A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law

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Comment

A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law

Susan R. Klein†

Workplace sexual harassment creates a problem that extends beyond the specific injuries suffered by the individual victim. Insofar as sexual harassment is directed predominantly toward women, it serves to perpetuate sex-based economic disparities. Sexual harassment plaintiffs have experienced an expansion of their substantive rights in recent years, through a variety of state and federal civil rights legislation and court decisions. The author contends, however, that defendants' use of discovery (and the corresponding introduction of evidence in open court) strips plaintiffs of their privacy to the extent that meritorious suits may be inhibited. The author focuses on two issues: the introduction of evidence regarding plaintiffs' past sexual behavior, and court-ordered psychiatric examinations of plaintiffs. The author suggests that legislation analogous to rape shield statutes be enacted to curb potential plaintiffs' fears of humiliation and embarrassment. The author further proposes that psychiatric examinations be ordered only when a plaintiff is planning to introduce expert testimony on her mental state. Alternately, the plaintiff could be accorded the right to have counsel present during psychiatric examinations.

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Sexual harassment, as a legal and social term, can be defined to include a variety of different behaviors, from purely verbal conduct such as suggestive or derogatory remarks, to physical conduct such as unwanted touching or rape. Whatever definition is accepted, sexual har-


2. The Working Woman's Institute suggests that:

Sexual harassment in employment is any attention of a sexual nature in the context of the work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work, or interfering with her employment opportunities. At one extreme, it is the direct demand for sexual compliance coupled with the threat of firing if a woman refuses. At the other, it is being forced to work in an environment in which, through various means, such as sexual slurs and/or the public display of derogatory images of women or the requirement that she dress in sexually revealing clothing, a woman is subjected to stress or made to feel humiliated because of her sex. Sexual harassment is behavior which becomes coercive because it occurs in the employment context, thus threatening both a woman's job satisfaction and security.


The Equal Employment Opportunity Commission Guidelines, which classify sexual harassment as unlawful discrimination under Title VII, provide that:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.


The California Fair Employment and Housing Commission concluded that:

Almost any type of conduct may constitute harassment. The potential range includes, but is not limited to, conduct which is verbal (such as epithets, derogatory comments or slurs), physical (such as assaults, impeding or blocking movement, or any physical interference with normal work or movement), or visual (the display of pictures, writings, objects, or photographs which are derogatory or offensive). (Cal. Admin. Code tit. 2, § 7287.6(b)(1)).


assent at its most injurious pervades the workplace. The physical and psychological effects of sexual harassment on women can be devastating. Victims often suffer from headaches, backaches, nausea, fatigue, insomnia, loss of appetite, weight changes, depression, nervousness, and even complete emotional breakdowns. Economically, harassment interferes with job performance, and it often leads to lack of hiring and promotion, firing, or resignation due to hostile working conditions. The ultimate effect of sexual harassment is to reinforce the economic subordination of women workers as a group, perpetuating their positions in "low paying and dead-end jobs."" This Comment analyzes state and federal rules of discovery and evidence as they pertain to civil sexual harassment suits, focusing particularly on California law. In recent years there have been tremendous improvements made in the California laws in this area, and these changes will be outlined below. However, the present form and interpretation of these statutes may continue to hamper the sexual harassment victims' ability and willingness to pursue their valid claims in court.

(propositions, physical advances, and harassing telephone calls to plaintiff); Robson v. Eva's Super Mkt., 538 F. Supp. 857, 859 (N.D. Ohio 1982) (propositions and physical assault to plaintiff); Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), rev'd, 568 F.2d 1044 (3d Cir. 1977) (employer physically restrained plaintiff and threatened her with harm if she did not comply with his sexual demands); C. MacKinnon, supra note 1, at 2, 29.

4. See generally, Goodman, Sexual Harassment: Some Observations of the Distance Traveled and the Distance Yet to Go, 10 CAP. U.L. REV. 445, 448-52 (1981) (history of workplace sexual harassment in the United States); L. Farley, supra note 1, at 56-68 (history of sexual harassment since the beginning of the modern labor movement). The number of women who have experienced sexual harassment on the job is shockingly high. In one informal study of 9,000 women, nine out of ten responding to the survey had been sexually harassed on the job; most of them found it demeaning, embarrassing, or intimidating. Safran, What Men do to Women on the Job, REDBOOK, March 1976, at 149. A survey by Federally Employed Women found sixty-seven percent of the women surveyed had experienced sexual harassment, including sexual remarks or jokes made in their presence, men touching or patting their bodies, men making propositions with promises of promotions or special treatment, and men sexually assaulting them. Sexual Harassment in the Federal Government; Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 19 (1979) [hereinafter Congressional Hearings] (Statement of Dorothy Helms). See also U.S. Merit System Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? Summary of Results 91-96 (March 1981) (reprinted in J. Lindgren & N. Taub, The Law of Sex Discrimination 183-85 (1988) (finding that 42% of women reported being sexually harassed); Wall St. J., Dec. 4, 1989, at B7 (in a survey done by the National Law Journal, almost two-thirds of 900 women attorneys reported experiencing some form of sexual harassment, including unwanted remarks or gestures and deliberate touching).


7. Id. at 165; Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. REV. 345, 361, 368 (1980).

8. The House Subcommittee that investigated sexual harassment in the federal government
ment contends that part of this unwillingness stems from the plaintiff’s exposure to public embarrassment and the loss of privacy engendered by the opposing counsel’s questions in discovery and on the witness stand regarding her past sexual history. A second component of plaintiff’s refusal to bring charges consists of her fear of the psychological humiliation she will suffer if forced to undergo an unwanted and intrusive psychiatric exam.

Part I of this Comment surveys the development and current state of discovery and evidence rules in all types of sexual harassment suits. Section A focuses on the Fair Employment Housing Act in California, and on similar versions of this Act, or of a human rights act, enacted in most states. Section B outlines the rules regarding discovery, psychiatric exams, and admissible evidence in state tort and contract suits, again using California law by way of example. The torts discussed include intentional infliction of emotional distress, tortious interference with an employment contract, and assault and battery. Section C details those rules applicable to sexual harassment suits brought under Title VII of the Civil Rights Act of 1964.

Part II examines the problems inherent in the above rules, and contends that certain discovery methods are unnecessary to a fair resolution of the sexual harassment lawsuit, implicate the constitutional right to privacy, deter the filing of meritorious suits, and may be detrimental to the well being of the sexual harassment victim.

Finally, Part III proposes additional reforms of the present evidence and discovery rules and of the use of court ordered psychiatric exams

9. Women who do file sexual harassment complaints are treated as rape victims traditionally have been treated; their word is doubted and they are charged with immoral behavior. Congressional Hearings, supra note 4, at 28 (Statement of Jan Leventer); id. at 35 (Testimony of Donna Lenhoff). As one victim put it, “...[o]ften it is the woman who is made to feel as though she is the culprit, by having the audacity to bring forward a complaint.” Id. at 13 (quoting Diane Williams, plaintiff in Williams v. Civiletti, 23 Fair Empl. Prac. Cas. (BNA) 1311 (D.D.C. 1980)).

10. The terms “psychiatric” and “psychological” will be used interchangeably for purposes of this Comment, although a psychiatrist is a medical doctor and a psychologist has a masters or doctoral degree. However, the import of an exam by either such individual is the same.


12. For the text of all state employment discrimination laws, see 3 Empl. Prac. Guide (CCH) §§ 2097-2917 (1987). A list of the states that have enacted fair employment practice laws and their statutes can be found infra note 14.

and considers how these reforms would ameliorate the inadequacies of these rules.

I

DISCOVERY AND EVIDENCE RULES IN SEXUAL HARASSMENT SUITS

A. Fair Employment and Housing Act

At least 42 states and the District of Columbia have enacted fair employment and practice laws that prohibit sex discrimination.\(^{14}\) Although these acts differ from state to state, most provide the same general protections as Title VII, prohibiting discrimination in employment based upon sex, race, or religion.\(^{15}\) Generally, a state administrative agency similar to the EEOC will attempt to resolve complaints prior to court action.\(^{16}\) These state acts are not preempted by federal civil rights


\(^{16}\) See, e.g., Mass. Gen. Laws Ann. ch. 151B, §§ 1-10 (West 1971 & Supp. 1981), requiring a complainant to file a charge with the state agency (Massachusetts Commission Against Discrimination [MCAD]) within six months of the unlawful act. Id. § 5. After filing with the MCAD, a complainant can wait for the agency to resolve the complaint administratively or can file a suit in state court. If the complainant chooses to file the suit, she must either wait 90 days or obtain a "right to sue" letter from the MCAD before that period has passed. In any case, the employee must file suit within two years of the unlawful act, or she waives her right to sue. Id. § 9.
laws; rather, the state agencies and the EEOC cooperate in enforcing anti-discrimination prohibitions. In many states, these statutes apply to a broader range of discriminatory acts than are covered by Title VII, provide a wider range of possible remedies, and cover businesses with fewer than fifteen employees.

In California, the Fair Employment and Housing Act (FEHA), enacted in 1959, declares that freedom from discrimination in seeking, obtaining, and holding employment is a civil right. The Fair Employment and Housing Commission (“Commission”), and the Department of Fair Employment and Housing (“Department”), were established to interpret and enforce the anti-discrimination laws of the state. The Act recognizes that “the practice of denying employment opportunity and discriminating in the terms of employment for such reasons fosters domestic strife and unrest, and deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public.”

17. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). Carey states that the state agencies and the EEOC are intended to provide “interrelated and complementary state and federal enforcement” of antidiscrimination acts. Id. at 65 (emphasis added). Such cooperation is statutorily mandated, as Title VII requires that complaints filed with the EEOC be deferred for resolution at the state level prior to federal action. 42 U.S.C. § 2000e-5(c) to (f) (1976).


public in general."\(^{23}\)

Prior to the FEHA's amendment in 1982, the Commission had interpreted California Government Code section 12940(a), which prohibits discrimination "because of . . . sex,"\(^{24}\) to protect employees from sexual harassment as well.\(^{25}\) In 1982, the California Legislature amended the FEHA and added section 12940(i), specifically to make harassment, including sexual harassment, a separate and distinct unlawful employment practice.\(^{26}\) The Legislature articulated the State's interest in eradicating sexual harassment in the workplace as violative of individual civil rights and of public policy in general.\(^{27}\)

Despite the 1982 amendments to the FEHA, sexual harassment victims found it difficult to pursue their claims in court due to the abuses of discovery by defendant-employers in these cases.\(^{28}\) In response to this problem, the Legislature enacted Senate Bill 1057, which added one sec-

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\(^{23}\) CAL. GOV'T CODE § 12920 (West 1980).

\(^{24}\) CAL. GOV'T CODE § 12940(a) (West 1980).


\(^{26}\) 1982 Cal. Stat. 4221-23 (codified as amended at CAL. GOV'T CODE § 12940(h) (West Supp. 1990). The section as amended states:

Section 12940. Unlawful employment practices.  
It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California:

(b) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, mental condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. 

\(^{27}\) In passing CAL. GOV'T CODE § 12940(i), the Legislature stated that it "finds and declares that it is the existing policy of the State of California to prohibit harassment and discrimination in employment on the basis of any protected classification. Such conduct whether intentional or unintentional is a violation of the civil rights of California citizenry and has been shown to decrease productivity in the work force. [CAL. GOV'T CODE § 12921 (West 1980).] It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which allegations of prohibited harassment and discrimination be filed, timely and efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by the nonsupervisors and clientele." 1984 Cal. Stat. 6403-04.

\(^{28}\) Assembly Committee on Judiciary, Elihu M. Harris, Senate Bill 1057, as amended, August 28, 1985 ("Without protection, victims face the risk of enduring further intrusions into details of their personal lives, with the clear potential to annoy and embarrass litigants. This bill is intended to curb the unnecessary abuses and risks incurred by such complainants."); Brief of Amicus Curiae American Civil Liberties Union on Behalf of Petitioner at 2, Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (No. SF 24932).
tion to the California Code of Civil Procedure, added two sections to the California Evidence Code, and made two amendments to the California Government Code.29 The preamble to the bill, which sets forth the Legislature's intent in adding the new statutes, states in part that "[t]he discovery of sexual aspects of complainant's lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. . . . Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the 'Catch 22' of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings. . . . Absent extraordinary circumstances, inquiry into those areas should not be permitted either in discovery or trial."30 These code sections will be discussed below.

Further changes were made to the California Civil Code one year later, when the Legislature repealed the entire Article containing the state's civil discovery rules and enacted a new set of civil discovery rules.31 The Legislature did not intend this specifically to affect the rules regarding sexual harassment suits, but intended its actions to be neutral. Instead, the Legislature's purpose was to recognize existing case law, to avoid unnecessary or harassing tactics, and to make civil litigation more economical.32 These changes will also be surveyed below.

A plaintiff aggrieved by sexual harassment first takes her case to the DFEH to be heard by the Commission, where a substantial number of sexual harassment cases are adjudicated.33 The Commission performs


32. Telephone interview with Debra Deboe, assistant to Assembly member Elihu M. Harris (Jan. 25, 1989). Assembly member Harris introduced the new Discovery Act in Assembly Bill Nos. 169 and 1334. The Act was drafted by the Joint Commission on Discovery, made up of members of the California State Bar and Judicial Council, after a two-year study.

the adjudicatory functions under the Act and hears administrative accusations brought by the Department against individuals and entities who are alleged to have committed unlawful practices under the Act. The Commission is empowered to interpret all substantive provisions of the Act. It executes this function by issuing regulations and by publishing precedential decisions which are issued in connection with accusations the Department brings before it. The Commission is also empowered to fashion limited remedies for the complainant.

These proceedings of the Commission must adhere to the strictures of the Administrative Procedure Act, under which respondents are not entitled to require the harassment victim to submit to a psychiatric examination.

A good example of the progressive attitude of the Commission on the discoverability and admissibility of evidence in administrative proceed
CEEDINGS can be found in *DFEH v. Fresno Hilton Hotel (Burns).* In that case the plaintiff, a cook at a hotel, had been sexually harassed by her supervisor, the head chef, for over a year and was eventually dismissed. This harassment consisted of a constant barrage of propositions, occasional fondling, and assigning to plaintiff extra duties, which he would have a busboy do instead “in exchange for Burns’ performance of sexual favors.”

Ms. Burns filed a complaint with the Department, which prosecuted the case for her in a hearing before an Administrative Law Judge. His proposed decision and a transcript of the hearing was submitted to the Commission, which found the hotel liable for creating and imposing a hostile and offensive work environment on Ms. Burns because of her gender. The Commission ordered respondent to pay Burns $15,000 compensatory damages for the emotional and physical distress suffered by her due to the harassment and $20,000 in punitive damages because respondent’s conduct was malicious. Additionally, the Commission ordered the respondent to post the Burns Order conspicuously for 90 days in all locations where employee notices are posted, to post a description of respondent’s internal procedure for handling sexual harassment complaints, and to post a description of employees’ rights and recourse under the Act in the same locations permanently.

During the hearing, the respondent offered the testimony of various individuals in support of its claims that Burns participated in sexual banter at the hotel and at a prior job and that she sexually harassed others at both places as well. The purpose of this evidence was for impeachment and to show Burns’ alleged lack of sensitivity to her supervisor’s conduct. The Commission held that the Department correctly objected to this evidence, finding that “in cases involving sexual harassment, evidence of the victim’s claimed sexual conduct with individuals other than the harasser will be inadmissible to show the victim’s alleged lack of offense or claimed absence of emotional injury.” It also found such evidence inadmissible to attack plaintiff’s credibility, finding that unchastity is insufficiently probative of a person’s general credibility as a witness.

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40. *Id. at 4-6.*
41. *Id. at 27-33.*
42. This decision was rendered before the California Supreme Court held that the Commission lacked authority to award punitive damages. *See Dyna-Med, Inc., 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67.*
43. *FEHC Dec. No. 84-3, slip op. at 42.*
44. *Id. at 25.*
45. *Id. at 20.* Further, the Commission noted that respondent cannot question the plaintiff on these irrelevant prior sexual encounters, obtain her denial of them, and then offer the impeaching testimony of its witnesses. In doing this, respondent sought to have admitted otherwise inadmissible extrinsic evidence of collateral matters. *Id. at 19 n.3 and 20 n.4 (citing People v. Lavergne, 4 Cal. 3d 735, 744 (1971)); Cal. Evid. Code §§ 780, 787.*
rejecting such evidence, the Commission found that the same policy reasons behind the rules of evidence in rape prosecutions applied in this area. 46

The amendments to the California Government Code contained in Senate Bill 1057, which apply in administrative proceedings, provide that discovery and admissibility at trial of evidence regarding specific instances of a sexual harassment victim's prior sexual conduct is not permitted unless offered to attack her credibility. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose. 47

Should the plaintiff sue in state court for a violation of the FEHA, the California Code of Civil Procedure applies to the action. These rules are not quite as favorable to the plaintiff as the procedures employed by the Commission. The recently enacted Senate Bill 48 limits discovery of plaintiff's prior sexual conduct with persons other than the alleged per-

46. FEHC Dec. No. 84-3, slip op. at 20, 21. The Commission noticed that a similar tactic has been used in the defense of rape cases. "[T]he evidence tends to focus the trier of fact on irrelevant issues revolving around Burns' personal life, which may be highly prejudicial to her case. Indeed, the danger from such evidence is that it removes the focus of the trier of fact from Adame's misconduct, and diverts it into an inquisition on Burns' character. The obvious goal here is to persuade the trier of fact that Burns is a 'loose woman' who encouraged and even enjoyed such advances." Id. at 21.

47. For the rule the Commission follows regarding the admission of evidence, see CAL. GOV'T CODE § 11513 (West Supp. 1990), which provides in pertinent part:

11513. Evidence; examination of witnesses; interpreters; inadmissibility of evidence of complainant's sexual conduct

(c) . . . In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (j). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(j) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

For the rule the Commission follows regarding discovery, see CAL. GOV'T CODE § 11507.6 (West Supp. 1990), which provides in pertinent part:

11507.6 Request for discovery; statements; writings; limitations on scope of discovery in sexual harassment, sexual assault, and sexual battery cases

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

48. See supra note 29.
petrator. It requires a party to show "good cause" for a judge to allow such discovery in sexual harassment actions, and this restriction applies to all forms of discovery, including depositions, interrogatories, requests to produce and requests for admissions.\(^{49}\) To meet this good cause requirement, a party has to demonstrate with specific facts that the matter sought to be discovered is relevant or reasonably calculated to lead to admissible evidence.\(^{50}\)

The recently changed Civil Discovery Act\(^{51}\) combines into a single action the above provisions requiring good cause justified by specific facts before a sexual harassment victim can be questioned about her sexual conduct.\(^{52}\) Additionally, the new code section appears even more stringent in that it requires that the matter sought to be discovered be both relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence, whereas the older code section called for only one or the other.

Overcoming the threshold requirements of this discovery rule has become more difficult since the enactment of the new evidence code sections.\(^{53}\) These code sections limit the admissibility of sexual-conduct information and indicate that such information will generally not be relevant. Under the evidence code, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct are inadmissible to prove consent by the plaintiff or to prove absence of in-

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49. **CAL. CIV. PROC. CODE** § 2036.1 (West Supp. 1988), which became effective January 1, 1986, provided as follows:

   In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, a party is required to show "good cause" in accordance with [Code of Civil Procedure] Section 2036 to obtain discovery regarding the plaintiff's sexual conduct with individuals other than the alleged perpetrator. That showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing.


51. See supra note 31.

52. **CAL. CIV. PROC. CODE** §§ 2036.1 and 2036(a) (for text, see supra note 49) have been replaced with **CAL. CIV. PROC. CODE** § 2017(d) (West Supp. 1990), which provides:

   (d) In any civil action, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. That showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing. . . .

