

CORPORATE LEGAL TIMES

Juries See No Middle Ground in Sexual Harassment Cases

How Jurors Distinguish Between the Trendy And the Traumatic

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THE MULTIMILLION-DOLLAR verdict against Miller Brewing Co. in the highly publicized "'Seinfeld' case" has once again raised the intriguing question of what constitutes sexual harassment in the workplace. Interestingly, for jurors in sexual harassment disputes, there appears to be no middle ground in resolving these matters.

Sexual harassment cases have become an important concern in recent years for at least three reasons:

- The frequency of such claims has risen in the past few decades;
- Like discrimination claims, they can be uniquely embarrassing to individual and corporate defendants; and
- When plaintiff verdicts are obtained, they almost always entail the assessment of punitive damages.

Unlike many other torts occurring in business and employment contexts, sexual harassment claims by their very nature involve accusations of egregious conduct. As a result, compensatory damages are frequently accompanied by punitive damages, which in many cases are quite substantial.

Sexual harassment claims also have attracted attention among litigators because they are highly charged with subjective, emotional and often nebulous issues related to how evidence is construed by the jury. In this regard, jurors' pre-existing emotional baggage has a potent role in determining how the claims are perceived.

JURORS' FRAMEWORK FOR DECISIONS

The popular conception is that harassment claims usually involve one or more female plaintiffs. Males have alleged harassment involving homosexual overtones by male superiors. In any event, the general organizing principles jurors use to make verdict decisions seem to be universally based on three major issues:

- Character judgments of the plaintiff(s);
- Character judgments of his or her supervisors (the allegedly harassing individuals); and
- Documentation or hard evidence.

The hard-evidence category includes contemporaneous journals; testimony by disinterested parties; and physical evidence, such as notes, photographs or tape recordings. In addition, this category also includes documentation of physical, emotional or financial damages that can be reliably attributed to the harassment.

Clearly, it is this third category for which simple common sense may seem to provide a fairly reliable basis for inferring the results of trial outcomes. After all, it is reasoned, the more compelling the hard evidence, the stronger the plaintiff's case. It is often difficult to ascertain, on an *a priori* basis, exactly what hard evidence is.

For example, Paula Jones' claims against President Clinton may appear compelling based on testimony that she was escorted to Clinton's room and from testimony by Jones' co-workers about statements she made immediately afterward. These disinterested third parties clearly lend some measure of credibility to her account. On the other hand, it is unclear what damages Jones sustained as a result of her alleged encounter.

Thus, because of the wide degree of variations in case scenarios, the actual effect of the evidence may only be apparent after we see

how it is construed by a jury. This uncertainty, coupled with concern over punitive damages, leads most defendants to seek mock trial results to forecast probable juror reactions.

Clearly distinguishing the sexual harassment case is the vital role of witness credibility and the jury's perception of character. A key moment of evasiveness or dishonesty on the part of a witness can mean the difference in millions of dollars in a punitive damages award.

The challenge for litigators is to note the types of interactions that occur between judgments of character and perceptions of hard evidence in assessing the dangers involved in a particular case.

THE DICHOTOMY OF SEXUAL HARASSMENT

Jurors categorize such cases into one of two classes, which we have termed "trendy" or "traumatic."

The trendy case in its simplest form is exemplified by an immature, opportunistic or sexually liberal plaintiff in the context of a defendant who is perceived as respectable, restrained, consistent and benevolent.

Traumatic cases typically involve the mirror image of this scenario, in which the plaintiff's characteristics are seen as admirable, while the defendant's conduct is seen as inappropriate, oppressive or even malevolent.

It appears to be difficult for jurors to find a middle ground here: One party or the other has to be at fault for the dispute to arise, and it is rare that jurors will see equal liability where sexual improprieties are concerned.

In the event that sexually based communications or behaviors are judged to be mutual, the plaintiff will be seen as opportunistic in bringing the suit. This is in marked contrast to most employment-related torts (such as wrongful termination), wherein plaintiffs are generally

excused for questionable conduct and supervisors are held to a much higher standard of appropriate conduct. With regard to sexual conduct, jurors hold the plaintiff to a standard very nearly as restrictive as that of her superiors. Failure to meet these standards may often result in the perception of the claims as trendy.

HARD EVIDENCE

The distinction between trendy and traumatic becomes sharpest in the area of hard evidence and, more specifically, documentation. While expectations are greater on the plaintiff in the area of sexual comportment in the harassment case, jurors are also harder on the plaintiff in the realm of record keeping and documentation.

A plaintiff who doesn't document harassment in some type of journal or notebook typically meets with considerable skepticism on the part of the jury, even among liberal feminists.

Mitigating factors can reduce the jury's expectations of hard evidence or documentation by the plaintiff. In many sexual harassment cases, allegations are so outlandish that jurors believe the events must have occurred. Thus, when Anita Hill discussed the pubic hair allegedly planted by Clarence Thomas, it was virtually unnecessary for her to have to prove it. How could anyone make such extraordinary claims unless they were true?

