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Past Sexual Conduct in Sexual Harassment Cases

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PAST SEXUAL CONDUCT IN SEXUAL HARASSMENT CASES

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INTRODUCTION

Rosie, Katherine, and Krista are plaintiffs alleging sexual harassment by coworkers in three different cases.[1] Rosie and Mike had engaged in a consensual relationship that spanned several months in the year prior to Rosie's sexual harassment allegations. Katherine, also suing for sexual harassment, frequently participated in joking and conversations of a sexual nature in the workplace, including participation in several practical jokes that involved placing sexually explicit materials in other employees' offices. The third plaintiff, Krista, was involved in an affair with a married neighbor and had an abortion several years ago. Should any evidence of each plaintiff's past sexual conduct be admitted? What guidelines are available to assist in this determination?

This Comment examines the admissibility of a plaintiff's past sexual conduct in a sexual harassment case under Federal Rule of Evidence 412, a rule that specifically addresses this type of evidence. Part I provides a brief overview of sexual harassment law, while Part II explains Rule 412 by reviewing the language of the rule, examining the history of the law, and evaluating the procedure required under Rule 412. Part III presents recommendations for evaluating evidence of past sexual behavior, and Part IV reviews cases that have considered the admissibility and discoverability of a plaintiff's past sexual conduct.

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1. Because the majority of sexual harassment complainants are women, these hypotheticals and this article refer to women plaintiffs. *See Study Finds Sexual Harassment Awards from EEOC Doubled from 1992 to 1993*, 1994 Daily Lab. Rep. (BNA) No. 100, at D-9 (May 26, 1994). However, the principles in this article apply equally to male plaintiffs. In 1992, the Equal Employment Opportunity Commission (the "EEOC") reported that nine percent of those filing sexual harassment complaints were men. *See id.*; *see also* Susan Perissinotto Woodhouse, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1148 (1996).

I. SEXUAL HARASSMENT OVERVIEW

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2] The Supreme Court, in *Meritor Savings Bank, F.S.B. v. Vinson*,[3] confirmed that sexual harassment is actionable under Title VII for both quid pro quo and hostile environment claims.[4] Quid pro quo harassment occurs when "submission to or rejection of [unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature] by an individual is used as the basis for employment decisions affecting such individual."[5] Hostile environment harassment is conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[6] Prior to the Supreme Court holding in *Meritor* and in accordance with Equal Employment Opportunity Commission guidelines, lower courts had consistently held that sexual harassment was actionable under Title VII.[7] The elements of a hostile environment claim are: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based on the employee's sex; (4) the harassment was sufficiently pervasive to alter the conditions of employment and create an abusive working environment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.[8] In *Meritor*, the Supreme Court noted that "[t]he gravamen of any sexual

2. 42 U.S.C. § 2000e-2(a)(1) (1994).

3. 477 U.S. 57 (1986).

4. *Id.* at 65, 67.

5. 29 C.F.R. § 1604.11(a)(2) (1994).

6. *Id.* § 1604.11(a)(3). *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citing *Meritor*, 477 U.S. at 64). While the EEOC guidelines contained in 29 C.F.R. § 1604.11 are not binding on the courts, *see* Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 750 (4th Cir. 1996), the EEOC's descriptions of both quid pro quo and hostile environment harassment were cited approvingly in *Meritor*. *See Meritor*, 477 U.S. at 65. This Comment focuses on hostile environment claims.

7. *See Meritor*, 477 U.S. at 65, 66. The EEOC guidelines are found in 29 C.F.R. § 1604.11.

8. *See* Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992). The fifth element of a hostile environment claim may not apply to a case where the alleged harasser is a supervisor. The Supreme Court recently decided a case addressing liability for a supervisor's harassment. *See* Faragher v. City of Boca Rotan, 118 S. Ct. 2275, 2280 (1998).

harassment claim is that the alleged [conduct was] 'unwelcome.'"[9] This "unwelcomeness" requirement has created a great deal of difficulty for courts and has generated significant criticism.[10] In an attempt to establish that certain conduct was not "unwelcome," defendants have sought to admit evidence of a plaintiff's past sexual behavior. The *Meritor* Court noted that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."[11] This is part of the "totality of circumstances" that may be considered in determining whether harassment occurred.[12] The Court decided *Meritor* in 1986, and Congress amended Federal Rule of Evidence 412 in 1994 to limit evidence of a plaintiff's past behavior in sexual harassment cases.[13]

