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INTRODUCTION

A Guide to This Book

In many civil cases, the major controversies center on causation of harm and credibility of the witnesses. Workplace sexual harassment cases are no different in this regard and may present greater challenges than many other types of cases because of the classic credibility contests that devolve into “he said, she said” disputes for which there are no witnesses to the core events in issue. Because many sexual harassment plaintiffs have complicated histories, determining legal causation can be quite difficult. The research studies on different aspects of sexual harassment that bear on questions of the nature and extent of emotional injuries, the causes of those injuries, and credibility continue to proliferate. However, the research implications for practitioners, and precisely how a forensic consultant should apply this almost overwhelming body of information within the constantly evolving legal framework, are considerably less apparent.

The U.S. legal system provides opportunities for input from mental health professionals to be a component of sexual harassment litigation. The person filing the lawsuit—the complainant or plaintiff—hires a lawyer to plead their case. Plaintiff’s counsel has an ethical obligation to provide the most

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effective representation of their client, which means bringing before the finder of fact—the adjudicator or judge and jury—information that supports the plaintiff's side of the case. Many sexual harassment claimants contend that they were harmed psychologically by the actions of their subordinates, coworkers, or supervisors or by the policies of the organization by which they were employed. The claimant's lawyer may determine that a mental health expert is necessary to document such harms and to provide credible evidence to the finder of fact. The lawyer then retains a psychologist or psychiatrist to conduct a psychological evaluation of the claimant and to produce a written report of that evaluation, which is mandated in U.S. federal courts and most state venues. The expert may be required to sit for a deposition—questioning under oath by defense counsel—or to testify in a trial.

In sexual harassment cases, the lawyer for the defense, who has an ethical obligation to provide the best defense, may determine that it would aid their representation of the employer if they hired their own expert to examine the claimant. This examination may be designed to produce testimony to rebut that of the plaintiff's expert or to support the defendant's case by providing to the court alternative sources of causation for the plaintiff's claimed damages or by showing that the plaintiff is feigning or exaggerating their alleged harassment-caused emotional distress. The defense-retained expert must almost always produce a written report and might be deposed and testify in trial.

In short, many sexual harassment cases that are not resolved through internal processes within the organization or through informal or formal mediation are those that are assisted by the work of mental health experts. In most cases, the finder of fact hears the testimony of two experts, one retained by the claimant's counsel and the other by the employer's lawyer. In most cases, these two expert opinions will differ.

This book brings together the two essential components related to sexual harassment: sexual harassment law and scientific research concerning how people function in the workplace. Those components provide a firm basis not only for the forensic practitioner to conduct an evidence-based forensic practice in cases involving sexual harassment but also for lawyers, judges, adjudicators, human resources professionals, and many others who deal with sexual harassment investigations, evaluations, arbitrations, and adjudications. The book acquaints readers with clinical and social-scientific literature on sexual harassment and applies those findings to issues that psychologists must consider in preparing ethically sound and well-substantiated forensic reports and testimony. As such, it provides a useful benchmark regarding

legal and ethical standards for competent forensic evaluations in workplace sexual harassment cases. The explication of a logical and systematic method to gather and process information in these often-complex cases is a critical part of this effort. We appreciate that not all experts approach this material and the task in the same manner, and others may emphasize different aspects of the literature from those that we have chosen to highlight.

This book is a second edition of our 2005 volume *Evaluating Sexual Harassment: Psychological, Social, and Legal Considerations in Forensic Examinations*. As one would expect, it has updated topics covered in the first edition. We have supplemented those additions with new topics and material that will be interesting and useful to new readers as well as those familiar with the initial work. The 2005 volume was well regarded and the recipient of a prestigious honor: the American Psychology-Law Society Biennial Book Award in 2005–2006 for the best authored interdisciplinary book. That volume was written at the start of the new millennium and relied mostly on research conducted in the 20th century. The 2000s brought substantive changes that prompted the writing of a second edition. These included significant new research on the topic as well as changes in the legal system reflected in the case law and legislation.