53. See supra note 29.
jury to the plaintiff, though such evidence may be admitted to attack the plaintiff's credibility.54

Notice that in state court proceedings under the evidence code, reputation and opinion evidence can be used to attack credibility, unlike the rule governing administrative proceedings. If the defendant attempts to use such evidence to attack credibility, he must make a written motion to do so accompanied by a supporting affidavit. The judge will then conduct a hearing out of the presence of the jury to determine whether the evidence is more probative than prejudicial.55

The 1986 amendments also affected the rules regarding psychiatric examinations of plaintiffs. Under these Senate Bill amendments, mental or physical examinations are not allowed in civil sexual harassment suits unless plaintiff put her mental condition in controversy and good cause was shown for the exam.56 The changes made to the Discovery Act a year later appear at first blush to have greatly increased the burden upon a defendant seeking such an exam. While the rewritten section of the

54. CAL. EVID. CODE § 1106 (West Supp. 1990) provides in pertinent part:
   (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.
   (b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.
   *
   *
   *
   (d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.

CAL. EVID. CODE § 783 (West Supp. 1990) provides in pertinent part:

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

   *
   *
   *
   (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

55. CAL. EVID. CODE § 783 (for text, see supra note 54); CAL. EVID. CODE § 352 (West Supp. 1990).

56. Former CAL. CIV. PROC. CODE § 2032, reprinted in CAL. CIV. PROC. CODE app. at 70 (West Supp. 1990), provided in part:

   (a) Order for examination. In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician, or to submit to a mental examination by a licensed clinical psychologist who has a doctoral degree in psychology and at least 5 years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, or to produce for such examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and all parties shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Code of Civil Procedure retains the "in controversy" and "good cause" requirements, it adds a number of new provisions. One of these allows the plaintiff to record the exam on audio tape, a right she did not possess under the prior provision. She is also permitted to have her attorney present during the examination. A provision allowing counsel to be present was included by the authors of the Act, who felt that "a civil litigant should be assisted by counsel during every stage of the lawsuit, and most especially during the compelled probing of his or her psyche in the course of a relatively lengthy interview with a professional selected and employed by the other side." However, the Assembly removed this provision before passing the Bill.

57. CAL. CIV. PROC. CODE § 2032 (West Supp. 1990) provides in pertinent parts:
Section 2032. Physical or mental examinations
(a) Parties. Any party may obtain discovery, subject to the restrictions set forth in Section 2019, by means of a physical or mental examination . . . in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action.
(b) Licensed physician or clinical psychologist. . . . A mental examination conducted under this section shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least 5 years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders . . . .
(d) Motion for examination; contents; notice; good cause; order granting examination. If any party desires to obtain discovery . . . by a mental examination, the party shall obtain leave of court . . . . The court shall grant a motion for a physical or mental examination only for good cause shown. If a party stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, a mental examination of a person for whose personal injuries a recovery is being sought shall not be ordered except on a showing of exceptional circumstances. The order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination . . . .
(g) Attendance at physical examination; presence of observer; motion for protective order; x-rays; recording of mental exam . . . .
(2) The examiner and examinee shall have the right to record a mental examination on audio tape. However, nothing in this article shall be construed to alter, amend, or affect the foregoing with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.
58. Id. § 2032(g)(2).
59. Id.
60. In that version of the California Civil Discovery Act of 1986 proposed by the State Bar Judicial Council Joint Commission on Discovery, the examinee was to be permitted to have her attorney or that attorney's representative attend the examination. "If in the judgment of this observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic procedure, the observer may suspend the examination to enable the party being examined or producing the examinee to make a motion for a protective order." STATE BAR - JUDICIAL COUNCIL JOINT COMMISSION ON DISCOVERY: PROPOSED CALIFORNIA CIVIL DISCOVERY ACT OF 1986, PROPOSED ACT AND REPORTER'S NOTES, JANUARY 1986, 87 [hereinafter PROPOSED ACT].
61. Id. at 91. The Commission realized that this provision would annul the 5-2 decision of the Supreme Court in Edwards v. Superior Court, 16 Cal. 3d 905, 549 P.2d 846, 130 Cal. Rptr. 121 (1976). However, it found that any problems caused by the presence of counsel in a mental examination would be better dealt with by ad hoc protective orders than by a general rule of exclusions. It also noted that the California courts have long recognized a right on the part of the person examined
In addition, this section of the Code of Civil Procedure provides that, where no claim for mental distress is made beyond that normally associated with the physical injury claimed and no expert testimony regarding the emotional distress will be offered at trial by the plaintiff, a mental examination will not be ordered unless there are exceptional circumstances. However, a careful reading will prove this latter provision is not as helpful in practice as it may seem. There is often no physical contact between the plaintiff and defendant; rather, the defendant harasses through verbal conduct and withdrawal of job benefits. Thus there may be no physical injury claimed, or if there is physical injury, it is the result of the emotional distress suffered by the plaintiff due to the harassment and is not directly caused by the defendant (at least not in the same sense as where a defendant hits a plaintiff with his automobile). By calling the "claim" one for physical injury and the mental distress "associated" with this claim, the provision implies that the emotional distress must be caused by a physical injury. Contrary to this, in sexual harassment cases, any physical injury experienced is often a result of the emotional distress, not the cause of it. The comments of the authors of the Discovery Act do not specifically discuss its application in sexual harassment cases, but the most natural reading suggests it was not intended to cover those situations.

In those instances where a psychiatric exam is ordered, the judge may issue a protective order prohibiting the psychiatrist from questioning the complainant regarding her sexual history. A recent interpretation of these Code sections by the California Supreme Court can be found in Vinson v. Superior Court. This case was decided after the Senate Bill went into effect (enacted 1985, operative 1986) but before the new Civil Discovery Act became operative (enacted 1986, operative 1987). However, the court discusses both versions in its opinion, and implies that there would be no difference in the outcome regardless of the section used.

Ms. Vinson, a 59-year-old widow, was employed in 1979 as a Certification Technician by the Oakland Citizen's Committee for Urban Renewal, which administered Oakland's CETA program. The CETA program was transferred to the defendant Peralta Community College District under the direction of defendant Ronald Grant. Ms. Vinson ap-
plied for a transfer to Peralta on five occasions but heard nothing in response. As her need for employment grew dire, she hand delivered a copy of her resume to Mr. Grant. He led her back to a private cubicle, where he stated:

My you have big titties, and I'd sure like to play with your titties and get you in bed because you look like you're a mouthful and I'd like to pet your ass and go to bed and have sexual relations with you. And if you get the job, do you think you'd like to go along with having sexual relations with the job . . . If you want the job, then you'll have to fulfill my sexual desires or you don't get the job. And if you think you can't go through with it as far as having sexual relations, then I'll see that you don't get the CETA job and any other job with Peralta, because I am the Director and I'll see to it that you don't get the job.66

Ms. Vinson refused to accede to Grant's demands and was not hired. She experienced loss of sleep and appetite, unwillingness to meet people, fear, anxiety, humiliation, reduced self-esteem, and neck and back pain as a result of this harassment. She continued to submit applications and was later hired by a supervisor under Mr. Grant in 1980 to work as a Certification Technician with Peralta. When he discovered she had been hired, Grant reassigned Ms. Vinson to the Payroll Unit, where she had no experience. She was terminated a month later by Mr. Grant. This firing intensified her anxiety and muscle pain, and she was forced to turn to her son for financial support. At no time did she seek psychiatric counseling, due to cost; however, she did consult her pastor.

In 1982 Ms. Vinson filed suit in California Superior Court alleging sexual harassment in violation of the FEHA and Title VII, wrongful discharge, and intentional infliction of emotional distress. Defendants subpoenaed all of Ms. Vinson’s medical records, though she succeeded in having this subpoena narrowed to include only those records directly relevant to the lawsuit. On January 14, 1985, defendants moved to compel Ms. Vinson’s attendance at medical and psychological examinations for the purpose of assessing her damages.67 She opposed this motion and sought protection from the examinations, or in the alternative, strict limits on their scope, the attendance of counsel, and recording of the interviews. The superior court for Alameda County granted defendants’ motion for these examinations in an order that did not allow plaintiff’s


counsel to attend or record the examinations or permit subsequent depositions of defendant's experts. The order did grant petitioner a five-day stay in which to seek review in the appellate court.

Plaintiff filed a petition for Writ of Mandate and/or Prohibition seeking a stay of the order of the superior court and ultimately a writ reversing the order. The appellate court issued an alternative writ on April 23, 1985, commanding the superior court to vacate its earlier order concerning medical and psychological examinations of petitioner, and to issue a new order allowing sufficient time for petitioner to review the reports and take the depositions of defendants' experts, and providing that "the examinations shall not invade areas protected by petitioner's right of sexual privacy, including but not limited to her prior sexual history." In the alternative, the court scheduled a hearing on the issues raised by the petition. The hearing by the court of appeal was held on June 4, 1985, and in a complete reversal of the position it outlined in the alternative writ, the court denied Ms. Vinson's petition thereby removing all the protections it had imposed by way of the alternative writ. Ms. Vinson then appealed to the California Supreme Court.

In her appeal, Ms. Vinson again argued that no psychiatric exam was warranted, because she had not placed her mental condition in controversy, that it would not lead to relevant evidence, and that it constituted an invasion of her privacy. She argued further that, should she lose on this issue and an exam be ordered, she should be permitted to have her counsel present, and the scope of questioning should be narrowed to exclude any inquiry regarding her prior sexual history. The court reversed the judgement of the appellate court, with directions to issue a writ of mandate compelling the trial court to limit the scope of the mental examination to exclude inquiry into the plaintiff's sexual history and practices. Thus Ms. Vinson won a partial victory, her past sexual history being protected from discovery, but still being forced to submit to a psychiatric exam without the presence of counsel.

