Evidentiary Issues in Sexual Harassment Litigation

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INTRODUCTION

For many years, the efforts of feminist litigators to protect women from sexual harassment in the workplace focused on convincing courts that sexual harassment is a form of sex discrimination actionable under state and federal anti-discrimination laws. Following widespread judicial acceptance of this contention in the late 1970s and early 1980s, however, the focus of sexual harassment litigation began to change from the viability of plaintiff's cause of action to issues regarding burdens of proof, appropriate discovery limitations, and the admissibility of various types of evidence.

In the past three years, two issues of particular significance in sexual harassment cases have attracted the attention of state and federal courts. The first is whether a sexual harassment defendant can inquire into the prior sexual conduct of a harassment plaintiff in the same way that criminal defense lawyers probed the sexual histories of rape victims before the widespread reform of rape laws in the 1970s.[1] The second issue is whether and, if so, for what purposes, a sexual harassment plaintiff can discover and introduce evidence regarding her harasser's conduct toward other female employees.

The purpose of this Article is to examine recent developments in these two areas and to provide guidance to litigators who, without the benefit of substantial judicial precedent, are confronted with these issues. The Article will conclude that, absent extraordinary circumstances, the sexual history of a harassment plaintiff is neither discoverable nor admissible at trial, because in most cases there is no evidentiary theory under

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[1] *See, e.g.*, FED. R. EVID. 412; *see also* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 412[01] (especially note 1) (1985) and 1985 Supp. at 241-60.

which it is relevant to any claim or defense. On the other hand, the harasser's conduct toward other female employees or customers is, in a number of situations, directly relevant to establishing the essential elements of a sexual harassment cause of action. In these cases, a plaintiff is entitled to discover and introduce evidence of this nature.

I. DEFENDANT'S ATTEMPTS TO DISCOVER OR INTRODUCE EVIDENCE OF A PLAINTIFF'S SEXUAL HISTORY

With seemingly increasing frequency in sexual harassment litigation, defendants are attempting to discover and introduce evidence relating to the plaintiff's past sexual conduct as part of their defense strategy. A defendant may attempt to use evidence of a plaintiff's sexual history to support a contention that the plaintiff is a "promiscuous" woman and that, consistent with this trait, she solicited the defendant's advances or was herself the sexual aggressor in the situation.[2] The defendant may also seek evidence of past sexual conduct hoping to show that, in light of her past behavior, it is unlikely that the plaintiff was offended or emotionally disturbed by the defendant's conduct.[3] Or the defendant may wish to use evidence of past sexual conduct to attack the plaintiff's credibility as a witness.

As patently unreasonable as these contentions may seem to those with feminist sensibilities, their potential effectiveness should never be underestimated. There exists in this society a powerful mythology that a woman who has been subjected to sexual violence has probably brought it on herself, either because she solicited it, or because she was "that sort of woman," and was consequently "fair game."[4] It is because of this mythology that the consent defense has been used so effectively in rape cases, and that a rape trial can be as brutalizing and humiliating for the victim as the rape itself.[5]

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[2] *See* Priest v. Rotary, 98 F.R.D. 755 (N.D. Cal. 1983).

[3] *See* Department of Fair Empl. & Housing v. Fresno Hilton Hotel, California Fair Employment and Housing Case No. FEP80-81C7-0514se, Precedential Decision No. 84-03 (1984) [hereinafter cited as F.E.H.C. Dec. No. 84-03]. Copies of the Commission's precedential decisions are available from its office, and are reprinted in CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION PRECEDENTIAL DECISIONS.

[4] For a thorough discussion of the nature and effects of this mythology, see S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975). For an overview of the impact the mythology has had on sexual harassment jurisprudence, especially in the early sexual harassment cases, see C. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979).

[5] In 1978, Congress amended the Federal Rules of Evidence by enacting the Privacy Protection for Rape Victims Act, now FED. R. EVID. 412, which excludes evidence regarding the rape victim's past sexual behavior in all but an extremely narrow range of circumstances. In support of the bill, Representative Holtzman made the following statement on the House floor:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence

The sexual harassment defendant who seeks to discover or admit evidence of the plaintiff's sexual history may be doing so not only in an attempt to play upon the trier of fact's prejudices, but also to make the litigation so uncomfortable for the plaintiff that she is willing to abandon it or settle for a fraction of its potential value. It is therefore imperative that the plaintiff's attorney be prepared to protect the plaintiff from improper discovery and admission of evidence about her past sexual behavior. Although this issue confronts practitioners throughout the United States, there are only two published decisions treating it, both originating in California. Nonetheless, these two decisions, *Priest v. Rotary*[6] and *Department of Fair Employment & Housing v. Fresno Hilton Hotel*,[7] can provide substantial assistance to attorneys across the country. The evidentiary principles upon which these cases were based are virtually uniform in American jurisprudence.

The purpose of the following section is to provide the practitioner with evidentiary background necessary for a cogent, non-ideological analysis of the sexual history issue as it may arise during the course of litigation. Additionally, it will examine in light of established evidentiary principles, the various evidentiary theories used by defendants to support the discovery or admission of evidence of sexual history.

A. Overview of the Principles Governing the Discovery and Admissibility of Evidence

The sexual harassment plaintiff's attorney must structure her argument differently depending on whether she is attempting to prohibit the *discovery* of evidence regarding the plaintiff's sexual history, or to exclude evidence at trial. Her arguments must differ because the standards governing the discoverability of evidence are different from those governing its ultimate admissibility.

Under Rule 26 of the Federal Rules of Civil Procedure, information is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence.[8] Consequently, a party who seeks to prevent her opponent from discovering information must demonstrate either that there is *no* evidentiary theory under which the evidence could be admissible, or that any potential relevance the evidence could have is outweighed by the annoyance, embarrassment or oppression its discovery would

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or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten incidents of rape is ever reported.

H.R. 4727, 95th Cong., 2d Sess. 124 CONG. REC. 34,913 (1978).

[6] 98 F.R.D. 755 (1983).

[7] F.E.H.C. Dec. No. 84-03, *supra* note 4.

[8] FED. R. CIV. P. 26(b).

inflict upon the plaintiff.[9] Thus, to succeed in protecting the plaintiff, counsel must have a thorough understanding of every possible evidentiary theory on which the defendant might base the potential relevancy of the evidence and be able to demonstrate how and why each is invalid.

Whether a particular piece of evidence is relevant will depend on the purpose or purposes for which it is offered. Thus, the same piece of information may be deemed relevant or irrelevant depending on the attorney's ability or inability to articulate a proper evidentiary theory supporting its admission.

The importance of these principles is graphically illustrated when a party seeks to introduce evidence of a person's character by testimony regarding either her reputation or her past acts. Under the Federal Rules of Evidence, testimony regarding a person's character or prior behavior is not admissible for the purpose of proving that on a particular occasion she acted in conformity with that character trait or past behavior.[10] However, such evidence may be admissible if it is offered for some other purpose,[11] or if the character of the plaintiff is "in issue" in the litigation. The term "in issue," as it is used in this context, has a limited meaning. A given fact is deemed to be "in issue" in a case only if that fact constitutes an essential element of a claim or defense.[12]

A plaintiff's reputation for promiscuity or sexual aggressiveness is

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[9] *See* FED. R. CIV. P. 26(c); *see also* Hughes & Anderson, *Discovery: A Competition Between the Right to Privacy and the Right to Know*, 23 U. FLA. L. REV. 289 (1971).

[10] FED. R. EVID. 404(a) provides in pertinent part: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ."

FED. R. EVID. 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Rule 404(b) exceptions, listed above, may be used by a defendant in his attempt to articulate a legitimate evidentiary theory to support the admissibility of evidence of the plaintiff's past sexual behavior. *See* Priest v. Rotary, 98 F.R.D. 755, at 759-61; *see also infra* text accompanying notes 22-33.

[11] *See supra* note 10.