II. FEDERAL RULE OF EVIDENCE 412

Congress originally enacted Federal Rule of Evidence 412 (known as the Rape Shield Law) in 1978 to bar the admissibility of a victim's prior sexual history in criminal cases involving sexual assault.[14] Congress amended Rule 412 in 1994 to limit the use of a plaintiff's prior sexual history in civil cases in which the plaintiff claims to be the victim of sexual misconduct.[15] The advisory committee's note indicates that the purpose of extending Rule 412 was to protect plaintiffs in civil suits, and sexual harassment cases in particular, from invasions of privacy, potential embarrassment, and sexual stereotyping.[16]

9. *Meritor*, 477 U.S. at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

10. *See generally* Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992); Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997).

11. *Meritor*, 477 U.S. at 69.

12. *See id.*

13. The number of sexual harassment cases has greatly increased over the last few years, with EEOC filings up from 6127 in 1991 to 15,354 in 1996. Likewise, awards under federal law have nearly quadrupled, from $7.7 million to $27.8 million. *See* Douglas Robson, *Huge Surge of Sexual-Harassment Cases Hits the Courts*, SAN FRANCISCO BUS. TIMES, May 16, 1997, at 12A.

14. *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046 (1978) (codified at FED. R. EVID. 412).

15. *See* FED. R. EVID. 412.

16. *See* FED. R. EVID. 412 advisory committee's note.

A. *Rule 412 in Criminal Cases*

Rule 412 provides that, in a criminal proceeding involving sexual misconduct, evidence of a victim's prior sexual behavior or sexual predisposition is generally inadmissible with certain exceptions.[17] "Rule 412 reflects the recognition that evidence of the victim's unchastity is ordinarily of no probative value on the issue of whether a rape or sexual assault occurred."[18] In the criminal context, "past sexual behavior" includes "all sexual behavior of the victim other than the conduct at issue in the trial."[19] A policy behind Rule 412 is to prevent the accuser "from being put on trial."[20] One exception in a criminal case, however, allows "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused . . . to prove consent."[21] Past conduct is "not relevant to prove consent if the conduct did not involve the defendant."[22] Commentators have noted other policy reasons behind the exclusion of a victim's sexual history: (1) juries tend to misuse the evidence by overvaluing it or drawing impermissible inferences; (2) victims are deterred from reporting and prosecuting rapes; and (3) sexist attitudes tend to be reinforced by admitting the evidence.[23] The same basic objectives that motivated the drafting of original Rule 412 were also reasons for the rule's extension to civil cases.[24]

B. *Amended Rule 412: Extension to Civil Cases*

The 1994 amendments to Rule 412 extended protection to alleged victims of sexual misconduct in civil cases by limiting the admissibility of the victim's past sexual behavior.[25] Amended Rule 412 now provides, in pertinent part:

> (a) Evidence Generally Inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving

17. *See* FED R. EVID. 412(a), (b).

18. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 412.02[1] (Joseph M. McLaughlin ed., 2d ed. 1998).

19. *Id.*

20. *Id.* § 412.02[4].

21. FED. R. EVID. 412(b)(1)(B).

22. WEINSTEIN, *supra* note 18, § 412.03[2]. *See* United States v. Johns, 15 F.3d 740, 744 (8th Cir. 1994); Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981).

23. *See* Catherine A. O'Neill, Comment, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. CHI. LEGAL F. 219, 224-25.

24. *See* FED. R. EVID. 412 advisory committee's note.

25. *See* FED. R. EVID. 412.

> alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.—
>
> . . . .
>
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under [other rules of evidence][26] and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.[27]

Rule 412 creates a presumption of inadmissibility for evidence regarding a plaintiff's past sexual conduct. The advisory committee emphasized the three ways in which the Rule 412 test differs from Rule 403 analysis.[28]

First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.[29]

C. *Procedure Under Rule 412*

Rule 412 provides the following procedure to determine if evidence of a plaintiff's sexual history is admissible:

26. A discussion of other rules of evidence is beyond the scope of this Comment. Rule 403 (*Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*), Rule 404 (*Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*), and Rule 406 (*Habit; Routine Practice*) are of particular relevance, but will not be explained in this Comment.

