

Sexual Harassment Litigation Strategies, Tactics, Discovery Issues and Motions in Limine:  
A Plaintiff's Perspective

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***SEXUAL HARASSMENT LITIGATION STRATEGIES, TACTICS,  
DISCOVERY ISSUES AND MOTIONS IN LIMINE:  
A Plaintiff's Perspective***

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## I. INTRODUCTION.

This paper will address four types issues which typically arise in sexual harassment cases: 1) plaintiff's emotional distress, including "Independent Mental Examinations" ("IME's"); 2) plaintiff's sexual history and conduct; 3) discovery regarding the company's investigation, including attendant attorney-client privilege and work-product doctrine issues; and 4) discovery regarding other complaints of harassment.

Many of these issues, particularly plaintiff's emotional and sexual history, also raise issues which are frequently the subject of plaintiff's in limine motions in sexual harassment cases. This paper includes a brief discussion of such motions.

## II. DISCOVERY OF PLAINTIFF'S EMOTIONAL STATE, INCLUDING "IME's"

- A. Although most plaintiffs will allege emotional distress injury, the United States Supreme Court has held that serious emotional distress is not an essential component of a claim for sexual harassment. (A plaintiff's belief that conduct was offensive does not mean that she also had to be seriously emotionally damaged by the offending behavior.) *Harris v. Forklift Systems*, 114 S. Ct. 367, 63 FEP Cases 225 (1993)
- B. The defendant is not entitled as a matter of right in all sexual harassment cases to conduct an "independent" mental examination of the plaintiff.
1. Under FRCP Rule 35 (and analogous state laws such as California's Code of Civil Procedure section 2032), defendants do not have an automatic right to a mental examination of the plaintiff, unlike other self-executing discovery such as depositions. If they cannot obtain from the plaintiff a stipulation to the examination, a noticed motion must be brought and the court can order such an examination only upon a showing of good cause.
  2. A mental examination will not (or should not) be ordered unless plaintiff has pled "severe" emotional distress resulting from the harassment. An allegation of "garden variety emotional distress" by the plaintiff is not sufficient to trigger a Rule 35 exam. Courts will sometimes scrutinize defense requests for these intrusive examinations, and will deny requests where plaintiff has not pled "severe" emotional distress, concluding that plaintiff has not placed her mental state "in controversy." Emotional distress damages are necessarily limited, however, by such a strategy.
  3. California's mental examination statute has codified this exception and specifically states that where a plaintiff has stipulated that "(1) no claim is being made for mental and emotional distress over and above that usually associated

with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages," a mental examination shall not be ordered except on a showing of " exceptional circumstances." Cal. Code of Civil Proc. section 2032(d)

4. Examples of cases holding that plaintiff has not placed her mental state in controversy and denying mental status examinations.
  - a. *Turner v. Imperial Stores, Inc.* 161 F. R. D. 8 (S. D . Cal 1994) Magistrate ruled that simply because the plaintiff sought emotional distress damages did not mean that the plaintiff had placed her emotional state "in controversy" and therefore no medical examination was ordered)
  - b. *Bridges v. Eastman Kodak Co., et. al.*, 850 F.Supp. 216, 222 (S.D.N.Y. 1994) (defendants not entitled to mental status examination although allowed "limited" discovery into matter relevant to issue of whether defendants' harassment caused the plaintiffs to suffer emotional harm)
  - c. *Curtis v. Express Inc.*, 868 F.Supp. 467 (N.D.N.Y. 1994) (rejecting mental examination where plaintiff presented only "garden variety" claim for emotional distress damage, and made no claim for ongoing severe mental injury)
  - d. *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525 (M.D.Fla. 1988) employee's claim based on hostile work environment did not place mental condition "in controversy" within the meaning of the rule governing mental examinations)
  - e. *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D.Mass. 1984) (rejecting the defense claim that emotional distress was synonymous with "in controversy" and refusing to order a mental exam)
  - f. *Doyle v. Superior Court*, 50 Cal. App. 4th 1878, 58 Cal. Rptr.2d 476 (1996) (rejecting mental examination where plaintiff, who claimed emotional distress, had established a cut-off date for that damage and was making no claim for current or future emotional distress damages; court also rejected defense argument that a mental examination should be compelled to test the plaintiff's credibility, stating "Mental examinations are not authorized for the purpose of testing a person's 'credibility.'" (58 Cal. Rptr. at 481-482)

