Sexual Harassment Defenses

by Dale Price and Adele Rapport

THERE ARE MANY defenses that employers can raise in response to a sexual harassment complaint. The most effective defense is that the employer took prompt remedial action reasonably designed to end the harassment. *See, Faragher v City of Boca Raton*, 524 U.S. 775, 807 (1998). Although less appealing from a personnel management standpoint, employers can also argue that they did not have notice of the hostile environment. *Id.* at 808. Notice is a legally proper defense, but employers who tolerate open and obvious harassment and then assert that the victim failed to follow the requirements of a grievance mechanism buried in an employee
handbook perpetuate an environment that creates serious morale and productivity problems. Eventually, an employee will complain and the employer will have to pay for its failure to take measures to ensure that its employees are not subjected to a hostile environment. Moreover, the absence of notice is not always a successful defense.

This article will address less frequently used defenses and strategies attempted by employers in an effort to avoid liability for sex harassment claims. Although these strategies may be successful in some cases, it is best not to raise them because they may ultimately be detrimental to the employers’ interests. More specifically, this article addresses employers’ attempts to prevail through intimidation by raising past sexual conduct and comments, efforts to hide investigative files by raising a self-critical analysis privilege, and excluding so-called “me, too” evidence concerning other victims who experienced similar hostile treatment.

**Rule 412 Implications**

The federal rules and case law interpreting those rules make clear, however, that defendants cannot necessarily use the plaintiff’s sexual history or even sexual banter in irrelevant settings (for example outside the workplace) as a sword to attack her credibility. (For the purposes of this article, the plaintiff will be referred to by the feminine pronoun. This is not to disregard that both complainants and harassers may be of either sex or gender orientation.) Plaintiff’s counsel would be wise to be familiar with the case law interpreting Fed. R. Evid. Rule 412, because defendants frequently step over the line in this regard.

**The Rule And The Advisory Committee Notes**

Fed. R. Evid. 412(b)(2) states (citations omitted):

“In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of any unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.”

The Advisory Committee Note on the 1994 revision of Fed. R. Evid 412 makes it clear that it applies to sexual harassment cases, stating that “[r]ule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.” The commentary further states that the applicability of the rule encompasses a wide range of behaviors: “Past sexual behavior connotes all activities that involve actual physical conduct, i.e., sexual intercourse or sexual contact…. In addition, the word behavior should be construed to include activities of the mind, such as fantasies or dreams…. Consequently, unless the [Fed. R. Evid. 412](b)(2) excep-
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The Notes carefully point out that Rule 412 establishes a far more stringent standard for the party proffering the evidence than does Fed. R. Evid. 403:

“The test for admitting evidence ...differs in three respects from the general rule...set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring the probative value to substantially outweigh the specified dangers. Finally, the Rule 412 test puts ‘harm to the victim’ on the scale in addition to prejudice to the parties.”

Finally, the Notes offer one more valuable comment about the scope of the rule: “In an action for sexual harassment,...while some evidence of the alleged victim’s sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-workplace conduct will usually be irrelevant.”

In reaching its conclusion, the Committee cited a pre-revision case, Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993), in which the Eighth Circuit held that evidence that the plaintiff posed nude for a men’s magazine was irrelevant to issue of the unwelcomeness of the alleged harasser’s sexual advances. See Advisory Committee Notes.

Using Evidence Of Sexual Predisposition

Importantly, Rule 412(c) describes the procedures that must be followed before a defendant can introduce evidence relating to a plaintiff’s sexual predisposition. The court in Sheffield v. Hilltop Sand & Gravel Co., Inc., 895 F. Supp. 105, 109 (E.D. Va. 1995) (discussed below) quoted the Notes and stated that “[t]he overarching purpose of Rule 412 and of the procedures outlined in subdivision (c), is to protect alleged victims against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details.”

The Rule 412 procedures require that the defendant provide notice at least 14 days before trial specifically describing the evidence and the purpose for which it will be offered. This motion must be filed under seal. The court will then hold an in-camera proceeding in which the parties can attend and be heard. The entire proceedings will then be sealed and remain under seal. Fed. R. Evid. 412(c).

Case Law Interpreting Rule 412

Rodríguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998), is one of the best opinions on the admissibility of sexual conduct and the necessary balancing the courts must do in evaluating various types of evidence submitted. There, the plaintiff and other female employees were told to be “especially cordial” to a certain client’s employees. They were also advised that they must come to a party for the client at a local hotel. They were to come alone and be available to dance with the client’s executives who were also entertained by scantily clad dancing women. One of the executives made a sexually explicit proposal to the plaintiff. She complained to her supervisor, who told her to respond to the client “as a woman.” He said he would do nothing about the situation. As is all too often the case, the defendant tried to paint the plaintiff as “sexually insatiable, as engaging in multiple affairs with married men, as a lesbian and as suffering from a sexually transmitted disease.” Id. at 855-56.

Defendant also claimed that plaintiff had an affair with a married man, which lessened her ability to focus on work and resulted in performance problems that eventually led to her termination.

The First Circuit held that Rule 412 barred introduction of evidence regarding Plaintiff’s boyfriend’s marital status and her alleged promiscuity,