PLI Current

The Journal of PLI Press

Vol. 4, No. 3, 2020

Character and Other Anecdotal Evidence in the Time of "Me Too," Millennials, and Generation Z

Monica C. Barrett, Esq. and Mallory Campbell, Esq.

Bond, Schoeneck & King, PLLC

Introduction

The strategy used to litigate sexual misconduct and sexual harassment cases has changed dramatically over the past decade. Beginning in 2011, when the United States Department of Education's Office for Civil Rights issued its "Dear Colleague Letter" directing college and university presidents to address the long-standing problem of

sexual assault on campuses across the country,[1] followed by the criminal trials of Bill Cosby and Harvey Weinstein and the numerous public allegations against Donald J. Trump, Sr., the culture has shifted to become more critical of behavior that previously may have been tolerated. In the 30 years since the U.S. Supreme Court decided *Meritor Savings Bank v. Vinson*,[2] judges have become highly attuned to the changed culture about sexual harassment. This heightened understanding by judges has led to changes in the way sexual harassment trials are conducted, particularly with regard to the introduction of evidence.

The Federal Rules of Evidence govern the introduction of evidence at both civil and criminal trials. In the past, in cases involving allegations of sexual misconduct and sexual assault, it was not uncommon for an accused to introduce evidence that the accuser was unchaste and, therefore, was either not telling the truth or had consented to the sexual contact. Accusers of sexual harassment or assault were often prohibited from introducing similar evidence of unchaste behavior against the accused. Over the past decade, especially with the impact of the "Me Too" movement, attitudes in the United States have changed regarding sexual offenses and the ways in which the accused and the accuser are treated by the public. Federal courts now allow greater leeway for the admissibility of the prior sexual misconduct of the accused and are more cautious in allowing evidence of the accuser's sexual behavior. As a result of the recent focus on sexual misconduct on college campuses by federal and state administrative agencies, and the consequent pressure on colleges to conduct investigations and hold internal hearings, there are many more opportunities to find a "record" of such past sexual behavior and attempts to introduce these issues into civil trials involving allegations of sexual harassment in the workplace. In this paper, we will examine the evidentiary issues that arise at trial when character or anecdotal evidence is used to try

[1] Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) (withdrawn Sept. 22, 2017), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[2] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (Court held that if the attentions of a supervisor were unwelcome, then the employee had a claim for sexual harassment on the basis of a hostile work environment, even if there were no tangible job impacts from the harassment. It recognized that sexual harassment is a violation of Title VII).

to prove the likelihood that certain behavior may have been "welcomed," or certain behaviors actually occurred, specifically regarding sexual harassment.

Evidence of the Accused Person's Prior Behavior

In general, evidence of an accused's prior bad acts is not admissible to prove propensity to commit the alleged act. For example, Rule 404(a) prohibits the use of character evidence "to prove that on a particular occasion the person acted in accordance with the character or trait."[3] In addition, Rule 404(b) prohibits the use of evidence of a crime, wrong, or other act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[4]

Rule 404(b) sets out several exceptions which detail how such evidence can be introduced if it is to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[5]

The Federal Rules of Evidence were amended in 1995 to enact Rules 413-415, which set out more specific guidelines on when "similar acts" evidence can and cannot be admitted at trials involving sexual assault and child molestation.[6] Prior to the 1995 amendments, courts generally would exclude evidence of prior sexual assaults of the accused, but would sometimes allow this evidence under one of the exceptions outlined in 404(b)(2).[7] For example, in *Horn v. Duke Homes*, a terminated employee filed suit against her former employer alleging that she was discharged for her refusal to respond to the sexual advances of her supervisor.[8] The plaintiff introduced testimony of three former female employees to show the supervisor's propensity to "use his power at [work] to sexually exploit women."[9] The testimony showed that the supervisor had a

---

[3] Fed. R. Evid. 404(a).

[4] Fed. R. Evid. 404(b).

[5] Fed. R. Evid. 404(b)(2).

[6] Daniel L. Overbey, *Federal Rule of Evidence 415 and Paula Corbin Jones v. William Jefferson Clinton: The Use of Propensity Evidence in Sexual Harassment Suits*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 343 (1998).

[7] Fed. R. Evid. 404(b)(2).