[12] FED. R. EVID. 405(b) provides: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

Proof of specific instances of conduct may be made under FED. R. EVID. 405(b) only in those rare cases in which character is in and of itself an *essential element* of a claim or defense, but not when it is being used circumstantially to infer an act which constitutes the essential element. U.S. v. Donoho, 575 F.2d 718 (9th Cir. 1978), *vacated on other grounds*, 439 U.S. 811 (1979); United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978); 22 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5267 (1969); J. WEINSTEIN & M. BERGER, *supra* note 1, at ¶ 405[05]; D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE ¶ 150 (1977).

Cases in which character or a trait of character is an essential element of a claim or defense are extremely rare. The Advisory Committee Note to FED. R. EVID. 405 gives only two examples: the chastity of a victim under a statute specifying her chastity as an essential element of the crime of seduction; and the competency of a driver in an action for negligent entrustment of a motor vehicle to an incompetent driver. In each of these cases, the character trait in question is not being used inferentially. It is, in and of itself, an ultimate fact which under the substantive law determines the rights and liabilities of the parties. It is this ultimate,

not an essential element of a defense in a sexual harassment case. Defenses ordinarily take one of two forms; each may stand alone or be used in combination with the other. First, the defendant may argue that he did not commit the acts complained of. Secondly, the defendant may concede that the plaintiff was subjected to an adverse employment action, but argue that the action was taken for non-discriminatory reasons.[13] However, when a plaintiff includes a claim for compensatory damages based on an allegation that the defendant's conduct had a damaging effect on her interest in sexual activity, then her sexuality is put "in issue." In such a case, a defendant would most likely be permitted to inquire into the plaintiff's past and present sexual behavior.

Consequently, the potential admissibility and hence the discoverability of evidence regarding the plaintiff's sexual history will turn on the purpose articulated by the defendant for its being sought or offered. The remainder of this section will examine various evidentiary theories which a sexual harassment defendant might advance and will discuss the extent to which they may or may not be valid.

B. Evidence of the Plaintiff's Sexual History to Prove That She Solicited the Defendant's Advances or Was the Sexual Aggressor

More often than one might think, a sexual harassment defendant's attorney will state, either during a plaintiff's deposition or in a brief supporting a motion to compel deposition testimony, that the defendant seeks evidence of the plaintiff's past sexual conduct to prove that she had a tendency to be promiscuous or sexually aggressive,[14] and that she acted in conformity with that tendency in her dealings with the alleged harasser. Evidence regarding the plaintiff's past sexual behavior is unquestionably inadmissible for this purpose.[15]

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rather than inferential, nature of the fact that makes it an essential element of the claim. *See* J. WEINSTEIN & M. BERGER, *supra*, at ¶ 401[03].

[13] Bundy v. Jackson, 641 F.2d 934, 953 (D.C. Cir. 1981).

[14] In *Priest v. Rotary*, defense counsel, when asked during Ms. Priest's deposition for an explanation of the potential relevancy of her sexual history, made the following statement: "Now, certainly this lady's sexual history is certainly [sic] relevant to the subject matter of this lawsuit, and it's certainly reasonably calculated to lead to the discovery or evidence that may be relevant to that issue showing habit, custom, and *propensity to engage in such conduct*." 2 Deposition Transcript of Evelyn J. Priest at 3, Priest v. Rotary, 98 F.R.D. 755.

Subsequently, in his brief supporting a motion to compel Ms. Priest's testimony, defense counsel articulated the following evidentiary theory to support its relevancy, again ignoring the proscriptions of FED. R. EVID. 404(b):

> In order to corroborate Mr. Rotary's position that the plaintiff was the sexual aggressor in this case, the defendant in deposing EVELYN PRIEST sought information from her to establish a *pattern of conduct* indicating that she had acted in a sexually aggressive manner on other occasions in order to receive benefits relating to her personal welfare.

Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Answers Upon Oral Deposition at 4-5, Priest v. Rotary, 98 F.R.D. 755.

[15] *See supra* text accompanying notes 10 and 12. That a defendant would articulate such an offer

Under Federal Rule of Evidence 404(b), evidence of a party's prior acts is not admissible to support an inference that the party acted in conformity with those past acts on a particular occasion.[16] The leading case applying this principle to rape litigation was *United States v. Kasto*,[17] and in *Priest v. Rotary*,[18] it was extended to sexual harassment litigation.

Once a sexual harassment defendant realizes that he has walked into the wall presented by Rule 404(b), he may, like the defendant in *Priest v. Rotary*, search for a different evidentiary theory to support the admissibility of the past-acts evidence. However, upon examination, these theories prove to be no more valid than the one just discussed.

C. Past Acts Evidence as Constituting Proof of Habit

In *Priest v. Rotary*, the defendant attempted to justify his attempts to discover the plaintiff's past sexual conduct by asserting that it would constitute evidence of "habit," which is admissible under Federal Rule of Evidence 406.[19] The district court noted that the distinction between character and habit evidence can at times be elusive, but not when one is attempting to characterize a person's past sexual conduct.[20] Quite correctly, the *Priest* court found the habit theory to be without merit.[21]

It is well-established that for past acts evidence to rise to the stature of "habit" evidence admissible under Federal Rule of Evidence 406, the evidence must reveal a consistent response to a specific situation which occurs with virtually invariable regularity.[22] The "semi-automatic,"

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of proof in the face of Rule 404's clear prohibitions demonstrates the strength of the nonconscious ideology that a woman who does not conform to traditional expectations regarding her sexual conduct cannot be heard to object to sexual advances of aggression by men in whom she has no sexual interest.

16 *See* 10 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 404.02 (1982).

17 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

18 98 F.R.D. at 758.

19 *Id.* Specifically, in *Priest*, the defendant contended that he was seeking to discover the identity of each person with whom the plaintiff had been sexually involved for the past ten years in order to show that she had a "habit" of seducing men so that she could move into their residences and avoid having to pay rent. Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Answers Upon Oral Deposition at 7, Priest v. Rotary, 98 F.R.D. 755.

20 98 F.R.D. at 758-59.

21 *Id.*

22 Professor Wigmore summarized the task of distinguishing habit evidence from evidence of character in the following commentary:

> There is, however, much room for difference of opinion in concrete cases owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances.

1A J. WIGMORE, EVIDENCE § 92 at 1608-09 (Tillers rev. 1983).

For a further discussion of the distinction between character and habit evidence, see

"non-volitional" or "reflexive" nature of habitual behavior is the quality which renders the evidence trustworthy and distinguishes it from character evidence.[23]

It is difficult to imagine how an individual's prior sexual conduct could be described as "reflexive," "non-volitional," "semi-automatic" or occurring with "invariable regularity." This is especially true if a defendant, like the defendant in *Priest*, is attempting to demonstrate that the plaintiff undertook a series of conniving schemes to seduce her prior sexual partners and her alleged harasser. The volitional, planned nature of such conduct would defeat any attempt to characterize it as "habit" evidence.[24]

It has already been established in the context of rape litigation that merely couching evidence indicating an unchaste character in terms of "habit" does not render that evidence admissible if it is not technically habit evidence.[25] A sexual harassment defendant's attempt to characterize evidence of a plaintiff's sexual history as evidence of habit is nothing more than an effort to circumvent Rule 404(b)'s exclusion of past acts evidence to support an inference of subsequent consistent behavior.

D. Use of Past Acts Evidence to Prove Motive or Intent

A sexual harassment defendant may also take the position that evidence of the plaintiff's past sexual relationships is relevant to prove "motive" or "plan," and is thus admissible under the Rule 404(b) exceptions.[26] This "motive" theory can take a number of forms. In *Priest v. Rotary*, the defendant contended that evidence of the plaintiff's sexual history would demonstrate that she possessed a "motive" or "plan" to seduce her alleged harasser for economic gain, and that, when she failed in her plan, she undertook a plan to retaliate against him by filing her sexual harassment case.[27]

As the district court noted in *Priest*, the defendant's first theory was nothing more than an attempt to discover evidence of past acts to prove a

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MCCORMICK ON EVIDENCE § 195 (2d ed. 1972) discussed in Priest v. Rotary, 98 F.R.D. at 758.

