Deposing the Plaintiff in the Harassment Case: 
the Management Perspective

American Bar Association

EEO Committee
Section of Labor and Employment Law

2013 National Conference on Equal Employment Opportunity Law

Savannah, Georgia

April 3-6, 2013

Presented By:

Karen Meyer Buesing
Shareholder
Akerman Senterfitt
401 E. Jackson Street, Suite 1700
Tampa, FL 33602
karen.buesing@akerman.com

Co-authored by: Nicholas J. Purvis
nicholas.purvis@akerman.com
I.  **INTRODUCTION**

It is often said that the most important tool in discovery is the deposition. The most crucial deposition for an employer facing a lawsuit by a current or former employee alleging harassment is the plaintiff's. A successful deposition is not the same as a successful cross-examination at trial and should not be treated as such. Rather, the deposition of the plaintiff is the key to winning the case because a proper deposition prevents surprise and enables you to fully prepare for summary judgment or trial. The well-established "golden rule" of a cross-examination is to never ask a question if you do not know the answer. To the contrary, while cross-examination is not the time to experiment, a deposition is. An effective deposition will discover the universe of relevant information, develop trial testimony, and assist counsel in evaluating the credibility and effectiveness of the witness.

By the time a plaintiff is deposed, counsel will already know the general nature of the alleged harassment and whether it resulted in a tangible employment action. Counsel needs to obtain detailed testimony regarding the alleged incident or incidents or harassment, as well as the workplace environment, the plaintiff's own background and conduct, plaintiff's relationships with peers and superiors, plaintiff's efforts to give the employer the opportunity to correct any wrongful conduct and damages.

The basics are obvious. Among other details of the alleged harassment, counsel will want to establish:

- Who engaged in the harassing conduct?
- Who witnessed the harassing conduct?
- What was the harassing conduct?
- When did the harassing conduct take place?
- Where did the harassing conduct take place?
• Why did the harassing conduct take place?

Less obvious is the importance of establishing context. In sexual harassment cases, for example, it is not only imperative to establish the frequency and severity of the alleged harassment, but also details surrounding the relationship between the parties, and the work environment. Exploring the plaintiff's prior work history and work environments is also important—joking and socializing is likely to be more common among staff in a hip bar or restaurant staffed by young people than in a law office environment. Work environment, relationships, off-duty socializing, joke-telling, perceptions of different treatment by different supervisors – all of these must be explored at deposition.

Identification of witnesses who can support or refute plaintiff's testimony is critical, as is testimony about how the plaintiff reacted at the time to the conduct she now complains of. All of the foregoing is critically important to development testimony showing the activity was not severe or pervasive, or that it was welcome, or that it was neither subjectively nor objectively offensive. The testimony of independent co-workers – those not close to either the accuser or the accused—can be especially helpful in establishing each of the foregoing.

It is equally important to find out any information regarding the plaintiff's complaints to management about the alleged harassment, or if none, then her reasons for failing to utilize the anti-harassment policies and procedures set forth by the employer. Even if the harassing conduct did occur, and it was actionable, in some circumstances the employer may avoid liability by establishing that the plaintiff unreasonably failed to take advantage of any established preventative or corrective opportunities provided by the employer to avoid or stop the harassment.
These are just the basics that counsel for the employer must delve into when deposing a harassment plaintiff. Planning for the deposition of the plaintiff requires thoughtful and thorough preparation into the unique circumstances of the case and the employer.

Any lawyer, plaintiff, or corporate personnel who has been involved in a harassment case can tell you that it is often not your run-of-the-mill lawsuit. Accusations of harassment can make both plaintiffs and employers alike uncharacteristically emotional and irrational. While the typical practice of law is worlds apart from our childhood memories of the emotional and melodramatic lawyering of Perry Mason, Ben Matlock, or Denny Crane (depending on your age), a harassment case can often cross-over into this made-for-TV world of juicy and dramatic plotlines and theatrical trial themes.

The emotions of the plaintiff can be exacerbated when you begin to inquire into the highly personal and often embarrassing areas of their life. Anxiety, embarrassment, and depression can be invoked by reliving the allegedly tormenting incident(s). Prior consensual relationships can complicate matters. A plaintiff's past conduct, mental condition, medical history, and the alleged effect on a plaintiff's financial and emotional stability are often relevant in establishing or disputing a claim of harassment. However, a question causing constant struggle with many employers and their counsel is "How far can I go?"