27. FED. R. EVID. 412(a), (b)(2).

28. Rule 403 was the rule most likely to be used to exclude past sexual history in civil cases prior to the Rule 412 amendments. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

29. FED. R. EVID. 412 advisory committee's note.

(c) Procedure to Determine Admissibility.—

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.[30]

The procedure set forth in Rule 412 does not apply to discovery of a plaintiff's past sexual conduct, which is governed by Federal Rule of Civil Procedure 26.[31] However, the advisory committee's note advises the courts to enter appropriate orders during discovery to protect against unwarranted inquiries and to ensure confidentiality so as not to undermine the rationale of Rule 412.[32]

Failure to follow the proper procedure under subsection (c) may result in serious consequences. One district court sanctioned a defendant who failed to place under seal its statement of facts describing evidence of the plaintiff's sexually explicit conversations with her coworkers.[33] While acknowledging the potential relevance of the evidence at issue, the court sanctioned the defendant by excluding the testimony of employees other than the alleged harasser regarding the plaintiff's workplace conduct.[34] The court noted that the plaintiff could still "open the door" to the evidence at issue if she testified that she never engaged in such conduct at work.[35] Clearly, a defendant must follow the procedure under Rule 412 or risk losing the evidence, even if the heightened standard for admissibility could be satisfied.

30. FED. R. EVID. 412(c).

31. *See* FED. R. EVID. 412 advisory committee's note. Rule 26 provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [which] appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1).

32. *See* FED. R. EVID. 412 advisory committee's note. *See* discussion *infra* Part IV.D.

33. *See* Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 109 (E.D. Va. 1995).

34. *See id.*

35. *See id.*

III. RECOMMENDATIONS FOR EVALUATING THE ADMISSIBILITY OF A PLAINTIFF'S PRIOR SEXUAL CONDUCT

In order to provide more consistent and workable guidelines for attorneys and judges to evaluate the admissibility of past sexual conduct, I recommend dividing the conduct at issue into three categories: (1) nonworkplace conduct; (2) workplace conduct; and (3) past conduct involving the alleged harasser. The first type of behavior, nonworkplace conduct, is a plaintiff's behavior in her personal life outside of work hours. This may include her relationship with her spouse, prior sexual contact with others, and other private activities of a sexual nature. A second category, workplace conduct not involving the alleged harasser, may include sexual behavior with other employees, participation in sexual joking, and use of vulgar speech in the workplace. This category may also include prior false claims of sexual harassment against other individuals. Finally, sexual conduct involving the alleged harasser may include behavior either in the workplace or contact outside of work hours such as a prior dating relationship.

Courts have generally treated the evidence within two of the three categories with consistency, both before and after amended Rule 412, although the courts do not categorize the conduct in their analysis. Generally, nonworkplace behavior of a plaintiff is inadmissible,[36] and conduct involving the alleged harasser and plaintiff is admissible.[37] The most troublesome and least consistent type of conduct is workplace behavior that does not involve the harasser.[38] In this category, I propose that the defendant must show a relationship between the plaintiff's workplace behavior and the alleged harassment in order to be admissible. Although each type of conduct must satisfy the requirements of Rule 412, the categorization may assist in the analysis and will encourage more consistent and predictable results in determining the admissibility of past sexual history in civil cases.

IV. SEXUAL HARASSMENT CASES ADDRESSING A PLAINTIFF'S PRIOR SEXUAL CONDUCT

Because the extension of Rule 412 to civil cases has only been in

36. *See* discussion *infra* Part IV.A.
37. *See* discussion *infra* Part IV.C.
38. *See* discussion *infra* Part IV.B.

effect since December 1, 1994, most recorded cases on this issue were decided prior to the amendments. However, the reasoning employed by the courts in those cases is helpful in evaluating the admissibility of evidence in each of the three proposed categories.

