*What Every Defense Attorney Must Know About Sexual Harassment*

*Litigation in the Era of Fake News and Rampant Suspicion*

*Preserving Evidence in a Medical Device Products Case*

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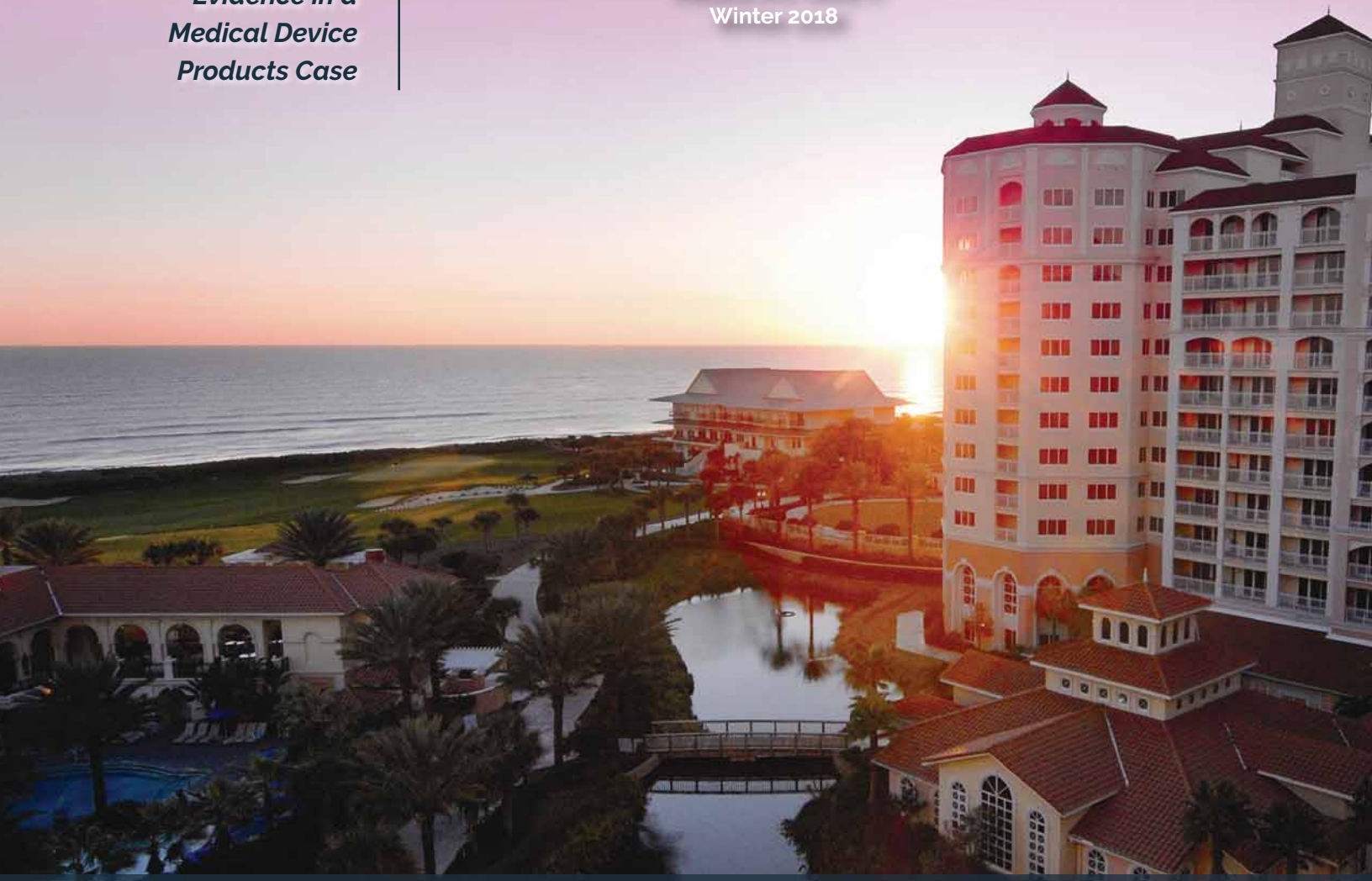