[23] United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); Frase v. Henry, 444 F.2d 1228 (10th Cir. 1971); CFW Constr. Co. v. Travelers Ins. Co., 363 F.2d 557 (6th Cir. 1966). *See also* C. CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 3204 at 4433, *cited in* Priest v. Rotary, 98 F.R.D. at 759.

[24] In rejecting the defendant's "habit" theory, the *Priest* court relied on the D.C. Circuit's leading decision in United States v. Levin, 338 F.2d 265 (D.C. Cir. 1964). In *Levin*, the court refused to characterize as habit the defendant's lifelong practice of remaining at home on the Sabbath, noting that the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value. 338 F.2d at 272. As the *Priest* court observed, if a person's lifelong religious practices cannot properly be characterized as habit, neither can a person's history of sexual relationships. 98 F.R.D. at 759.

[25] Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981).

[26] *See supra* note 10 for the text of FED. R. EVID. 404(b) and a discussion of the exceptions.

[27] 98 F.R.D. at 760.

propensity to act in a certain manner, an attempt which Rule 404(b) clearly prohibits.[28] As for the defendant's "motive to retaliate" theory, the *Priest* court refused to accept the idea that the plaintiff's prior sexual conduct would have any bearing on whether or not she intended to retaliate against the defendant by suing him for sexual harassment.[29]

An attempt to use a motive or intent theory to establish the relevancy of sexual history evidence in a sexual harassment case is invalid for a second reason. Under Rule 404(b), prior acts may be admitted to show motive, other than motive to falsify evidence or bring false charges, only in cases where motive or intent is "in issue" between the parties, that is to say, where intent or motive is an essential element of a claim or defense.[30] Plaintiff's intent or motive is not an element of a defense to an action for sexual harassment under Title VII,[31] and thus cannot serve as the basis for the admissibility of past-acts evidence under Rule 404(b).

Additionally, if the party opposing the admission of the past acts evidence claims that he did not engage in the conduct alleged by the party seeking its admission, the evidence is not admissible to prove motive or intent. The motive and intent exceptions to Rule 404(b) are intended to apply only to situations where a party admits the doing of an act but claims that he or she did it innocently or mistakenly.[32] Consequently, if a defendant seeks to prove that the plaintiff had a "motive" to proposition him, and the plaintiff contends that she did not proposition him, Rule 404(b)'s intent exception will not apply.[33]

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[28] *Id.*

[29] It should be noted that in certain limited circumstances, evidence proving that a party had a sexual relationship with a *specific individual* may be relevant in proving an ulterior motive in instituting litigation. In United States v. Kasto, 584 F.2d 268, the court noted that in rape cases, where evidence proving an ulterior motive surrounding the charge of rape incidentally required the admission of evidence showing a prior sexual relationship, such evidence would be allowed. *Id.* at 271 n.2. To illustrate this proposition, the *Kasto* court cited the Texas case of Shoemaker v. State, 58 Tex. Crim. 518, 126 S.W. 887 (1910). In *Shoemaker*, a rape defendant sought to prove that the alleged victim had been having sexual relations with a man by the name of Tom Baynum. The proferred evidence was also to demonstrate that when confronted about this relationship by her morally outraged sisters, the alleged victim told them that if they made her move out of the house, as they threatened, she would charge one of the sister's husband, the defendant, with rape. 58 Tex. Crim. at 521, 126 S.W. at 888-89. Thus, the "motive" involved in *Shoemaker* was a motive to charge the defendant falsely, not a "motive" or, more properly stated, a "propensity" to engage in consensual sexual relations with him. The latter is what the defendant in *Priest v. Rotary* was attempting to demonstrate.

[30] United States v. Coades, 549 F.2d 1303 (9th Cir. 1977); United States v. Crockett, 514 F.2d 64, 72 (5th Cir. 1975); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[03] (1985).

[31] The essential elements of such a defense are: first, that the defendant did not commit the acts of sexual harassment alleged by the plaintiff; or second, that the plaintiff was subjected to the adverse employment decision for a legitimate, non-discriminatory reason. Bundy v. Jackson, 641 F.2d at 953. *See infra* discussion accompanying notes 104-105.

[32] United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978); United States v. Coades, 549 F.2d 1303, 1306; Garcia v. Aetna Fire Casualty & Ins. Co., 657 F.2d 652, 655 (5th Cir. 1981).

[33] *See* discussion of United States v. Powell, 587 F.2d 443, in Priest v. Rotary, 98 F.R.D. at 760-61.

E. Attempts to Discover or Introduce Evidence of Plaintiff's Sexual History to Show an Alleged Lack of Sensitivity, or an Oversensitivity, to Sexual Conduct

In cases in which the plaintiff has made a claim for compensatory damages,[34] or has alleged a violation of Title VII through the creation of a hostile, offensive, or intimidating work environment,[35] the defendant may argue that evidence of her prior sexual conduct will show that she was not likely to have been emotionally disturbed or injured by whatever transpired between her and her alleged harasser. This contention was advanced by the respondent and rejected by the California Fair Employment and Housing Commission in *Department of Fair Employment & Housing v. Fresno Hilton Hotel*.[36]

In refusing to permit introduction of the evidence regarding the complainant's sexual history, the Commission in *Fresno Hilton* relied heavily on the Northern District of California's decision in *Priest v. Rotary*.[37] However, the Commission went further and noted that even if it admitted evidence that the complainant had consensually engaged in sexual horseplay with persons other than her alleged harasser and had a number of former sexual partners, it would not follow from those facts that the unwelcomed sexual advances of a different individual would not offend her. As the Commission stated, to find otherwise, "we would have to believe that the emotional responses of harassment victims are fungible and indistinguishable. Furthermore, we would have to accept the absurd and deeply offensive notion that a woman's consensual conduct with some individuals negates her right to say 'no' to the same or similar conduct with others."[38]

The California Commission's decision, reflected in the above language, found support in the Fourth Circuit's opinion in *Katz v. Dole*.[39] In *Katz*, the defendant offered evidence at trial that the plaintiff had engaged in sexual banter with one of her male co-workers in an effort to show that she had not really been offended by other employees' sexually suggestive behavior. The *Katz* court, like the Commission in *Fresno Hilton*, refused to accept that the latter proposition followed from the former fact.

In other cases, the defendant may attempt to demonstrate that the

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[34] Compensatory damages are not available in actions under Title VII of the Civil Rights Act of 1964. The plaintiff in such an action is limited to equitable relief. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1452 n.153 (2d ed. 1983) and cases cited therein. Compensatory and punitive damages are available, however, under some state anti-discrimination statutes including the California Fair Employment and Housing Act. Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982).

[35] *See infra* text accompanying notes 73-85.

[36] F.E.H.C. Dec. No. 84-03, *supra* note 4.

[37] *Id.* at 21-22.

[38] *Id.* at 23.

[39] 709 F.2d 251 (4th Cir. 1983).

plaintiff had an "oversensitivity" to sexual banter, or some psychological condition that caused her to imagine that sexual advances were being made when, in fact, they were not. The Northern District of Illinois recently confronted such a defense strategy in *Jennings v. D.H.L. Airlines.*[40] In *Jennings*, the defendant attempted to discover the records of the plaintiff's psychotherapist to demonstrate that the plaintiff's complaint of sexual harassment resulted from her own emotional problems, which caused her to be "oversensitive" to sexual conduct, and not from any "real" harassment.

The district court refused to require the production of the records, ruling instead that they were protected by the psychotherapist-patient privilege.[41] In so ruling, the court noted that the issue of whether the employer had created a hostile, offensive and intimidating work environment[42] is determined by applying an *objective* test; it does not depend on the plaintiff's subjective state of mind.[43]

The *Jennings* case is an extremely important tool in protecting sexual harassment plaintiffs from psychological abuse during the course of litigation. *Jennings* stands for the proposition that the focus of the evidentiary inquiry in a hostile work environment case should be on the *defendant's* conduct, not on the plaintiff's psychological predispositions. If the plaintiff's state of mind is not relevant, it is correspondingly not discoverable.