Deposing a harassment plaintiff may invoke unsettled issues of evidence, procedure, and law. This paper will discuss strategies in preparing for the deposition of a harassment plaintiff and help guide you through some of the unique discovery and evidentiary issues that arise in the harassment context.

II. **OBTAINING TESTIMONY REGARDING OBJECTIVE AND SUBJECTIVE TESTS OF OFFENSIVENESS**
The Supreme Court first recognized the validity of “hostile or abusive work environment” claims under Title VII in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). The *Meritor* Court held “that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” *Meritor*, 477 U.S. at 66. One of the hallmarks of a harassment claim is that the plaintiff must prove the alleged harassing activity was severe or pervasive. Conduct is only actionable if it is sufficiently severe or pervasive to have altered the conditions of the victim’s employment and created an abusive working environment. *See Clark Cty School Dist. v. Breeden*, 532 U.S. 268, 270 (2001). The severe or pervasive requirement has developed into a two-part test, *i.e.*, the plaintiff must show that the harassing conduct is both subjectively and objectively abusive or hostile.

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court adopted a requirement that the plaintiff must show a defendant's conduct to be both objectively and subjectively severe or pervasive to be actionable.

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

*Id.* at 21-22 (emphasis added).

Establishing the objective and subjective severity of the harassing behavior, both individually and cumulatively, is one of the most important goals in deposing the harassment plaintiff. There are various factors to consider in establishing the objective and subjective view of the severity or pervasiveness of the harassing conduct. While the determination "is not, and by its nature cannot be, a mathematically precise test," the *Harris* court set forth some non-
exhaustive factors to consider in determining whether an environment is hostile or abusive: 1) the frequency of the discriminatory conduct; 2) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and 3) whether it unreasonably interferes with an employee's work performance. *Id.* at 22-23. The Court further recognized that “no single factor is required.” *Id.*

The employee must "subjectively perceive" the harassment as sufficiently severe or pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable. *Mendoza v. Borden, Inc.*, 195 F. 3d 1238, 1246 (11th Cir. 1999) (citations omitted). The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief.

As discussed more below, gaining access to the plaintiff's electronic life, particularly the plaintiff's various email accounts, social media accounts (e.g. Facebook, Twitter, Instagram, Blogs) can be crucial in establishing the subjective severity of the harassment. It is surprising how much personal and detailed information is publicly available in today's digital means of communication. A plaintiff may be much less assertive of the subjective offensiveness of the harassing conduct if, for example, you establish early on in the deposition you have personal emails or other communications from the plaintiff gushing over a crush on the same supervisor the victim now claims was exhibiting unwelcome advances. While this by no means is meant to infer that a "crush" is sufficient consent for unwanted sexual advances, it is helpful in setting the tone for the deposition and getting more truthful and less embellished subjective feelings.

The objective factor, however, is perhaps the more critical for it is here that the finder of fact must actually determine whether the work environment was hostile. The objective standard
protects the employer from the "hypersensitive" employee while protecting reasonable employees from unlawful discrimination.

Counsel should spend significant time establishing the details of each incident of alleged harassment as the standard for actionable conduct is high. For example, the court granted summary judgment in favor of the employer in a case where a waitress claimed that she was sexually and racially harassed for over a year, including her supervisor grabbing her rear two to five times, "talking dirty" to her five times, including saying sexual things he wanted to do to her, discussing his sexual exploits and asking her out 10-20 times, which she always refused. However, restaurant video evidence showed the waitress hugging him frequently, kissing him once and she admitted joking around with him. Further, she quit her job and then asked to return and did so. The court found the conduct was not sufficiently severe or pervasive. See *Grace Guthrie v. Waffle House, Inc.*, 460 Fed.Appx. 803 (11th Cir. 2012).

