

PSYCHOLOGICAL OPINIONS IN SEXUAL HARASSMENT CLAIMS

Albert M. Drukteinis, M.D., J.D.

Although sexual harassment is not specifically included in Title VII of the Civil Rights Act of 1964, it flows by regulation of the Equal Employment Opportunity Commission (EEOC) from sex discrimination. It is defined as unwelcomed sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, when linked to employment conditions, as part of a quid pro quo for employment decisions or when it creates an offensive, hostile work environment. Sexual harassment behaviors range from sexual innuendo, touching, and flirtatious remarks, to clear-cut sexual assault and rape. Often these are accompanied by retaliation against the victim for reporting it. It is estimated by some that up to 60% of victims ignore sexual harassment, believing that if they complain it will only cause more harm. In recent years, however, sexual harassment litigation has been increasing dramatically. In the past five or six years the EEOC reports that these complaints have almost tripled in number and by the year 2000 it is predicted that they will double again. What sexual harassment is and whether or not it occurred are legal and factual matters, but invariably psychological issues become embroiled in them and psychological opinions are frequently presented as part of the claim. These opinions are usually ones which either clarify the claim or define the damage.

Psychological opinions which attempt to clarify the claim are the most controversial because they draw conclusions or make inferences about factual matters. Since many times it is only the word of the victim against the harasser, these opinions can tip the scales one way or another. Sometimes psychologists who give such opinions, and who may be acting in good faith, do not realize that they are entering a non-psychological area. This is in part because psychologists in a treatment relationship with a patient claiming sexual harassment need to validate the seriousness of the patient's experience if they are to be helpful. But taking that clinical validation to a courtroom is another story. This is why treating psychologists are inherently biased if they are performing their clinical job well. This is also why independent experts, whose scope of inquiry is more broad and who are not allied to the patient, may be in a more objective position to give opinions. Regardless of who is giving the opinion, mental health science has not reached the level of sophistication or accuracy to be able to determine whether an alleged sexual harassment incident actually occurred. No constellation of symptoms, mental status appearance, or psychological test results can do that. Even if suspect factors such as a bizarre psychotic account, gross inconsistencies, obvious manipulation or marked personality predisposition are not present, psychologists don't really know who is lying, who is fantasizing, and who is embellishing.

However, opinions about a victim's behavior in the harassment situation may be appropriate, especially when a fact finder might not understand it otherwise. So, for example, explaining that victims often remain silent because of economic necessity, fear of retaliation, intimidation and powerlessness, or embarrassment may be helpful. But, care must be taken not to conclude that this victim who may have responded that way was, therefore, harassed. In addition, psychological opinions can help clarify typical response patterns that a victim of sexual harassment exhibits. Reactions such as guilt, self-blame, minimization and denial of harassment or even disconnecting oneself emotionally from the uncomfortable events are not unusual. Without an understanding of those types of responses, a victim may be incriminated as inconsistent with having been harassed. Again, focusing on the general pattern of trauma response is not the same as concluding that harassment occurred.

Psychological opinions in sexual harassment claims often ignore more complex organizational and workplace dynamics which form the background of many of these claims. Without input from people at the workplace and review of employment files, the account of the alleged victim stands in isolation from many potential contributing factors. It is not uncommon, for example, for personnel issues such as poor performance, reprimands and warnings, or fear of termination to present a crisis for which a sexual harassment claim serves as a convenient solution. Psychological evaluations which explore all aspects of the work environment, interpersonal relationships there, and work performance can provide a more balanced view of the relative seriousness of the known stressors.

Another area for psychological opinions is identifying personality traits or personality disorders which may have created or contributed to the claim. First of all, not all sexual harassment is actionable. It must be severe or pervasive enough to create an objectively hostile or abusive work environment. Similarly, if the claimant is not a reasonable woman of normal sensitivity, her claim may not prevail. A number of personality disorders can play an important role in employment litigation and provide an alternative explanation of the claimant's emotional distress. For example, histrionic personality disorder, borderline personality disorder, anti-social personality disorder, narcissistic personality disorder, and paranoid personality disorder are just a few descriptions of people who have unusual sensitivity or are predisposed to maladaptive ways of dealing with others. If there is a clear history or pattern of such personality traits, then psychological opinions about them are important for a full understanding of events. Again, this does not mean that the psychological opinion can conclude that an event did not occur, in fact, individuals with some personality disorders may be vulnerable to victimization. Similarly, there may be a personality disorder that is present in the alleged harasser which can help explain a predatory pattern of conduct.

Research has shown that a past history of sexual abuse can predispose a person to a variety of different reactions which may influence a later sexual harassment claim. Since the standard for liability in these claims is that of a reasonable woman who is not hypersensitive, the typical eggshell rule of common law does not apply except as to damages. So, a person who has been previously abused may have developed fear, hypervigilance, and an unusual sensitivity. In this context, even a trivial innocuous remark may produce an excessive reaction. Also, people with previous sexual abuse are at times prone to repetition compulsion which means they have a tendency to repeat past behavior in spite of the suffering that may have been associated with it. In essence, they recreate the earlier sexual abuse by placing themselves in a position to be abused again. The relevance here is for the defense of welcomeness since the sexual conduct in a sexual harassment claim must be unwelcomed and not solicited by the claimant. Finally, research has shown that individuals who experienced sexual abuse may be so damaged and rageful that they fabricate later incidents of abuse as a way of venting their anger. Because of previous experiences, their ability to describe abuse can be quite sophisticated and believable. Psychological opinions in all of these areas can be important sources of clarification about the possible circumstances of a claim.

Psychological opinions which define the damage are seemingly more straightforward since they are based on diagnostic criteria. Unfortunately, this is more complicated since the criteria for many mental disorders are arbitrary and easily met by someone just distressed and pursuing litigation. Also, while a psychological opinion may purport to only address emotional harm, it invariably infers that the harm springs from a particular event which, in fact, occurred. The most striking example is the controversial diagnosis of post-traumatic stress disorder (PTSD) in which the trauma is built into the label. Although

attempts have been made to identify specific and objective criteria for this condition, its rampant use in litigation attests to its subjectivity. Most individuals exposed to a typical traumatic stressor do not develop PTSD, although following a rape the incidence can be high. Long-term lingering emotional symptoms in response to ordinary sexual harassment are unusual unless the nature of the harassment was particularly egregious and pervasive. Psychological opinions are routinely offered on emotional damages and the relative effects of alternative causes, the harm from litigation itself, and the secondary gain that comes from an expected financial award. In traditional tort claims of negligence, the plaintiff must have suffered some harm. In sexual harassment claims, neither economic harm nor emotional harm is necessary. However, the degree of damages awarded will undoubtedly be linked to psychological opinions which offer definition for the distress and the disorder suffered.

Every individual has the right to work in an environment free from demeaning and humiliating sexual harassment. Laws that enforce that right are appropriate and help create parity for all workers. But the increase in sexual harassment claims also raises social questions. What behaviors are normal, should be acceptable, and will always be a part of men's and women's relationships? What harm comes to individuals or classes of individuals when a power gradient is established through sexual intimidation? How can the workplace be sensitized and educated about this without becoming cynical? How can a person communicate sensitivity without retribution? How can we accurately distinguish whether a sexual harassment claim is really based on the circumstances alleged or just a means of empowerment in a conflictual and insecure work environment? Psychological opinions may help on some of these questions, but social opinion and public policy will be required for equitable solutions.