- g. See also, *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S. Ct. 234, 244 (1964) (analyzing the "in controversy" and "good cause" requirements of Fed. R. Civ. P. 35). The "in controversy" and "good cause" requirements are not mere formalities, and they are not met by mere conclusory allegations in the pleadings or by mere relevance to the case. 379 U.S. at 118. A movant must show that "each condition to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination ... The ability of the movant to obtain the desired information by other means is also relevant." *Id.*

### C. Reasonable Limits and Restrictions on the Examination

1. Many plaintiffs' attorneys will insist that the so-called "independent" mental examinations (referred to by plaintiff's counsel as "defense" mental examinations), be reasonably restricted in time and scope.
  - a. For obvious reasons, many plaintiffs' counsel view these exams with extreme distrust, because they are so easily and frequently abused.
  - b. An unrestricted IME affords the defendant, in essence, a "second deposition" of the plaintiff - but one in which plaintiff's counsel is not permitted to be present to object, instruct the witness not to answer, or to otherwise protect her client from questions which would clearly be inappropriate and objectionable during regular discovery.
  - c. IME's contain questions and aspects that are inappropriate for purposes of the issues in a sexual harassment case.
  - d. IME's can easily violate a plaintiff's protected right to privacy (e.g., irrelevant and intrusive questions regarding sexual history or instances of child abuse). In addition to infringing upon the plaintiff's own privacy rights, these examinations often infringe upon the privacy rights of her family members and friends.
  - e. The examinations are often conducted long after the incidents in question and are not useful for determining the plaintiff's mental condition at the time of the incidents, but only at the time of the examination. As a result, the results of the IME have the potential to significantly confuse a jury.
  - f. There is substantial question regarding the scientific validity, objectivity, and acceptability of many of the psychological tests employed.

2. Most proposed IME's will generally consist of psychological testing and a psychological interview or assessment. Some of the issues which should be carefully considered by plaintiff's counsel and her client in considering a stipulation to an IME include the following:
  - a. Qualifications of the examiner. Often there will be two, one for the testing and one for the interview. Insist that defense counsel supply their CV's and check their qualifications and reputation.
  - b. Place of examination. In California, for example, an examinee may not be required to travel over 75 miles for the examination.
  - c. Length of examination. Plaintiff's counsel should insist on a maximum for the IME overall (6-8 hours maximum). There should be an agreement about whether the testing and interview will take place all on one\* day or on two half days.
  - d. Specific psychological tests to be administered. Defense counsel will often ask for an overbroad, lengthy, tiring, and ultimately useless battery of psychological exams. Plaintiff's counsel should insist from the outset in being provided with the specific psychological tests which will be given, and should only stipulate to a reasonable number (3-4 maximum) of specifically relevant tests.
    - (1) Common proposed test batteries include examinations such as: Minnesota Multiphasic Personality Inventory (MMPI 11); the Millon Test (MCMI-II or MCMI-III); the Rorschach ink-blot test; the Shipley Institute for Living Scales; Draw-A-Person tests; sentence completion tests; as well as many others. In proposing tests, defense counsel should keep in mind how skeptically many jurors view such tests, particularly tests such as the Rorshach Ink Blot test.
    - (2) Plaintiff's counsel should become familiar with these psychological tests. Many of the tests proposed by defendants are simply overkill, are not relevant (many IQ and neurological tests, for example), or are not widely regarded or accepted even among the psychological community.
    - (3) Plaintiff's counsel should force defense counsel to explain the purpose and relevance of each specific proposed test. If there is good reason to object, do so. The court will have to find good cause for the administration of each test. Jurors are not the only

ones who react skeptically to many of these psychological instruments - many courts are so inclined as well.

- (4) A relatively new development is an attack on such psychological examinations based on the United States Supreme Court's decision regarding expert witness testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) See, e.g., *Usher v. Lakewood Engineering & Mfg., Co.*, 158 F.R.D. 411 (N.D.111. 1994) (Shadur, J.) There undoubtedly will be further developments in this area.
- e. Conditions of the interview or assessment. Consider insisting upon a tape recording if the psychiatrist or psychologist has a reputation for abuse in these exams See, e.g., *Zabkowica v. West Bend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984) (allowing recording by tape or court reporter). Consider how the tapes will be handled and how they can be used. For example, consider having the tape kept solely by the expert, not turned over to defense counsel, plaintiff's counsel or the parties - but kept only in case of a dispute over abuse.) It may not be in the plaintiff's best interest to have a readily available tape recording with yet further detailed questioning, which defense counsel can use as an additional "impeachment" weapon.
- f. Reports by the examiners performing the IME. Under Rule 35 (and most analogous state provisions), plaintiff is entitled, upon request, to a detailed written report of the assessment and psychological testing. Plaintiff's counsel should remember to specifically request such reports. If the request is made, defendant will correspondingly be entitled to any reports by plaintiff's treating or consulting psychological experts who treated or examined plaintiff or "the same condition."
- Plaintiff's counsel should request that plaintiff's counsel, or at a minimum, plaintiff's psychological expert, should be provided with all the raw data from the testing and the specific detailed results, not just the conclusory reports prepared by the defense examiners.
- g. Who can be present during the interview. Generally, plaintiff's counsel or psychological expert will not be allowed to be present during the IME. Only one or two cases have permitted this See, e.g., *Vreeland v. Ethan Allen, Inc.*, 151 F.R.D. 551 (S.D.N.Y. 1993) *DeBari v. Incaica Cia Armador, S.A.*, 126 F.R.D. 12, 13-14 (E.D.N.Y. 1989) If there is serious concern, arrange that counsel can be present in the waiting room in the office where the exam is being conducted or by telephone.