[8] Horn v. Duke Homes, Div. of Windsor Mob. Homes, 755 F.2d 599, 601 (7th Cir. 1985).

[9] *Id.* at 602.

similar pattern involving newly divorced female employees and the court affirmed the finding of liability against the employer.

With the introduction of Rules 413-415, courts could now broadly allow evidence of an accused's prior sexual misconduct in a sexual assault case to establish an inference that the defendant had a propensity to commit such acts; Rules 413 and 414 are specific to criminal cases involving sexual assault and child molestation, while Rule 415 applies to civil cases.

Rule 415 provides that:

> In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation.[10]

Rule 413(d) defines "sexual assault" for the purposes of Rules 413 and 415 as a crime under federal law or the law of the state that involves:

1. Any conduct prohibited by 18 U.S.C. chapter 109A;
2. Contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;
3. Contact, without consent, between the defendant's genitals or anus and any part of another person's body;
4. Deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
5. An attempt or conspiracy to engage in conduct described in subparagraphs 1-4.[11]

In a civil case involving alleged sexual assault, the court may admit evidence that the party committed any other sexual assault as defined by 413(d). Rule 415 allows the question as to whether the party has ever done something like this before to be

[10] Fed R. Evid. 415(a).

[11] Fed R. Evid. 413(d).

admitted into evidence. The plaintiff can offer evidence that the defendant is the kind of person who would engage in sexual misconduct. "Congress has said that…it is not improper to draw the inference that the defendant committed this sexual offense because he has the propensity to do so."[12]

If a party intends to offer this kind of evidence in a civil case, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony at least 15 days before trial.[13] The evidence then must be assessed in accordance with Rules 104(b) and 403 before admission. Rule 104(b) provides that "when the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." In many situations, this may require a pretrial hearing with witness testimony to support the basis for such evidence. For evidence under Rule 415, the court must first decide under Rule 104(b) "whether a reasonable jury could find by a preponderance of the evidence that the past act was an 'offense of sexual assault' under Rule 413(d)'s definition and that it was committed by the defendant."[14]

If found to be adequate under Rule 104(b), and even though the Rule does not explicitly provide for this, courts have implied that Rule 415 is subject to the balancing test under Rule 403. Rule 403 stipulates that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[15] "[E]ven when the evidence of a past sexual offense is relevant, the trial court retains discretion to exclude it under Federal Rule of Evidence 403."[16]

---

[12] U.S. v. Rogers, 587 F.3d 816, 822 (7th Cir. 2009).

[13] Fed. R. Evid. 415(b).

[14] Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 154-55 (3d Cir. 2002).

[15] Fed. R. Evid. 403.

[16] *Johnson*, 283 F.3d 138 (3d Cir. 2002); *see also* Martinez v. Hongyi Cui, 608 F.3d 54, 60 (1st Cir. 2010) ("After Rules 413-415 were enacted, the question arose whether evidence admissible under these rules was subject to Rule 403's balancing test for prejudicial, confusing, or misleading evidence. We agree with the conclusion, universal among the courts of appeals, that nothing in Rule 415 removes evidence admissible under that rule from Rule 403

In *Johnson v. Elk Lake School District*, a student filed suit against her guidance counselor for sexual harassment and abuse.[17] At trial, the court refused to allow the plaintiff to introduce the testimony of a former co-worker of the guidance counselor regarding a bizarre incident that ended with the counselor touching the co-worker's crotch area.[18] On appeal, the court agreed with the exclusion of the testimony since "its slight probative value was outweighed by other factors such as the danger of unfair prejudice, confusion of the issues, and waste of time."[19] More specifically, the court highlighted the risks by noting that when "evidence of the past act of sexual offense is equivocal and the past act differs from the charged act in important ways, we believe that no presumption in favor of admissibility is in order, and that the trial court retains significant authority to exclude the evidence under Rule 403."[20]

In *Martinez v. Hongyi Cui*, a woman brought claims against a first-year medical resident for sexually assaulting her during an emergency room exam.[21] At trial, the plaintiff sought to introduce testimony of another woman who was sexually assaulted by the defendant.[22] The court refused to admit the evidence. On appeal, the court found no error since the trial court excluded this evidence under Rule 403's balancing test, explaining that the testimony from the other woman would be "potentially unfairly prejudicial and, so, likely to confuse the issues or mislead the jury."[23] The court explained that the other woman's testimony would have required a "minitrial" and that plaintiff's case "could get lost in the details."[24]

