practice would not only be unwieldy; it would make determination of a hostile environment extremely subjective and difficult. How exactly do you determine the perceptions of a "reasonable," mixed-race, 70-year-old Guatemalan woman who practices a mixture of an indigenous religion and Catholicism?

### **WHAT IS THE APPROPRIATE STANDARD?**

As we have indicated, it is very difficult to settle on a judicial standard that recognizes the differing perceptions of racial and ethnic groups in sexual matters, but is nondiscriminatory in its application. As Robert Unikel observed: ". . . incorporating the individual's personal characteristics [such as ethnicity] into the reasonable person standard risks changing that standard from an objective one to a wholly subjective one" [25, p. 370].

Although we fully recognize this drawback, we nevertheless believe that a modified reasonable-person standard is the best alternative. While such a standard is predominantly consistent, it allows judges the latitude to take particular circumstances into account. The courts have recognized a number of such associations: race, ethnicity, alienage, legitimacy, sex, age, and intelligence. This approach would require the judging individual or group to apply a reasonable-person



standard, but also give judges the discretion to take salient group associations into account.

Essentially, the modified reasonable-person standard views sexual harassment through the eyes of a reasonable person, but allows those responsible for determining the existence of such harassment (Equal Employment Opportunity Commission and its hearing officers, federal and state courts, juries, arbitrators) the latitude to examine certain group associations to determine their significance.

Taking significant group associations into account is hardly a novel suggestion. The courts have long recognized, for example, that determining whether an individual acted in self-defense requires the application of a standard that incorporates salient group associations. Thus, in *State of North Dakota v. Leidholm* the court reasoned, “an accused’s actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused’s and who sees what the accused sees and knows what the accused knows” [26, at 811]. The battered-wife defense, for example, accepts the premise that it is inappropriate to view the retaliatory actions of a woman solely from the perspective of a reasonable person. To fully understand the battered wife’s response, this argument contends, we need to appreciate her individual circumstances.

This recognition of a victim’s significant group associations has also been recognized by labor arbitrators in sexual harassment cases. Arbitrator Yarowsky, for example, sustained the discharge of a male employee because the female employees who complained of his behavior exhibited “fierce pride in their personal integrity . . . [which] . . . given their social strata as custodial personnel [was] their central, most important, sustaining power” [27, at 417]. The fact that the harassed employees were all custodial workers clearly convinced the arbitrator that their perspectives were somewhat different from those of “generic” employees [27].

Thus, in a sexual harassment case, a judge could recognize, or instruct a jury to recognize, that an 80-year-old white woman would reasonably react differently to a particular situation than a young man raised in a sexually permissive country. As Unikel observed, such an approach allows a judge to “. . . incorporate particularly relevant group references [such as ethnicity] into the decision-making process without sacrificing the objectivity of the reasonableness principle” [25, p. 371].

A modified reasonable-person standard is a hybrid approach that was fleshed out by the New Mexico Court of Appeals in a case in which a woman killed her companion/former husband [28]. In this case, Anita Gallegos had been brutalized by her companion/former husband over an extended period of time. Although the court did not use the “modified reasonable-person” terminology, it suggested a “hybrid” filter, combining both “subjective and objective standards” to determine whether Gallegos perceived she was in imminent danger when she killed her alleged abuser. Essentially, the court held that the reasonableness of the defendant’s subjective beliefs was significant and that the jury needed to be aware

of these perceptions before it could render an appropriate decision. This, therefore, became a hybrid standard: looking at how a reasonable person would act in such a situation, but also taking account of the subjective factors dependent on Gallegos' previous experiences [28].

In one of the most publicized sexual harassment cases in history, involving a Mitsubishi facility in central Illinois, the popular press made much of the fact that the elements of Japanese culture that existed at the plant were a contributing factor to the harassment [29]. For example, when male American managers visited Japan for training they were taken to "audience participation" bars where customers' sex acts with prostitutes were part of the entertainment. These encounters were then discussed openly at the Mitsubishi plant. This apparent acceptance of the harassing behavior eventually included the display by several employees, including managers, of pornographic pictures taken at sex parties that were arranged by the managers; sexual graffiti placed on cars as they came down the assembly line; men's bathrooms that were "virtually papered with sexual graffiti," including insulting pictures and names and phone numbers of individual female employees; male employees simulating masturbation, fondling themselves, and simulating having sex in front of female employees; and subjecting women to an unending stream of offensive names, including "whore" and "slut" [29]. In reporting on the Mitsubishi case, the media implied that the managers who themselves were Japanese, or trained according to Japanese norms, were simply reflecting Japanese cultural expectations and did not realize the egregious nature of their behavior.

