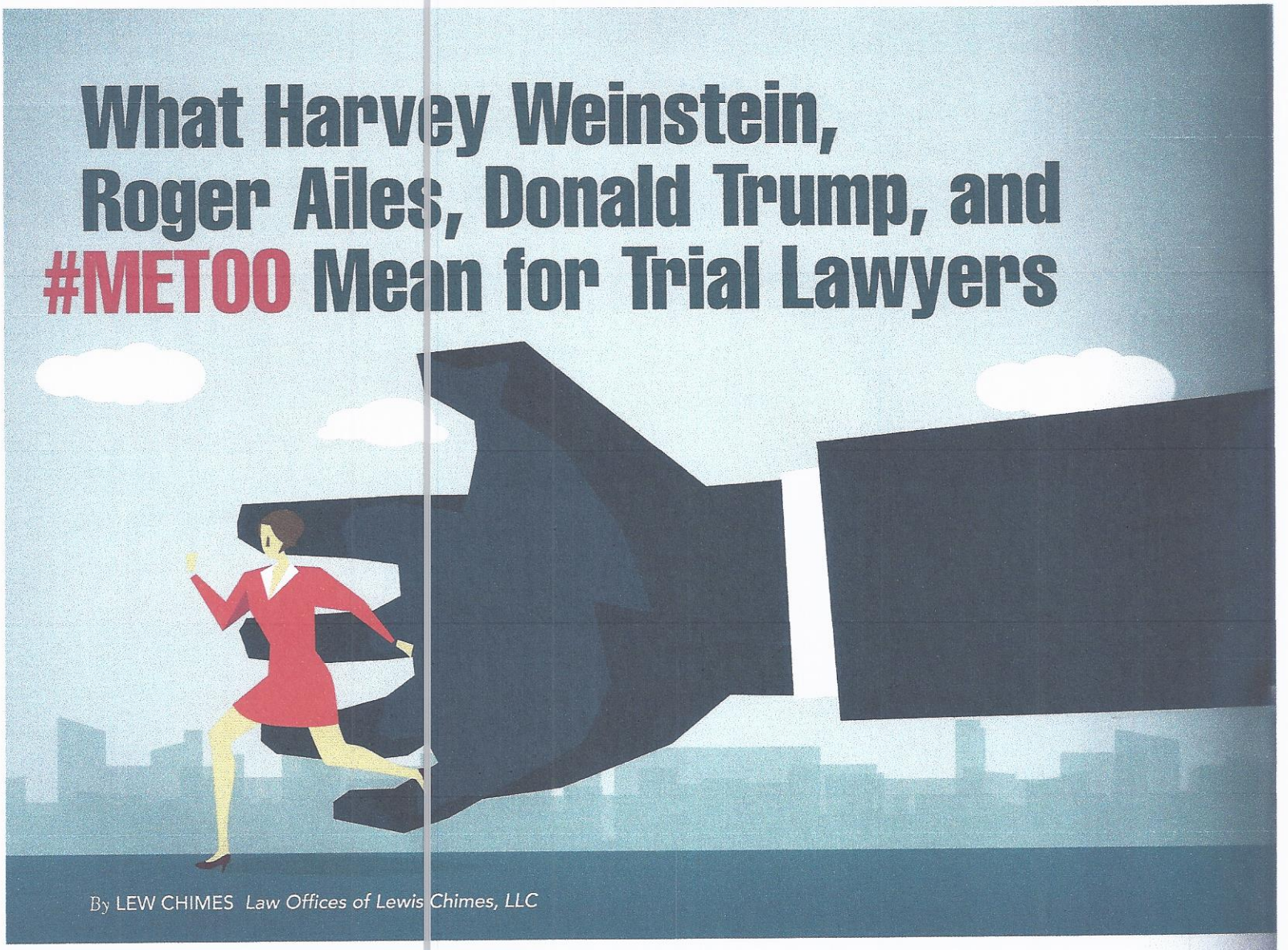
What Harvey Weinstein, Roger Ailes, Donald Trump, and #METOO Mean for Trial Lawyers



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In order to escape accountability for his crimes, the perpetrator does everything in his power to promote forgetting. Secrecy and silence are the perpetrator's first line of defense. If secrecy fails, the perpetrator attacks the credibility of his victim. If he cannot silence her absolutely, he tries to make sure that no one listens. To this end, he marshals an impressive array of arguments, from the most blatant denial to the most sophisticated and elegant rationalization. After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it upon herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and define reality, and the more completely his arguments prevail.

– Judith Lewis Herman

Recent events have brought sexual abuse and harassment to the forefront. It remains prevalent. If you are male (and naïve), ask your wife, your sister, your daughter, or any female colleague. If you are a woman, you already know. It is everywhere. It does not just happen to actresses and models; it happens to waitresses, paralegals, medical assistants, machinists, police officers. Hopefully, more women will be emboldened to come forward and speak out.

As trial lawyers, we represent the underdog. We fight powerful interests. These cases are difficult and emotional. We should be running to take on this fight.