The 15 years since the publication of the first volume have seen the education, training, and professional work of a new generation of forensic professionals. This generation has the advantage of a solid base of specific forensic professional standards, a broad base of research about psychopathology and assessment, and an array of training experiences in the specialty of forensic psychology or psychiatry. This time frame has also brought more experienced clinicians into forensic practice. This volume is designed to provide an introduction to sexual harassment for these professionals and a solid basis for scientifically informed forensic work.

The new millennium also brought about changes in how society responds to people of differing sexual orientations and identities. We refer to these populations of interest as sexual and gender minorities (SGM) rather than lesbian, gay, bisexual, transgender, queer or questioning, and other identities (LGBTQ+). This term is more inclusive of persons with sexual orientation identities and gender identities not specifically referenced by the identities listed in designations such as LGBTQ+ (R. E. Morgan et al., 2020). We are just beginning to acknowledge how SGM populations are impacted by sexual harassment (e.g., Eliason et al., 2011; Rabelo & Cortina, 2014). The same applies to racial and ethnic minorities (e.g., Chamallas, 2004). Overshadowing both scientific and legal changes are changes in how many people now view sexual harassment as a societal and work life problem.

The many scandals in political, work, and entertainment settings, and the emergence of the #MeToo movement, brought to the public eye a pervasive problem that most women, and social science researchers, had recognized for many years (Fitzgerald & Cortina, 2018). With this new attention have come renewed examinations of tolerance for inappropriate sexual behavior in the workplace (Bernard et al., 2018; Russell & Oswald, 2016).

In addition to these significant social changes, psychology and the law continued to advance. From the early 1960s, our understanding of social science and clinical research and of how that information can assist the legal system has grown steadily (Grisso & Brigham, 2013). The new millennium brought articles and book chapters on applications of psychology to civil cases (e.g., Gold, 2004; Goodman-Delahunty & Foote, 2011; Lareau, 2016). Highly qualified forensic psychologists and psychiatrists have been called into federal courts, state courts, and administrative hearings to provide testimony concerning the science of sexual harassment as well as whether alleged discrimination may have harmed a civil plaintiff (Lawson & Fitzgerald, 2016). In our initial volume, we developed a model for forensic assessment in these settings. In this book, we elaborate that model to provide a tool for practitioners in legal settings.

Forensic psychologists, psychiatrists, and psychological social science researchers consult and testify in many diverse professional contexts. Social scientists work with schools, businesses, and governmental agencies to design systems that reflect an understanding of what we know about patterns of sexual harassment, harassers, and the targets of harassment. In this book, we use the term *harasser* in preference to *perpetrator* to refer to the person who does the harassing, as it is more neutral, is gender neutral, and does not suggest criminality, although some acts of sexual harassment compose crimes. Similarly, we use the term *target* in preference to *victim* or *survivor* to refer to the recipient of sexual harassment and assault because of its neutrality, and in recognition of the fact that in legal proceedings involving sexual harassment, the person filing suit is not determined to be a “victim” until the court determines liability. The term *target* is commonly used in social science research and is gender neutral.

Social scientists may testify in court about the phenomenon of sexual harassment, particularly as it affects different classes of targets (Wright & Fitzgerald, 2009). Forensic psychologists and psychiatrists may conduct evaluations with plaintiffs in sexual harassment cases to assist the court in determining whether these parties were harmed by the actions of defendants—organizations or individuals employed by those organizations. Although somewhat controversial (see Chapter 4), mental health professionals may be asked to testify about *liability* in these actions—that is,

whether the defendant is responsible for what occurred between the plaintiff and alleged harasser(s). These forays into the legal system by psychologists and psychiatrists require a detailed understanding of the social science research conducted in the area and how scientists have interpreted data gathered in that research. It is our hope that this book can provide that foundation.