This proposition may hold, however, only if the plaintiff's complaint does not include a prayer for damages to compensate for mental distress caused by her exposure to the work environment. *Jennings* was brought under Title VII, which does not provide a basis for an award of compensatory damages.[44] The *Jennings* court specifically noted that if the plaintiff's complaint had included a claim for emotional distress damages, her psychological well-being would have been in issue,[45] and hence discoverable.

There may, however, be circumstances in which, even where the plaintiff's mental condition is put in issue by an emotional distress claim, requiring her to submit to a psychological evaluation would be inappropriate. Numerous state discovery statutes and Federal Rules of Civil Procedure Rule 35 require a showing of good cause before such discovery will be permitted, and lodge in the trial court the discretion to prohibit the discovery even when the mental condition of the party is in issue in the litigation.

Consequently, if the sexual harassment defendant has been guilty of

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[40] 34 Fair Empl. Prac. Cas. (BNA) 1423 (N.D. Ill. 1984).
[41] *Id.* at 1425.
[42] *See infra* discussion accompanying notes 74-86.
[43] *Id.*
[44] *See* cases cited *supra* note 32.
[45] 34 Fair Empl. Prac. Cas. (BNA) at 1425.

prior discovery abuse in the litigation or has failed to demonstrate why the discovery it seeks cannot be obtained by less intrusive means (or if the motion has not been timely made), the plaintiff's counsel should consider opposing the motion on the grounds that the burden and oppression which the examination will occasion outweighs its potential value to the opposing litigant.[46]

This situation was presented in *Zabkowicz v. West Bend Company*.[47] In *Zabkowicz*, the plaintiffs, a married couple, alleged that they had suffered extreme emotional distress as a result of the wife's having been sexually harassed at work.[48] The defendant sought an order requiring both plaintiffs to submit to a psychiatric examination by the defendant's expert witness in the absence of plaintiff's counsel or a recording device. The *Zabkowicz* court refused to order the examination, and held that in situations where a psychiatric evaluation of a sexual harassment plaintiff is appropriate, the plaintiff is entitled to have a recording device, counsel, or any other third party present at the examination.[49]

In cases where a sexual harassment plaintiff may properly be required to submit to a psychological evaluation, plaintiff's counsel should move for a protective order permitting herself to be present at the examination, requiring that a tape recording of the examination be made, and limiting the scope of the examination to the issue of whether the harassment caused the plaintiff to suffer mental distress. Inquiry into the plaintiff's sexual history or other aspects of her personal life should not be permitted to show a propensity to act in a sexually aggressive or promiscuous manner,[50] to challenge her credibility,[51] or to demonstrate that the work environment itself did not violate Title VII or a similar state

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[46] As of the publication of this Article, the California Supreme Court is considering the case of Vinson v. Superior Court, No. SF 24932 (review granted Sept. 19, 1985). In *Vinson*, the plaintiff is arguing, with substantial persuasiveness, that a psychological or physical examination of a sexual harassment plaintiff by the defendant's experts should never be permitted, because in the context of sexual harassment litigation it is inherently abusive and results in too great a chilling of the plaintiff's entitlement to seek vindication of important civil rights. For further information regarding the *Vinson* case, readers are encouraged to contact plaintiff's counsel, Patricia Shiu, at the Employment Law Center in San Francisco, California.

[47] 35 Fair Empl. Prac. Cas. (BNA) 209 (E.D. Wis. 1984).

[48] It is curious that the issue regarding proof of emotional distress arose at all in *Zabkowicz*, given that compensatory damages for mental suffering or emotional distress are not permitted in cases under Title VII, which provides only for equitable relief. Shah v. Mount Zion Medical Center, 642 F.2d 268, 272 (9th Cir. 1981); DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 194 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); Pearson v. Western Elec. Co., 542 F.2d 1150 (10th Cir. 1976).

[49] 35 Fair Empl. Prac. Cas. (BNA) at 210.

[50] *See supra* text accompanying notes 10-11.

[51] Under California law, expert testimony on the issue of credibility is not admissible at trial. People v. Russel, 69 Cal. 2d 187, 195, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 216 (1968), *cert. denied sub nom.* Russel v. Craven, 393 U.S. 864 (1968); Ballard v. Superior Court, 64 Cal. 2d 159, 173, 410 P.2d 838, 847, 49 Cal. Rptr. 302, 311 (1966); People v. Fleming, 140 Cal. App. 3d 540, 544, 189 Cal. Rptr. 619, 620 (1983). For a justification of this rule, see Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648 (1960).

statute.[52] Plaintiff's counsel should also ensure that the order permitting a psychological evaluation specifies the conditions required by the appropriate state or federal discovery rule.[53]

F. The Use of Protective Orders in Sexual Harassment Discovery Disputes

Under Rule 26(c) of the Federal Rules of Civil Procedure,[54] a court may deny or limit a party's right to take discovery, even though the information sought might be relevant in the litigation. Under the Rule, the degree to which proposed discovery will aid in the search for truth must be balanced against the burdens or dangers of abuse it would occasion.[55] A protective order is appropriate when the discovery sought by a party, or the manner in which the discovery is to be taken, would, in comparison to any legitimate value it might have, unduly burden, embarrass, oppress, or annoy the party from whom it is sought.[56]

Plaintiff's counsel should be prepared to use Rule 26(c), or its state equivalent,[57] to protect the sexual harassment plaintiff from a number of potentially abusive discovery practices. As was done in *Priest v. Rotary*,[58] any attempt by the defendant to compel discovery relating to the plaintiff's prior sexual conduct should be accompanied by a plaintiff's motion for a protective order prohibiting such inquiries. Moving for a protective order gives the plaintiff an opportunity to expound upon the public policy considerations justifying a limitation on discovery, because the motion is decided by balancing the value of the discovery against the burden and oppression it would occasion; the plaintiff would get this

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[52] *See supra* discussion of Jennings v. D.H.L. Airlines in text accompanying notes 40-45.

[53] For example, both CAL. CIV. PROC. CODE § 2032 and FED. R. CIV. P. 35 require that any order permitting a mental or physical examination specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[54] FED. R. CIV. P. 26(c) provides, *inter alia*:

> *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain letters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court . . . .

[55] Belcher v. Bassett Furniture Indus., 588 F.2d 904, 908 (4th Cir. 1980); Carlson Cos. v. Sperry Hutchinson Co., 374 F. Supp. 1080, 1088 (D. Minn. 1974).

[56] For a thorough discussion of the standards governing protective orders under FED. R. CIV. P. 26(c), see 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2040 (1969). For a discussion of the competing interests of privacy and full disclosure in litigation, see Hughes & Anderson, *supra* note 9.

[57] *See, e.g.*, CAL. CIV. PROC. CODE § 2019(b)(1).

[58] 98 F.R.D. 755.

opportunity even if the court considers the information sought to be of marginal relevancy.

In *Priest v. Rotary*,[59] these public policy considerations proved to be highly persuasive to the district court. The *Priest* court noted that discovery of the intimate aspects of plaintiffs' lives, as well as those of their friends and acquaintances, would have a dangerous potential to discourage the prosecution of harassment cases, just as it once chilled the reporting and prosecution of rape.[60] The court also accepted the plaintiff's contention that discovery of a party's past sexual conduct constitutes such a serious invasion of her constitutionally protected right to privacy that it should not be permitted unless justified by extraordinary circumstances.[61]

There are additional situations in which a Rule 26(c) order may help protect the plaintiff from further harassment by the defendant in the guise of legitimate discovery. For example, should the defendant bring the accused harasser to the plaintiff's deposition, counsel might consider the possibility of terminating the deposition and bringing a motion under Rule 26(c)(5) to bar his attendance. As discussed above, a protective order should certainly be sought should the defendant seek an order permitting physical or mental examination of the plaintiff. A protective order under Rule 26(c)(5) might also be obtained to place under seal any information regarding the plaintiff's sexual history or mental condition that is deemed discoverable by the court.

In almost all of these contexts, plaintiffs can draw upon the procedural rules and substantive standards developed to protect rape victims from abusive criminal defense practices. As the court in *Priest v. Rotary* stated:

> It is often said, that those who do not learn from history are condemned to repeat it. By carefully examining our experience with rape prosecutions, however, the courts and bar can avoid repeating in this new field of sexual harassment suits the same mistakes that are now being corrected in the civil rape context.[62]

The need for conscientious and creative advocacy to protect sexual harassment plaintiffs from potential discovery abuse cannot be overempha-

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[59] *Id.*

[60] *Id.* at 761.