In another case, the court again granted summary judgment on harassment claims where a doctor identified only five incidents of behavior in a six-month period, including her supervisor making uninvited comments about his personal sex life, referring to a girlfriend as a "slut," telling a story of looking for a prostitute; telling her that her boyfriend likes to "take it up the ass;" reaching into her purse and obtaining a cough drop, then pretended he was high on Ecstasy while making a "sexually explicit comment;" and placing sexually explicit written material in the doctor's mailbox. There was no evidence that the supervisor ever touched the complaining physician or made any sexual propositions or advances towards her and, immediately after she complained, the comments ceased. While the court found that the complaining physician had a subjective belief that she was subjected to unlawful sexual harassment, the court found that her subjective belief was not objectively reasonable and the conduct was not sufficiently severe or
III. "HOW FAR CAN I GO?"

It has been cemented into legal minds since our beginnings in law school that the key to winning any case is preparation, preparation, preparation. The ultimate goal in any deposition is to make every effort to leave no stone unturned. Similarly, it is our goal as lawyers to give our client the best chance to win its case, including gathering as much contradictory evidence to plaintiff's allegations and hot pursuit of any legally exculpatory defenses.

In the harassment suit context, there are numerous legal defenses employers may bring to defeat an otherwise actionable claim. Likewise, there are numerous strategies and themes common to defeat a harassment plaintiff's claims of an environment sufficiently hostile to establish harassment. However, these defenses do not often come without a fight. It is important that the lawyer is prepared with legal authority in hand to contest any objections during the course of the deposition. Not only will having the legal authority cement your position on the record, but it will help set the tone for the deposition and likely limit the frequency of objections from the other side. Below are some of the legal issues relatively unique to harassment claims that a lawyer must be familiar with prior to deposing the plaintiff.

   a. Defense's Ability to Probe Into Plaintiff's Prior Sexual Conduct in Sexual Harassment Cases

      i. The "Unwelcomeness" Element

In addition to the harassing conduct being severe and pervasive as discussed above, for conduct to constitute sexual harassment, it also must be "unwelcome by the victim." See Meritor, 477 U.S. at 69. Conduct is unwelcome if the employee did not solicit or incite it and if the employee regarded the conduct as undesirable or offensive. See Burnes v. McGregor
Electronic Industries, Inc., 989 F.2d 959, 962 (8th Cir. 1993); Henson v. City of Dundee, 682, 903 (11th Cir. 1982). Clearly, certain severe conduct, particularly rape, is fundamentally unwelcome. See e.g., Lapka v. Chertoff, 517 F.3d 974, 982 (7th Cir. 2008) (“It goes without saying that forcible rape is ‘unwelcome physical conduct of a sexual nature.’”); accord Little v. Windermere Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2002).

As to whether a plaintiff solicited or incited the harassing conduct, a plaintiff’s words, deeds, and deportment can be examined to determine whether the objected to conduct was unwelcome and should have been perceived as such by the harasser. See Meritor, 477 U.S. at 69. The deposition is an essential tool to prepare the defense that the plaintiff's past words, deeds and the way he or she carried themselves is of great importance. But the question becomes, how far can you go? How far can you go into asking a plaintiff about his or her prior sexual conduct and history?

The context of the plaintiff’s conduct must always be examined, but decisions amongst the courts vary widely on the acceptable scope. For example, the Seventh Circuit held that a plaintiff did not welcome her coworkers’ harassing conduct despite her use of invective and “unladylike” behavior because, when the circumstances were viewed in context, it was clear that her use of vulgar language was an effort to be “one of the boys” and that it was clear that she did not incite or solicit her coworkers’ harassing behavior. See Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994). In contrast, the Seventh Circuit also found that a plaintiff welcomed the sexual conduct at issue because the evidence showed she was enthusiastically receptive to sexually suggestive jokes and activities and frequently initiated sex-based conversations herself. See Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).
While the plaintiff's own conduct can be relevant to the determination of welcomeness, it is the workplace conduct that most matters. The fact that a plaintiff engages in certain sexual conduct unconnected to the workplace does not by itself establish that a plaintiff solicited or incited sexual harassment. For example, the fact that a plaintiff posed naked for a magazine that was distributed nationally did not constitute inviting or soliciting sexual advances. See Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 963 (8th Cir. 1993). A plaintiff’s use of foul language or sexual innuendo in a consensual setting outside the workplace “does not waive her legal protections against unwelcome harassment.” Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987). Similarly, while a plaintiff’s participation in dirty jokes or vulgar language may sometimes allow an employer to obtain summary judgment, it is not always so. For example, in Clegg v. Falcon Plastics, Inc., No. 05-1826, 12006 WL 887937 (3d Cir. April 6, 2006), the plaintiff had sent an email to the alleged harasser requesting that he “talk dirty” to her. Because she maintained that the purpose of that email had been to make a joke, the court held that while her email may raise a question about whether the conduct was unwelcome, it did not prove as a matter of law that she invited what ultimately followed and the unwelcomeness of the conduct should be decided by a jury. Id. at *5 n.7.