How should the courts deal with such a case if the harassees, rather than the harassers, acted according to Japanese cultural norms? Under the modified reasonable person standard, because ethnicity is an accepted group association, judicial notice would be taken of the different sensibilities of Japanese Americans compared with a generic reasonable-person standard. Touching a Japanese-American woman, for example, would be considered more of a hostile action because it would be perceived as more offensive by someone raised according to Japanese cultural norms.

In a determination of a hostile sexual environment context, a modified reasonable-person standard would allow us to have what is overwhelmingly a uniform standard of behavior, but also to modify that standard slightly based on differing cultural norms. Although it would be impossible to quantify this approach, such a hybrid filter would overwhelmingly consider the perceptions of a reasonable person and give marginal consideration to perceptions peculiar to a particular cultural background. This would prevent the use of a completely idiosyncratic approach, in which someone would never know whether his/her behavior would be perceived as offensive, but would still allow some consideration of cultural differences.

In addition to taking judicial notice of cultural differences as part of our proposed hybrid filter, the increasing heterogeneity of the labor force also requires that the reasonable-person standard be modified continuously to take account of

this change. Thus, as the labor force increasingly incorporates Hispanic and Asian-American workers, our concept of a reasonable person must evolve to gradually incorporate the sensibilities of these cultures.

While such an approach seems to be the best alternative available, it is, of course, predicated on the assumption that those who make the decisions are knowledgeable about and sensitive to the differing perceptions of racial/ethnic groups regarding sexual matters. It would certainly be beneficial to educate judges, arbitrators, and jurors about the differing perceptions of racial/ethnic groups regarding gender and sexual matters; offer diversity training in law schools; and have judges and arbitrators who reflect the increasing diversity in our country.

### CONCLUSION

How would these standards actually be applied in a real-world context?

First, plaintiffs would be allowed to introduce evidence to show that because of their ethnicity they are particularly sensitive to sexually harassing behavior. This heightened sensitivity would, of course, have to be established by the evidence; group membership would not be sufficient to establish such a modified standard. Thus, it would probably be extremely difficult for a third-generation Hispanic, raised in a predominantly non-Hispanic part of the country, to argue that s/he had appreciably different perceptions from those of non-Hispanics.

Second, defendants could not be allowed as an affirmative defense to show evidence that their victim was less sensitive because of his/her particular ethnic background. Although it was raised in a racial, rather than an ethnic context, it is clearly inappropriate to accept the argument made by the supporters of Justice Clarence Thomas at his Supreme Court confirmation hearings: that Anita Hill should not have been offended by Thomas' actions because African-American women are used to such behavior.

Third, if a modified reasonable-person standard were adopted, it would have to be applied by all levels of the EEOC, as well as by judges and juries. Since judicial determinations are typically appeals of earlier EEOC rulings, consistency would demand that the same standards be used by each of these groups. In jury trials, a judge would have to instruct the jury that the alleged victim's ethnicity might have a bearing on whether a hostile environment was present and to consider this in their deliberations.

For arbitrators, no change in approach is really required. Because arbitrators have typically rejected the concept of *stare decisis*, they do not believe that awards involving different parties but similar issues have precedential value. Because each case is considered unique, taking the salient group associations of the alleged victim of sexual harassment into account would amount to standard practice. In addition, since arbitrators attempt to render decisions in conformity with the law, if the legal standard were changed, so should the arbitral standard.

Finally, it appears that the modified reasonable-person standard would mainly be significant when determining the liability of employers and the amount of a potential fine. Under current law, a defending employer may raise an affirmative defense to liability or damages if it exercised reasonable care to prevent or promptly correct any sexually harassing behavior. If a company employed members of an ethnic group that were particularly sensitive to sexually harassing behavior and did little or nothing to train its other employees and supervisors regarding the need for a heightened sensitivity, it might be easy to infer that it had not exercised reasonable care to prevent such harassment. In sum, as a company's labor force becomes increasingly diverse, managerial and employee training about sexual harassment will need to be modified to reflect the differing perceptions of particular groups on what constitutes a hostile environment.

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