[61] *Id.* at 762. The *Priest* court referred in its opinion to Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COL. L. REV. 1 (1977). As the author of that article noted:

> [T]he practice being examined, introduction of sexual history, arguably impinges upon the victim in ways that differ in kind and degree from the ordinary rigors of being a witness. For many people (especially, in our society, women) the trauma of baring one's intimate past to the eyes of the world—turning one's bedroom into a showcase—overshadows the usual discomfort of testifying, or having others testify, to one's biases, lies or even convictions of criminal acts.

Id. at 41.

[62] 98 F.R.D. at 762.

sized, especially while the law is in its present formative stage of development.*

II. EVIDENTIARY ISSUES RELATING TO THE HARASSER'S CONDUCT TOWARD OTHER EMPLOYEES

The investigation of a sexual harassment claim frequently reveals information suggesting that the harrasser's conduct toward the plaintiff was not an isolated event. The plaintiff herself, or her co-workers, will often provide the plaintiff's attorney with reports of his offensive conduct toward other female employees. When this occurs, and when a plaintiff attempts to use this information in support of her claims, issues regarding the discoverability or admissibility of the evidence will inevitably arise, especially if the plaintiff is simultaneously resisting defense efforts to discover or admit evidence relating to her past sexual behavior.

There are obvious reasons why a plaintiff may want to offer evidence of the alleged harasser's conduct toward other female employees. The cornerstone of virtually every sexual harassment defense is a frontal attack on the plaintiff's credibility,[63] a strategy which, with disturbingly frequent effectiveness, plays upon the notion that women imagine sexual aggression and fabricate charges of sexual assault.[64] Alternatively, reminiscent of the provocation and consent theories which have for so long characterized rape defenses, a sexual harassment defendant may contend that the plaintiff *invited* his sexual advances or was herself the sexual aggressor in the situation.[65] Evidence showing that the alleged harasser engaged in sexually suggestive or offensive conduct towards a number of women, including the plaintiff, has an obvious ability to undermine this defense theory.

However, when a plaintiff attempts to discover or admit evidence of this sort, the defendant is likely to argue, with some facial appeal, that evidence of his conduct toward employees other than the plaintiff is inadmissible "propensity" or past acts evidence directly analogous to inadmissible evidence of the plaintiff's past sexual conduct. Upon closer analysis, however, it becomes clear that a number of evidentiary theories support the admissibility of a sexual harasser's conduct toward female employees other than the plaintiff, and that this evidence is *not* analogous to evidence of the plaintiff's sexual history. This section will discuss the evidentiary theories which support the admissibility of a harasser's con-

* Since the writing of this Article, the California Legislature enacted Senate Bill 1057 which, in essence, codified the federal court's decision in *Priest v. Rotary*. The bill added § 2036.1 to the CAL. CIV. PROC. CODE and §§ 783 and 1106 to the CAL. EVID. CODE. Additionally, the bill amended §§ 11507.6 and 11513 of the CAL. GOV'T CODE.

63 *See, e.g.*, Bundy v. Jackson, 641 F.2d 934.

64 *See* S. BROWNMILLER, *supra* note 4, at 250, 412, 415.

65 *See* Priest v. Rotary, 98 F.R.D. at 760.

duct toward other employees and review the treatment this issue has received in the sexual harassment cases.

A. Evidence Regarding the Harasser's Conduct Toward Other Employees in the Early Sexual Harassment Cases

In the early 1970s, federal district courts were extremely resistant to recognizing that sexual harassment was sex discrimination violating Title VII. Despite the fact that all of the sexual harassment cases had involved a male's sexual advances toward a female employee, many courts refused to acknowledge the role that gender plays in sexual harassment.[66] These courts dismissed sexual harassment cases on the grounds that sexual *advances* did not constitute sex *discrimination*.

In support of this view, these courts focused on what they perceived to be the "personal" or "individual" nature of the harassment.[67] They reasoned that if sexual harassment was personal, it could not be directed at a protected group *per se*; thus it was not "sex-based," as Title VII requires.[68]

In response to these rulings, several plaintiffs alleged that other female employees, in addition to themselves, had been sexually harassed.[69] In these cases, plaintiffs convinced district courts to recognize the harasser's conduct as a form of sex discrimination violating Title VII. In contrast, in *Miller v. Bank of America*,[70] where no such allegations were made, the district court dismissed the plaintiff's claim citing the absence of allegations of similar conduct by the harasser toward other female employees.[71]

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[66] *See, e.g.*, Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). In *Barnes v. Train*, the district court granted defendant's motion for summary judgment, ruling that the defendant's conduct was not prohibited by Title VII. The court stated, "The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. . . . [The supervisor's conduct] does not evidence an arbitrary barrier to continued employment based on plaintiff's sex." 13 Fair Emp. Prac. Cas. (BNA) at 124. *See also* Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (plaintiff's gender was "incidental" to her claim of abuse), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

[67] In *Barnes v. Train*, the district court characterized the plaintiff's allegations of sexual harassment as involving "a controversy underpinned by the subtleties of an inharmonious personal relationship." 13 Fair Empl. Prac. Cas. (BNA) at 124. In Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975), the district court stated that the defendant's conduct "appears to be nothing more than a personal proclivity, peculiarity or mannerism," and that rather than discriminating against the plaintiff, he was merely "satisfying a personal urge."

[68] *See* C. MACKINNON, *supra* note 4, at 85.

[69] Williams v. Saxbe, 413 F. Supp. 654, 660 n.8 (D.D.C. 1976), *rev'd in part sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

[70] 418 F. Supp. 233 (N.D. Cal. 1976).

[71] The *Miller* court characterized the plaintiff's claim of sexual harassment as an "isolated act" of discrimination and distinguished it from the ultimately successful sexual harassment claim in Williams v. Saxbe, 413 F. Supp. 654, which did include allegations of conduct toward other female employees.

Given that courts considered an allegation of offensive conduct toward other female employees as essential to a valid sexual harassment claim, they would have been hard-pressed to deem evidence supporting that allegation to be irrelevant and inadmissible. Consequently, the early sexual harassment decisions frequently contain references to evidence of the alleged harasser's treatment of women employees other than the plaintiff.[72]

A present day sexual harassment plaintiff, however, can no longer rely on these cases to support her attempt to discover or admit evidence of this sort. In 1977, two federal circuit courts held that sexual harassment *was* "sex-based" discrimination which violated Title VII, even if the plaintiff was the only female employee affected by the harasser's conduct.[73] These two reversals became a catalyst for a definitive change in Title VII law, and it is now virtually undisputed that sexual harassment is a form of sex discrimination actionable under Title VII. Courts no longer view sexual harassment as "personal," and they no longer require allegations of harassment toward other female employees. Thus, although there is no opinion on point, it is reasonable to assume that evidence of an alleged harasser's conduct toward other female employees can no longer be admitted on the theory that it is an essential element of the plaintiff's cause of action; a plaintiff must find other evidentiary theories if she expects to be permitted to discover or submit such evidence.

B. The Hostile, Intimidating and Offensive Work Environment Theory

Since the Title VII cause of action for sexual harassment was recognized in 1977, courts have come to distinguish between two broad categories of sexual harassment claims. The first, generally referred to as a "job detriment" claim, involves a plaintiff who has lost some tangible job benefit because of her unfavorable response to the harasser's sexually suggestive conduct or requests for sexual favors. The job detriment involved can include termination, demotion, failure to promote, denial of a promised raise, or any other concrete aspect of employment.[74] In some

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[72] *See, e.g.*, Williams v. Saxbe, 413 F. Supp. at 662, and Miller v. Bank of Am., 418 F. Supp. 233 at 236.