Welcomeness is not synonymous with voluntariness. An employee who voluntarily participates in the sexual conduct at issue may still not welcome the conduct. As the Meritor Court stated: “The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” Id. Thus, if an employee voluntarily engages in sexual relations with a harasser out of fear of losing her job, the harasser’s sexual advances are unwelcome.
If the plaintiff did not perceive the alleged harassment as abusive, then there can be no violation of Title VII. It is not necessary, however, for a plaintiff to verbally reject or object to the alleged harassment. A plaintiff’s consistent resistance to all sexual advances is enough to establish that she perceived the conduct to be abusive and that it was unwelcome. See Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990). The Chamberlin Court held that there was sufficient evidence that the plaintiff perceived her supervisor’s sexual advances as unwelcome based upon the plaintiff withdrawing her hands from the clasp of her supervisor, changing the topic of conversation when he made sexual advances, and leaving his presence. Id. Similarly, in EEOC v. SDI Athens East, LLC, 690 F. Supp. 2d 1370, 1378 (M.D. Ga. 2010), the court held that a reasonable fact-finder could find unwelcomeness where the plaintiff walked away from the harasser, gave him looks of disapproval, and told him not to touch her.

An employer has the fundamental right to contest the allegations of the accuser, but the limits on how far the employer's counsel may dig into the employee's past conduct is a minefield that requires careful preparation and research. It is best to research the depths of discoverability under the specific facts of your case, and be prepared with legal authority from your jurisdiction in hand in anticipation of objection from your adversary. Below are some of the decisions and authority that have dealt with the balancing of maintaining the victim's privacy, and the employer's right to confront its accuser.

\[ \text{ii. Discovering Plaintiff's Past History to Combat Welcomeness} \]

In many sexual-harassment cases, the defendants argue that the conduct alleged was not "unwelcome," or that the work environment created by that conduct was not "intimidating, hostile, or offensive" to the plaintiff. To support this argument, defendants commonly attempt to inquire into the plaintiff's sexual history generally, and into specific instances of the plaintiff's
past sexual conduct. The unwelcomeness requirement led some courts to allow the discovery and introduction of evidence of a plaintiff’s appearance, dress, and sexual activities. *Meritor*, 477 U.S. at 60. ("[I]t does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.") Plaintiffs frequently object to such inquiries, contending they are designed less to elicit relevant evidence than to embarrass, humiliate, and punish the plaintiff. Throughout most of recent history, the battleground on this issue was limited in both federal and state court to rules such as Rules of Evidence 401-406 (relevancy; unfair prejudice; character evidence; habit) and to Rule of Civil Procedure 26 (scope of discovery, protective orders).

In 1994, Congress clarified the "Rape Shield Rule" in the Federal Rules of Evidence and extended it to civil actions. Fed. R. Civ. P. 412 (Advisory Committee Notes). Unlike the criminal rule, the civil rule does not absolutely preclude the admission of a plaintiff's past sexual conduct or predisposition except in particular circumstances. Compare Fed. R. Evid. 412(b)(1) (criminal) with Fed. R. Evid. 412(b)(2) (civil). The civil rules leaves to judges the duty of balancing whether the probative value of the proffered evidence substantially outweighs the prejudice to a party or the harm to the victim. Id. Since this rule has been in place, courts have applied it in an unpredictable manner; evidence of a victim's sexual past is admitted in some cases but not in others, even when the proffered evidence is substantially similar. While the Rules of Evidence do not apply to discovery, Rule 412's presence could have some effect on the assessment of what might be relevant pursuant to Rule 26, Federal Rules of Civil Procedure.