The Court reasoned that Ms. Vinson had placed her mental condition in controversy and that good cause existed for an exam, within the meaning of the California Civil Code section 2032, solely because she alleged ongoing mental and emotional distress, even though she had not seen a psychiatrist and would call no expert witnesses to document these

69. Id.
damages. The exam was necessary in order to assess the truth and severity of plaintiff’s alleged damages. The court also held that plaintiff had waived her right to privacy as to these issues by initiating the suit, though she did not implicitly waive her right to privacy with respect to her sexual history. The courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery. Since defendants had failed to explain why probing into sexual history was relevant to plaintiff’s claim, no good cause existed for discovery into that area and it would not be permitted. Finally, the court held that the trial court had not abused its discretion in excluding plaintiff’s counsel from the examination, though trial courts retain the power to permit the presence of counsel when needed. Plaintiff may record the examination on audiotape to permit evidence of any abuse of court-imposed limitations to be presented to the trial court in a motion for sanctions.

B. State Tort and Contract Actions

A plaintiff can sue in state court for sexual harassment using a variety of common law tort and contract theories. One commentator even suggests a new tort of sexual harassment, though this has yet to be adopted in any jurisdiction. The most obvious tort is a private action for sexual harassment under a state fair employment and housing act, as discussed above in Section A. This is basically a tort action for violation of the state’s public policy, and the controlling evidence and discovery rules would be those contained in that state’s code of civil procedure.

72. Vinson, 43 Cal. 3d at 839-40, 740 P.2d at 409, 239 Cal. Rptr. at 297.
73. Id. at 841-42, 740 P.2d at 410-11, 239 Cal. Rptr. at 298-99.
74. Id. at 843-44, 740 P.2d at 412, 239 Cal. Rptr. at 300.
75. Id. at 844-47, 740 P.2d at 412-14, 239 Cal. Rptr. at 300-02.
76. One advantage of suing in tort is that it may provide more complete recovery than suing under Title VII (where relief is limited to back pay, reinstatement, injunctive relief or declaratory judgment) or in state administrative procedures under fair employment and housing acts. Compensatory damages for pain and suffering, both mental and physical, as well as punitive or exemplary damages may be awarded. See Shaffer v. National Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983) (court recognized that tort claim for compensatory and punitive damages for intentional infliction of emotional distress was necessary to supplement the state antidiscrimination statute, which provided only for injunctions, reinstatement and back pay), aff’d on rehearing, 117 L.R.R.M. (BNA) 2062 (E.D. Pa. 1984); Schoenheider, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. PA. L. REV. 1461 (1986). Other advantages to suing either in tort or contract are the avoidance of delays inherent in pursuing administrative relief, longer limitations periods for filing, and the right to a jury trial on demand. See, Wald, Alternative to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination, 5 HARV. WOMEN’S L.J. 35 (1982) (arguing that administrative delays, narrow statutory relief, and growing restrictions in judicial interpretation of Title VII potentially make state tort claims more successful).
77. Schoenheider, supra note 76, argued that traditional theories of recovery in tort are ill-suited to redress workplace sexual harassment because the antidiscrimination laws lack a common-law history. Id. at 1476.
78. See supra note 49-63 and accompanying text.
Trial and discovery rules in all tort and contract actions will be governed by the code of civil procedure used in that jurisdiction, and it is beyond the scope of this paper to discuss the codes of each state separately. However, it should be noted that California’s rules, especially since the legislation enacted in 1986,79 are among the most liberal (toward the complainant) in the country.80 Statutes in other states may not have California’s prohibition on the discovery and admissibility of evidence of a plaintiff’s prior sexual conduct in civil sexual harassment cases, and in fact may not even include sexual harassment as a form of sex discrimination in their anti-discrimination laws. Thus in focusing on California law, the reader should be forewarned that there may be additional problems pursuing these causes of action in other states.

Other examples of possible tort claims a victim of sexual harassment might pursue include intentional infliction of emotional distress, tortious interference with an employment contract, assault and battery, breach of contract, and invasion of privacy. A brief description of the requirements and pitfalls of these theories of recovery follows. This description does not include evidentiary or discovery rules.

A person who sexually harasses another might incur liability for emotional stress or bodily harm he causes her. “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”81 In Howard University v. Best,82 a female professor whose contract had not been renewed alleged that a male dean’s sexual advances had resulted in her termination and caused her to develop hypertension and to require counseling.83 The appellate court upheld her claim of intentional infliction of emotional distress, reversing the trial court’s holding that as a matter of law this behavior was not outrageous.84 A number of other courts have sustained sexual harassment claims under the tort of inten-
tional infliction of emotional distress.\textsuperscript{85}

This tort of outrage is probably the most successful ground on which to recover for mental harm, and is often accompanied by an award of punitive damages.\textsuperscript{86} In addition, while a plaintiff must show that the employer's conduct was intentional, she need not prove it was motivated by sex-based considerations.\textsuperscript{87} The biggest drawback of using tort claims is that courts decide on a case-by-case basis what constitutes outrageous conduct, instead of recognizing that the abuse of power inherent in sexual harassment in the workplace justifies a finding of outrageousness per se.\textsuperscript{88}

A plaintiff can also sue for tortious interference with an employment contract. The plaintiff in \textit{Kyriazi v. Western Electric Co.}\textsuperscript{89} not only brought a Title VII suit against her employer, but she also sued two supervisors and three coworkers under state law, alleging a tortious interference with her employment contract with Western Electric. Such interference occurs when "one intentionally acts to deprive another of an economic benefit."\textsuperscript{90} Here the coworkers had circulated obscene cartoons about the plaintiff, shot rubber bands at her, and openly speculated about her virginity. The supervisors had ignored this treatment of

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\textsuperscript{85} See, e.g., Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (employee can bring a claim of outrageous conduct even if she was barred from alleging wrongful discharge); Shaffer, 565 F. Supp. 909 (employer's creation of a hostile work environment caused plaintiff severe emotional distress); Vegh v. General Elec. Co., 34 Fair Empl. Prac. Cas. (BNA) 135 (E.D. Pa. 1983) (allegations of verbal and physical unwanted sexual advances were sufficient to establish a claim for relief); Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981) (abusive language and physical advances from a supervisor was sufficient to sustain sexual harassment claim under the tort of outrage); Rice v. United Ins. Co. of Am., 465 So. 2d 1100 (Ala. 1984) (pattern of outrageous acts by employer and supervisor was sufficient to support claim of intentional infliction of emotional distress); Mindt v. Shavers, 214 Neb. 786, 337 N.W.2d 97 (1983) (plaintiff sexually harassed and assaulted by co-worker recovered $60,000 in compensatory damages for emotional distress). But see Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984) (court dismissed emotional distress claim of plaintiff who alleged that her coworkers constantly harassed her about her marital status and role as a mother, deliberately overloaded her work schedule, and caused her professional embarrassment); Ponton v. Scarfone, 468 So. 2d 1009 (Fla. Dist. Ct. App. 1985) (court held that employer's sexual advances toward a female employee did not constitute intentional infliction of emotional distress), review denied, 478 So. 2d 54 (Fla. 1985).


\textsuperscript{87} Thus this tort may provide recovery where sex discrimination is too difficult to prove. This same advantage applies to breach of the "good faith" contract duty, \textit{infra} note 98 and accompanying text, since again the plaintiff would not be required to show a gender-based motivation for her employer's "bad faith" actions.

\textsuperscript{88} Schoenheider, \textit{supra} note 76, at 1483-84.

\textsuperscript{89} 461 F. Supp. 894 (D.N.J. 1978).

\textsuperscript{90} Id. at 950. \textit{See also} RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by ... causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting. . . .").
plaintiff and suggested she see a psychiatrist when she complained. All five were fined $1,500 each in punitive damages for their conduct.

There are a number of disadvantages associated with this theory of recovery. Among the most serious are that the plaintiff cannot be an employee-at-will, a claim may be brought only against a third party, not against the employer himself, and the interfering conduct must cause economic loss: plaintiff cannot recover for mental distress.

An assault and battery claim can also be the basis for recovery. Such suits require that the victim actually suffer physical contact (or reasonable apprehension thereof) by the defendant. Thus many forms of sexual harassment will be excluded. In one case, a caretaker in a trailer park used this theory to obtain compensatory and punitive damages from her employer, who had repeatedly touched her in a sexual manner and on several occasions assaulted her violently.

A victim of sexual harassment might also choose to pursue a breach of contract claim. Although employment contracts are traditionally considered to be "at will" and terminable by either party at any time, developing doctrines might allow a victim of sex discrimination to argue that there is an implied duty not to treat employees arbitrarily based upon sex. This would be found in either an implied term of the employment contract prohibiting sex discrimination, or a more general implied duty of good faith. Thus in Monge v. Beebe Rubber Co., the court found that the employer had unlawfully terminated the plaintiff in retaliation for her refusal to date him. However, the disadvantages of these

92. Cummings, 561 F. Supp. at 937 (a claim for tortious interference should be brought against the individuals who interfere, not against the employer); Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 950; Restatement (Second) of Torts § 766 (1965).
93. Kyriazi at 950; Restatement (Second) of Torts § 766 (1965).
94. See Restatement (Second) of Torts §§ 13, 18, 21 (1965).
96. See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1824-28 (1980).
97. Wald, supra note 76, at 48-50.
98. See, e.g., U.C.C. § 1-102(57) (good faith duty may not be disclaimed); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (court implied good faith duty despite express term making contract "at will"). See also Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1204-05 (8th Cir. 1984) (sexually harassed plaintiff was dismissed in violation of public policy).
100. Sex discrimination was implicit in plaintiff's grievance in this case, though not recognized
theories is that there is little if any case law supporting them as applied to sexual harassment suits, and that damages for mental distress are barred.\textsuperscript{101}

