

Assessing Emotional Distress Claims in Sexual Harassment and Gender Discrimination Litigation

Liza H. Gold, MD

Based on Gold, LH: Sexual Harassment. In Rosner, R. and Scott, C. (Editors): *Principles and Practice of Forensic Psychiatry*, 3rd edition. Oxford University Press, pp. 327-335, 2017

- Illegal sexual harassment in the workplace is a subset of gender-based workplace discrimination, defined by federal, state, and case law.
- Psychiatric evaluations in sexual harassment or gender discrimination should include characteristics of the harassment, premorbid functioning of the plaintiff, prior work history, the effects of retaliation, the effects of litigation, as well as other factors.
- Sexual harassment is adversely related to job-related, psychological, and physical outcomes but the severity of the harassment is usually the primary predictor of psychological outcome. More severe outcomes to less severe harassing behaviours raise issues of pre-existing psychological vulnerability.
- PTSD diagnoses should not be made in the absence of a past or present traumatic stressor. Most sexual harassment experiences do not meet the definition of a traumatic stressor capable of resulting in PTSD.
- Personality disorder diagnoses should not be made based in the absence of a longitudinal history consistent with these disorders.
- Psychiatric evaluators in sexual harassment litigation should maintain neutrality, avoid dual agency, review all documents and conduct a complete assessment

Psychiatrists retained in sexual harassment and gender discrimination cases may be asked to address causation of emotional injury, damages, psychological symptoms and/or diagnoses, related functional impairment, and issues relating to treatment, treatment costs and prognosis. Title VII of the 1964 Civil Rights Act (CRA) prohibits discrimination on the basis of sex, race, color, religion, or national origin. In practice, multiple causes of action are the rule in gender discrimination and sexual harassment cases. Under federal law, compensatory and punitive damages for Title VII sexual harassment claims are capped at \$300,000. As a result, most Title VII claims are accompanied by additional uncapped claims such as Intentional Infliction of Emotional Distress or are brought in jurisdictions other than federal court where damages are not capped. Therefore, regardless of whether evidence of emotional injury is required in order to prevail, plaintiffs typically offer evidence of emotional harm, since the bulk of employer liability and damage awards in harassment and discrimination litigation is related to assertions of emotional distress and psychological injury.

Best practices suggest utilizing a forensic mental health expert to provide evaluation and if needed, testimony, in sexual harassment and discrimination claims. Many plaintiffs' attorneys are inclined to use a plaintiff's mental health treatment provider as an expert witness. This practice is widely acknowledged to be problematic for many reasons. Some of these include the appropriate limitations of confidentiality.

These will preclude treatment providers from obtaining any corroborating reports or evidence from anyone other than the patient. In addition, treatment providers have a natural and appropriate bias towards believing that their patients' narrative, thus precluding assessment of malingering.

Breaching confidentiality, even with the patient's permission, or questioning the patient's version of workplace events can easily disrupt or corrupt the treatment relationship, depriving a patient of effective mental health treatment at a time of great stress and associated impaired coping. In addition, treatment providers may be anxious about involvement in the legal system and may be aware of their own lack of expertise in issues relating to employment litigation generally and sexual harassment litigation in particular. For these and other reasons, treatment providers are often hesitant to become involved in patients' litigation, and may outright simply refuse to participate as anything other than fact witnesses.

Broadly speaking, sexual harassment and related forms of gender discrimination fall into three categories:

- 1) Gender harassment: a broad range of verbal behavior, physical acts, and symbolic gestures not aimed at sexual cooperation but which convey insulting, hostile, and degrading attitudes about women. Examples include sexual epithets, slurs, taunts, and gestures, the display or distribution of obscene or pornographic materials, gender-based hazing, and threatening, intimidating or hostile acts.

- 2) Unwanted sexual attention: both verbal and nonverbal behavior that is unwelcome, offensive, and unreciprocated. This may include unwanted touching.