[73] Barnes v. Costle, 516 F.2d 983 (D.C. Cir. 1977), *rev'g* Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977), *rev'g* 442 F. Supp. 553 (D.N.J. 1976). The holdings in *Barnes* and *Tomkins* that sexual harassment is sex discrimination are based on the courts' recognition that but for the female gender of the plaintiff, she would not have been subjected to the conduct in question. Put another way, sexual harassment is sex discrimination for the reason that the plaintiff became the target of the offender's advances *because* she is a woman.

[74] *See, e.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, in which the circuit court deemed the defendant liable for demoting and eventually terminating the plaintiff due to her refusal to comply with her male supervisor's sexual demands. The court stated: "[W]e conclude that Title VII is violated when a supervisor . . . makes sexual advances or demands

cases, a plaintiff may allege that she suffered actionable job detriment even though she in fact acquiesced to her supervisor's demands because she was fearful of losing her job.[75]

The second category of claims challenges a work environment made intolerable to the plaintiff by her male supervisor's or other male employees' persistent physical or verbal abuse. These are referred to as "hostile, offensive and intimidating work environment" claims.[76] The most significant difference between these two types of claims is that the work environment claim does not entail the loss of any "concrete" or "tangible" job benefit.[77]

Despite the fact that courts had already recognized both job detriment and hostile work environment claims in race discrimination cases,[78] many were reluctant to do so in sexual harassment cases.[79] These courts interpreted Title VII's provision prohibiting discrimination with respect to "terms, conditions and privileges of employment"[80] as prohibiting only sexual harassment which resulted in the loss of a tangible job benefit. Sexual harassment which "merely" pervaded the work environment was not considered to be a "term or condition" (one could hardly characterize it as a "privilege") of one's employment.[81]

However, many courts had, since 1971, interpreted the "terms and conditions" clause as protecting minority employees from expressions of racism in the workplace.[82] Thus, for nine years, courts recognized claims

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toward a subordinate employee and conditions that employee's job status, evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands." *Id.* at 1048-49. *See also* Barnes v. Costle, 516 F.2d 983, and Garber v. Saxon Business Prods., 552 F.2d 1032.

[75] *E.g.*, Vinson v. Taylor, 753 F.2d 141, 36 Fair Empl. Prac. Cas. (BNA) 1423 (D.C. Cir. 1985), *rev'g* 23 Fair Empl. Prac. Cas. (BNA) 37 (D.C.C. 1980).

[76] For brevity's sake, these will be referred to simply as "work environment" claims for the remainder of this Article. For a full explanation of what might constitute sexual harassment in the work environment context, see C. MACKINNON, *supra* note 4, at 40-47.

[77] *See, e.g.*, Robson v. Eva's Super Mkt., 538 F. Supp. 857 (E.D. Ohio 1982). In *Robson*, the plaintiff alleged that her male supervisor offered her a hundred dollars to "go to bed" with him, continually directed profane and suggestive comments to her, stared at her body, patted her buttocks and boasted of sexual conduct with her to other employees. The plaintiff also alleged that her supervisor "penalized" her at work and that she eventually had to quit her job. The court denied the defendant's motion for summary judgment and held that the plaintiff had alleged a factual basis for a claim of sexual harassment under Title VII.

[78] *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (job detriment claim) *with* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (work environment claim).

[79] *See, e.g.*, Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979); Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305 (D.D.C. 1980); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978).

[80] 42 U.S.C. § 2000e-2(a)(1) (1982).

[81] *E.g.*, Fisher v. Flynn, 598 F.2d at 665, in which the court held that a cause of action under Title VII requires "but-for" causation between an employee's refusal of demands and discharge. See also Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305, in which the court held that sexual harassment is actionable only when the employer retaliates for rebuffed advances.

[82] For example, in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court stated:

challenging racially discriminatory work environments, yet did not recognize claims challenging sexually harassing work environments.

This pattern began to change in 1980, when the Equal Employment Opportunity Commission issued its guidelines on sexual harassment in the workplace,[83] which stated that the creation of a sexually harassing work environment did constitute a violation of Title VII. The approach taken in the EEOC guidelines was then adopted in 1981 by the District of Columbia Circuit in the landmark case of *Bundy v. Jackson*,[84] in which the court, following *Rogers v. EEOC*,[85] held that sexual harassment constituted sex discrimination violating Title VII even if it did not result in tangible job detriment to the plaintiff. Swayed by the EEOC guidelines and the *Bundy* decision, most courts now recognize the hostile work environment claim.[86]

A sexual harassment plaintiff whose complaint includes a hostile, offensive and intimidating work environment claim will be permitted to introduce evidence regarding the harasser's conduct toward other female employees for the simple reason that this conduct is an essential element of the plaintiff's cause of action. The essential elements of a hostile work environment claim are set out in the Eleventh Circuit's decision in *Henson v. City of Dundee*.[87] To prove the fourth element of the *prima facie* case—that the harasser's conduct affected the plaintiff's terms and condi-

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> [E]mployee's psychological as well as economic fringes are statutorily entitled to protection from employer abuse, . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

454 F.2d at 238; *see also* Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); United States v. City of Buffalo, 457 F.Supp. 612 (W.D.N.Y. 1978). *But see* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977). While the court acknowledged that derogatory comments could be so opprobrious as to constitute a Title VII violation, it nevertheless affirmed the trial court finding that the "casual" ethnic slurs used did not raise a Title VII claim.

83 29 C.F.R. § 1604.11(a)-(g) (1985). The regulations state in pertinent part:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Id. § 1604.11(a) (citation omitted).

84 641 F.2d 934 (D.C. Cir. 1981).

85 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

86 *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Robson v. Eva's Super Mkt., 538 F. Supp. 857 (E.D. Ohio 1982); Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981); Hayden v. Cox Enter., 28 Fair Empl. Prac. Cas. (BNA) 1315 (N.D. Ga. 1982); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980); Caldwell v. Hodgeman, 25 Fair Empl. Prac. Cas. (BNA) 1647 (Mass. Dist. Ct., Quincy Div. 1981).

87 682 F.2d 897 (11th Cir. 1982). The *Henson* court lists the following elements as constituting the plaintiff's *prima facie* case: (1) the plaintiff belongs to a class protected under Title VII; (2) the plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) the harassment complained of affected a "term, condition or privilege" of employment. 682 F.2d at 903-04.

tions of employment—the plaintiff must show that the harassment was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."[88] Whether the harassment is sufficiently severe and persistent to seriously affect the plaintiff's psychological well-being is to be determined in light of the "totality of the circumstances" of the case.[89] Thus to prove the fourth element of a hostile work environment claim, a plaintiff may introduce evidence of the alleged harasser's conduct toward other female employees of which she was aware and which created a hostile, offensive or intimidating workplace for the plaintiff.[90]

To utilize the hostile work environment theory to support the admission of evidence regarding the harasser's conduct toward other female employees, a plaintiff *must* first lay the necessary legal groundwork by including an allegation about the creation of such an environment in her complaint. It is also critical that the plaintiff who wishes to rely on this theory prove not only that the harasser engaged in the conduct in question, but furthermore that, at some point during her employment, she became aware of that conduct and was psychologically affected by it.

Under the hostile work environment theory, evidence of a harasser's conduct toward other female employees is relevant to show that it created a psychologically damaging work atmosphere for the plaintiff. Obviously, a plaintiff could have been affected by such conduct only if she was aware of it. If evidence of her awareness is lacking, a trial judge may properly conclude that the only purpose for the evidence is an attempt to show that the alleged harasser had a propensity to harass female employees. If this is the case, the evidence is inadmissible under Federal Rule of Evidence 404(b). Consequently, at trial, it is important to elicit testimony from the plaintiff as to how she became aware of the instances of the harasser's conduct toward other female employees; and it is advisable to get her testimony into the record before those employees testify to the conduct themselves.[91]

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[88] *Id.* at 904.

[89] *Id*; *see also* EEOC Guidelines on Sexual Harrassment in the Workplace, 29 C.F.R. § 1604.11(b) (1985) ("In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances").