A. Nonworkplace Conduct

Courts consistently hold that sexual conduct by the plaintiff that occurs outside of the workplace generally is not admissible because it is irrelevant to the issue of whether sexual harassment occurred.[39] "'Sexual behavior' includes all activities, other than those 'intrinsic' to the alleged misconduct, that involve sexual intercourse or sexual contact, or that imply such physical conduct."[40] Sexual conduct also includes evidence that has sexual connotations such as "dress, speech, or life-style."[41] Examples of sexual conduct include the use of contraceptives,[42] abortions,[43] the viewing of X-rated movies with a spouse,[44] and prior dating relationships.[45]

Prior to the 1994 amendments to Rule 412, courts had generally excluded and prevented discovery of nonworkplace sexual conduct of the alleged victim of harassment. The Eighth Circuit held that the fact that the plaintiff had posed nude for a magazine outside of work was not admissible because the evidence was not material to the issue of sexual harassment.[46] An earlier decision in 1983 by a district court held that the defendant could not discover detailed information about the plaintiff's past sexual conduct, including the names of any person with whom she had sexual relations in the past ten years.[47] An Alabama district court held that evidence of the plaintiff being abused at home by her boyfriend had no bearing on whether she was sexually harassed at work.[48] Similarly, a California court, under a state rule analogous to Federal Rule 412,[49] held that the trial court

39. *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993).

40. *Sheffield*, 895 F. Supp. at 108 (citing FED. R. EVID. 412 advisory committee's note).

41. FED. R. EVID. 412 advisory committee's note.

42. *See* Alberts v. Wickes Lumber Co., No. 93-C-4397, 1995 WL 117886, at *2 (N.D. Ill. Mar. 15, 1995).

43. *See* Kelly-Zurian v. Wohl Shoe Co., 22 Cal. App. 4th 397, 411 (1994).

44. *See id.*

45. *See* Barta v. City & County of Honolulu, 169 F.R.D. 132, 136 (D. Haw. 1996).

46. *See Burns*, 989 F.2d at 963.

47. *See* Priest v. Rotary, 98 F.R.D. 755, 756, 762 (N.D. Cal. 1983).

48. *See* Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922, 932 (M.D. Ala. 1992).

49. *See* CAL. EVID. CODE § 1106 (West 1995). California and Iowa are the only two states to extend "rape shield" protection to civil cases thus far. *Compare id.*, *with* IOWA CODE ANN. §

properly excluded evidence of the plaintiff's abortions, prior sexual conduct with individuals other than the accused harasser, and the viewing of X-rated movies by the plaintiff and her husband.[50] One judge distinguished between a plaintiff's sexual behavior and her "marital" history, holding that "Rule 412 does not give . . . the authority to exclude evidence of past marriages."[51] However, the court went on to exclude the evidence under other rules of evidence because the information was irrelevant.[52]

B. Workplace Conduct

The Supreme Court indicated in *Meritor* that a plaintiff's provocative speech and dress at work may be relevant to the determination of whether the conduct complained of is "unwelcome."[53] However, if the alleged harasser is unaware of the plaintiff's behavior, the court will probably not admit evidence on these matters.[54]

1. Pre-amendment Cases

Cases prior to the extension of Rule 412 recognized the difficulty in evaluating a plaintiff's sexual history in the workplace. While the Fourth Circuit noted that a "[p]laintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment,'" the court held that the plaintiff's workplace conduct was admissible because the behavior tended to prove that the defendant's conduct was welcome.[55] Likewise, a district court held in 1982 that the plaintiff "actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct."[56] The Seventh Circuit held

668.15(1) (West Supp. 1997).

50. *See Kelly-Zurian*, 22 Cal. App. 4th at 411.

51. Janopoulos v. Harvey L. Walner & Assocs., No. 93-C-5176, 1995 WL 107170, at *1 (N.D. Ill. Mar. 7, 1995).

52. *See id.* at *2.

53. *See Meritor*, 477 U.S. at 69.

54. *See* Mitchell v. Hutchings, 116 F.R.D. 481, 484 (D. Utah 1987).

55. Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (quoting Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983)); *see also* EEOC v. Grinnell Corp., 63 Fair Empl. Prac. Cas. (BNA) 387, 389 (D. Kan. 1993).