## MARK YOUR CALENDAR

51st GDLA Annual Meeting, June 14-17

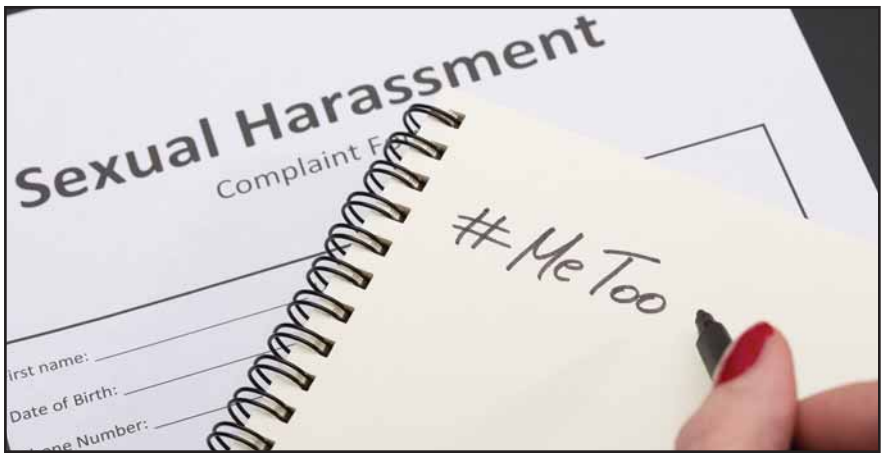
Hammock Beach Resort, Palm Coast, Florida

# What Every Defense Attorney Must Know About Sexual Harassment: A Primer

By Robert A. Luskin and Joshua Y. Joel
*Goodman McGuffey, Atlanta*

Harvey Weinstein. Bill O'Reilly. Roger Ailes. Kevin Spacey. Matt Lauer. Charlie Rose. Representative John Conyers, Jr. Senator Al Franken. Judge Alex Kozinski. And, the list goes on.

In the current climate, it seems that sexual harassment claims are taking down big names almost every week, and there is increased awareness of issues of sexual harassment in the work place. As defense attorneys, we must be prepared for a likely deluge of sexual harassment claims that will come our way. In fact, the Equal Employment Opportunity Commission has reported a spike in visits to its sexual harassment website, as well as a surge in interest in its sexual harassment workplace training program. The purpose of this article is to provide some basic guidance for Georgia defense attorneys, many of whom are not employment law practitioners, on defending against sexual harassment claims and recognizing the potential issues before they become a major problem and your client ends up in the headlines.




## Defining Sexual Harassment

Sexual harassment is a form of workplace sex discrimination when an individual is subjected to unwelcome sexual conduct in the workplace. "Unwelcome" is not the same as non-voluntary. In fact, the Eleventh Circuit has held that a victim can engage in otherwise voluntary sexual activity in the classic legal sense, but it could still be considered sexual harassment if the employee did not solicit or incite the activity.[1] The lynchpin is whether the employee regarded the conduct as undesirable or offensive, even if, in the moment, he or she voluntarily participated. The Supreme Court has echoed this holding, holding that the inquiry is whether the victim, by his or her conduct, indicated that the alleged advances were unwelcome.[2] Thus, the alleged victim's activity—including his or her provocative speech or manner of dress—is relevant to considering whether the sexual advances were unwelcome. While this standard has been criticized by commentators, it reflects the current state of the law in the United States.

The EEOC guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Such activity can include:

- Offensive sexual comments, including innuendo, obscene jokes, or lewd language;
- Sexually offensive communications, such as e-mails or text messages;
- Sexual or romantic propositions of coworkers;
- Insults, whistling, or other sexually suggestive sounds;
- Displaying pornographic pictures or sexual material in the workplace;
- Unwelcome touching; or
- Pressuring or coercing a coworker for sexual favors.

It is important to note that the gender of the harasser and victim is only relevant to the extent it shows that unwanted sexual activity occurred. In other words, sexual harassment can be male to female, female to male, male to male, or female to female, as long as it was unwanted and motivated by the victim's sex.

## Sexual Harassment Claims Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex.[3] The idea that sexual harassment could be considered sex discrimination did not crystalize until 1980, when the EEOC added sexual harassment claims to its sex discrimination guidelines. In 1986, the Supreme Court followed by recognizing standalone sexual harassment claims under Title VII in *Meritor Savings Bank v. Vinson*.[4] After *Vinson*, federal courts recognize three types of claims of sexual harassment prohibited under Title VII: *quid pro quo* claims, hostile work environment claims, and retaliation claims.