Under Rule 412, evidence offered to prove a victim's sexual predisposition or that a victim engaged in other sexual behavior is inadmissible unless "its probative value substantially
outweighs the danger of harm to any victim and unfair prejudice to any party." See Fed. R. Evid. 412(a) and (b)(2). The advisory committee notes state that the procedure of Rule 412(c) relating to notice of intention to use such evidence at trial does not apply to discovery but that courts should enter appropriate protective orders to protect against unwarranted inquiries and to ensure confidentiality. Further, it advised, "Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery." Fed. R. Evid. 412, advisory committee's notes to 1994 amendments.¹ While Federal Rule of Civil Procedure 26 controls, Federal Rule of Evidence 412 . . . also informs the instant dispute over the boundaries of proper inquiry into an alleged sexual harassment victim’s sexual conduct and history.” A.W. v. I.B. Corp., 224 F.R.D. 20, 23 (D. Me. 2004). See also Gibbons v. Food Lion, Inc., No. 98-1197-CIV-T-23F, 1999 WL 33226474, at *2 (M.D. Fla. Feb. 19, 1999) (stating that a majority of courts that have considered whether Fed. R. Evid. 412 is applicable to discovery “have found that Rule 412 has significance in the resolution of a discovery dispute.”)

However, despite the majority view that Federal Rule of Evidence 412 applies to discovery, courts vary widely on the balance between the probative value and danger or harm to the victim or unfair prejudice. Many court decisions seem to abide by an unwritten guideline of admissibility, i.e. whether the information sought pertains to the relationship between the alleged harasser and the victim, or whether the information relates to some tangential behavior separate and apart from the victim's employment. See EEOC v. Donohue, 746 F.Supp.2d 662 (W.D. Pa. 2010) (Employee's sexual behavior in her post-separation workplace had no logical relevance

¹ The advisory committee notes have persuasive force although not the force of law. See, e.g., United States v. Vonn, 535 U.S. 55, 64 n.6, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002) (“In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule[.]”)

{25926668;2}
and would not lead to logically relevant evidence having probative value that substantially outweighed the potentially prejudicial and chilling effect that would be produced by permitting such discovery); *Herchenroeder v. Johns Hopkins University Applied Physics Laboratory*, 171 F.R.D. 179, 182 (D. Md. 1997) (information sought by former employer, as to whether plaintiff and co-worker had ever discussed engaging in sexual activity, had some relevance to plaintiff's claims for sexual harassment and was discoverable); *Warren v. Prejean*, 301 F.3d 893, 906 (8th Cir. 2002) (Testimony by an alleged harasser of the plaintiff's own statements to him regarding her sexual history is not excluded by Rule 412 because it is not "other sexual behavior;" even if it did invoke the Rule 412 balancing test, it would be admissible because the relationship between the alleged harasser and the victim was in dispute, and the harasser could certainly present her own evidence about her interactions with the victim and whether any alleged advance would have been welcomed by the victim under the circumstances.)

**iii. Prior Sexual History Offered to Reduce or Negate Damages**

The 1991 Civil Rights Act established a plaintiff's right to sue for damages in sexual harassment claims which can up new grounds of relevancy for evidence of the plaintiff's sexual history. For example, an employer may want to offer plaintiff's psychiatric and sexual history to challenge whether the alleged acts of the harasser caused the injury, or to try to suggest that the plaintiff was already emotionally disturbed and therefore should not be compensated.

Courts often experience difficulty in determining when evidence of a plaintiff's sexual history is relevant in the context of emotional distress claims. For example, in a tort action for wrongful transmission of a sexually transmitted disease, the trial court allowed testimony about the plaintiff's breast augmentation surgery, her past sexual activity, and her employment as a nude dancer. *Judd v. Rodman*, 105 F.3d 1339, 1341-42 (11th Cir. 1997). The court further held
that the prior sexual activity was directly relevant to causation for transmission of genital herpes and that evidence of her nude dancing both before and after contracting the disease was probative of her claim that she "felt dirty." Id. at 1342.

b. Defendant's Ability to Inquire into Plaintiff's Medical and Mental History

The Civil Rights Act of 1991 is like a pot of gold for employees alleging claims of harassment and hostile work environment. The Civil Rights Act of 1991 allows employees to seek compensatory damages for emotional distress, whereas, prior to the Act, such damages (often the largest part of total damages awarded in successful harassment cases) were not recoverable under Title VII. However, with this pot of gold arose the issue of whether plaintiff's claims for emotional distress opened the door to a torrent of discovery into the plaintiff's psychological history.

