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Workplace Sexual Harassment, Retaliation and Plaintiff Preparation: Getting Results

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Disclaimer before getting to Agenda

Assume the following:

EEOC:
Violation of Title VII, the federal statute governing sexual harassment as a form of illegal sex-based discrimination at work has been proven.

The following have been met:

1. Protective category
2. Meets min. job requirement
3. Plaintiff suffered material adverse employment action
4. Evidence of discriminatory intent

Discrimination=Adverse Actions
Objective tangible harm

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Agenda

High Cost of Sexual Harassment

- \$ Direct Results
- \$ Indirect Results

Research

- Statistics
- Scope


Plaintiff Preparation

- How to support Plaintiff-Stress Response/Coping Skills
- Depositions
- Understanding the Adult Learner

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Agenda




Legal Definition

- Sexual Harassment
- Retaliation



Workplace Policies

- Match definition?
- Current?
- Review Process?




Training

- Match the policy?
- Accessible to work force?
- Reporting process?

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Agenda




Timelines

- Discovery
- Health-Workman's comp.



Deposition

- Most cases never go to trial
- High successful depositions-critical




Changing Times

- #MeToo
- Media-Time Magazine

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High Cost of Sexual Harassment: Direct and Indirect

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High Cost of Sexual Harassment in Dollars-Direct Effect

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\$168 Million

Ani Chopourian vs. Catholic Healthcare West (2012)

\$95 Million

Ashley Alford vs. Aaron's Rents (2011)

\$10,592 Million

Carla Ingraham vs. UBS Financial Services (2011)

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High Cost of Sexual Harassment in Dollars-Indirect Effect

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Indirect

Employee Absenteeism

Productivity affected

Health Compensation claims

Turnover

Early Retirement

Research:

Employee tardiness and absenteeism (Baba et al. 1998; Jacobsen et al. 1996), sick leave and health compensation claims (Cartwright and Cooper 1997), and turnover intentions (Baba et al. 1998; Shaffer et al. 2000) are also evidenced as resulting from sexual harassment.

Similarly, stress-related health problems such as heart disease, migraines, and ulcers are associated with employee productivity decreases (Adams 1988), such as disability claims (Gebhardt and Crump 1993) and organizational withdrawal behavior, including absenteeism, turnover, and early retirement (Hanisch and Hulin 1990).

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Stats and Scope

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US Equal Employment Opportunity Commission

Reported for 2015

75% of all workplace harassment incidents go unreported.

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	WOMEN	MEN
Verbal sexual harassment	71%	34%
Unwelcome sexual touching	31%	17%
Cybersexual harassment	11%	10%
Being physically followed	20%	12%
Unwanted genital touching	10%	12%
Sexual assault	17%	7%

Source: Stop Street Harassment
South West England

Stop Street Harassment Study-January 2018

MORE THAN 3 OUT OF 4 WOMAN HAVE BEEN VERBALLY HARASSED


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Why don't people report?

Epidemic:
Widespread
Rampant
pervasive

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Fear! Retaliation

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Woman of Silicon Valley Shame-Fear-Guilt



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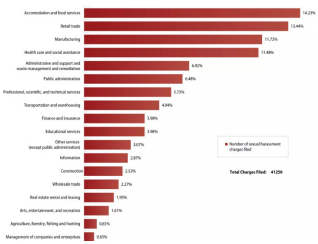
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Blue Collar Workers

- ▶ The Silicon Valley Woman fall on the graph at the very bottom, the least likely to experience sexual harassment.
- ▶ Imagine, if these strong independent woman fear of reporting, what to say of the blue collar worker with less resources.

Bureau of Labor and Statistics

Table 1
Total sexual harassment charges filed, by industry, fiscal years 2005 through 2015



■ Number of sexual harassment charges filed

Total Charges Filed: 45,000

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Case Study: Erika

- ▶ 34 Year old immigrant from Russia 3 years prior.
- ▶ English her second language
- ▶ 6 year old daughter-good mother, sought to live in a good area for her daughters education. Landed a job in her desired area.
- ▶ No other family in USA
- ▶ Working as a secretary-good worker

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Psychological Affect on Victims

Research Demonstrates the many negative consequences to the victims.

DANSKY, B.S., & KILPATRICK, D.G. (1997). Effects of sexual harassment. In W. O'Donohue (Ed.), Sexual harassment: Theory, research, and treatment (pp. 152-174). Boston: Allyn & Bacon.

The psychological and physical costs of sexual harassment are many fold. Although not all victims of sexual harassment necessarily experience all symptoms, the range of difficulties is broad and the likelihood is high that many victims experience at least some distress associated with their experience.