- 3) Sexual coercion: extortion of sexual cooperation in return for job-related considerations.

The majority of people reporting sexual harassment experiences are women and the majority of alleged harassers are men. Sexual harassment of women usually consists of a cumulative series of escalating and varied experiences causing the target to experience a chronic level of stress and affective arousal, most accurately characterized as a particularly noxious form of occupational stress. The less severe forms of sexual harassment behaviors, such as offensive comments or jokes are the most prevalent; the most severe behaviors, such as physical or sexual assault, are the least frequent. However, the more severe types of sexual harassments, such as sexual coercion, are typically accompanied by exposure to gender harassment and unwanted sexual attention.

The most common responses to sexual harassment are to ignore or avoid it; the least common response is to formally report it. Although studies consistently find individuals who report having experiencing sexual harassment in the workplace, only 5% to 30% file formal complaints and less than 1% subsequently participate in litigation.

Exposure to sexual harassment can have a multitude of job-related, psychological, and physical effects. The psychiatric evaluation of emotional distress caused by alleged harassment and discrimination requires consideration of many factors, including:

- Characteristics of the harassment (frequency, duration, magnitude)

- Plaintiff's emotional, psychological, and workplace responses to the harassment
- If the plaintiff complained, the employer's responses to the complaints and/or harassment
- Availability of support for the plaintiff inside and outside the workplace
- Plaintiff's resources, strengths, vulnerabilities, including past psychiatric and occupational history
- Effects of litigation, widely acknowledged to be stressful
- Emotional effects of any claimed retaliation, which may be clinically distinct from the effects of the claimed harassment
- Effects of underlying medical conditions or medication that may cause psychological symptoms
- Previous or concurrent trauma, sources of stress, or distress
- Use or abuse of drugs and alcohol
- Effects of adverse employment actions or workplace conflict

Generally, the severity of the harassment (and retaliation), as assessed by specific characteristics, is proportional to the severity of its psychiatric consequences. Psychiatric and physiological symptoms caused by sexual harassment may rise to a level of prolonged or intense distress and/or functional impairment that meets criteria for a psychiatric diagnosis. However, some individuals may be uniquely vulnerable to severe outcomes from objectively less severe experiences. Some individuals may be experiencing significant psychiatric symptoms that they ascribe to workplace experiences but may likely be caused by some other problem in their lives. Psychiatric factors and life events that may affect claims of causation and damages should be considered, such as possible alternate causation of claimed emotional distress and pre-existing mental health disorders or problems.

The issues of functional impairment, prognosis, and potential recovery are integral to damage assessments. Current level of impairment is assessed through evaluation of the claimant's history, behavior, and examination findings. The claimant's pre- and post-incident(s) functional capacities must be compared. Prognostic opinions should be based on an assessment of functioning, the effects of pre-existing and current psychiatric status, the natural history of the specific disorder, and the actual or potential effects of treatment. Comparison of the plaintiff's personality, behavior, and functioning before and after the alleged harassment and discrimination is crucial in the determination of motivation for recovery and willingness to enter treatment. The stressful effects of litigation must also be considered.

Sexual harassment experiences do not necessarily result in the development of any specific psychiatric disorder. However, psychiatric diagnoses most commonly reported in association with sexual harassment experiences include adjustment disorders, depressive mood disorders, and anxiety disorders.

Sexual Harassment and Posttraumatic Stress Disorder

Posttraumatic Stress Disorder (PTSD) is a commonly claimed diagnosis in sexual harassment cases and in other types of litigation, particularly by plaintiff's experts. This diagnosis implies direct causation and therefore is welcomed as part of a

plaintiff's legal arguments. However, the most common sexual harassment behaviors, such as verbal comments, are relatively minor and rarely traumatic. Conversely, the more uncommon and severe forms of sexual harassment, such as sexual assault, clearly meet the Diagnostic and Statistical Manual of Mental Disorders criteria for a traumatic stressor.