### *Quid Pro Quo* Claims

In *quid pro quo* sexual harassment, sometimes referred to as committing a "tangible employment action," an employer explicitly or implicitly makes a condition of employment dependent on the victim's willingness to subject

himself or herself to unwanted sexual activities. For example, the Eleventh Circuit's seminal case, *Henson v. City of Dundee*,[5] involved a police supervisor who refused to allow a female officer to attend police academy unless she had sex with him. Other examples include a manager threatening to terminate an employee if she does not provide sexual favors or continue providing sexual favors or a CEO offering an employee an opportunity to go on a business trip with him, provided that the employee repays him with sexual favors on the trip. In these cases, because the supervisor relies on his or her apparent or actual authority to harass the victim, the employer is strictly liable because the harasser, by definition, acts as the company itself. Furthermore, this type of sexual harassment can make an employer liable even in a single incident and does not require a showing of a pattern of behavior.

**Hostile Work Environment Claims**

Another, and more common, form of Title VII sexual harassment involves claims in which sexual misconduct in the workplace is sufficiently severe and pervasive as to alter the terms of an individual's employment. To establish such a claim, an employee must have been subject to activity that created an intimidating, hostile, or offensive work environment. Isolated incidents of petty slights are not sufficient.

To demonstrate the "severe and pervasive" requirement, consider the following examples. The Eleventh Circuit found no hostile work environment where a male supervisor was caught staring at a subordinate, called her at her home a number of times, offered to do her favors, commented on her beauty, unzipped his pants in the subordinate's presence supposedly to tuck in his undershirt (which was the only shirt he was wearing), touched the employee on her knee and thigh, and touched her bracelet and the hem of her dress.[6] The supervisor also made comments such as "Indian people are really decent, and the Caribbean and Western people are really promiscuous. I can look at you and I can tell you are innocent and you don't have much experience" and "Oh, you were all by yourself on a dark and stormy night? Why didn't you call me? I would have come and spend [sic] the night with you." While the court recognized that the defendant's actions made the plaintiff uncomfortable, it reasoned that the employee never claimed that the activity was intimidating, the actions were not accompanied by sexually explicit comments, and the touching incidents were momentary and did not involve further sexual advances.

On the other hand, a hostile work environment was found where a city mayor repeatedly told stories of his sexual escapades to a city employee even though she asked him to stop, persistently tried to give the employee gifts despite her rejections, made sexual comments to her about her body, her clothing, and his desire for her, and demeaned her work telling her she was "cute" when she was upset.[7] Or, for example, the Eleventh Circuit held that conduct was sufficiently severe or pervasive where a female's supervisor fre-

*Continued on page 44*

# Beware of the Weinstein Tax:

## *How the New Tax Bill Affects Sexual Harassment Settlements*

In a nod to the #metoo movement and increased awareness of workplace sexual harassment and issues of sexual abuse, the Tax Cuts and Jobs Act, signed into law by President Donald Trump on December, 22, 2017, includes what has become known as the "Weinstein Tax."

The Weinstein Tax, originally proposed by Democratic Senator Bob Menandez, is not a tax at all. Rather, Section 13307 of the Act, prohibits settlement funds or attorneys' fees paid out pursuant to confidential settlement agreements from being deducted from taxes. In an effort to curb the use of settlement agreements that muzzle those who raise claims of sexual harassment or abuse, the provision was intended to protect the victims and incentivize employers not to demand confidentiality. Specifically, Section 13307 states:

> PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—
> No deduction shall be allowed under this chapter for—
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
> (2) attorney's fees related to such a settlement or payment.

When faced with a sexual harassment claim—whether meritorious or not—employers must now consider the tax implications of contemplating settlement. For many, if not most sexual harassment claims, the potential risks of not including a non-disclosure provision will outweigh any tax benefits. This is especially true in cases that do not involve significant settlement payment amounts, as it is usually far more beneficial to keep any claims confidential then to receive the deduction. Therefore, the provisions effect on these agreements is questionable.

But, interestingly, the new law, while apparently intended to target only employers, is written broadly enough that it may prohibit plaintiffs from deducting their settlement payments as well. In fact, under the Act as written, victims of sexual harassment or abuse may need to pay taxes on the full amount of settlement payments, and even for their attorneys' fees. This may result in a lower settlement for plaintiffs, and create the opposite effect than what was intended.

It remains to be seen how the IRS will interpret the law, or whether Congress will issue technical corrections. Meanwhile, employers should be aware of this new development. If you find yourself in the unfortunate situation of defending a sexual harassment claim consider involving your companies tax professional or at the very least consider the tax implications.

—Joshua Y. Joel

## Sexual Harassment

*Continued from page 21*

quently tried to get plaintiff to date him using "many direct as well as indirect propositions for sex," followed her into the bathrooms, attempted repeatedly to "touch her breasts, place his hands down her pants, and pull off her pants," and enlisted the help of others to try and grope her.[8] As evident from these cases, the conduct must be quite extreme to establish a hostile work environment.