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High Cost of Sexual Harassment Individually

Post Traumatic Stress

Dept. of Veterans Affair, 2015 study found 20% increase in PTSD in females due to sexual harassment.

Anxiety, depression


Ball University:
2018 "Workplace harassment can cause severe stress which can lead to unhealthy behaviors such as eating more junk food and smoking," explains Jagdish Khubchandani, an associate professor of health science at Ball State University, and one of the study's lead authors.

Suffering
in
Silence

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Post Traumatic Stress Disorder

AVINA, C., & O'DONOHUE, W. (2002). Sexual harassment and PTSD: Is sexual harassment diagnosable trauma? *Journal of Traumatic Stress, 15*, 49-79. Sexual harassment has become a major social, legal, and mental health problem because of its high prevalence and its negative consequences for victims. These consequences can include decreased productivity, loss of job, decreased income, and impaired psychological and physical well-being. Despite evidence from empirical studies that victims often exhibit PTSD symptoms, some have argued that sexual harassment does not constitute legitimate trauma. We argue that many forms of sexual harassment meet the diagnostic Criteria A1 and A2 of PTSD. Finally, the DSM-IV trauma criterion is explicated, and its relationship with sexual harassment and its effects are discussed.



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Eating Disorders

The results of structural equation modeling suggest a link between sexual harassment and eating disorder symptoms among women and indicate that this relationship is mediated by psychological distress, self-esteem, and self-blame.

HARNED, M.S., & FITZGERALD, L.F. (2002). Understanding a link between sexual harassment and eating disorder symptoms: A mediational analysis. *Journal of Consulting and Clinical Psychology, 70*, 1170-1181.

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Alcoholism

Results: Active coping had no significant impact on the ability to end harassing or abusive experiences. Moreover, the use of problem-focused coping that was unsuccessful predicted some drinking outcomes for both men and women, controlling for Wave 1 drinking and sociodemographic characteristics. Implications: The data suggest that increased institutional attention to the prevention of workplace harassment and abuse might impact on decreasing alcohol use and abuse.

Richman and colleagues (1999) found that sexual harassment put both men and women at increased risk for depression, anxiety, hostility, and problematic alcohol use.

RICHMAN, J.A., ROSPENDA, K.M., FLAHERTY, J.A., & FREELS, S. (2001). Workplace harassment, active coping, and alcohol-related outcomes. *Journal of Substance Abuse, 13*, 347-366.

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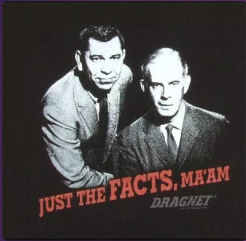
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And then finally when all else fails, the plaintiff usually has exhausted all avenues-
They come to you


AND YOU SAY.....

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Just the Facts Ma'am

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Elephant in the Room

The Emotions



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Plaintiff Preparation:

How to support Plaintiff emotionally

Depositions

Understanding the Adult Learner

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Plaintiff Preparation

► Stress and Emotions

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Stress Definition

Hans Selye

► Hans Selye in 1936, who defined it as "the non-specific response of the body to any demand for change".

Parker

► The physical response of the body to adjust itself for an immediate survival event to either fight-flight or freeze in a perceive or actual stressful event

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Thoughts Create a Physical Chemical Hormone28

Negative Thoughts


- ▶ Norepinephrine-increases heart rate, tightens muscles, shallow breathing-body prepares for the flight or fight response

Positive thoughts

- ▶ Enkephalins
- ▶ Endorphins
- ▶ Dopamine


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GAS-General Adaptation Syndrome29




Alarm

Alarm phase: Alerting to problem requiring action-once taken care of-body goes back to equilibrium.



Resistance

If the alarm phase continues, or not taken care of, then the stage of resistance-trying to fend off the problem.



Exhaustion


If the stage of resistance last for a length of time that the body can no longer tolerate, the stage of exhaustion which brings disease and health and psychological issues.

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Support your client for wining outcomes30

Know yourself

- ▶ Take care of yourself first



Know your support systems in your area

- ▶ Professionals in area that will work in collaboration
- ▶ Biofeedback
- ▶ Meditation
- ▶ Exercise
- ▶ Counseling
- ▶ Laughter-the best medicine

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SMART Goals

- Specific
- Measurable
- Action Oriented
- Realistic
- Time Bound

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Reward Yourself!

Neuroplasticity

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Meditation

Percent of the brain we use?