Finally, a plaintiff could sue for a violation of the right to privacy.\textsuperscript{102} The court in Rogers \textit{v.} Loews L'Enfant Plaza Hotel recognized the right to privacy—the right “to be let alone.”\textsuperscript{103} The plaintiff alleged that the defendant, her supervisor, would make “sarcastic, leering comments about her personal and sexual life” when calling her at work and at home.\textsuperscript{104} Noting that although in most circumstances calling someone is not an intrusion, the court found that in the circumstances at hand and accompanied by allegations of sexual harassment, “the pleadings are sufficient to indicate an intrusion into a sphere from which plaintiff . . . could reasonably expect that defendant . . . should be excluded.”\textsuperscript{105} The court in Cummings \textit{v.} Walsh Construction Co. also recognized the right, but it granted defendant’s motion for summary judgment on the tort claim of “invasion of privacy,” because the plaintiff had failed to prove the essential element of a “physical intrusion, analogous to a trespass, into a plaintiff’s private affairs, seclusion or solitude” that is “unwanted.”\textsuperscript{106} It also granted defendant’s motion for summary judgment on the claim of “public disclosure of private facts,” because the plaintiff “stripped the veil of privacy” from the facts at issue by communicating them to third persons.\textsuperscript{107}

\textbf{C. Title VII Actions}

Sexual harassment began to be recognized by the federal appellate courts as unlawful sex discrimination within the meaning of Title VII in 1977.\textsuperscript{108} There are two basic types of sexual harassment: \textit{quid pro quo} by the court. The court balanced the employer’s interest with the public’s interest to carve out an exception to the at-will doctrine. It held that “a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of employment contract.” \textit{Id.} at 133, 316 A.2d at 552.

\begin{itemize}
  \item \textsuperscript{101} Monge, 114 N.H. at 134, 316 A.2d at 552.
  \item \textsuperscript{102} S. OMILIAN, SEXUAL HARASSMENT IN EMPLOYMENT 124-25 (1987).
  \item \textsuperscript{103} 526 F. Supp. 523, 528 & n.6 (D.D.C. 1981) (citing W. PROSSER, THE LAW OF TORTS, \textsection 117, at 804 (4th ed. 1971)).
  \item \textsuperscript{104} \textit{Id.} at 525.
  \item \textsuperscript{105} \textit{Id.} at 528.
  \item \textsuperscript{106} 561 F. Supp. 872, 884 (S.D. Ga. 1983).
  \item \textsuperscript{107} \textit{Id.} at 885.
  \item \textsuperscript{108} See, for example, the following cases, listed in chronological order: Tomkins \textit{v.} Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber \textit{v.} Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977); Barnes \textit{v.} Costle, 561 F.2d 983 (D.C. Cir. 1977); Miller \textit{v.} Bank of Am., 600 F.2d 211 (9th Cir. 1979); Henson \textit{v.} City of Dundee, 682 F.2d 897 (11th Cir. 1982); Huebschen \textit{v.} Department of Health and Social Servs., 716 F.2d 1167 (7th Cir. 1983); Meritor Savings Bank, FSB \textit{v.} Vinson, 477 U.S. 57 (1986).
\end{itemize}

The relevant portion of Title VII states:
harassment, involving the employer's attempt to trade employment opportunities for sexual favors, and hostile environment harassment, involving severe or pervasive harassment that poisons the work environment, psychologically damages the victim, and interferes with her work performance.

The issues that arise concerning discovery and proof of these two types of claims can be divided according to plaintiff's workplace sexual behavior and her prior sexual history. As to plaintiff's workplace sexual behavior, the Supreme Court in *Meritor Savings Bank v. Vinson* expressly held that evidence of the victim's conduct such as provocative dress and speech would be admissible as relevant to the "unwelcome" criteria of *quid pro quo* sexual harassment. Where the employee has herself been sexually aggressive, the sexual advances that follow may not be unwelcome and thus not constitute sexual harassment.

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, religion, sex, or national origin.


In response to the developments in sexual harassment case law, the EEOC issued *Guidelines on Sexual Discrimination* in 1980 specifically recognizing sexual harassment as a violation of Title VII. For the 1986 version of these Guidelines, see supra note 2.

109. See *Henson*, 682 F.2d at 909, where the court identified the elements of a case of *quid pro quo* harassment: the plaintiff must belong to a protected class; the plaintiff, as employee, was subjected to unwelcome sexual harassment; the harassment was on the basis of sex; the plaintiff's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment; and employer liability. For additional cases discussing *quid pro quo* sexual harassment, see *Hicks*, 833 F.2d 1406; *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) (physical assault by supervisor in retaliation for victim's previous rejection of sexual advances was actionable as sexual harassment).

110. See *Henson*, 682 F.2d at 903-05, where the court identified the elements of a case of hostile environment harassment: the plaintiff belongs to a protected class; the plaintiff, as employee, was subjected to unwelcome sexual harassment; the harassment was on the basis of sex; the harassment was so severe or pervasive as to affect a term, condition, or privilege of employment; and the employer is liable under the doctrine of respondeat superior. For additional cases discussing hostile environment sexual harassment, see e.g., *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (hostile environment claims rejected where the sexual harassment was purely verbal and visual), *cert. denied*, 107 S. Ct. 1983 (1987); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Ross v. Double Diamond, Inc.*, 45 Fair Empl. Prac. Cas. (BNA) 313, 319-20 (N.D. Tex. 1987) (to prevail in a hostile work environment claim, plaintiff must prove both that the defendant's conduct would have interfered with a reasonable individual's work performance and that the plaintiff was actually offended).


112. 477 U.S. at 68-69; see supra note 103. According to the EEOC Guidelines, sexual harassment occurs when submission to "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" is made a term or condition of an individual's employment. 29 C.F.R. § 1604.11(a) (1980).

A problem with Justice Rehnquist's opinion in *Meritor* is that he offers almost no guidance in defining "unwelcomeness," and thus opens the door for much embarrassing and irrelevant evidence to be discovered and admitted. For example, a man might conclude that a certain action by a woman, such as wearing a low-cut blouse, is an indication that his sexual advances would be welcome, though she intended to impart no such meaning. Though the Court of Appeals excluded from evidence testimony about Vinson's dress and personal fantasies, finding this irrelevant in determining whether she had found particular sexual advances unwelcome, the Supreme Court held this same evidence admissible, finding no per se rule against it.

As with all evidence, however, it may still be excluded if its relevance is outweighed by the potential for undue prejudice. Thus in one case evidence of plaintiff's workplace sexual behavior was excluded because it was unknown to the harasser and could not have led him to believe his sexual advances would be welcome.

Unlike workplace sexual conduct, evidence of prior or contemporaneous sexual conduct outside the workplace is unlikely to be admitted at trial, and is also excluded from discovery. The leading case in this area is *Priest v. Rotary*, which involved allegations by a waitress that she had been subjected to an abusive work environment and discharged for resisting her employer's sexual demands. On hearing the defendant's motion to compel discovery, the federal district court held that the defendant could not inquire as to the names of each of plaintiff's sexual partners during the previous ten years. This discovery was not allowed because any evidence obtained as a result would be inadmissible under a federal evidence rule excluding evidence of character or past acts offered to show that a person acted in conformity therewith.

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481, 484 (D. Utah 1987) (workplace conduct of plaintiff that is known to the defendant bears on what conduct the defendant thought was welcome).

114. For a discussion of the "unwelcome" criterion, see generally *Note, Perceptions of Harm: The Consent Defense in Sexual Harassment Cases, 71 IOWA L. REV. 1109* (1986) (proposing a consent standard that would require courts to focus on whether the victim overtly consented to the sexual conduct rather than on whether the victim resisted a harasser's behavior).


117. Id.; *Fed. R. Evid. 403*.


121. *Fed. R. Evid. 404* provides in pertinent part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity there-
A mental examination of the plaintiff may be ordered by the court if good cause is shown and the mental condition of the party is in controversy.\textsuperscript{122} However, since in Title VII cases no emotional distress damages are allowed,\textsuperscript{123} it is highly unlikely that the plaintiff’s mental condition would ever be in controversy in a \textit{quid pro quo} sexual harassment case. On the other hand, defendants have argued that the plaintiff does put her mental condition at issue in a Title VII abusive environment case.\textsuperscript{124} In this type of case, plaintiff is not seeking emotional distress damages, but is claiming that she was subjected to an environment that caused her psychological damage. This argument advanced by defendants has been unsuccessful in court. In \textit{Vinson}, the Court commented that “[a] simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff’s mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition.”\textsuperscript{125} Similarly in \textit{Robinson v. Jacksonville Shipyards, Inc.}, the court held that a Title VII case does not place the plaintiff’s mental condition in controversy. There the defendants sought an examination to prove that the plaintiff was hypersensitive to the pornography that was circulating in the workplace. The court found any such showing would be irrelevant, since plaintiff’s burden was to show not only that she was affected by the harassment but that a reasonable person in her place would have been.\textsuperscript{126}

\textsuperscript{122} \textit{Fed. R. Civ. P. 35} provides:

Rule 35. Physical and Mental Examination of Persons

(a) Order of Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party’s custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

\textsuperscript{123} The statute does not provide for punitive damages or any compensation for plaintiff’s emotional suffering. See 42 U.S.C. § 2000e-5(g) (1982); Bohen v. City of E. Chicago, Indiana, 799 F.2d 1180, 1184 (7th Cir. 1986) (denying damages in sexual harassment case that did not result in discharge); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (denying recovery for mental suffering and emotional distress); Hayden v. Cox Enters., 534 F. Supp. 1166 (N.D. Ga. 1982) (disallowing compensatory damages).

\textsuperscript{124} \textit{Vinson}, 43 Cal. 3d at 839-40, 740 P.2d at 410, 239 Cal. Rptr. at 298; Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 526 (M.D. Fla. 1988).

\textsuperscript{125} \textit{Vinson}, 43 Cal. 3d at 840, 740 P.2d at 411, 239 Cal. Rptr. at 299.

\textsuperscript{126} \textit{Robinson}, 118 F.R.D. at 529-30. This subjective/objective test is discussed in \textit{Ross}, 45 Fair Empl. Prac. Cas. (BNA) 313.
II
THE PROBLEMS RESULTING FROM THESE RULES

It cannot be denied that discovery into a sexual harassment plaintiff's past sexual history or an unwanted court-ordered psychological exam have detrimental side effects on both the victim and the State. Such discovery is traumatic and thus discourages the filing of lawsuits.\textsuperscript{127} Women already face many obstacles to equal treatment in employment: reluctance to hire women or the offering of only the lowest paid jobs; denial of advancements, promotions, seniority, and equal treatment; and the constant threat of being the first fired or laid off.\textsuperscript{128} By placing yet another obstacle before woman workers in the form of court-sanctioned discovery into sexual conduct and coercive psychiatric examinations, it is likely that even more women will choose not to file justified sexual harassment lawsuits.

