As More #MeToo Cases Come to Court, What Evidence Is "Relevant" to Prove the Plaintiffs' Claims?

Katherine Proctor April 14, 2020

Since the 2017 ignition of the #MeToo movement, allegations of sexual harassment have been treated with unprecedented recognition in public discourse. But in the courts, accusers have been less successful.

The disgraced Hollywood producer Harvey Weinstein, whose years of sexual misconduct as reported by The New York Times and The New Yorker sparked the movement, was convicted in a New York court in February of two of the five charges he faced arising from the allegations. The charges of which he was acquitted included the most serious brought against him.

Many sexual assault survivors certainly saw the conviction as a win, despite the mixed result -- in March Weinstein received a sentence of 23 years in prison. But those seeking legal consequences against perpetrators of sexual misconduct still face substantial obstacles. John Winer, a partner at Winer, Burritt & Tillis in

Oakland who represents plaintiffs in civil sexual harassment cases, detailed in a recent article for Law360 his perspective on why such plaintiffs might have a harder time meeting the burden of proof in a courtroom than in public opinion.

"Sadly, the rules of evidence in California and most states, are set up in a way in which the alleged perpetrators have an enormous advantage over accusers in terms of attacking credibility," Winer writes. "The advantage emanates from evidentiary rules around what evidence is relevant in a sexual harassment trial."

Defense attorneys and legal scholars differ on to what extent they agree with that statement. But as more sexual harassment cases brought to light during the #MeToo movement make their way into courtrooms, California's rules of evidence in such cases are likely to become a greater point of legal contention.

Discovery and the defendant's state of mind

Winer said that over his forty years of practice, there have been improvements in the law affecting sexual harassment plaintiffs' courtroom experiences. For example, he said, it's now much more difficult for the defense to get into evidence anything about the plaintiff's sex life with anyone except the alleged perpetrator.

But because sexual harassment plaintiffs are usually claiming damages for emotional distress, Winer said, plaintiffs' personal lives are much more open to discovery than defendants' are.

"If you're bringing a case for psychological or emotional injury, then under the California rules of evidence and discovery, basically everything that could either be an alternate cause of your emotional distress is fair game for discovery, for the defense to try to establish that it wasn't caused by the event you're suing for," he said.

Lynne Hermle, a partner and employment defense attorney at Orrick, said that these rules don't present an imbalance but preserve fair trials for sexual harassment defendants.

"Oftentimes there is evidence that there were other very distressing events," Hermle said. "It's really a fairness issue."

Plaintiffs claiming emotional distress damages will likely always have to open at least some of their personal lives to discovery, said Eileen Scallen, an evidence expert and a professor at the UCLA School of Law.

"The sad thing is that if you claim any kind of emotional distress, your life is subject to scrutiny," Scallen said.

But discovery conditions for plaintiffs have improved in recent years, she said, noting that it used to be common for employment defense lawyers to subject plaintiffs to "routine mental exams" even for allegations of "garden variety emotional distress."

"That really was a harassment technique, and a deterrent to women coming forward," Scallen said.

Compounding the imbalance that opening up the plaintiff's life to discovery creates, Winer said, is that most courts don't consider the defendant's state of mind relevant evidence.

"The issue most of the time in a sexual abuse case is whether the perpetrator did what he or she was alleged to do," Winer said. "You can't get at the defendant's state of mind. Therefore anything that might have caused that state of mind isn't really relevant."

Hermle, the defense attorney, said that evidence regarding a defendant's state of mind could be relevant in a sexual harassment case.

"In a case in which the question is, 'Were the attentions of the individual defendant welcomed?', I do think the defendant's state of mind is relevant," Hermle said. "Technically you could argue that it isn't, because the question isn't what did he or she think. But you could imagine that if you're on the jury, and that's an issue in dispute, you want to understand what the individual defendant was thinking and what they were responding to."

Prior allegations

In addition, Winer said, many state courts won't admit prior similar allegations against the defendant as relevant evidence in sexual harassment cases -- a tendency that he said further stacks the deck against plaintiffs, especially because several perpetrators exposed by the #MeToo movement have allegedly demonstrated patterns of serial sexual misconduct.

"Some courts will say what happened two years ago, what this man or woman did to somebody else, isn't really relevant to what they did this time," Winer said. "There's not necessarily a connection. So that makes it very difficult to get that evidence in."

Hermle said that admitting such evidence can result in a "mini-trial."

"The parties wander down that track, whether those allegations did or did not occur -- in which the court might allow some evidence to show that there was a particular pattern," she said. "It's a risky thing to do for appellate purposes. Really what you're trying to litigate is whether this defendant harassed this plaintiff, and not whether something happened on a prior event."

Scallen, the evidence scholar, noted that federal rules of evidence make admissible prior similar allegations in civil cases involving sexual assault, but California's rules are less straightforward.

Still, she pointed out, California Evidence Code section 1101(b) provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact...other than his or her disposition to commit such an act."

"This kind of evidence, these prior acts or 'Me Too' evidence is becoming more admissible," Scallen said, adding that this likely arises from increased awareness surrounding sexual misconduct in the past few years.

Although they come from opposing bars, Winer and Hermle can find one point of agreement: courtroom conditions for sexual harassment cases contain room for improvement.

"It will never be fair if the defense can discover more things about the plaintiff than the plaintiff can discover about the defense," Winer said.

As Hermle sees it, since the #MeToo movement, in sexual harassment cases "defendants are at a disadvantage." But, she added, "you could argue that years ago, plaintiffs in these cases had an uphill battle they shouldn't have faced."

"What you're hoping for is a balance in which a jury can fairly look at the evidence of these particular circumstances," Hermle said. "That's sometimes tough to do in an emotionally charged case."

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