As an example from our files, in one case involving an oil company defendant, a female plaintiff alleged that "snuff" photographs and pictures of nude females in bondage tied to a farm animal feeding trough were pasted to her wall. Although some jurors in a mock trial setting expressed doubt because there were no marks on the wall where plaintiff claimed that she had scraped the pictures off, the defendants were sufficiently alarmed by the mock trial results to settle the case. Again, the bizarre nature of the allegations increased their inherent credibility, without the benefit of objective verification.

CHARACTER JUDGMENTS

Exceedingly high or low levels of witness credibility can occasionally supplant the need for hard evidence. However, for a case to achieve the level of traumatic, the absence of hard evidence can in many instances be excused or explained away by a jury when either the plaintiff's testimony is seen as highly believable or individual defendant testimony is perceived as evasive, callous, unresponsive or dishonest.

One variable that appears to be ubiquitous in

sexual harassment cases is psychological instability of one or more of the players in the case scenario.

In some cases, the plaintiff is judged to have significant psychiatric problems; other cases involve individual defendants who are perceived to be psychologically abnormal. In these cases, the determination of whether the suit becomes labeled as trendy or traumatic may hinge on the comparison of the perceived mental health between the plaintiff versus an individual defendant.

As a general rule, psychiatric problems among individual defendants automatically qualify a case for the traumatic category, regardless of the plaintiff's characteristics. In the case of psychiatric issues, the defendant has a far greater burden than the plaintiff to attain a level of respectability. In this regard, the pressure exerted by a jury begins to look like a typical employment case in that personality problems by defendant supervisors are uniformly inexcusable, while they may be excusable in the plaintiff.

In particular, if unusual, inappropriate or bizarre behavior has been documented for a male supervisor in the past, the case is likely to be a hopeless cause for the defense.

For example, in one California case in which instances of sexual harassment were not documented by the plaintiff, jurors found for the plaintiff anyway because there was ample witness testimony that the male supervisor had used foul language, made racist comments and displayed bias in hiring decisions. These practices had been documented in company files.

If an individual defendant has been written

tiff's psychiatric problems precede the harassment? Is there evidence to suggest that sexually inappropriate behavior was elicited or welcomed by the plaintiff? If so, the plaintiffs' case is again likely to be seen as insubstantial.

In one particular case against a Fortune 50 company, a woman with a documented history of psychiatric treatment and clear instances of flirtation with male supervisors received only \$100,000 in damages and jurors remarked on the trendy nature of her claims.

However, if the alleged harassment precedes the plaintiff's psychological problems, jurors are likely to conclude that sexually inappropriate behavior caused or exacerbated the plaintiff's condition. In these instances, psychological instability works in the plaintiff's favor by generating sympathy, and the case becomes traumatic, with a significant likelihood of punitive damages.

JUROR PROFILES

We have tested a number of background characteristics among jurors – such as attitudes about abortion, religion and pornography, and experiences with problems on the job – in assessing the degree to which such characteristics predispose jurors toward one side or the other in sexual harassment cases.

None of these areas yielded particularly strong relationships with later verdict predispositions. In some cases, relationships were found that could be useful in jury selection for a particular lawsuit, but none were found to be predictive across all of the sexual harassment cases that we have encountered.

Only two areas have proven to be valid as

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up in a personnel file for inappropriate conduct, the playing field is tilted more heavily in favor of the plaintiff than it would be in the opposite direction, had the plaintiff exhibited comparable behaviors. Similarly, if a defendant supervisor has a history of flirtation or affairs with subordinate co-workers, it will be more harmful to the defense than similar facts would be for the plaintiff. In short, to attain the status of trendy, the psychological profiles of individual defendants must be near-spotless.

Interesting questions arise when the plaintiff is seen as emotionally unstable. Did the plain-

useful in jury selection for all sexual harassment cases. The first may be called "cynicism with regard to male behaviors." This variable is defined by the extent to which it is believed that males act in unfaithful, unreliable or contemptible manners within romantic relationships. In this regard, the most predictive juror characteristic of high-damage awards was found to be strong endorsement of the statement, "Most married men cheat on their wives."

The second fruitful area for predicting jurors' reactions to a case pertains to their

judgments of high-profile sexual harassment cases that have been well-publicized in the past. According to this principle, attitudes toward other sexual harassment cases will be the best possible predictors of reactions to new, unfamiliar sexual harassment cases. Indeed, our research has borne this out: The best predictor of verdict orientation in several cases studied in the 1990s was the extent to which Anita Hill was seen as more believable than Clarence Thomas during the Senate confirmation hearings.

CONCLUSIONS

Sexual harassment cases are among the most difficult to generalize about, since they almost always involve behaviors by both

plaintiffs and individual defendants that are idiosyncratic, highly unusual or even bizarre. Allegations often involve behaviors that occur inside and outside the work environment between supervisors and subordinates, and that are generally poorly substantiated by verifiable evidence.

For this reason, and because of the anger often precipitated by claims that are construed as believable, the need to study each case individually is nowhere more urgent than in the case of sexual harassment. One generalization does appear to be clear: Jurors are likely to either label the case as trendy or traumatic, and in the latter instance, substantial punitive damages may be expected.

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