plaintiff may strengthen her hand in opposing or restricting mental examinations, as discussed above.

### III. PLAINTIFF'S SEXUAL HISTORY AND CONDUCT

- A. Federal Rule of Evidence 412 was amended in 1994 to cover civil cases. The amendment was enacted to afford greater protection to sexual harassment plaintiffs from overly intrusive invasions of personal privacy aimed at deterring the exercise of the plaintiff's rights.
- B. The Advisory Committee Notes for the amendment to Rule 412 make clear that a victim's sexual history is not simply "fair game" for the defendant in a sexual harassment case. The notes indicate:

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will continue to be covered by Fed.R.Civ.P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate (protective) orders pursuant to Fed.R.Civ.P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. *Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case and cannot be obtained through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-workplace conduct will usually be irrelevant.*

Fed.R.Evid. 412, Advisory Committee Notes, 154 F.R.D. at 534 Subdivision c, (*citing with approval, Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (emphasis added).

- C. Examples of cases restricting inquiry into plaintiff's sexual conduct.
1. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1292-93, 75 FEP Cases 852 (8th Cir. 1997)
  2. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993)
  3. *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983)

- D. Courts will also restrict the scope of inquiry temporally. See, e.g., *Mitchell v. Hutchings*, 116 F. R. D. 481, 485 (D. Utah 1987) (holding that sexual conduct remote in time was not relevant in a sexual harassment claim); *Jenson, supra*
- E. Some states have similar rules: See, e.g., California Code of Civil Procedure section 201 7(d) and Evidence Code section 11 06(a) (precluding the use of evidence of plaintiff's sexual conduct with anyone other than the alleged harasser to prove consent by plaintiff or the absence of injury.)

#### IV. DISCOVERY REGARDING OTHER COMPLAINTS OF HARASSMENT.

- A. Many courts have held that evidence of other acts of harassment may be relevant either to show notice to the employer or, where the harassment was known to the employer, to establish that the harassment was sufficiently pervasive or severe to establish a hostile work environment for the plaintiff.
- B. Examples of cases holding that plaintiff may discover the existence of other harassment complaints include the following:
  - 1. *Giraud v. Henkels & McCoy*, 1993 U.S. Dist. LEXIS 14644 (D.Or. 1993) (requiring employer to disclose other sexual harassment, retaliation, or discrimination claims as directly relevant to claim that employer knew or should have known of quid pro quo harassment, but limiting disclosure to time and units in which plaintiffs or defendants worked)
  - 2. *Longmire v. Alabama State Univ.*, 151 F.R.D. 414 (M.D.Ala. 1992) (complainant allowed to ask questions about sexual activities that alleged harasser may have had with persons whom he supervised or were his employees)
- C. If defendants assert privacy rights of third parties in resisting such discovery, plaintiff should offer protective orders restricting access to and use of such information in order to gain what is often highly relevant information.
- D. Plaintiffs have received a considerable boost from the U.S. Supreme Court in their efforts to discover other complaints of harassment and the employers' responses to those complaints. Under the decisions in *Faragher* and *Ellerth*, when defendant interposes the affirmative defense of reasonable, effective policies and remediation efforts, the door would seem to be open to discovery concerning all such complaints and company responses.

## V. DISCOVERY REGARDING THE COMPANY'S INVESTIGATION

A. Employers have a legal obligation to investigate complaints of sexual harassment.

1. *Meritor Savings Bank v. Vinson*, 47 U.S. 57, 72-73 (1986)
2. *EEOC Policy Guidance on Current Issues on Sexual Harassment*, 8 Fair Employment Practices, Labor Relations Reporter at 405:6700

B. Discovery regarding the investigation, therefore, will be an issue in many sexual harassment cases, assuming the employer conducted an investigation at all. Defendants have attempted to justify nondisclosure of documents and communications under a variety of theories, but are increasingly meeting with resistance from the courts.