The pitfalls associated with the discovery of a sexual harassment victim's sexual history were recognized by both the California legislature and the federal courts.\textsuperscript{129} Although such evidence is not discoverable or admissible unless good cause is shown, this will not fully allay the fears of an employee considering such a suit. Were the rules simply to bar the use of such evidence completely, as most jurisdictions have done for criminal rape suits,\textsuperscript{130} fewer women would be silenced by choosing to preserve their right to private lives instead of risking a suit.\textsuperscript{131} Since the evidence code in California does not allow evidence of the victim's sexual

\textsuperscript{127} See supra notes 29, 30, 46 and accompanying text; infra note 130.

\textsuperscript{128} See generally, W. Pepper and F. Kennedy, Sex Discrimination in Employment 43 (1981); C. Mackinnon, supra note 1.

\textsuperscript{129} See infra notes 173, 174. In support of enacting Fed. R. Evid. 412, Representative Holtzman noted: "Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported." H.R. 4727, 95th Cong., 2d Sess., 124 Cong. Rec. 34,913 (1978).

\textsuperscript{130} It is reasonable to assume that a change in the rules pertaining to sexual harassment along the same lines as the rape shield statutes would achieve the same result. Those latter statutes are believed to encourage victims of sexual assault to report and prosecute these crimes. J. Marsh, A. Geist & N. Caplan, Rape and the Limits of Law Reform 77 (1982) (75% of prosecutors and police sometimes or frequently advise complainants about Michigan's rape shield statute in order to encourage them to prosecute); Rape Reform Legislation and the Impact of the 1974 Robbins Rape Evidence Law: Hearing Before the Subcomm. on Violent Crime of the Cal. Senate Comm. on the Judiciary (1976) (testimony of Marion Ann Gross, Rape Crisis Counselor, Sacramento Rape Crisis Center) (victims calling the rape crisis center usually ask whether their prior sexual conduct would come up in court if they decide to report the rape and are told about the California rape shield statute); Id. at 71 (testimony of Robert Dondero, Assistant District Attorney, San Francisco County) (district attorney's office tells complainants that their prior relationships will generally not be the subject of inquiry on cross-examination, and the majority of victims have expressed that this is one of the reasons they come forward).
conduct to be admitted to prove consent or the absence of injury, its only purpose lies in attacking credibility. The proponents of the rape shield legislation recognized that this type of evidence, concerning the victim's moral character, has little bearing on credibility.

The harm suffered by a sexual harassment victim in submitting to a psychological exam is great, especially when that exam is unsupervised. Therapists are trained to delve into the psyches of their patients, assisting them in letting down their natural defenses so that the most personal and intimate thoughts and feelings will surface. To do this, the doctor encourages the development of a relationship between herself and the patient based upon trust. This skill is properly used when the therapist is retained to treat the patient with the best interests of the patient's emotional and psychological well-being in mind, as when the patient seeks out the doctor for counseling. However, when the purpose behind the examination is to gather information in order to assist the defendant-harasser in building a strong defense against the plaintiff's action, the therapist assumes a role that is vastly different from that of a health care provider. Instead, the role of the therapist under these circumstances is that of an adversary. Were any other agents of the defendant to try to question the plaintiff without her attorney present, the court would undoubtedly prohibit it. However, because of the mystique surrounding the psychiatric profession, as well as their political influence, a plaintiff is forced to submit to unsupervised questioning of a highly private

132. CAL. EVID. CODE § 1106 (for text, see supra note 54).
133. See FED. R. EVID. 412 (for text, see infra note 175) (prohibiting discovery and admissibility of evidence of victim's prior sexual conduct); People v. Armbruster, 163 Cal. App. 3d 660, 210 Cal. Rptr. 11 (1985); CAL. PENAL CODE § 1112 (West Supp. 1981) (for text, see infra note 181) (prohibiting psychiatric examinations to test a sexual assault victim's credibility); for the rationales of the Burns and Priest decisions, see supra notes 30, 45, 46 and accompanying text.
134. R. LANGs, THE TECHNIQUE OF PSYCHOANALYTIC PSYCHOTHERAPY 64-88 (1973); H. LURIE, CLINICAL PSYCHIATRY FOR THE PRIMARY PHYSICIAN 10-23 (1976). This technique is particularly effective when probing into an already sensitive area in connection with humiliating, degrading incidents in the course of a pressure- and anxiety-filled legal investigation and process, and it could well lead to situations where the plaintiff makes statements that she otherwise would not make.
135. It should be mentioned that at no time during a court-mandated psychiatric exam does the examining doctor tell the patient that the information revealed during the session is confidential, and she may even begin the session with a disclaimer. In addition, the plaintiff's attorney has surely warned her that the session is not for therapeutic purposes, and informed her of any limits placed on the exam. However, the doctor will appear to be very understanding and on the plaintiff's "side," and will certainly not act as an adversary. Rather, she will employ her psychiatric skills to encourage disclosure, often asking very open-ended questions. If there are some limits on the subject matter of the questioning, the plaintiff may not understand them, be afraid to refuse to answer, and certainly cannot be expected to object.
136. It should be noted that the psychologist is acting in this situation as an expert hired by the defendant to testify for him. She was selected by the defendant, not the court, and she has no obligation to the plaintiff other than to act within the ethical code established by her profession.
DISCOVERY IN SEXUAL HARASSMENT CASES

A minority of courts have recognized the distinction between the therapist’s role as a health care provider and that of a defense counsel’s agent. A federal court in Wisconsin admitted that a mental examination is forensic and not therapeutic; the court also determined that plaintiffs will be permitted to have their attorney present during psychological examinations. As that court noted in Zabkowicz v. West Bend Co.,138 “in the context of an adversary proceeding, the plaintiff’s interest in protecting themselves [sic] from unsupervised interrogation by an agent of their opponents outweighs the defendants’ interest in making the most effective use of their expert.” Another court likened a pre-trial examination of a plaintiff by a defendant’s doctor to a deposition. In Nomina v. Eggeman,139 the court balanced the defendant’s interest in discovery against the rights of the plaintiff to have his own counsel present at a physical examination conducted by the defendant’s doctor. It held that during any medical examination the plaintiff may be required to answer questions he would have to answer upon deposition, but he should not be required to answer other questions. In order to protect his right not to answer the impermissible questions, his counsel should be present. In so holding, the court stated that “[a] true doctor and patient relationship does not exist as the privilege is not between doctor and patient, but between the defendant and the doctor.”140

One judge in Pennsylvania permitted the plaintiff to have her own psychiatrist or medical expert present during the court ordered examination as an observer.141 In workers’ compensation cases in California, the applicant is permitted to have her own physician there as an observer during any medical or psychological examination required by his employer.142

In addition, an unsupervised exam has significant potential for emo-

137. As noted, supra note 60, the California Civil Discovery Act of 1986 as proposed by the State Bar-Judicial Council Joint Commission on Discovery allowed the presence of plaintiff’s counsel during a mental examination. Although there is no legislative history of the deletion of this provision from the Act as passed, one might suspect that the California Psychiatric Association’s lobbying effort had some influence. They argued adamantly against this provision. Brief of Amicus Curiae at 15-30, Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (No. SF 24932).
140. Id. at 126, 188 N.E.2d at 444. This case involved a physical, not a mental examination. In California the court has held that a plaintiff is entitled to have her attorney present during a physical exam, Sharff v. Superior Court, 44 Cal. 2d 508, 510, 282 P.2d 896 (1955), but not during a mental exam, Edwards v. Superior Court, 16 Cal. 3d 905, 909-12, 549 P.2d 846, 848-50, 130 Cal. Rptr. 14, 16-18 (1976).
142. CAL. LAB. CODE § 4052 (West 1989) provides that an employee may bring a physician to any examination in Worker’s Compensation Cases. CAL. LAB. CODE § 3209.3 (West 1989) provides that the term “physician” includes physicians and psychologists. For further analogies between civil
tional and possibly mental damage as well. A victim of sexual harassment is often in an extremely vulnerable condition during the lawsuit and thus open to the refined skill of the therapist in breaking down her defenses. Consequently, she may reveal much personal information to the therapist.\(^ {143}\) Aside from the potential damage to the plaintiff from having to relive the traumatic incident revealing this information in an interview devoid of a therapeutic purpose, the plaintiff might be further damaged at trial when she sees the same therapist, who has queried her on intimate aspects of her life, testify against her. The therapist will testify specifically about those intimate aspects that were revealed to her in the guise of a traditional therapy session, in order to rebut the plaintiff's claim of damages resulting from the harassing incident. The trust which formed the basis of her disclosure of intimate details will be betrayed and the information elicited from the session will be used against the plaintiff in a way that leaves her even more defenseless.\(^ {144}\)

Because these psychological exams are potentially so injurious to the victims of sexual harassment, they should not be required unless absolutely necessary to a fair resolution of the lawsuit.\(^ {145}\) However, in many cases where these exams are ordered, it is arguable that the plaintiff has not put her mental condition in controversy. At least one court has found that the plaintiff did not place her mental condition in controversy by asserting a claim of damages for physical and emotional distress. In Cody v. Marriott Corp.,\(^ {146}\) the court refused to require the plaintiff to submit to a psychiatric exam where the plaintiff "merely made a claim of emotional distress, not a claim of a psychiatric disorder requiring psychiatric or psychological counseling."\(^ {147}\) The understandable policy reason behind this decision was that, otherwise, mental examinations would be

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\(^ {143}\) Testimony given in an exam is not admitted as evidence; rather, the psychiatrist uses what he learns to form an expert opinion of whether plaintiff is suffering from emotional distress and of the extent of her damages. Then he testifies as to his opinion. Under the California and federal rules of evidence, experts can base their opinions on any evidence normally used by those professionals, whether or not such evidence would have been admissible at trial.