Although there is a psychotherapist-patient privilege in federal cases, see Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), intended -- like the closely related doctor-patient privilege -- to avoid deterring people from seeking treatment for fear that by doing so they will incur a disadvantage in litigation, the privilege is not absolute. The Jaffee Court explicitly held that the psychotherapist-patient privilege, like all other testimonial privileges, can be waived. See Jaffee, 518 U.S. at 15 n.14. The Supreme Court, however, declined to explicitly set forth the manner in which the privilege would be waived, instead leaving it to the lower courts to fashion a doctrine of waiver to be applied to the psychotherapist-patient privilege.

A plaintiff waives his right under the privilege when, by seeking damages for emotional distress, he places his psychological state at issue in the litigation. See Doe v. Oberweis Dairy, 456 F.3d 704, 718 (7th Cir. 2006) (citing Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000)).
2000) ("[T]he privilege is not absolute. If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state"). Courts often employ the parlance that "one cannot use a privilege as both a shield and a sword." Kronenberg v. Baker & McKensie, 747 F.Supp.2d 983, 989 (N.D. Ill. 2007) (discussing waiver of psychotherapist-patient privilege).

The issue of waiver of the psychotherapist-patient privilege arises frequently in the harassment context because the plaintiff usually claims damages for emotional distress. However, very few appellate courts have clearly addressed this issue. Federal courts faced with this issue have developed three divergent approaches for ascertaining whether the privilege has been waived. See Koch v. Cox, 489 F.3d 384, 390 (D.C. Cir. 2007) (discussing the approaches to determining waiver).

The so-called "narrow" approach finds the privilege waived only when a patient places the substance of psychotherapeutic advice, or communications with a psychotherapist, directly at issue. See id. The so-called "broad" approach finds the privilege waived at any point that the plaintiff makes any claim for emotional distress. See id. (citing Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000)). Some courts have interpreted the Seventh Circuit's single post-Jaffee opinion on the subject as falling into the "broad" category, but the subject was addressed only briefly and did not expressly tie the privilege waiver to the presence of an emotional distress claim. See Oberweis, 456 F. 3d at 718. The so-called "middle ground" approach holds that "[w]here a plaintiff merely alleges 'garden variety' emotional distress and neither alleges a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress, that plaintiff has not placed his/her mental condition at issue to justify a waiver of the psychotherapist-patient privilege." Koch, 489 F. 3d at 390; see also Flowers v. Owens, 274
F.R.D. 218, 223-226 (N.D. Ill. 2011) (giving a detailed account of waiver of the psychotherapist-patient privilege, and describing the contours of the doctrine that make the nature of the damages sought relevant to the issue of waiver).

The majority seems to be that court's apply the "middle ground" approach. Courts throughout the country which apply the "middle ground" approach have held that where the plaintiff seeks garden variety emotional damages—which is to say, damages limited to the typical negative emotional impact on the plaintiff that obviously flow from the defendant's alleged misconduct—the privilege remains intact and is not waived. See, e.g., Flowers, 274 F.R.D. at 225 ("Since Jaffee, most courts have held that claims of 'garden variety' emotional damage do not result in a waiver of the psychotherapist/patient privilege."); Diehl v. Bank of America Corp., 2010 WL 4829970, *1-2 (M.D. Fla. Nov. 19, 2010); Kunstler v. City of New York, 2006 WL 2516625, *9 (S.D. N.Y. Aug. 29, 2006); Owens v. Sprint/United Mgmt. Co., 221 F.R.D. 657, 660 (D. Kan. 2004); Sabree v. United Brotherhood of Carpenters & Joiners of America, 126 F.R.D. 422, 426 (D. Mass. 1989).

Being properly prepared for the deposition, and appearing armed with relevant authority regarding the admissibility of the plaintiff's mental health history and records prior to the deposition is important. Opening the door to a plaintiff's mental health history could provide invaluable evidence for trial, or cause the plaintiff to dismiss its emotional distress claims altogether.

IV. DISCOVERING SOCIAL MEDIA CONTENT

A recent law review article on social networking discovery notes that “it is unlikely. . .the civil litigant not only uses social networking sites, but also does so on a daily basis. . . .In civil lawsuits for damages, especially in the personal injury and insurance litigation context,
potentially relevant discoverable information is often abundant on these sites.” Even E. North, Comment, Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1286, (2010).