Expert witnesses and consultants in sexual harassment cases may be hired by an array of parties to perform a variety of roles. As discussed in Chapter 7, a mental health professional may be hired as a third-party investigator or mediator in a sexual harassment case. They may be retained by a company to consult on employment practices to prevent or correct sexual harassment and reduce the organization's risk of litigation. They may be hired by lawyers to consult on a case to more effectively pursue or defend a civil rights lawsuit. Well-trained experts may be retained by the claimants' lawyer or the lawyer for the defendant(s) to conduct mental health examinations of plaintiffs in sexual harassment cases. In all of these roles, the mental health professional must possess a firm foundation in science and a strong adherence to ethical standards.

INTENDED AUDIENCE

This book is intended as a resource for professionals working in sexual harassment cases, including psychologists, psychiatrists, lawyers, judges, and human resources specialists.

Mental Health Practitioners

For clinical psychologists and psychiatrists who have some forensic experience but have not worked in sexual harassment cases previously, the book provides a solid base for initiating practice in this area. For the experienced forensic psychologist or psychiatrist, this book provides a ready summary of the relevant research, even in areas that are not usually on their "need-to-know" list. This volume elucidates a comprehensive evaluation model (see Chapter 6) for conducting evaluations; making sense of the evaluation data; and explaining evaluation results to lawyers, judges, mediators, adjudicators, and juries.

Chapter 7 on alternative dispute resolution (ADR) introduces an aspect of practice into the realm of prevention, intervention, and active problem-solving. For many, this is a new arena of practice that should, as is ethically

necessary, be undertaken with consultation and supervision (American Psychological Association, 2017).

Human Resources Specialists

For human resources professionals, this book offers a basis for understanding how people's interactions in the workplace may result in claims of sexual harassment. Understanding harassers and their patterns of behavior is an important component in this mix, as is understanding how different people perceive and react to potentially harassing events in the workplace. A grasp of the impact of sexual harassment on harassment targets can lead to more effective risk management and care of employees, and to the development of preventive measures that can reduce employee use of sick leave and staff turnover.

Legal Professionals: Lawyers, Magistrates, and Judges

For lawyers, this book provides insight into the large body of research comprising the scientific and factual bases for forensic evaluation of plaintiffs in sexual harassment cases. The book goes beyond a discussion of the extant research in sexual harassment by applying the research findings to issues likely to arise in civil rights or tort litigation. Lawyers may use this material to aid their clients in making strategic decisions about litigation or in preparing more sophisticated and comprehensive examinations of mental health experts.

For judges, magistrates, industrial relations tribunals, and other fact-finding bodies, this book provides significant background in the body of knowledge on sexual harassment. As a foundation for understanding the sometimes complex dynamics of sexual harassment of plaintiffs by defendants, this book can help fact finders evaluate scientific bases of expert testimony of mental health experts. In addition, portions of the book that address assessment procedures and ethics inform the court on issues to consider in deciding whether to admit expert evidence.

Social Scientists, Sexual Harassment Researchers, and Policymakers

Although we rely extensively upon social science research for much of what is discussed in this book, social science researchers can benefit from understanding how their research is used "in the trenches." As Foote (2016) argued, and we reiterate, much social science research is unhelpful to the

forensic practitioner. Social scientists who read this book will better understand how their research is applied and how critical it is in the clinical evaluation of sexual harassment complainants.

THE FIVE-STAGE MODEL: A BRIEF INTRODUCTION

Throughout this volume, and particularly in Chapter 6, the five-stage model for forensic evaluation in civil cases is discussed. This model evolved over 20 years (Foote, 2020; Foote & Lareau, 2013; Goodman-Delahunty & Foote, 2009, 2011, 2013a, 2013b; Goodman-Delahunty et al., 2012) and was designed to provide a framework for mental health professionals to conceptualize, undertake, report, and testify about evaluations in civil cases.