---

scrutiny."); Bernard v. E. Stroudsburg Univ., 700 Fed. App'x 159, 169 (3d Cir. 2017); Elcock v. Kmart Corp., 233 F. 3d 734, 754 (3d Cir. 2000) (District courts have "significant latitude" to engage in the Rule 403 balancing test); U.S. v. Kellogg, 510 F.3d 188, 197 (3d Cir. 2007) (A Rule 403 analysis should only be reversed if the trial court's decision was "arbitrary or irrational.").

[17] *Johnson*, 283 F.3d at 143.

[18] *Id.*

[19] *Id.* at 150.

[20] *Id*. at 144.

[21] *Martinez,* 608 F.3d at 56.

[22] *Id.* at 59.

[23] *Id.* at 61.

[24] *Id.* at 61.

While the implementation of Rule 415 was a bold step towards allowing victims of sexual assault to introduce evidence of similar acts of their accuser, courts have constructed a high bar to allowing this evidence by requiring it to pass through the 104(b) test and the 403-balancing test. Given the substantial discretion of the trial judge in making these types of critical determinations, it remains a difficult matter for a successful appeal.

Evidence of the Accuser's Prior Behavior

Before implementation of Rule 412, victims of rapes or sexual assaults could be asked personal questions about their clothing and past sexual history. This evidence was used to discredit the victim and often had the consequence of dissuading victims from coming forward in such cases.

Rule 412 provides that:

> The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> 1. Evidence offered to prove that a victim engaged in other sexual behavior; or
>
> 2. Evidence offered to prove a victim's sexual predisposition.

There are limited exceptions to this rule. In a civil case, the court "may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[25] The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

The Advisory Comments to Rule 412 explain that the aim is "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."[26]

---

[25] Fed R. Evid. 412(b)(2).

[26] Fed. R. Evid. 412 Advisory Committee's Notes.

When an accused wants evidence of the accuser's sexual conduct admitted, the court must satisfy a balancing test to ensure that the probative value of the evidence "*substantially outweighs* the danger of harm to any victim and of unfair prejudice to any party."[27]

A party that wishes to admit this kind of evidence must file a motion "that specifically describes the evidence and states the purpose for which it is to be offered" at least 14 days before trial, serve the motion on all parties, and notify the victim.[28] Failure to comply with these requirements can result in the exclusion of the evidence. For example, in *Michigan v. Lucas*, albeit a criminal case involving Michigan's rape-shield statute, the trial court prevented the accused from introducing evidence of an alleged rape victim's past sexual conduct with the accused since he did not follow the statutory requirements to file a written motion and offer of proof before trial.[29] The Michigan Court of Appeals adopted a *per se* rule and held that precluding evidence of a rape victim's prior sexual relationship with a criminal defendant based on a failure to follow procedural notice provisions violated the Sixth Amendment right to confrontation. On appeal to the U.S. Supreme Court, the Court held that the Michigan Court of Appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violated the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. According to the Court, "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify the severe sanction of preclusion."[30]

Importantly, Rule 412 extends coverage over sexual harassment lawsuits.[31] In *Wolak v. Spucci*, a policewoman brought suit against her employer for a hostile work environment.[32] At trial, the district court allowed defendants to question the plaintiff about her out-of-work sexual behavior, including questioning her about two parties she attended at which pornographic videos were shown. In ruling in favor of the

---

[27] Fed R. Evid. 412(b)(2) (emphasis added).

[28] Fed. R. Evid. 412(c)(1)(A).

[29] Michigan v. Lucas, 500 U.S. 145 (1991).

[30] *Id.* at 152-153.

[31] Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000).