Diagnostic questions arise when a plaintiff claims a diagnosis of PTSD directly caused by sexual harassment experiences that falls between these two extremes. Nevertheless, a PTSD diagnosis is most likely to be associated with more severe and frequent sexual harassment. Absent a claim of that includes severe harassment, such as assault or coercion, evaluators should consider exposure to an alternate traumatic stressor or a pre-existing PTSD diagnosis.

Mental health professionals frequently and mistakenly diagnose any stress related response or symptom as PTSD, particularly in the context of litigation. In fact, most people exposed to trauma do not develop PTSD. Exposure to the more common and less severe behaviors associated with sexual harassment can be distressing and stressful, but is unlikely to result in the development of PTSD without a pre-existing vulnerability. An individual who claims or demonstrates symptoms consistent with PTSD as a result of exposure to less severe forms of sexual harassment should be carefully assessed for the possibility of malingering, individual susceptibility to psychiatric morbidity, pre-existing psychiatric disorders, or concurrent or prior traumatic exposure.

Sexual Harassment and Personality Disorders

Just as PTSD is a preferred plaintiff's diagnosis in sexual harassment litigation, Cluster C Personality Disorders, particularly Borderline Personality Disorder (BPD), is a preferred defence diagnosis. One common defence strategy is to argue that PTSD claimed as damages in a sexual harassment case is likely to have been caused by a history of previous sexual abuse or victimization that has itself resulted in a BPD, a diagnosis which is strongly associated with a history of childhood sexual abuse.

Features of BPD, include dysfunctional coping, emotional reactivity, dysfunctional patterns of interpersonal behaviours, and perceptual distortions of self and others. Prior sexual abuse or trauma might render individuals "hypersensitive," that is, more likely to inappropriately interpret and label innocuous workplace behaviour as sexual harassment. Distortion in perception lends itself to arguments that the plaintiff's perception of the alleged harassment is not credible. Features of BPD may be invoked to argue that the plaintiff was an active participant in the events rather than a passive victim.

Forensic evaluators should be cautious about making a personality disorder diagnosis based solely on the events in the case but in the absence of an adequate supporting longitudinal history. A diagnosis of a personality disorder should be based on lifelong, pervasive, and inflexible patterns of dysfunction and maladaptive coping. Individuals with personality disorders typically have histories of chaotic lives and problematic interpersonal relationships across all spheres of functioning. Evidence of such patterns and dysfunction requires review of previous employment history and records, prior and current interpersonal functioning in other areas of life, and even prior litigation history.

Defence examiners in particular may inappropriately assign a diagnosis of a personality disorder based on the plaintiff's current presentation. Women who have experienced sexual harassment, made a formal complaint, perhaps experienced retaliation, and experienced the stress of litigation can appear histrionic, angry, defensive, or reactive on evaluation, even in the absence of pre-existing psychiatric disorders. This presentation may be exacerbated by the stress of undergoing a psychiatric evaluation, leading examiners to assign a diagnosis of BPD in the absence of evidence that such a diagnosis was present prior to their examination.

Psychiatric evaluation in sexual harassment cases should include consideration of behavioural patterns or cognitive processes that might affect interpersonal relationships or cause perceptual distortion. Determination of an individual's tendency to invite, misinterpret, distort, or overreact to the behaviours of others is a critical part of a sexual harassment assessment, whether due to BPD or any other psychological process, such as an underlying psychosis or paranoid thought disorder.

Conclusion

Forensic psychiatrists can offer expert opinions and testimony regarding the aspects of sexual harassment and gender discrimination that fall within psychiatric training and expertise. Credible opinions, based on professional expertise, guided by forensic and clinical psychiatric ethics and methodology, and informed by relevant social science are of value to all parties in sexual harassment cases. Forensic psychiatric expert testimony based on these fundamental practices and on relevant research can assist the court in clarifying the complex issues that arise in sexual harassment and gender discrimination litigation.