The fact patterns in these cases can be extraordinarily complicated. Employers defending these cases will point to evidence suggesting consent, lack of severity of the conduct, and failure to report inappropriate behavior. More disturbing, victims of sexual harassment pursuing these claims will be subjected to an exponentially greater assault on their credibility, their background and their own sexual history than any other type of plaintiff filing a lawsuit.

Employer Responsibility

Laws prohibiting sexual harassment impose a duty upon employers to provide a safe working environment free of sexual harassment. But these laws do not impose strict liability on employers for sexual harassment in the workplace.

Status of the Harasser: Supervisor or Co-Worker

In order to determine whether an employer is liable for sexual harassment in the workplace, the initial issue is whether the harasser(s) is a supervisor or co-worker. An employee is a "supervisor" if he/she is "empowered … to take tangible employment actions against the victim, such as hiring, firing, failing to promote, imposing discipline, or reassignment with significantly different responsibilities."[1]

Determining if the harasser is a supervisor depends upon whether the victim suffered tangible employment action.

Supervisor Harassment Resulting in Victim Suffering Tangible Employment Action

If the harasser is a supervisor, and the victim has suffered a tangible employment action, then the employer is automatically liable for the sexual harassment.[2]

Supervisor Harassment: No Tangible Employment Action

In cases where the harasser is a supervisor, and the victim has suffered no tangible employment action, the employer can raise an affirmative defense and avoid liability by proving (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[3]

Employer Liability for Co-Worker Harassment

When the harasser(s) is a co-worker, then liability of the employer is established under traditional principles of agency liability. An employer can be held responsible for the sexual harassment of co-workers when:

- It failed to take reasonable steps to prevent sexual harassment in the workplace;
- It knew or reasonably should have known of the hostile environment and failed to prevent it;
- It failed to properly investigate reports of harassment and/or take appropriate remedial steps.[4]

Practical Considerations

Complain!

A client walks into your office and tells a salacious tale of raunch and inappropriate behavior. You believe that you have hit the lottery, and immediately write a strong letter of representation, and immediately file a complaint. Wrong! This is the biggest mistake attorneys unfamiliar with these types of cases make.

Never run to court or start litigation without having your client make a complaint in accordance with the company's anti-harassment complaint procedures. You can assist in drafting the complaint, but in most instances, the client, not the attorney, should be the one making or filing the complaint.

Cooperate with any Investigation

Employers are obligated to investigate and remediate complaints of sexual harassment and your client is

WHAT IS SEXUAL HARASSMENT?

Quid Pro Quo Cases

- Client job, promotion, raises, contingent on sexual relationship with supervisor/superior.
- Client fired, demoted, treated negatively due to rejection of sexual advances by supervisor/superior.

Hostile Environment

- Acts or comments of a sexual nature that demonstrate "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[5]
- A single egregious incident (such as sexual assault, sexual abuse, displaying pornography) may create a hostile environment.
- A single hostile environment may be created by conduct/behavior of multiple individuals, based upon the totality of the circumstances, even when the conduct of any single individual standing alone may be insufficient.[6]
- Whether behavior has created a hostile environment is subject to both a subjective standard (the client perceived it as being hostile and altering the terms and conditions of employment) and an objective standard (what a reasonable person experiencing the same conduct and treatment would perceive).[7]

obligated to cooperate. Any proper investigation should include an interview with your client, and your client should cooperate. He/she should go on their own in most instances. If your client is vulnerable, fragile, or unsophisticated, you can seek permission to accompany him/her.[8]

Don't Sue the Company if They Do the Right Thing

The obligation is on employers to prevent and remediate sexual harassment in the workplace. If the company responds appropriately, then you have fixed the problem and done a greater service to your client than any lawsuit will do.

Failure to Respond to Your Client's Complaint

Unfortunately, the employer's instinct will frequently be hostility to the victim, and a circle-the-wagons mentality. These actions will ultimately strengthen your client's claim.

Hostile Environment Retaliation

Title VII and the FEPA also prohibit retaliation against individuals or persons who complain about discrimination and suffer retaliation. Victims of sexual harassment do not make complaints because they fear retaliation. This fear is well-founded. Often the harasser is a higher-level employee in the company who has political clout or is a source of great profit. Human Resources Departments responsible for administering sexual harassment policies are often are loyal to management even in the face of valid claims.

WHAT IS NOT SEXUAL HARASSMENT?

- Consensual sexual conduct.
- Dating (although a supervisor dating a subordinate can lead to bad things).
- Co-worker flirting where the potential victim does not make clear that it is unwelcome.
- Isolated and sporadic inappropriate comments or actions. (Although this may not rise to the level of a hostile environment, it probably violates company policy. The client should be advised to report it; over time it may become sufficiently pervasive to rise to level of sexual harassment.)
- Client receives benefits, advancement through consensual sexual relationship with supervisor/superior.

Proving retaliation claims against victims of sexual harassment are based upon the timing of the retaliatory acts (how soon after the complaint does it occur) and pretext (how stupid is the company's justification for the retaliatory act after he/she made a complaint).

Many jurors who may be ambivalent about a sexual harassment claim will be incensed by retaliation on the victim who has filed a good faith complaint. Retaliation claims are often more straightforward and easier to understand.