**Retaliation Claims**

Title VII also prohibits employers from taking any adverse action against an employee for complaining about a hostile work environment. The law also protects the employee from retaliation for cooperating with the EEOC in its investigation of a harassment claim or for participating in a company's internal investigation. The protections against such retaliation apply even if the employee's claim turns out to be untrue, as long as the claim was made in good faith. Thus, a victim must only establish that she subjectively believed the conduct to be inappropriate and that a reasonable person would also consider it inappropriate, even if the allegations turn out to be untrue. So, for example, a report of sexual harassment was found to be objectively unreasonable where the only basis for the employee's belief that a coworker was being harassed was the age and position disparity between the vice president of the company and the 17-year-old employee with whom he was flirting.[9]

**Analyzing a Title VII Sexual Harassment Claim**

Absent direct evidence, sexual harassment claims are subject to the *McDonnell-Douglas* burden-shifting analysis applicable to Title VII claims.[10] Direct evidence of sexual harassment only involves "only the most blatant remarks."[11] A *quid pro quo* case is more likely to be supported by direct evidence, such as testimony that a supervisor said he would give a promotion if the employee had sex with him. Direct evidence is far less likely to exist in connection with hostile work environment claims.

Under the burden-shifting test, the Plaintiff must first establish a *prima facie* case of sexual harassment. The first requirement is to show that the victim is a member of a protected class, which will almost always be established given that sexual harassment applies no matter the victim's gender. Next, the victim must show he or she was subjected to unwelcome harassment, as defined earlier in this article. The victim must then show that the harassment was based on his or her gender, which is also usually an easy threshold to cross in sexual harassment cases. The final requirement for a *prima facie* case depends on the kind of claim being asserted. In hostile work environment cases, the claimant must show the harassment was severe and pervasive enough to effect a term, condition, or privilege of employment and that the employer knew, or should have known, about the harassment and failed to take corrective action.[12] In *quid pro quo* cases, the victim must show that a supervisor relied upon his apparent or actual authority to extort sexual consideration from an employee.[13] In retaliation cases, the victim must show that he or she was retaliated against because she reported the hostile work environment.[14]

If the employee can establish these elements, the burden will shift to the employer to show a legitimate, non-discriminatory reason for the adverse employment action. In other words, even if an employee can establish that he or she experienced actionable sexual harassment in the workplace, if the adverse employment action would have happened regardless of the harassment, the claim may still fail. The burden will then shift back to the employee to show that the proffered reason of the employer was not the real reason for the action, but rather pretext for discrimination. If the Plaintiff fails to meet his or her burden at any stage of the analysis, or if she fails to rebut the legitimate, non-discriminatory reason presented by the defense, his or her claim will fail.

**Timeliness**

To sue for sexual harassment under Title VII, a plaintiff must first file a timely charge of discrimination with the EEOC. In Georgia, the time limit for filing a charge is 180 days from when the alleged discrimination occurred or from when the employee believes or has reason to believe that he or she was a victim of discrimination. In sexual harassment claims, a plaintiff may rely on the "continuing violation" doctrine in order to extend the timeliness of a charge. Under this doctrine, a charge will be considered timely if it was filed within 180 days of the last alleged discriminatory act in a pattern of actions.

Officially, the EEOC has 180 days to investigate a charge, but it often takes longer to make a determination. If the EEOC issues a dismissal and notice of right to sue, a plaintiff has only 90 days to sue in federal court. In a rare case, the EEOC may itself pursue a lawsuit. For example, in the last two years in Georgia, the EEOC has settled three sexual harassment suits: for $20,000 with El Chapparo, Inc., for $25,000 with King's Way Baptist Church, and for $50,000 with the Crawford County Development Authority.

**Other Causes of Action Under Georgia Law**

Title VII only covers employers with 15 or more employees. While establishing that an employer has less than the requisite number of employees will extinguish any Title VII claim—and federal jurisdiction where there is no diversity—Plaintiff may seek other forms of state law relief in response to sexual harassment. The statute of limitations on such claims is two years.

**Negligent Retention**

The most commonly asserted state-law cause of action in sexual harassment cases is negligent supervision and retention. Under this theory, an employer can be held liable for the sexual harassment by one employee of another employee if the employer knew or should have known that the alleged harasser had a propensity to engage in

harassment and nonetheless continued to employ the alleged harasser.[15] An employer can only be found liable under this theory if there is evidence, usually by way of communications or actions in the workplace that would put a reasonable employer on notice that the alleged harasser was likely to commit sexual harassment. Such a claim could arise, for example, where an employee reported specific repeated incidents of sexual misconduct to management and management neglected to take action. Absent similar evidence, the claim will not succeed.