The first of the five temporal stages—Stage 1—consists of the “day before” analysis, in which the examiner explores the claimant’s preharassment history in some detail through interview, record review, and other data gathering. Stage 2 addresses the period in which the alleged harassment occurred, which in some cases may be brief, if the harassment consisted of a single event, or may persist for years in a hostile work environment or quid pro quo case. Many positive and negative events may arise during Stage 3, the interval between the end of the alleged harassment and the day the claimant meets with the mental health professional for the evaluation. The formal mental health evaluation occurs during Stage 4, when claimant and collateral interviews and psychological testing are conducted to assess the claimant’s status at that point in time. During this period, the data are integrated and synthesized to determine the relationship between on-the-job events and the claimant’s psychological status. Finally, in Stage 5, the examiner extrapolates from the data gathered so far to determine the probable future course for the claimant, including recommended treatment and likely long-term outcomes for the claimant’s assessed emotional disorders and functional impairment.

OVERVIEW OF THIS VOLUME

We begin in Chapter 1 by describing the evolution of sexual harassment from the passage of the Civil Rights Act of 1964 to the contemporary #MeToo revolution. This chapter acquaints readers with the major theories of sexual harassment and research findings on the incidence and prevalence of sexual harassment.

Chapter 2 offers a more in-depth legal overview of the liability and damages phases of litigation and provides a discussion of the contributions of expert witnesses on these topics. We outline the elements of proof that a plaintiff must establish, the defenses available to an employer, and the types of monetary damages and other relief that a plaintiff can potentially recover. Readers will be acquainted with landmark U.S. Supreme Court decisions on sexual harassment from 1986 to 2020, when protection for all sexual minority and gender identities was ultimately incorporated within the definition of sexual harassment. We draw primarily on examples from federal sexual harassment cases, as these are often the basis of related state, local, and common law claims. We describe examples of types of clinical and social framework expert evidence proffered in sexual harassment cases. To supplement the material in this chapter, Appendix A provides an overview of federal and state claims that can be made regarding sexual harassment.

Chapter 3 presents research about the three components of sexual harassment: harassers, targets, and workplaces. We discuss the harasser, without whom this volume would be unnecessary. We explore research on what motivates harassers and different styles of harassment that have been distinguished. Drawing from large-scale government-sponsored studies and more recent polling research, we identify demographic features of certain targets more likely to be harassed. This chapter brings together research on targets in the context of what is known about harassers and the influence of the workplace context on harassment. We present findings on revictimization—the idea that those who have suffered trauma are more likely targets of predators and harassers later in life. We contrast this with research on the more benign source of harassment complaints stemming from workplace romances. The third section of the chapter focuses on the all-important topic of context—where the harassment takes place and factors that can foster or inhibit it.

Chapter 4 delineates how different people and systems decide what constitutes harassment. This differs from our earlier discussion of definitions of harassment because the perception of harassment does not always comport with legal definitions. In this chapter, we further explore the legal issues of *welcomeness* and *reasonableness*, as these constructs are integral to determinations as to whether specific events are categorized as harassment.

Chapter 5 describes the harms caused to targets by harassment. This account is a critical component of this volume because all readers must understand the range of reactions that targets experience and the ways that harassment causes damage to mental health, relationships, physical health, and work life. This body of research constitutes the foundation for emotional and vocational damages in harassment lawsuits.

Chapter 6 brings together much of the information already presented in this volume. Following the five-stage evaluation model (Foote, 2020; Goodman-Delahunty & Foote, 2011), we describe how to apportion evaluation tasks into a rational sequence that results in a defensible opinion about the extent and cause of emotional damages in sexual harassment cases. We discuss the model in terms of the five temporal stages just outlined, and we provide a case study to illustrate the use of the model. A supplement to this chapter can be found in Appendix B, a sample psychological evaluation using the five-stage model.

Chapter 7 focuses on the resolution of sexual harassment complaints and the role that ADR plays in reducing the need for trials and other procedures that are expensive and taxing to all involved parties. This chapter provides a critique of ADR and discusses how mental health professionals may obtain training and experience to be involved in these processes. This chapter was one of the two most commonly downloaded chapters of our 2005 volume. It provides critical information for those seeking to resolve harassment problems without litigation.

In Chapter 8, we provide a summary of the material covered in this volume. Bringing together the distinct threads developed in the course of the book, we offer some recommendations for practice and for future research in the area.