[90] Using evidence of the alleged harasser's conduct towards other female employees in this way is distinguishable from using it to support an inference that the defendant was more likely to have harassed the plaintiff if he harassed other female employees. While it is improper to offer past acts evidence as inferential proof of an alleged wrongdoer's propensity to act in a certain manner, this is not the purpose for which the evidence is being offered in a hostile work environment case. The evidence is offered as direct proof of an essential element of the plaintiff's case in chief, and as such, is admissible. *Compare* FED. R. EVID. 404(b) *with* J. WEINSTEIN & M. BERGER, *supra* note 1, at ¶ 401[04].

[91] For example, assume that the plaintiff's attorney wishes to offer the testimony of a female coworker that the alleged harasser sexually propositioned her. To lay the proper foundation for this testimony under the hostile work environment theory, the plaintiff must be able to testify that she either witnessed, or was told about, the incident. If the plaintiff was told about the

If the plaintiff learned *after* she left her employment that other female employees had also been harassed by the defendant, she will not be able to rely on the work environment theory to support the admissibility of evidence relating to these incidents. Similarly, the theory cannot be used to support the admission of evidence relating to the alleged harasser's conduct outside the workplace. For his conduct actually to affect a plaintiff's work environment, that conduct must have been directed toward female employees or other women, such as customers, in the workplace itself.[92]

The hostile work environment claim provides, in some cases, one additional basis for the discoverability and admissibility of evidence regarding the harasser's conduct toward female employees other than the plaintiff. When a sexual harassment plaintiff has been harassed by an individual other than the actual owner of the company by which she is employed, she will generally be attempting to hold the company itself, not merely the individual harasser, liable for the Title VII violation under the theory of respondeat superior.[93]

In a job detriment case, courts hold the employer strictly liable for the discriminatory actions of the supervising or managing employees who took the adverse action against the plaintiff.[94] However, in a hostile work environment case, unless the individual creating the hostile environment was the actual owner of the business, the plaintiff must, as part of her *prima facie* case, establish that the employer knew or should have known that the hostile environment was being created and failed to take proper remedial action.[95]

A hostile work environment plaintiff can demonstrate that the employer should have known of the creation of such an environment by showing that the harassment was so pervasive that it could not have escaped the attention of a reasonably responsible employer. She may also

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incident, her testimony to that effect will undoubtedly draw a hearsay objection from the defendant's attorney.

However, the plaintiff's testimony that "so-and-so" told her of the incident is *not* hearsay. The statement of an out-of-court declarant constitutes hearsay *only if* it is offered for the truth of the facts stated. This testimony would not be offered for that purpose, but for the purpose of demonstrating the plaintiff's awareness of an incident and her resulting state of mind.

[92] It should be noted that in Rogers v. EEOC, 454 F.2d 234, the court held that the defendant created a hostile and offensive work environment for the Hispanic plaintiff by the defendant employer's conduct toward its Hispanic *clients*.

[93] As a matter of fact, the employer itself is, under Title VII the *only* proper defendant. Individual persons cannot be sued under Title VII unless they are the owners of the employing business. This is true even if the individuals in question are high-level executives. *See, e.g.*, Pate v. Alameda-Contra Costa Transit Dist., 21 Fair Empl. Prac. Cas. (BNA) 1228 (N.D. Cal. 1979) (personnel manager not "employer" within the meaning of Title VII and is hence not liable for unlawful practices).

[94] Vinson v. Taylor, 753 F.2d 141, 149-52; Henson v. City of Dundee, 682 F.2d at 909; Barnes v. Costle, 516 F.2d at 993.

[95] Henson v. City of Dundee, 682 F.2d at 905; Bundy v. Jackson, 641 F.2d at 943; Katz v. Dole, 709 F.2d at 255-56.

offer evidence that other women had lodged complaints against her harasser in the past and that sufficient remedial action had not been taken.

C. The Admission of Evidence of the Harasser's Conduct Toward Other Female Employees in the Hostile Work Environment Cases

Sexual harassment plaintiffs can point to a number of hostile work environment cases in which courts have admitted evidence relating to the alleged harasser's conduct toward other female employees. For example, in *Bundy v. Jackson*,[96] the district court admitted evidence that the plaintiff's male supervisor had sexually intimidated her female co-workers as well as herself. And in *Morgan v. Hertz Corp.*,[97] the court admitted testimony that the plaintiff's harasser also subjected other female employees to vulgar and indecent language.

A small but growing number of courts have directly addressed the relevancy of testimony regarding the alleged harasser's conduct toward women other than the plaintiff in a hostile work environment case. The first judicial statement on the admissibility of such testimonial evidence was made in *Caldwell v. Hodgeman*,[98] an unemployment insurance appeals case. After acknowledging the validity of a hostile work environment claim, the *Caldwell* court stated that "[w]here the environment becomes relevant, the experience of others becomes relevant." Recently, the District of Columbia Circuit addressed the issue in greater detail in *Vinson v. Taylor*.[99]

In *Vinson*, the district court had refused to hear evidence establishing that the alleged harasser had sexually harassed the plaintiff's co-workers. The court of appeals reversed, holding that evidence tending to show that the alleged harasser's conduct extended to other women in the workplace is directly relevant to the question of whether he created a work environment violating Title VII.[100] In fact, the court noted that such evidence may be critical to the establishment of the plaintiff's case, since a hostile work environment case must be based on more than a mere showing of "isolated indicia of a discriminatory environment."[101]

As the above discussion demonstrates, the inclusion of a cause of action for the creation of a hostile work environment can serve as a basis for the relevancy of evidence regarding the alleged harasser's conduct

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96 641 F.2d 934, 940 n.3 (D.C. Cir. 1981).

97 542 F. Supp. 123 (W.D. Tenn. 1981), *aff'd sub nom.* Sones-Morgan v. Hertz Corp. 725 F.2d 1070 (1984).

98 25 Fair Empl. Prac. Cas. (BNA) 1647 (1981).

99 36 Fair Empl. Prac. Cas. (BNA) 1423, *rev'g* 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

100 *Id.* at 1427.

101 *Id.* (citing Bundy v. Jackson, 641 F.2d at 943 n.9).

toward female employees other than the plaintiff. This evidence is not offered to demonstrate that the alleged harasser had a propensity to act in a certain manner toward the plaintiff. Rather, it is offered to establish directly one or more of the essential elements of the plaintiff's *prima facie* case.

D. The Job Detriment Theory and Proof of Intent to Discriminate

As discussed above,[102] a sexual harassment plaintiff can establish a violation of Title VII either by demonstrating that the harasser's conduct created a hostile work environment or by establishing that her unfavorable reaction to a supervisor's sexual advances resulted in some tangible job detriment.[103] The inclusion of a job detriment claim in the complaint will provide an additional basis for the admissibility and hence the discoverability of evidence regarding a harassing supervisor's prior conduct toward other female employees.

To establish a violation of Title VII under the job detriment theory, a plaintiff must first establish a *prima facie* case by proving that: (1) she is a member of a protected group; (2) she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) her reaction to the harassment affected tangible aspects of her employment.[104] Once the plaintiff has made out a *prima facie* case, the burden of going forward with the evidence shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for the adverse action taken against the plaintiff. Should the defendant carry this burden, the plaintiff is afforded an opportunity to prove by a preponderance of the evidence that the "legitimate non-discriminatory" reason offered by the defendant was not his true reason, but was instead a pretext for discrimination.[105]

At all times, the plaintiff carries the burden of proving that the harassing supervisor intentionally discriminated against her because of her reaction to his unwelcome sexual advances or other conduct of a sexual nature. Proof of intent to discriminate is an essential element of a job detriment claim.

While the burden of proving intent may be onerous in some respects, it also provides the plaintiff with an evidentiary theory which supports the admissibility of the harassing supervisor's conduct toward other female employees. Under Rule 404(b) of the Federal Rules of Evi-

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[102] *See supra* text accompanying notes 74-86.

[103] Henson v. City of Dundee, 682 F.2d at 901-03, 908-09; Bundy v. Jackson, 641 F.2d at 943-46.

[104] Henson v. City of Dundee, 682 F.2d at 909, 911 n.22; Bundy v. Jackson, 641 F.2d at 951.