56. Gan v. Kepro Circuit Sys., Inc., 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982). *See* McLean v. Satellite Tech. Servs., 673 F. Supp. 1458, 1459 (E.D. Mo. 1987) (finding that sexual advances were not unwelcome where plaintiff frequently displayed her body at work by showing photographs of herself or lifting her clothes).

in *Reed v. Shepard*[57] that the plaintiff did not state a claim of sexual harassment because she willingly participated in workplace conduct that included touching, sexually suggestive remarks, and other inappropriate behavior.[58]

2. Post-amendment Cases

Some post-amendment cases list several considerations when evaluating a plaintiff's sexual behavior at work including the overall work environment, the nature of the plaintiff's and defendant's conduct, and the remoteness in time to the alleged harassment. These factors assist in the court's analysis and are more useful than a per se rule of exclusion.

One theme throughout the cases is that a plaintiff does not waive her right to be free from sexual harassment by engaging in vulgar behavior, but the nature of her behavior considered in the totality of the circumstances is determinative of its relevance. In *Balletti v. Sun-Sentinel Co.*,[59] a district court stated that

> [plaintiff's] crude and vulgar behavior [in the workplace] far exceeded any matters of which she complained. Her behavior here is fatal to her claims. These are not the actions of an employee who subjectively perceives her work environment to be abusive or of one who seeks to convey to her co-workers that their behaviors are unwelcome.[60]

One example of past behavior that receives somewhat different treatment is prior false claims of harassment by the plaintiff. The Rule 412 advisory committee's note specifically addresses prior false sexual harassment claims by the plaintiff, stating that Rule 412 would not exclude that evidence.[61]

To show a relationship between the plaintiff's sexual history and the harassment, the defendant's conduct must be similar to the plaintiff's behavior at issue. For example, if a plaintiff engaged in sexually explicit conversations with coworkers and then later complains of sexual innuendo at the workplace, her conduct is relevant. However, a plaintiff's participation in vulgar speech may not be related to a coworker's attempt to touch the plaintiff. The

57. 939 F.2d 484 (7th Cir. 1991).

58. *Id.* at 486-487.

59. 909 F. Supp. 1539 (S.D. Fla. 1995).

60. *Id.* at 1548. *But see* Kimzey v. Wal-Mart Stores, Inc., 907 F. Supp. 1306, 1309 (W.D. Mo. 1995) (noting that participation in a crude work environment "does not invite or sanction, and certainly does not legalize, a hostile and abusive work environment").

61. *See* FED. R. EVID. 412 advisory committee's note.

inquiry should involve an examination of the entire work environment, the nature of the plaintiff's participatory conduct, and the nature of the alleged harassment.[62] Further, if the accused harasser was unaware of the plaintiff's conduct, a relationship between the harassment and the behavior is unlikely.[63]

C. *Conduct Between the Alleged Harasser and the Plaintiff*

Because prior sexual conduct between the plaintiff and the alleged harasser may relate to the determination of welcomeness, this type of conduct is generally discoverable and may be admissible.[64] In a hostile environment case, it is not sufficient that the behavior is inappropriate for the workplace; the employee must also perceive the conduct as abusive and offensive.[65] In the 1982 case of *Reichman v. Bureau of Affirmative Action*,[66] the court admitted evidence of the plaintiff's "flirtatious" behavior with the alleged harasser, such as her complimenting his appearance, acting provocatively around the alleged harasser, and behaving unprofessionally.[67] The court determined that the manager's advances were not unwelcome.[68] Clearly, the fact that the plaintiff engaged in a consensual relationship with the alleged harasser at one time does not foreclose the possibility that the conduct became unwelcome and rose to the level of sexual harassment at a later time.[69]

Prior consensual sexual contact between the alleged harasser and the plaintiff can change the focus of the inquiry. One court held that when a prior consensual relationship with a coworker ended, and the employee was subsequently fired following the coworker's negative

62. *See* Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1008, 1010 (7th Cir. 1994) (holding that plaintiff's lack of power and isolation in the male-dominated workplace must be considered in determining whether her use of foul language demonstrated that coworker's sexual language was unwelcome); *see also* Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1275 (5th Cir. 1989) (stating that plaintiff's limited sexual comments as "replies to an onslaught of sexual remarks and gestures" did not establish as a matter of law that her coworkers' sexual behavior was welcome).