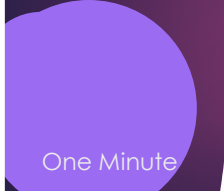
Study of Buddhist monks brains: MRI-CT-PET Scans

Brain waves-Alpha → release hormones by our thoughts → Neuroplasticity

Use all the senses-brain does not know the difference between what we experience and perceive in the world and our thoughts-it is all the same to the brain!

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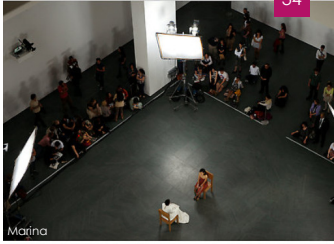
The power of being fully Present




One Minute

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Marina Abramovic in the MoMA atrium. In her performance piece "The Artist Is Present," visitors silently facing her. Ruth Fremson/The New York Times



Adult Learner

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Adult Learner


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Visual

Pamphlets

Videos


Books



Auditory


Conversation

CDs



Practice

Practice Depositions





U.S. Equal Employment
Opportunity Commission

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Legal Definitions


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Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

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► **Reasonable Person:**
The conduct is severe or pervasive enough to create a work environment that a **reasonable** person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Defendant will try argue the "Reasonable person" clause and look for history of sexual abuse, trauma, or unhealthy relationships in the Plaintiff's life.



EEOC

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Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

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Sexual Harassment

- It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

EEOC

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EEOC

Title VII of the Civil Rights Act of 1964.
Age Discrimination in Employment Act of 1967, (ADEA),
Americans with Disabilities Act of 1990, (ADA).

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- Harassment
- Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).
- Harassment is **unwelcoming conduct** (1) based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful if (a) enduring the offensive conduct becomes a condition of continued employment, or (b) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws, or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.
- Retaliation, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
- Offensive conduct** may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or personal attacks, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:
 - The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, co-worker, or a non-employee.
 - The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
 - Unlawful harassment may occur without economic injury to, or discharge of, the victim.
- Prevention is the best tool to eliminate harassment in the workplace. Employees are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employees should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.
- Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

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Harassment

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Protective Class:

- Hostile work environment
- Harassment unwelcomed
- Subjectivity and objectively offended
- Severe and pervasive

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Referring to the definition of the law

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Policies-

- Are the policies in place that match the law?
- Are there avenues for people to report?
- Is there training in place that occurs regularly?
- Who updates the policies?
- How often are they updated?
- Does the employer practice what it preaches-are there identifiable items that say otherwise? Prevailing climate?

Retaliation Policy?

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Time Line

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Language of Logic and Law

► Discover protocols:
Review protocols on
Federal Judicial Center




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(2) **Definitions.** The following definitions apply to cases proceeding under the Initial Discovery Protocols.

- a. **Concerning.** The term “concerning” means referring to, describing, evidencing, or constituting.
- b. **Document.** The terms “document” and “documents” are defined to be synonymous in meaning and equal in scope to the terms “documents” and “electronically stored information” as used in F.R.C.P. 34(a).
- c. **Identify (Documents).** When referring to documents, to “identify” means to give, to the extent known: (i) the type of document, (ii) the general subject matter of the document, (iii) the date of the document, (iv) the author(s), according to the document, and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent, or, alternatively, to produce the document.
- d. **Identify (Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.





PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 2: PRODUCTION BY PLAINTIFF.

(1) **Timing.**

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) **Documents that Plaintiff must produce to Defendant.**

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job descriptions(s), and income

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PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

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Timelines

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Assist in the attorney-client discovery process.

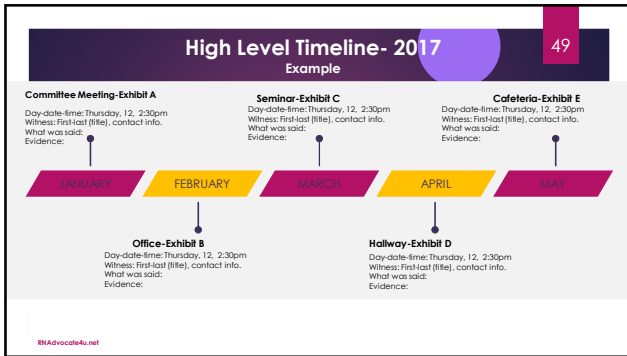
A timeline can act as a conduit between attorney legal facts and discovery into a process that the plaintiff can understand and easily assist and engaged.