\(^ {145}\) It is interesting to note that the California Psychiatric Association argued that no psychological exam is necessary when a plaintiff merely alleges emotional distress, and does not seek further psychiatric treatment. Brief of Amicus Curiae at 5-15, Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (No. SF 24932). Their reasons were that there is no good cause for an examination in such a case, that there is no compelling state interest to weigh against the privacy interests of the plaintiff, and that no expert testimony is needed for a jury to appreciate that conditioning a job on acquiescing to sexual relations causes emotional distress. They went on to argue, though, that if an examination were to be conducted, no attorney should be present. Id. at 15-30; supra note 131.


\(^ {147}\) Id. at 423.
routine in all cases alleging emotional distress. Unfortunately, most courts find that the plaintiff does put her mental condition in controversy when initiating such a suit.148

A fruitful comparison on this point can be made between civil sexual harassment cases and cases brought under the California Workers' Compensation Act.149 The purpose of that act is to compensate workers for injury or disease arising out of and in the course of employment, without regard to fault.150 This is done by requiring the employer to provide full medical treatment for any injuries151 and by providing wage-loss indemnity to the employee for any temporary disability and indemnity for any residual permanent disability.152 In these situations, the employee may be required to submit to a medical or psychological examination to determine whether her injury is work related, whether she is in need of further treatment, and whether she has suffered any temporary or permanent disability.153

In these workers' compensation cases, the employee may be required to submit to an examination, if she is asking her employer to pay for present and future physical or psychological treatment to correct her injury, or if she is asking her employer for disability payments because she is medically unable to work due to an employment related injury. In these narrow circumstances she is clearly putting her physical or mental condition at issue, unlike a sexual harassment plaintiff seeking mental distress damages without accompanying treatment by a physician. The purpose of workers' compensation is to pay the future medical expenses or loss of wages accompanying an injury. By contrast, a sexual harassment victim who suffers emotional distress is not placing her mental con-

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152. Temporary disability is provided for under *Cal. Lab. Code* § 4650 (West Supp. 1989). Its purpose is to cushion the immediate effects of the injury by providing the worker with wages lost during the time that he is off work following his injury. Allied Comp. Insurance Co. v. IAC (Etkins), 211 Cal. App. 2d 821, 27 Cal. Rptr. 918 (1963). Permanent disability is provided for in *Cal. Lab. Code* §§ 4658, 4660, 4662 (West Supp. 1989). Though no definition is given in the Labor Code, a working definition is "the irreversible residuals of an injury, either mental or physical, which produce an impairment of earning power or capacity." Welch, *Permanent Disability Evaluation, Calif. Workers Compensation Practice* 533 (C.E.B. 1974).
153. *Cal. Lab. Code* § 4050 (West Supp. 1989) provides that an employee must submit to an examination, and *Cal. Lab. Code* § 4053 (West Supp. 1989) provides that so long as an employee refuses to submit to an examination his right to begin or maintain a proceeding for the collection of compensation is suspended.
dition in controversy when she does not seek further medical or psychiatric treatment or claims a permanent disability resulting from the harassment.

A further reason why these mental exams should not be ordered is that they do not assist the trier of fact in reaching their verdict. Expert testimony is allowed only when the question is one which cannot be resolved by common knowledge. Questions relating to the extent of a plaintiff's damages stemming from sexual harassment are within the province of a jury composed of her peers. Understanding the extent to which an individual could be injured by sexual harassment is not a complex or technical matter, nor is it beyond the comprehension of the average person that a victim might suffer anxiety, loss of sleep, and mental anguish.

In a suit for emotional distress where the conduct involved racial slurs, the California Supreme Court has held that "it is the members of the jury, who when properly instructed, are in the best position to assess the degree of harm suffered and to fix a monetary amount as just compensation therefor." There is no reason to believe juries will be any less capable of assessing damages in sexual harassment cases. Likewise, juries are often able to establish the causation element of a plaintiff's claim without the help of expert testimony, by using common knowledge. In Godfrey v. Steinpress, the plaintiffs sued a real estate broker for fraud and intentional infliction of emotional distress for failing to disclose a report showing that the house that plaintiffs bought was severely infested with termites. The court allowed the plaintiff to testify as to the effects learning of the termites had on her, finding the jury capable of "appreciating and evaluating the significance of termite infestation without resort to expert opinion as to the causal relationship between

154. CAL. EVID. CODE § 801 (West 1980) states in part:

Opinion testimony by expert witness. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; . . .

FED. R. EVID. 702 provides:

Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.


156. This argument would only hold true where the plaintiff is not going to put on any expert testimony regarding her mental condition. Where the plaintiff's damages are so unusual or extensive that she brings forth expert testimony to document them, or where she consulted a psychiatrist at the time of the harassment and wishes to call her as a witness, it would be unfair not to let the defendant refute this with his own expert.
termites and distress." It seems perverse that, according to the courts, a jury is better able to appreciate the emotional distress from living in a termite-infested dwelling than the causal relationship between an unwanted and coercive sexual advance and the victim's emotional distress.

An additional example can be found by turning once again to workers' compensation law. In Sweeney v. Workmen's Compensation Appeals Board, the court held that whether a person has such pain that he is unable to work is not a question that requires expert medical testimony. Rather, it is an issue that the fact-finder can determine based upon the testimony of the applicant alone.

In fact, the jury is likely to be at least as good as a psychiatrist in determining whether a victim is telling the truth regarding her injuries. Thus there is no need for an expert to inform the jury as to whether the plaintiff is lying about the cause of her injuries or whether she has suffered any at all. Furthermore, psychiatrists are usually unable to accurately diagnose whether a patient is suffering from mental distress at all. Since these psychiatric opinions are no more valid than those of laypeople, their conclusions should not be admitted in court. Because a plaintiff's claim of emotional distress is not dependent on a medical diagnosis, what most defendants are truly seeking by way of this psychological examination is an assessment of the plaintiff's credibility in regard to


159. Id. at 303, 70 Cal. Rptr. at 467.

160. See generally Comment, Psychiatric Examinations of Sexual Assault Victims: A Reevaluation, 15 U. CAL. DAVIS L. REV. 973 (1982) (advocating that other states adopt provisions similar to CAL. PENAL CODE § 1112, which prohibits psychiatric examination to test witness credibility in part because psychiatrists are unable to assess witness credibility); Slovenko, Witnesses, Psychiatry and the Credibility of Testimony, 19 U. FLA. L. REV. 1, 21 (1966) (author notes that "[a] good poker player probably knows better than a psychiatrist whether a person is lying"); Letwin, "Unchaste Character." Ideology, and the California Rape Evidence Laws, 54 S. CAL. L. REV. 35, 73 (1980) (noting "... a general skepticism of psychiatric ability to 'postdict' a person's behavior, as well as skepticism about whether psychiatrists (most of whom are males) enjoy even a relative immunity from the sexual stereotypes that prevail in the society at large." (footnotes omitted)).

161. See generally Ash, The Reliability of Psychiatric Diagnosis, 44 J. ABN. & SOC. PSYCH. 272 (1949) (study finding that psychiatrists agreed on specific diagnosis in only 21 percent of the cases); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CAL. L. REV. 693 (1974) (authors find that psychiatrists are unable to reach diagnostic conclusions as to non-organic illnesses that are reliable or valid, and thus should not be permitted to testify in civil commitment proceedings); Melendez & Marcus, You Should Test the Psychological Tests, Los Angeles Daily J., May 29, 1990, at 7 (study showed that results of psychological tests purportedly determining whether litigants suffered from mental or emotional distress were infected with errors, misdiagnoses, and biases); Stoler & Geertsma, The Consistency of Psychiatrists' Clinical Judgments, 137 J. NERV. MENT. DIS. 58, 64 (1963) (study finding that the psychiatrists "were unable to agree as to a patient's diagnosis, prognosis, psychodynamics, the causes of her problems, the feelings she was consciously experiencing or the feelings that were latent (unconscious)").
this claim. However, courts agree that expert testimony does not help jurors to assess a witness' credibility. If they wish to attack the plaintiff's credibility at trial, they can do so by demonstrating inconsistencies in her testimony, calling witnesses to contradict her, and raising other doubts as to the truth and veracity of her statements.

A final problem with present discovery rules is their potential to infringe on the complainant's privacy rights. Sexual harassment victims have a right to privacy under the federal and most state Constitutions. The United States Supreme Court found an individual's right to privacy from governmental intrusion to be protected by the First, Third, Fourth, Fifth, and Ninth Amendments to the United States Constitution, and in California, a right to privacy is guaranteed under Article I, section 1 of the California Constitution. In *Fults v. Superior Court*, involving a paternity action, the court held that an individual's sexual relations are within an established "zone of privacy." In this case, the trial court had ordered the mother to answer interrogatories concerning her sexual activity with anyone other than the defendant for a period of one year prior to the date of conception and one year after that date. The appellate court reversed, finding these questions unreasonably intruded on the mother's right to privacy. Moreover, a plaintiff does not waive her constitutional right to privacy simply by filing a court action.

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164. *Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy under federal constitution protects a married couple's right to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (every individual has the privacy right to be free from unwarranted intrusion into fundamental matters); Roe v. Wade, 410 U.S. 113 (1973) (balancing individual's right of privacy against governmental interests in protecting right to obtain abortion).*

165. *CAL. CONST. art. I, § 1 (amended 1974) reads as follows:*

_All people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy._

_Three years later, the California Legislature underscored the importance of this right by enacting CAL. CIV. CODE § 1798.1 (West Supp. 1985) declaring "that the right to privacy is a personal and fundamental right."_*

166. *88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).*

167. *Id. at 904, 152 Cal. Rptr. at 213.*

168. *Id.*

169. *Nelson v. McCarthy, 637 F.2d 1291, 1295 (9th Cir.), cert. denied, 451 U.S. 940 (1980) (federal courts closely scrutinize waivers and indulge in every reasonable presumption against waiver of a fundamental constitutional right); Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (plaintiff did not waive her right to privacy in respect to claiming emotional distress damages, though she did waive her right to privacy in respect to questions regarding her present mental and emotional condition); Britt v. Superior Court, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (plaintiff did not waive confidential association affiliations by filing lawsuit for emotional disturbance caused by operation of airport).*
In determining whether one's constitutional right to privacy has been violated, a court will balance the interests of protecting the plaintiff's constitutional rights against the defendant's interest of disclosure in discovery proceedings. In balancing these interests, discovery must be "justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights." In weighing these interests in cases similar to Vinson, most courts have ordered the plaintiff to submit to a psychiatric exam. By so doing, they have failed to adequately consider the psychological damage such an exam may cause the plaintiff, whether the plaintiff's mental state was actually in controversy, whether the jury needs such expert testimony to make its decision, and the interest of the government in influencing conduct outside the courtroom in order to further the public policy of terminating sexual harassment.