63. *See Mitchell*, 116 F.R.D. at 484.

64. *See* Bigoni v. Pay 'N Pak Stores, 48 Fair Empl. Prac. Cas. (BNA) 732, 734 (D. Or. 1988); Evans v. Mail Handlers, 32 Fair Empl. Prac. Cas. (BNA) 634, 637 (D.D.C. 1983).

65. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

66. 536 F. Supp. 1149 (M.D. Pa. 1982).

67. *Id.* at 1164.

68. *See id.* at 1177. *But see* Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at *8 n.4 (D. Kan. Aug. 24, 1994) (holding that two incidents, one in which the plaintiff authored a parody on birth control, and another in which she commented on the alleged harasser's penis size, did not preclude the plaintiff from establishing a hostile work environment).

69. *See generally* Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).

comments to her supervisor, a presumption was created that the employer acted because of the failed relationship rather than on the illegal basis of gender.[70] The plaintiff failed to rebut the presumption because she did not show that the employer made further sexual demands and punished her for refusing to continue the relationship.[71] However, a plaintiff's allegation that her supervisor threatened to destroy her career and issued a disciplinary letter following her refusal to continue the relationship raised an inference that the employee was harassed.[72]

D. Effect on Discovery

Rule 412 is concerned with the admissibility of evidence, but that logically will have some effect on discovery allowed in the suit. The advisory committee suggested that courts should presumptively issue protective orders and confidentiality orders in cases that implicate Rule 412 in order to preserve the rationale of the rule.[73] However, Federal Rule of Civil Procedure 26 governs discovery, and the procedures of Rule 412 do not apply to that stage of the litigation.[74]

1. Plaintiff's Conduct

Courts have limited discovery of a plaintiff's conduct using the rationale of Rule 412. A district court addressed the impact of Rule 412 on discovery in a sexual harassment case in *Sanchez v. Zabihi*.[75] The defendant in *Sanchez* alleged that the plaintiff was the sexual aggressor, and asked in an interrogatory for information about "personal, romantic, or sexual advances" that the plaintiff had made towards other employees in the last ten years.[76] The court noted the importance of not undermining Rule 412 in discovery and placed limits on the defendant's interrogatories.[77] Finding the interrogatory

70. *See* Keppler v. Hinsdale Township High Sch. Dist. 86, 715 F. Supp. 862, 869 (N.D. Ill. 1989).

71. *See id.*

72. *See* Babcock v. Frank, 729 F. Supp. 279, 288 (S.D.N.Y. 1990); *see also* Shrout v. Black Clawson Co., 689 F. Supp. 774, 779-80 (S.D. Ohio 1988) (holding that the plaintiff was subject to harassment although she and the defendant had engaged in a consensual relationship several years earlier). *But see* Sardigal v. St. Louis Nat'l Stockyards Co., 42 Fair Empl. Prac. Cas. (BNA) 497, 502 (S.D. Ill. 1986).

73. *See* FED. R. EVID. 412 advisory committee's note.

74. *See* sources cited *supra* note 31.

75. 71 Fair Empl. Prac. Cas. (BNA) 835 (D.N.M. 1996).

76. *Id.* at 835.

77. *See id.*

to be overly broad, the court limited the inquiry to the three years prior to the alleged harassment, and held that the plaintiff was not required to answer "about any matter involving the coworker who later became her spouse."[78]

2. Plaintiff's Claims

Despite the protections of Rule 412, specific claims by the plaintiff may open the door to discovery of workplace conduct that is not between the accused harasser and the plaintiff. For example, the court in *Winsor v. Hinckley Dodge, Inc.*[79] held that the trial court properly allowed discovery into the plaintiff's relationship with her former manager.[80] In that case, the plaintiff claimed that she was sexually harassed by rumors of an affair with that manager as well as insinuations that she received preferential treatment as a result.[81] Those claims made discovery into her actual relationship with the manager relevant.[82]

A plaintiff's claims of mental anguish, emotional damages, or assertion of pendent state law claims of intentional infliction of emotional distress may expand the type of evidence that is discoverable and admissible. Courts may allow a broader examination of the plaintiff's personal life to determine if other factors caused or contributed to the emotional distress.[83] Merely filing a sexual harassment claim does not automatically place mental condition in controversy.[84] One author opined that because "plaintiffs will now routinely seek compensatory damages under Title VII, courts most likely will permit expanded discovery by the defendant, particularly to allow the defendant to discover the precise cause of any alleged emotional distress."[85] A defendant seeking

78. *Id.* at 837.