[32] *Id.*

admissibility of such evidence, the judge noted the need for "balance and practicality in dealing with…plaintiff's sexual sophistication in the context of a hostile environment case. At least for purposes of computing her damages for shame and humiliation and the like, no plaintiff should be permitted to portray herself to the trial jury falsely, as some sort of shrinking violet or as a novice in a nunnery."[33]

On appeal, however, the court found that admitting evidence of plaintiff's sexual behavior violated Rule 412, but the error was harmless as the plaintiff had "failed to establish an element of her case."[34]

In *Socks-Brunot v. Hirschvogel,* another sexual harassment lawsuit, an employee sued her employer for sexual harassment based on a hostile work environment.[35] At trial, the defendant was permitted to introduce evidence to try to prove that plaintiff welcomed the conduct by speaking to co-workers about personal, sexual matters, and therefore invited the crude sexual comments from her supervisor.[36] The jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial on the basis that the court improperly admitted evidence of plaintiff's "culpability in creating the alleged hostile work environment."[37] The court agreed and granted a new trial.

The court found that there is "no doubt that Rule 412 is intended to apply to sexual harassment cases," and explained that in a rape case, evidence of an alleged victim's prior sexual activity is prohibited.[38] The court elaborated further by explaining that this also applies in *quid pro quo* sexual harassment claims: "[t]he same logic clearly applies, for example, in a civil lawsuit in which a supervisor is accused of firing a subordinate after the employee refused demands for sex. The defendant may not offer evidence that the employee had engaged in sexual conduct with other co-workers or

---

[33] *Id.* at 159.

[34] *Id.* at 158. ("Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication.").

[35] Socks-Brunot v. Hirschvogel Inc, 184 F.R.D. 113 (S.D. Ohio 1999).

[36] *Id.* at 117.

[37] *Id.* at 114.

[38] *Id.* at 118.

supervisor…Federal Rule of Evidence 412 prohibits such testimony beyond debate."[39] As for sexual harassment claims based on hostile environment, as was the basis for the *Socks-Brunot* case, the Court referenced the Advisory Committee Notes to Rule 412(c) which provided that "[i]n an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant."[40]

Applying this logic, the court in *Socks-Brunot* found that the evidence was improperly admitted and was "highly prejudicial, personally invasive, and legally irrelevant."[41] In addition, the court explained that defense counsel extensively cross-examined the plaintiff employee as to an affair she discussed with her co-workers, but never inquired whether the plaintiff discussed the affair with her supervisor. In further support of its ruling, the court stated that "[c]onversations held between the plaintiff and female co-workers, to which [plaintiff's supervisor] was not a party and which described a sexual liaison, are clearly governed by Rule 412. Had the Court been aware before trial that this highly prejudicial evidence offered by the defendant involved only statements made by plaintiff to co-workers whom she never accused of sexual harassment, the evidence would have been stricken even under the more relaxed Rule 403 standard, and clearly should have been stricken under Rule 412."[42]

In *B.K.B. v. Maui Police Dep't*, an employee filed an action against the employer and the county claiming state and federal violations of race and sex discrimination.[43] Over the plaintiff's objections, defendants presented evidence of plaintiff's explicit conversations with co-workers at a house party.[44] Specifically, defendant's witness testified that he had been a good friend of plaintiff, and testified that he and another male co-worker were with plaintiff in her home when she talked about how she enjoyed using sex toys while masturbating, she modeled lingerie for them, and she told the witness she once had an orgasm while thinking of him while she was masturbating. At trial, the court noted that this was likely a violation of Rule 412 and imposed sanctions

---

[39] *Id.* at 117.

[40] Fed. R. Evid. 412 Advisory Committee's Notes.

[41] *Socks-Brunot*, 184 F.R.D. at 120.

[42] *Id*. at 120-21.

[43] B.K.B. v. Maui Police Dep't, 276 F.3d 1091 (9th Cir. 2002).