Social media discovery can be equally effective in employment cases. Imagine your excitement when the plaintiff alleged to have been harassed by a co-employee turns over his Facebook account revealing that this employee was bragging to his friends about the advances of his co-employee. Social media can provide great contradictory evidence to plaintiff's claims of emotional distress, physical manifestations of that stress, or the truthful reasons for missing work or resigning. Facebook can provide a treasure trove of information in litigation.

At the beginning of a case, counsel should search the internet for plaintiffs' names to determine whether they have accounts with Facebook or other social media websites. The information that the public can view on an individual's Facebook page will vary depending on the privacy settings that he or she has chosen. A person's name, profile pictures, and user ID are always publically available. Most public Facebook profiles reveal some photos, number of friends, and minimal personal content. Discovery requests can be tailored to request either a full printout of all social media activity, or the login username and password allowing you access to that account. This information can be sought through deposition as well; however, it is suggested that you obtain and review this information to use in the deposition.

The scope of discovery into social networking information “requires the application of basic discovery principles in a novel context,” and the issue to be addressed by the courts in this regard is to “define appropriately broad limits. . . .on the discoverability of social communications. . . .and to do so in a way that provides meaningful direction to the parties.”

V. **DEPOSING AN EMOTIONAL PLAINTIFF**

True harassment invokes feelings of unworthiness and cuts to the core of our self-worth. When a person's dignity and emotional stability are center stage, naturally, this can invoke severe emotional responses. Deposing a plaintiff in a sexual harassment case requires the practitioner to be skilled in handling an emotional witness. Practitioner's must comply with the golden-rule to never lose their cool and always maintain control of the witness.

VI. **DEVELOPING TESTIMONY TO ADDRESS DAMAGES**

An employee who suffers from discrimination (or retaliation) is entitled to a wide variety of potential relief under Title VII of the Civil Rights Act of 1964, as amended. Under Title VII, an employee may be entitled to the following relief:

- Reinstatement
- Pecuniary Damages (including front pay, back pay, medical expenses, moving expenses, job-hunting expenses, and other quantifiable expenses)
- Compensatory Damages (including pain and suffering, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, loss of health or other intangible losses)
- Punitive Damages
- Attorney's Fees and Costs

Title VII sets forth limits on non-economic damages (compensatory and punitive damages) that vary depending on the size of the employer. 42 U.S.C. § 1981a(b)(3). The non-economic damages cap ranges from $50,000 for employers with 15-101 employees up to a maximum of $300,000 for employers with 501 or more employees. *Id.* However, many plaintiffs which believe they have a shot at high dollar punitive damages award bring these cases pursuant to their state laws. Although most state laws regarding discrimination and harassment mirror the provisions of Title VII, some states do not have the damages caps present in Title VII. Juries often award damages well beyond that of the damages cap set forth in Title VII or similar state laws, but the court will remit the such award so as not to exceed the damages cap. *See, e.g.,*
Compre v. GCC Drum, Inc., Case No. 99-C-6564 (N.D. Ill. 2003) (Jury verdict of $4 million in racial harassment and discrimination lawsuit under state law involving use of racial slurs, consisting of $3 million dollars in punitive damages and $900,000 in emotional distress damages (reduced after remittur), and $100,000 in lost wages); Bates v. Bd. of Ed. of the Capital School Dist., 2000 WL 376405 (D.Del. 2000) (Jury awarded employee $750,000 for emotional distress damages in Title VII case where the employer retaliated against employee for refusing to rehire him into a position; reduced to $300,000 cap.)

Juries are unpredictable in what damages they deem appropriate. This is even more prevalent in harassment claims, where one influential juror with personal detrimental experiences may be irrational in determining the true nature and degree of the damages alleged and be inclined to award significant damages. Therefore, it is critical to pinpoint early on in the case the universe of potential damages, including the degree, severity, and frequency of the emotional anguish a plaintiff complains of and how it affects the plaintiff's life.