[105] Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)); Craig v. Y & Y Snacks, 721 F.2d 77, 79-80 (3d Cir. 1983); Bundy v. Jackson, 641 F.2d at 953.

dence,[106] evidence of a party's prior "wrongs" or acts is not admissible to prove that on a particular occasion he acted in conformity with his prior conduct. However, under the exceptions enumerated in Rule 404(b), such evidence *is* admissible to prove intent where intent is an essential element of a party's claim or defense.[107] Thus, while Rule 404(b) prohibits the admission of evidence of the harasser's prior conduct to show that he had a propensity to harass the plaintiff sexually, it permits introduction of the same evidence to prove that the adverse action taken against her was motivated by a desire to retaliate for her negative response to his advances.[108]

Courts have allowed plaintiffs to introduce past acts evidence to prove intent to discriminate in numerous individual disparate treatment cases.[109] In so doing, many of these courts have noted that discriminatory intent can rarely be proved directly and can often be established only by the cumulative force of circumstantial evidence.[110] These courts echo the view expressed in *Texas Department of Community Affairs v. Burdine*,[111] in which the Supreme Court stated that the purpose of rules relating to burdens of proof in Title VII disparate treatment cases is

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[106] *See supra* note 11 for text of Rule 404(b).

[107] J. WEINSTEIN & M. BERGER, *supra* note 30, at ¶ 401[03].

[108] For example, in a termination case, the plaintiff may wish to introduce evidence that other women were fired by her alleged harasser after they refused his advances or responded negatively toward his sexually offensive conduct. If, when asked for an offer of proof, the plaintiff's attorney states that the evidence is offered to prove that the harasser had a tendency to do this sort of thing and thus was likely to do it to the plaintiff, Rule 404(b) will prohibit its admission. However, if the attorney states that the evidence is offered to prove intent to discriminate, which is an essential element in the plaintiff's claim, Rule 404(b) would sanction its introduction.

[109] Grano v. Department of Dev., 637 F.2d 1073 (6th Cir. 1980) (individual sex discrimination claimant may introduce evidence of discriminatory treatment of other female employees to prove intent to discriminate); Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977), *cert. denied*, 434 U.S. 856 (1977) (statistical evidence reflecting defendant's past treatment of other employees is admissible to prove intent to discriminate in individual disparate treatment case); Blowers v. Lawyers Coop. Pub. Co., 25 Fair Empl. Prac. Cas. (BNA) 1425 (W.D.N.Y. 1981) (defendant's prior treatment of female employees relevant to plaintiff's showing of pretext); Stewart v. Campbell Soup Co., 27 Fair Empl. Prac. Cas. (BNA) 972 (N.D. Ohio 1981) (over defendant's objection that evidence of its prior treatment of employees and applicants other than the plaintiff was irrelevant and inadmissible, court held such evidence relevant to prove intent to discriminate); Department of Fair Housing v. Hubacher Cadillac-Saab, Inc., Cal. F.E.H.C. Decision No. 81-01 (1981) (in a sexual harassment job detriment case, employer argued that evidence regarding the harasser's treatment of female employees other than the plaintiff was inadmissible propensity evidence. Commission rejected this contention and held evidence admissible to prove intent to discriminate); Brown v. Wood, 575 P.2d 760, 21 Fair Empl. Prac. Cas. (BNA) 88 (Alaska 1978) (an individual employment discrimination plaintiff must be allowed, as part of her proof of pretext, to furnish evidence not only that the employer discriminated against her, but also that there exists a pattern of similar discrimination by the employer).

[110] *See* cases cited *supra* note 109 and, in particular, Stewart v. Campbell Soup Co., 27 Fair Empl. Prac. Cas. (BNA) at 973. In Miller v. Poretsky, 595 F.2d 780, 796 (D.C. Cir. 1978), the court went so far as to state in relation to the admissibility of past acts evidence to prove intent to discriminate, "victims may find it virtually impossible to prove discriminatory purposes unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others."

[111] 450 U.S. 248 (1981).

"progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[112]

It is now beyond dispute that proof of intent to discriminate in a Title VII case may be made through the introduction of statistics which demonstrate a pattern and practice of discrimination by the defendant against persons of the plaintiff's race or sex.[113] A statistical analysis compiling the many employment decisions made by a particular defendant is, in actuality, nothing more than an accumulation of numerous items of past acts evidence. Such statistics survive Rule 404(b) scrutiny only because they are offered to prove intent, one of the Rule 404(b) exceptions. The same is true of *single* items of past acts evidence offered to prove intent in an employment discrimination case.

As the foregoing discussion demonstrates, the inclusion of a job detriment claim in a sexual harassment suit provides the plaintiff with an evidentiary theory supporting the admissibility of evidence regarding her alleged harasser's conduct toward other female employees. One cautionary note is in order.

For evidence regarding the harasser's prior conduct to be relevant to the issue of intent to discriminate, the evidence should demonstrate not only that the supervisor had harassed other female employees, but also that he had taken some adverse action against them as a result of their negative reactions to his conduct. This is because the issue of intent relates to the reasons for the allegedly retaliatory action, *i.e.*, termination, demotion, lack of promotion, and *not* to the state of mind accompanying the harassing conduct itself.[114] Evidence showing harassment without accompanying retaliatory action would, however, be admissible to demonstrate the existence of a hostile, offensive and intimidating work environment.[115] Thus, in advocating the relevancy of such evidence,

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[112] *Id.* at 255 n.8.

[113] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

[114] There is one decision of the California Fair Employment and Housing Commission, however, that holds the contrary. In Department of Fair Empl. & Housing v. Hubacher Cadillac-Saab, Inc., F.E.H.C. Dec. No. 81-01, the Commission, citing CAL. EVID. CODE § 1101(b), admitted evidence of the alleged harasser's sexually harassing conduct toward other female employees and female customers without any accompanying showing of adverse actions taken against them. The Commission stated that such evidence would be probative of the alleged harasser's intent to discriminate, *i.e.*, that his offensive behavior was not *inadvertent*. A litigant who attempts to use this holding outside of California, or in a case brought under Title VII may encounter some difficulty, however. Courts interpreting Title VII have generally held that the intent of the alleged harasser is irrelevant to the determination as to whether his allegedly offensive conduct constituted sexual harassment as defined in the EEOC Guidelines. *See, e.g.*, Katz v. Dole, 709 F.2d at 255-56; EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.11(b) (1985). Rather, this determination is made by applying an objective test which examines the nature of the conduct itself and the context in which it occurred. The state of mind of the alleged harasser—or for that matter the alleged harassee—is not considered to be relevant to this determination. Jennings v. D.H.L. Airlines, 34 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (N.D. Ill. 1984).

[115] *See supra* text accompanying notes 100-102.

plaintiff's counsel would be well-advised to rely on a hostile work environment theory rather than a theory relating to proof of intent.

It is difficult at the commencement of an action to know precisely what facts will be revealed during the discovery process. For this reason, and because the admissibility of different types of past acts evidence depend on different evidentiary theories, the prudent practitioner should include, whenever appropriate, both a hostile work environment and a job detriment claim in the complaint. In combination, these two claims provide a sound basis for the admissibility and hence for the discoverability of the alleged harasser's conduct toward female employees other than the plaintiff.

CONCLUSION

The discovery and admission at trial of evidence of either the plaintiff's or the alleged harasser's prior sexual conduct are susceptible to great abuse in sexual harassment litigation. In the coming years, courts and litigants will be challenged to fashion principles and procedures which balance the legitimate discovery needs of both parties against the potential for the oppression and chilling of protected rights that disclosure of the intimate details of people's personal lives can occasion. To achieve this goal, counsel and the courts must resist the temptations posed by bias and ideology. The plaintiff's attorney must assist the court in distinguishing between the improper use of the plaintiff's sexual history to create prejudice against her, and the proper use of the defendant's harassment of other employees to prove a tainted work environment or intent. Each issue that arises must be carefully analyzed by examining the evidentiary theory that purportedly supports the relevancy of the evidence sought or offered at trial. Additionally, whenever discovery of a party's sexual history is permitted, fair procedures must be fashioned to assure that the discovery is taken in a manner which limits the possibilities for abuse.