**Intentional Infliction of Emotional Distress**

A frequent avenue sexual harassment allegers take is to claim intentional infliction of emotional distress. Georgia courts have somewhat eased the way for such claims stemming from workplace sexual harassment by holding that the existence of a special employment relationship may make otherwise non-egregious conduct outrageous.[16] While isolated incidents may not amount to an actionable claim, repetitive inappropriate sexual behavior over the victim's protests may have the cumulative effect of being considered outrageous by a court. In the words of the Georgia Court of Appeals, "[t]he workplace is not a free zone in which the duty not to engage in wilfully and wantonly causing emotional distress through the use of abusive or obscene language does not exist. Actually, by its very nature, it provides an environment more prone to such occurrences because it provides a captive victim who may fear reprisal for complaining, so that the injury is exacerbated by repetition, and it presents a hierarchy of structured relationships which cannot easily be avoided."[17] Despite this strong language, plaintiffs are often unsuccessful in their intentional infliction of emotional distress claims because it is not common for the conduct to rise to the level of outrageous.

It is important to note that a company's best defense to liability for intentional infliction of emotional distress for sexual harassment lies in the nature of sexual misconduct: it is almost always committed for purely personal reasons unrelated to the furtherance of the employers' business.[18] Thus, such a claim will almost always only be appropriate against the employee-harasser individually. To reach the employer, the Plaintiff must show that the employer was responsible for its own negligence or omissions, like in negligent retention claims discussed above. Alternatively, a victim may be able to reach the corporate entity of a business solely owned by the alleged harasser. Otherwise, it will be difficult for a company to be held liable.

**Battery**

If the alleged sexual harassment went beyond words and involved physical touching, plaintiffs will often include a battery claim in their complaint. Any offensive or rude touching is considered battery, even if the harasser is not alleged to have touched the victim in a private area. But, touching a coworker in a private area, such as the breasts, buttocks, or groin, will almost always be considered offensive. Alternatively, offensive touching may be found when the allegations include repeated touching in the context of a supervisory employment relationship, which itself makes it difficult for the victim to protect his or herself.[19] Because battery is an intentional tort, however, the plaintiff will almost always only be able to set forth a claim against the employee-harasser, and not the company that employed him.

**A Final Word**

While some sexual harassment claims are baseless or may simply involve bad judgment, it is important to know that defense attorneys are often confronted with legitimate sexual harassment claims. Further, even when dealing with frivolous accusations where there is no legally actionable claim, the potential financial and reputational costs of the public relations nightmare, in addition to the defense costs, can be debilitating to a business. In the current social climate, defense attorneys must be aware of the legal issues surrounding these claims and be prepared to counsel our clients on the best strategy for a defense. ◆

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**Endnotes**

1 *Henson v. City of Dundee*, 682 F.2d 897 (1982).
2 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
3 42 U.S.C. § 2000e, *et al.*
4 477 U.S. 57 (1986).
5 *Henson v. City of Dundee*, 682 F.2d at 903.
6 *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *Cheatham v. DeKalb Cty., Georgia, 682 F. App'x 881, 888 (11th Cir. 2017)*
7 *Bruno v. Monroe Cty.*, No. 07-10117-CIV, 2008 WL 4276532 (S.D. Fla. Sept. 18, 2008), *aff'd*, 383 F. App'x 845 (11th Cir. 2010).
8 *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1248 (11th Cir. 2004).
9 *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)
10 *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).
11 *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir.1999).
12 *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1275 (11th Cir.2002).
13 *Henson v. City of Dundee*, 682 F.2d at 903.
14 *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1291 (11th Cir. 2002).
15 *See, e.g., H.J. Russell & Co. v. Jones*, 250 Ga. App. 28, 30 (2001).
16 *Trimble v. Circuit City Stores, Inc.*, 220 Ga. App. 498, 499-500 (1996).
17 *Coleman v. Hous. Auth. of Americus*, 191 Ga. App. 166, 169 (1989).
18 *Travis Pruitt & Assocs., P.C. v. Hooper*, 277 Ga. App. 1, 3-5 (2005).
19 *Newsome v. Cooper-Wiss, Inc.*, 179 Ga. App. 670, 672 (1986).