C. Attorney-Client and Work Product Privileges. Employers should be aware that using attorneys (in house or outside counsel) to conduct the investigation may result in waiver of the attorney client privilege and the work product doctrine. Indeed, lawyers conducting such investigations are frequently being deposed on their actions.

1. *Harding Lawson v. Dana Transport*, 914 F.Supp. 1048 (D. N.J. 1996)
2. *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 691 (A.2d 321 (N.J. 1997)
3. *Worthington v. Endee*, 177 F.R.D. 113, 1998 U.S. Dist. Ct. LEXIS 546 (N.D.N.Y. Jan. 23, 1998)
4. *Peterson v. Wallace*, 984 F.Supp. 821 (D. Vt. 1997)
5. *Pray v. New York City Ballet*, 1997 WL 266980 (S.D.N.Y. May 19, 1997)

D. Critical Self-Analysis Privilege. Employers, on occasion, have attempted to invoke the "critical self-analysis privilege" to protect an internal investigation from disclosure. The courts' reception to this "privilege" has been mixed at best. It originally surfaced in cases where employers were attempting to prevent disclosure of affirmative action plans prepared in compliance with OFCCP programs or other government regulations, or in instances where programs or surveys were employed to gauge weaknesses in a company's employment policies. Many courts have become reluctant to apply the privilege, even in those contexts. See, e.g., *Abel v. Merrill Lynch & Co.*, 1993 U.S. Dist. LEXIS 1213 (S.D.N.Y. 1993); *Vanek v. Nutrasweet Co.*, 59 Empl. Prac. Dec. (CCH) para. 41,600 (N.D. Ill. 1992)

Cases explicitly rejecting the critical self-analysis privilege in sexual harassment cases, where defendants have invoked the privilege to preclude disclosure of investigatory materials, include *Harding v. Dana Transport, supra*; and *Payton v. New Jersey Turnpike Authority, supra*, discussed above.

## VI. THE FARAGHER AND ELLERTH DECISIONS BROADEN DISCOVERY.

A. In *Faragher and Ellerth*, 118 S.Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cases (BNA) 14 (1998), the United States Supreme Court considered the issue of the vicarious liability of an employer for sexual harassment by a supervisor or manager. The Court also considered whether a plaintiff could make out a claim for sexual harassment if she did not suffer a tangible adverse employment action in refusing a supervisor's advances.

B. The Court's holding in both cases was the same:

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed.R.Civ.Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

C. If the employer can and does invoke the affirmative defense described above, plaintiffs will obviously seek discovery on the employer's sexual harassment policies; sexual harassment procedures; application of the policies and procedures in the instant and other complaints; whether other women have made use of the company's procedures or by-passed them and the reasons for doing so (this goes to the reasonableness of plaintiff's failure to use the system, e.g., well-grounded fear of retaliation); dissemination of the policies, procedures, and information about sexual harassment;

and the effectiveness of the policies, procedures, and actions taken in stopping harassment in the workplace.

## VII. PLAINTIFF'S TYPICAL IN LIMINE MOTIONS IN SEXUAL HARASSMENT CASES

Two of the areas discussed above, plaintiff's emotional status and history, and plaintiff's sexual history and conduct, implicate important privacy rights. Those rights include plaintiff's privacy rights, and often implicate privacy considerations for third parties as well. These are also areas which defendants tend to attempt to explore (or exploit) during discovery. Even where a court has allowed discovery into these realms of great personal privacy, closer scrutiny will often occur when defendants attempt to admit such evidence at trial.

Plaintiffs, therefore, must often bring in limine motions before trial in sexual harassment cases to thwart defense efforts to prejudice a jury with such evidence. The following are examples of the kinds of motions plaintiffs are often forced to bring to maintain some vestige of their privacy in these cases.

- A. Motions in limine to exclude evidence of sexual assault, rape, incest, or child abuse earlier in plaintiff's life.
- B. Motions in limine to exclude evidence of plaintiff's past sexual conduct and relationships unrelated to the perpetrator(s) in the case
- C. Motions in limine to exclude certain medical or psychological records of plaintiff, or certain excerpts from those records (e.g., ob-gyn records of little or no relevance, excerpts from records discussing other members of plaintiff's family or others with whom plaintiff had relationships)
- D. Motions in limine to exclude evidence and records related to abortions plaintiff may have had
- E. Motions in limine to exclude evidence regarding substance abuse earlier in plaintiff's life
- F. Motions in limine to exclude evidence regarding arrests, convictions

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