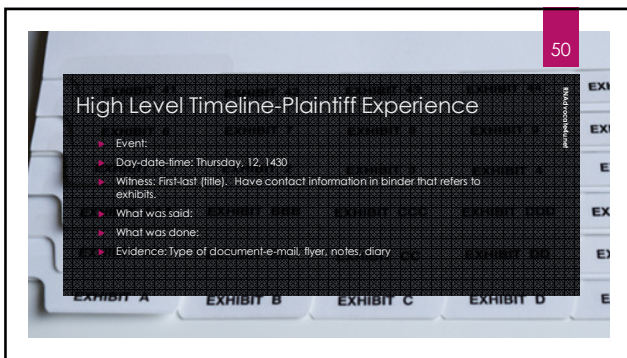
Perceive it as a translator.

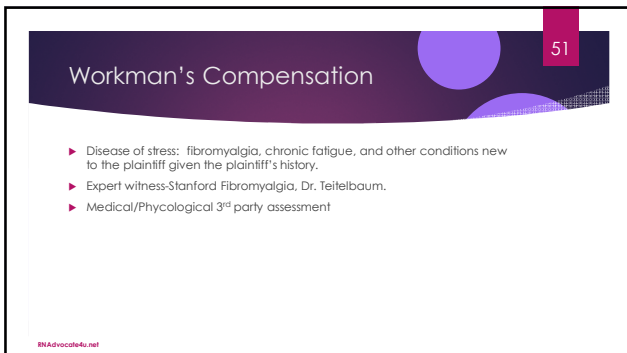
You speak one language-logic and law, and the Plaintiff speaks another raw emotions-a good timeline can bridge the gap.

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Timeline-Health
Workman's comp. Cases

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Provide consistent
brief format in
timeline. Exhibit
binder with correlating
evidence.

MD Visit-Specialty

Reason of visit

Date

Day

Time

Outcome: (example-
prescription, referral,
receipts, etc.)

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Medical Timeline- 2017
Example-Plaintiff

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MD Apt.-Name-Specialty
Exhibit A
Day-date-time: Thursday, 12, 2:30pm
Reason for visit:
Outcome: New prescription
Evidence: Medical records, report, x-ray,
receipt

Phycologist Eval-Name-Specialty.
Exhibit B
Day-date-time: Thursday, 12, 2:30pm
Reason for visit:
Outcome: New prescription
Evidence: Medical records, report, x-ray

Counselor-Type-Name
Exhibit C
Day-date-time: Thursday, 12, 2:30pm
Reason for visit:
Outcome: New prescription
Evidence: Medical records, report, x-ray

PT-Name
Exhibit D
Day-date-time: Thursday, 12, 2:30pm
Reason for visit:
Outcome: New prescription
Evidence: Medical records, report, x-ray

Alternative Therapy-Biofeedback
Exhibit E
Day-date-time: Thursday, 12, 2:30pm
Reason for visit:
Outcome: New prescription
Evidence: Medical records, report, x-ray

JANUARYFEBRUARYMARCHAPRILMAY

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Third Party
Psychological/Medical
Evaluation

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These are comprehensive and provide a timeline
from the professional about plaintiff's medical
history-Highly recommend.

"Reasonable Person"

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Depositions

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The Deposition of the plaintiff is one of the most crucial moments in a harassment case.



USE ALL THE RESOURCE DISCUSSED TO HAVE IMPACTFUL DEPOSITIONS.



PLAINTIFF READY FOR DEPOSITIONS, UNDERSTANDS EXPECTATIONS, NOT DISTRACTED BY STRESS OR POST TRAUMATIC STRESS DISORDER.

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Starting to see a shift-Those who are paving the way and making a difference



#MeToo

Tarana Burke

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Person of the Year
TIME
2018
THE WOMEN
REVEALED

Silence Breakers

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Conclusion

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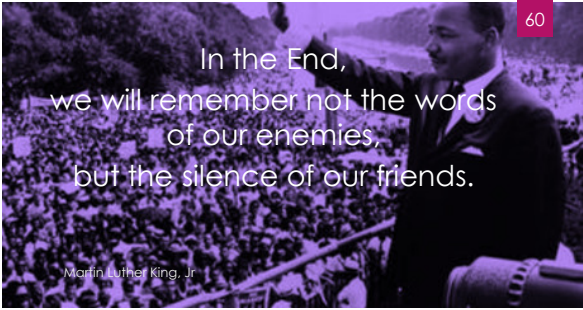
Study:

Khubchandani also advocates for safe and supportive disclosure of harassment, and serious punishment and disciplinary action for perpetrators of harassment.

"Otherwise, employees will not have faith and trust in management and the perpetrators will continue to harass and damage the career of others," he tells Quartz.

"Workplace harassment can be expensive from a health, safety, and legal standpoint and is highly preventable with good policy enforcement and education."

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In the End,
we will remember not the words
of our enemies,
but the silence of our friends.

Martin Luther King, Jr.

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