

Attempts to blame sexual harassment on plaintiff backfire

One of our primary roles as attorneys is to protect our clients from their worst instincts, like this one: “Let’s file a motion to require a sexual harassment plaintiff to submit to a psychosexual examination.”

Umm, no.

It should seem obvious that this isn't a great idea. However, it's not fiction or hypothetical. In a recent case, a federal court decided the propriety of just such a motion (very much) in the employee's favor. (*Carbajal v. Hayes Management Services*, No. 4:19-cv-00287-BLW, DC ID 2022)

A psychosexual examination is an evaluation that specifically addresses sexual development, sexual deviancy, sexual history, and risk of re-offense as part of a comprehensive evaluation of a sexual offender. In *Carbajal*, the defendant sought the examination to determine whether the plaintiff subjectively perceived the work environment as sexually offensive, specifically about some of her alleged “friendly” behavior towards her accused harasser.

The court wasn't having *any* of it.

As stated in its ruling, “Hayes Management asks the Court to order Carbajal—a plaintiff in a civil case alleging she is a victim of sexual harassment—to undergo this highly intrusive and personal evaluation intended to ferret out a convicted sex offender's future dangerousness. Hayes Management's request not only demonstrates a gross misapprehension of [the] law ... but borders on being abusive and harassing ...

“Hayes Management's argument requires a psychosexual evaluation of Carbajal as a means of probing into her sexual attitudes and private sexual behavior to determine the subjective offensiveness of Chris Hayes' conduct, which grossly misconstrues what constitutes unwelcome sexual harassment. Carbajal's sexual attitudes and sexual behaviors in her private life in a consensual setting do not waive ‘her legal protections against unwelcome harassment’ ...

“To allow Hayes Management to subject Carbajal to a psychosexual evaluation to obtain evidence regarding her private sexual behavior or attitudes would not only undermine Title VII's goal of ridding the workplace of any kind of unwelcome sexual harassment but would also undermine the purpose of Rule 412, which 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.’”

As this case illustrates, just because you *can* file a motion doesn't mean you *should*. Your job is to find your company an attorney who will protect you from making these types of errors, not one who will let you engage in expensive follies.

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