III
POSSIBLE REFORMS TO THESE RULES

One reform, relating to discovery in general, would be to change the evidence rules allowing the history of the sexual harassment victim to be discovered and used at trial if good cause is shown. Such a reform might be modeled after the rape shield laws enacted in most states and by the federal government in the 1970's. These laws commonly provide that any evidence of a rape victim's past sexual behavior is not admissible and include very limited exceptions.

Civil sexual harassment suits are more deserving of the kind of pro-

172. Vinson, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987); Jennings v. D.H.L. Airlines, 34 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (N.D. Ill. 1984) (court refused to allow discovery of records of plaintiff's psychotherapist in this Title VII action, but specifically found that if plaintiff's complaint had included a claim for emotional distress the records would have been discoverable).
173. See supra notes 136-62 and accompanying text.
174. At the present time, 48 states and the federal government have rape shield statutes. See Comment, Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence, 1985 Wis. L. Rev. 1219 n.3.
175. See, e.g., Fed. R. Evid. 412, which provides in relevant part:
Rape Cases; Relevance of Victim's Past Behavior
(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.
(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is
protective legislation embodied in rape shield laws than other private civil suits, because the civil rights of the victims are involved. As with its interest in its criminal statutes, the State of California has a strong interest in eradicating sexual harassment in the workplace. This interest distinguishes this law from other civil actions, where the interest is solely a private one. The Fair Employment and Housing Act declares that freedom from discrimination in employment is a civil right, and the California Supreme Court has recognized that "[t]he purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights." The only way for the state to attain its goal of eradicating employment discrimination and protecting the civil right of workers is by this private right of action, since sexual harassment in the workplace is often not a criminal offense. If discovery rules make it too difficult for a plaintiff to pursue such a claim, society loses in as great a measure as the particular victim. No discovery into the victim's sexual history is permitted in criminal rape trials, although the defendant can potentially lose his liberty. In civil sexual harassment suits, only money is at stake, so there is less of a risk to the defendant. Thus it would be in conformity with state policy to extend these rape shield laws to fully cover civil sexual harassment suits.

A second type of reform, a reform advocated in Part II above, is to prohibit psychological exams unless the plaintiff herself plans to use expert psychiatric testimony to substantiate her emotional distress claims. If the plaintiff does not plan to introduce any expert testimony at her trial regarding her mental distress damages, then there is no reason to allow the defendant to do so. Otherwise, if the defendant is permitted to introduce expert testimony, the defendant will usually be able to find an expert who will claim either that the harassment was not the cause of the plaintiff’s emotional distress or that the plaintiff has suffered no emo-

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(1) admitted in accordance with subdivision (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of —

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

176. See supra note 21.


178. See supra notes 173 and 174.

179. The California Legislature has recognized this; they just have not gone far enough in their drafting. In Senate Bill 1057, they state that they “are mindful that a similar state of affairs once confronted victims in criminal prosecutions for rape, who often ran the risk of finding their own moral characters on trial during the prosecution of their assailant. The Legislature has taken measures to curb these abuses in rape proceedings. It is the intent of the Legislature to take similar measures in sexual harassment, sexual assault, and sexual battery cases.” 1985 Cal. Stat. 4655.
tional distress at all (but is feigning it), and the plaintiff will be forced to counter this testimony with an expert witness of her own. This will deteriorate into a battle between the experts, each one making opposite claims. This is not helpful to the jury, and in fact can be quite confusing. A jury is capable of making its own determination as to whether such harassment, as is proved by the plaintiff, would cause mental distress in a reasonable person, and can assess the plaintiff's credibility after hearing her direct testimony and cross-examination by the defendant's counsel to determine whether she actually suffered emotional damages. Defendants can counter such damage claims with less intrusive discovery means, such as cross-examining the complainant, and deposing or interviewing those persons knowledgeable about the plaintiff's emotional state at the time of harassment, such as her family, friends, and co-workers.

An additional reason for prohibiting these exams is to prevent the deleterious effect they have on both the victims and the state. It is illuminating to note that California law does prohibit judges from ordering psychiatric examinations of victims of criminal sexual assault. Certainly an analogy can be drawn to civil sexual harassment proceedings. The policy reasons for prohibiting such examinations in rape cases stem from the strong deterrent impact these exams have on the filing of a lawsuit. These identical policy reasons are present in cases involving

180. As the dissent in Edwards v. Superior Court, 16 Cal. 3d 905, 919 n.6, 549 P.2d 846, 855 n.6, 130 Cal. Rptr. 14, 23 n.6 (1976) (Sullivan, J.) points out in a footnote, a battle of experts regarding a party's mental condition is seldom useful to a jury.

... [I]t is noteworthy that numerous courts and commentators have criticized the willingness of many experts to become the "hired champions" of one side or the other and the consequent reduction of many trials to a "battle of the experts."

See also supra note 160 and accompanying text.

181. See supra notes 136-43 and accompanying text.

182. CAL. PENAL CODE § 1112 (West Supp. 1981), enacted in 1980, provides:

The trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.

See also People v. Armbruster, 163 Cal. App. 3d 660, 210 Cal. Rptr. 11 (1985) (upholding constitutionality of section 1112 and rejecting claim that statute violated Proposition 8's requirement that all relevant evidence be admitted, where the object of the examination was to test credibility). But in many other states, the judge has discretion as to whether or not to order such an exam. See generally 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 737 n.1 (Chadbourne rev. 1970 & Supp. 1985) (citing cases in which courts have considered whether or not to order a psychiatric examination of sexual assault complainants).

183. See People v. Browning, 108 Cal. App. 3d 117, 123, 166 Cal. Rptr. 293, 296 (1980) (noting that if a woman who has been raped has to submit to a psychiatric examination, only a small percentage of rapes will be reported); Hearing on Proposed Rape Legislation for 1979, Before the Subcomm. on Violent Crime of the Senate Comm. on the Judiciary, Feb. 19, 1979, 14-16 (statement of Judge Armand Arabian) (requiring a rape victim to submit to a psychiatric examination was as likely as discovery into her sexual conduct to result in the victim's unwillingness to pursue prosecution); O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution—Or How Many Times Must a Woman Be Raped?, 18 SANTA CLARA L. REV. 119, 146 (1978) (author notes the deterrent effect on the filing of charges in rape cases which can result if victims are compelled to submit to psychiatric examinations).
sexual harassment.

A more politically realistic reform would be to allow the examination, but require the plaintiff's attorney to be present in every case. This is necessary to prevent improper questions from being asked and answered. Recording these examinations, as is allowed in some states,\(^{184}\) does not solve the problems encountered by allowing the defendant's expert to question the plaintiff without supervision.\(^{185}\) The invasion of the plaintiff's privacy has already taken place, thus the damage to her is done. Further, even if the judge, upon motion from plaintiff's attorney (who presumably will listen to these recordings after the examination takes place), determines that some of the questions were improper, there is little that can be done at that point to correct it. It is, of course, too late to "unask" these questions. The judge could sanction the doctor (though she probably won't, as the therapist will say he thought the question was permitted), and not let these answers be brought into evidence at trial, but she can't tell the doctor not to let the answer influence his opinion as to the cause and extent of the plaintiff's injuries. This opinion is already formed, the therapist cannot forget what he heard in forming his opinion.

If an exam is ordered (either because the above reform is rejected or the plaintiff intends to call an expert witness), and counsel is not permitted to be present and object to improper questions, any one or more of a number of procedural safeguards might be employed. The court might allow the presence of counsel but require that counsel refrain from objecting during the examination, except for those instances when the exam has clearly exceeded the boundaries of the court's order. The court might allow the presence of counsel only if she remains absolutely silent. The court might require plaintiff's attorney to be available nearby or by telephone to respond to any questions the plaintiff has regarding the scope of permissible inquiries, and allow plaintiff to interrupt the exam in order to consult her attorney before answering. Alternately, the court could allow the plaintiff to be accompanied by a friend, or a psychologist who she selects to monitor the examination. Finally, the court itself could select an independent psychologist, or require that both parties agree on the examiner.

IV

Conclusion

The discovery and admission at trial of evidence of a plaintiff's prior sexual conduct, and court-ordered psychiatric examinations of a plaintiff, are susceptible to great abuses in sexual harassment litigation. The Cali-

\(^{184}\) California allows such audio-recordings, Cal. Civ. Proc. Code § 2032(g); supra note 57.

\(^{185}\) See supra text accompanying notes 138-40.
California legislature has taken great strides toward curbing these abuses, by enacting such legislation as Senate Bill 1057, the Civil Discovery Act of 1986, and California Penal Code section 1112. One can only hope that other states, observing the effect these rules have on sexual harassment litigation, will follow suit and enact similar legislation. However, more needs to be done if society is truly committed to eradicating sexual harassment in the workplace. A sexual harassment plaintiff has already been forced to discuss the sexual matters forming the basis for her complaint in order to bring her sex discrimination claim. The question now to be faced is how much additional inquiry she must withstand in order to redress this wrong. Tearing down the remaining legal barriers that discourage women from filing such suits will require a recognition of just how serious and pervasive this problem is, and perhaps a slightly different balancing between the interest of the parties involved.