79. 79 F.3d 996 (10th Cir. 1996).

80. *Id.* at 1002-03.

81. *See id.*

82. *See id.*

83. *See* Marshall v. Nelson Elec., 766 F. Supp. 1018, 1035 (N.D. Okla. 1991) (holding that plaintiff's emotional distress was not caused by workplace conduct, but was a result of spousal abuse, among other things), *aff'd*, 999 F.2d 547 (10th Cir. 1993); *cf.* Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222-23 (S.D.N.Y. 1994) (stating that questions about sexual history are unrelated to the question of mental anguish and therefore not permitted), *and* FED R. CIV. P. 35(a).

84. *See* Lahr v. Fulbright & Jaworski, L.L.P., 164 F.R.D. 204, 210 (N.D. Tex. 1996).

85. CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW § 1.2.2, at 14 (Bruno Stein ed., 1996). *See* Alberts v. Wickes Lumber Co., No. 93-C-4397, 1995 WL 117886, at *5 (N.D. Ill. Mar. 15, 1995) (holding that the plaintiff could not claim the protection of Rule 412 to

evidence concerning other potential sources of emotional distress should be distinguished from the argument that a plaintiff who has engaged in certain behavior is somehow immune to emotional distress from harassment.[86]

3. Nonparty Witnesses

Another possible impact on discovery is Rule 412's effect on nonparty witnesses. In *Burger v. Litton Industries, Inc.*,[87] the district court granted plaintiff's motion in limine to prevent the defendant from questioning a nonparty witness, who claimed to have also been harassed by the same manager, about her alleged consensual sexual conduct with employees other than the alleged harasser.[88] The court cited the advisory committee's statement that Rule 412 applies "without regard to whether the alleged victim or person accused is a party to the litigation."[89] The court held that the information sought did not "substantially outweigh" the invasion of the witness' privacy.[90] However, another district court denied the application of Rule 412 sought by the plaintiff because the nonparty witness had raised no objections to discovery and did not seek protection under Rule 412.[91]

CONCLUSION

While courts have treated evidence of a plaintiff's past sexual conduct with some consistency, categorizing the evidence in question will assist in the analysis and ensure greater consistency in decision-making. The plaintiff's nonworkplace conduct is generally not relevant and therefore not admissible. Past sexual conduct between the plaintiff and the alleged harasser is ordinarily discoverable and admissible; however, a past consensual relationship does not preclude a finding of sexual harassment. Finally, a plaintiff's sexual conduct at work that is not directed at the harasser should only be admitted if there is some relationship between the conduct and the harassment.

prohibit the defendant's questioning of her inability to engage in intimate relationships after the plaintiff raised that issue); *see also* Ramirez v. Nabil's, Inc., No. CIV.A.94-2396-GTV, 1995 WL 609415, at *3 (D. Kan. Oct. 5, 1995).

86. *See Mitchell*, 116 F.R.D. at 485; *see also* Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1326-27 (8th Cir. 1994).

87. No. 91-CIV.-0918-(WK)-(AJP), 1995 WL 476712, at *1 (S.D.N.Y. Aug. 10, 1995).

88. *Id.* at *2.

89. *Id.* (citing Rule 412 advisory committee's note).

90. *See id.*

91. *See* Stalnaker v. Kmart Corp., 71 Fair Empl. Prac. Cas. (BNA) 705, 707 (D. Kan. 1996).

Returning to the hypotheticals at the beginning of the Comment, the likely result is as follows. Krista's affair and abortion will not be admissible in her sexual harassment suit. Rosie's prior consensual relationship with the accused coworker will likely be admissible. And Katherine's inappropriate workplace behavior should only be admitted if the harasser knew of the plaintiff's behavior prior to his conduct, and if there is some relationship between his behavior and her actions. With proper analysis and application, Rule 412 can provide protection to the plaintiff throughout the lawsuit while allowing the alleged harasser to present a full defense.