[44] *Id.* at 1098.

on defense counsel, and, instead of allowing for a new trial, provided a "lengthy curative instruction" for the jury to disregard that part of the evidence.[45] In an example of an attempt to "unring the bell," the trial court's jury instruction was as follows:

> Yesterday [the witness] presented some testimony about statements he said [Plaintiff] made to him about her alleged use of some sexual devices. That testimony is stricken. That means you are to disregard that testimony entirely and to treat it as if you had never heard it. By that I mean, you are not to think that [Plaintiff] ever made that statement to [the witness] or to [her co-worker], or to anyone else then or ever. You are not to think that she performed the acts that [the witness] claims that she had performed. You are not to assume that [Plaintiff] welcomed or tolerated comments or actions of a sexual nature by others, either in the workplace or in work-related activities, or with other work colleagues. You are not to assume that she tolerated that just because she allegedly made these comments to [the witness.] Instead, you are to totally put these comments out of your mind and you are not to speculate as to the reason that I am giving you this instruction.[46]

Not surprisingly, the jury returned a verdict for the defendants. On appeal, the court found that "defendants both flouted the procedural requirements of Rule 412 and failed to establish that the probative value of [the witness's] testimony substantially outweighed its prejudicial effect."[47] The Ninth Circuit explained that the purpose of Rule 412 is "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."[48] The court found that "no matter what the instruction, it was impossible to dispel the effect of [defendants'] lurid and prejudicial testimony."[49] As such, the court remanded for a new trial.

In further admonition of the trial court in its failed attempt at a curative instruction to the jury, the Ninth Circuit noted that, immediately prior to issuing the instruction, the judge joked with the jury that their lunch break would be further delayed because

---

[45] *Id.* at 1098.

[46] *Id.* at 1098, n.6.

[47] *Id.* at 1106.

[48] *Id.* at 1104 (quoting Fed. R. Evid. 412 Advisory Committee's Notes).

[49] *Id.* at 1105-06.

of the need to issue the curative instruction. In injecting a note of levity to the proceedings just prior to the curative instruction, the judge further undermined the value of the instruction.[50]

In *Basile v. Spagnola*, a female employee sued her supervisor for creating a hostile work environment.[51] At trial, the plaintiff presented testimony about multiple incidents of inappropriate behavior by the supervisor.[52] The trial court denied the supervisor's motion *in limine* to introduce evidence about the plaintiff's prior sexual conduct, specifically that she flashed her breasts at the workplace when the supervisor was off-duty.[53] The jury returned a verdict in favor of the plaintiff employee. On appeal, the court affirmed the decision to refuse to admit that evidence explaining that "a plaintiff's private sexual behavior does not change her expectations or entitlement to a workplace free of sexual harassment."[54] The Second Circuit also noted that defendant, in his motion *in limine*, only presented hearsay evidence that the plaintiff had flashed her breasts at the workplace while her accused supervisor was off-duty. In light of Rule 412, and the fact that the accused was not present, the court found that the prejudicial effect of the evidence outweighed the probative value.[55]

Conclusion

The case law outlined in this paper demonstrates the positive impact resulting from the enactment of Rules 412-415. The application of these Rules in particular cases of sexual assault and harassment signifies a shift in the nature of trials that mirrors the shift in attitudes in society. The change in attitudes in society is reflected in the admissibility of evidence in sexual harassment trials. Now, evidence of the accused is more readily accepted, and evidence of the accuser is more restricted. With the "Me Too" movement, and the change in how sexual assault cases are handled on college campuses, Millennials and Generation Z individuals are entering the workforce with much different expectations about what should not be tolerated in the workplace. In

---

[50] *Id.* at 1105, n. 7.

[51] Basile v. Spagnola, 346 Fed. App'x 687 (2d Cir. 2009).

[52] *Id.* at 689.

[53] *Id.* at 690.

[54] *Id.*

[55] *Id.* at 690.

the past 30 years, attitudes in the United States have shifted from a culture of tolerance to that of understanding the seriousness of sexual harassment and assault allegations and the pressures faced by victims who must confront the accused in court.

Monica C. Barrett joined Bond Schoeneck & King as a member in 2016 after having served as Interim General Counsel at Rutgers, the State University of New Jersey. She provides legal advice and counsel to colleges and universities, public school districts, and independent schools in all aspects of education law, including student affairs, faculty tenure and promotion, governance issues, athletics, and academic affairs. Ms. Barrett was a speaker at PLI's Employment Discrimination Law & Litigation 2020 program.

Mallory A. Campbell is an associate in Bond Schoeneck & King's Labor and Employment practice group. She represents employers in complex labor and employment litigation matters, including wage and hour class actions and employment discrimination and retaliation cases. She represents employers in federal and state courts as well as before administrative agencies such as the New York State Department of Labor and the Equal Employment Opportunity Commission.