Whether to Sue the Individual Harasser

Title VII does not permit claims against individuals. The Connecticut Fair Employment Practices Act permits suits against individuals under an "aiding and abetting theory." Harassers can be sued under various common law theories, such as intentional and negligent infliction of emotional distress, and assault and battery (if there is physical contact).

The concern about suing the individual harasser in the same case as the employer is that the jury may focus on the harasser and give a large (and uncollectible) award against the harasser and let the company off.

On the other hand, it may be extremely important to your client that the individual harasser is held accountable. Suing the harasser also makes obtaining discovery directly from the harasser much easier. If the company (or municipality) is jointly representing the harasser, the appearance of the harasser sitting next to the employer at the defense table can be quite helpful at trial.

Finally, explore whether there may be insurance available against the harasser (either through the employer's employment coverage or the harasser's homeowner's insurance).

Experts Make a Good Case Better

Experts are expensive, and large recoveries in employment cases are not the norm. But a strong case will be exponentially better using an appropriate expert. In addition, discrimination laws provide for attorney's fees and costs if the plaintiff prevails. In appropriate cases consider use of the following types of experts:

Human Resources Expert

An expert in anti-harassment procedures and policies can address the inadequacies in the employer's sexual harassment policies, procedures, and response to complaints of sexual harassment.

Stereotyping Expert

In an appropriate case, use of an expert on sexual stereotypes and misconceptions can be used to educate the jury on the demeaning nature of the sexually degrading conduct and the larger impact of these stereotypes in society. This type of expert can be used to discuss the insidious nature of seemingly innocuous or subtler stereotypes and explain how they are derived from deeply pernicious roots.

Treating Psychologist vs. Retained Forensic

Emotional distress damages are a large part of the damages in sexual harassment cases. If your case ends up in federal court, be aware that federal judges and appeals courts are much more inclined to examine and reduce large emotional distress awards.

A supportive treating psychologist can be extremely helpful, both as a damages witness and to defend such an award after trial. Equally important, the treating psychologist can provide important support to the client to deal with the stress of the litigation.

A retained forensic psychologist can dramatically increase the value of any case at trial or for settlement. In addition to describing in detail the emotional injuries, the expert can explain the specific impact of sexual harassment and sexual assault.

The Broad Hearsay Exception

First the obvious: Statements that constitute a hostile environment are not hearsay. Statements denigrating someone based on gender are not being offered for the truth of the matter asserted.

The often-overlooked exception: Hostile remarks that are not directed against the plaintiff are admissible as part of the hostile environment. Remarks or behavior that are not directly overheard by the plaintiff are also part of the hostile environment if he/she became aware them during his/her employment.[9] The fact that the inappropriate statement was made or that a certain act occurred must be proven by competent, non-hearsay evidence before the plaintiff can testify that he knew about it.[10]

The Continuing Violation Exception

A sexual harassment claim is different than a discrimination claim that relates to a termination of employment, a demotion, a promotion, or a failure to hire. Those types of claims relate to a discrete act, and the statute of limitations is tied to the date of the discrete act.[11]

A hostile environment is an ongoing continuing violation that can occur over months or years. "Under the continuing violation doctrine, a plaintiff may bring claims for discriminatory acts that would have been barred by the statute of limitations as long as 'an act contributing to that hostile environment [took] place within the statutory time period.'"[12]

Be aggressive about finding evidence that demonstrates a long-standing pattern or culture of tolerance for egregious behavior.

Summary Judgment

Employers file summary judgment motions in **all** these cases. Defending summary judgment, particularly in federal court, takes an enormous amount of time. Federal judges are not hesitant to grant these motions.

Make sure that you have admissible evidence sufficient to overcome a summary judgment motion. You should be confident that you have sufficient evidence on both the issue of whether a hostile environment exists and your theory of employer liability. If not, you should settle the case before you put in the time, or do not bring the case.

One Final Reason to Take on These Claims

If you win, the defendant pays your attorney's fees and costs. And, you get to feel very good about yourself.

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1 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998).

2 *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998); *Burlington Indus.*, 524 U.S. at 762.

3 *Faragher*, 524 U.S. 775; *Burlington*, 524 U.S. 742.

4 *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65, (2d Cir. Conn. 1998); *Patterson v. County of Oneida*, 375 F.3d 206, 226, (2d Cir. 2004).

5 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

6 *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000); see also *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 551-52 (2d Cir. 2010).

7 *Harris*, 510 U.S. at 21.

8 The *EEOC Enforcement Guidelines Re: Supervisory Liability*, provide guidance and standards on investigations of sex harassment complaints.

9 *Schwapp v. Town of Avon*, 118 F.3d 106 (2d Cir. 1997); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150-51 (2d Cir. 1997).

10 *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 71 (2d Cir. 2000); *Howley v. Town of Stratford*, 217 F.3d 141, 155, (2d Cir. Conn. 2000).

11 For most discrimination statutes, the administrative filing date is 180 days for the Connecticut commission on Human Rights and Opportunities and 300 days for the Equal Employment Opportunities Commission.

12 *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2d Cir. 2010) (*quoting Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105, 114 (2002).