With respect to lost wages (front pay, back pay), it is important to arm yourself with any information and documentation relevant to calculating potential lost wages prior to the deposition. This includes document and interrogatory requests to the plaintiff geared to determine the extent of his/her efforts to find substitute employment or the nature and details of any subsequent employment he/she may have obtained. You should also verify and supplement this information through non-party discovery directed toward employers that the employee worked for in the past. You may also want to secure discovery from a plaintiff's current employer, but be cautious lest it should impact their employment; it is to the Defendant's advantage that a plaintiff remain employed.
With respect to emotional pain and suffering, it is important to inquire into the medical and mental health history of the patient. As discussed above, depending on the jurisdiction and depending on the nature of the emotional distress damages alleged, the prior and current medical and mental health history of the plaintiff should be thoroughly examined. Information regarding a plaintiff's prior diagnosis and treatment can impact their damages. Prior medical history should always be carefully examined. For example, a prior history of sexual abuse may mean the plaintiff is not objectively reasonable in her perception of a modest gesture. A prior diagnosis of depression can defeat a plaintiff's claim that her pain and suffering is related to the harassment she claims to have endured. Similarly, a divorce, a custody battle, a dying family member, or other personal tragedy will help pave the way to an argument that the emotional distress suffered during the relevant time period was caused by personal tribulations rather than the alleged actions of the employer.

Social media discovery, as discussed above, can also be an invaluable tool in developing damages testimony. Discovering a plaintiff's virtual life, both through both written discovery and deposition, can be tremendously valuable in curtailing the degree or severity of the emotional distress damages ultimately sought by a plaintiff. As discussed above, a plaintiff may be less inclined to allege a debilitating condition if there is evidence that they were out partying every weekend or at Disney World, posting pictures of tea time with Cinderella. Furthermore, social media may also reveal evidence contradicting a plaintiff's allegation that continuous efforts were made in securing substitute employment. It is often humorous to find the degree and detail of information shared by persons to an ever growing network of friends that can be detrimental to a case, and contradictory the damages alleged.
There is perhaps no other category of damages that strikes fear in a defendant than the threat of punitive damages. In employment cases resulting in million dollar verdicts for an aggrieved employee, the bulk of the damages a jury awards are almost always punitive damages.\(^2\) The purpose of a punitive damages award is to deter the employer from discriminating in the future, not to compensate the employee for any identifiable damages. 42 U.S.C. 1981a(b)(1); see also Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1998) (discussing what a plaintiff must prove to recover punitive damages under Title VII). Title VII, as amended by the 1991 Civil Rights Act, limits compensatory and punitive damages award, however, to cases of "intentional discrimination" – that is cases that do not rely on the "disparate impact" theory of discrimination. Kolstad, 527 U.S. at 534. Section 1981a(a)(1) limits compensatory and punitive damages wards to instances of discrimination, while section 1981(a)(b)(1) requires plaintiffs to make an additional demonstration of their eligibility for punitive damages. Id. Whether an employer is held liable for punitive damages hinges on whether the plaintiff can sufficient show the defendant's discriminatory actions were with "malice" or "reckless indifference." "The terms 'malice' and 'reckless' ultimately focus on the actor's [i.e. employer's] state of mind." Id.

Therefore, the deposition is the best opportunity to seek any evidence the Plaintiff may have to support an argument that the alleged discrimination was intentional. When determining whether vicarious liability exists for an employer entity for punitive damages awarded due to the conduct of an employee, traditional common law agency principles apply to Title VII cases. Id. at 541-42. Under Title VII, in order for an employer to be held liable for punitive damages for the acts of an employee, the plaintiff must show: 1) the principal authorized the doing and the manner of the act, or 2) the agent was unfit and the principal was reckless in employing him, or

\(^2\) Prior to the Civil Rights Act of 1991, only equitable relief, primarily back pay, was available to prevailing Title VII plaintiffs; the statute provided no authority for an award of punitive damages or compensatory damages. See Landgraf v. USI Film Products, 511 U.S. 244 (1994).
3) the agent was employed in a managerial capacity and was acting in the scope of employment, or 4) the principal or a managerial agent of the principal ratified or approved the act. Id. at 542 (citations omitted). Oftentimes a plaintiff may not be properly prepared to answer detailed questions regarding the nexus between the offending employee and the employer sufficient to support a claim for vicarious liability for punitive damages. Establishing the extent of the plaintiff's knowledge or evidence regarding the scope of a supervisor's or management's knowledge of any offending harassment will go a long way in curtailing the likelihood of egregious claims for punitive damages in the future.