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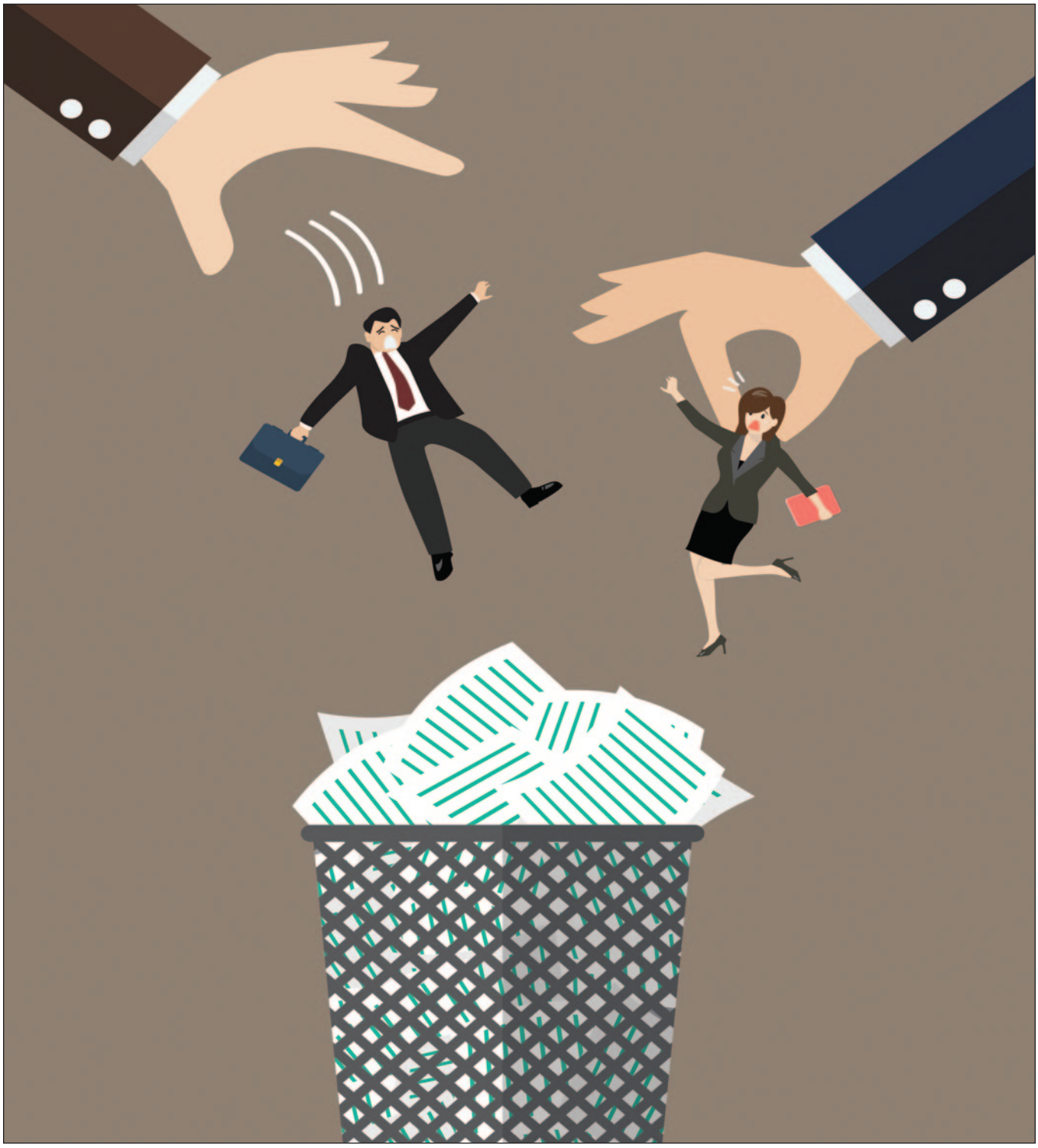

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Using the Rules of Evidence in Discovery to Protect Plaintiffs in Sexual Harassment Cases

By Iris Halpern

Introduction

If you work as a plaintiffs' lawyer and litigate sexual harassment, you know that moment will come. It happens in almost every case. Those exasperating written discovery requests seeking unrestrained access to all your client's email accounts, social media, group chats, and blog entries. Or those deposition questions about your client's sexual partners or activities. You can **feel** these requests and questions are inappropriate, but what can you do? Quite a lot, it turns out.

Rule 412 of the Federal Rules of Evidence protects victims of sexual harassment in civil lawsuits from just this type of intrusive discovery. Last year, the Colorado legislature amended the state's rape shield statute to include similar protections. So now both federal and state law prohibit the introduction of a victim's prior or subsequent sexual conduct or reputation and similar evidence at trial except under strictly limited circumstances. Although the plain language of these rules concerns the admissibility of evidence at trial, courts have utilized these rules to limit discovery into non-workplace sexual conduct and relationships other than that between the victim and alleged harasser. Limiting discovery promotes the purpose of these evidentiary rules by encouraging victims of sexual misconduct to come forward without fear of humiliation.

The Purpose Behind Extending Federal Rule of Evidence 412 to Civil Actions

Congress extended the protections of Federal Rule of Evidence 412 through enactment of the Violent Crime Control and Law Enforcement Act of 1994.[1] Even before that, courts were reticent to allow the defendant in civil sexual harassment cases to delve into a plaintiff's private sexual conduct. For example, in *Mitchell v. Hutchings*, a case decided years before Rule 412's extension, the district court quashed six deposition subpoenas served on the plaintiffs' sexual partners and other individuals aware of their sexual history.[2] The basis for doing so, the court observed, was that past sexual history could not serve as "habit" evidence under Federal Rule of Evidence 406; did not impact emotional distress damages; and had no bearing on whether the defendants acted outrageously or intolerably.[3] In the words of the court, "[t]he fact that the plaintiffs may welcome sexual advances from certain individuals has absolutely no bearing on the emotional trauma they may feel from sexual harassment that is unwelcome. Past sexual conduct does not callous one to subsequent, unwelcomed sexual advancements."[4]

The dangers inherent in permitting a defendant to put on evidence at trial about a plaintiff's sexual history were recognized by Congress when it first adopted Rule 412 and then later extended it to civil litigation. According to the Advisory Committee Notes, the purpose was "[t]he need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward . . ."[5] Thus, in addition to mitigating the personal risk of injury inherent in discovery of private sexual matters, Rule 412 seeks to eliminate the "prejudicial and chilling effect" that permitting use of such evidence in trial has on future victim participation.[6]

The significance behind Rule 412, in both the criminal and civil context, is not difficult to grasp. "There is an inordinate risk of harm," to the plaintiff if those accused of sexual misconduct are permitted to delve into the plaintiff's intimate sexual details, such as "the unjustified invasion of privacy into Plaintiff's life, the potential for public and private embarrassment to Plaintiff as a result, and the likelihood of significant prejudice based on improper sexual stereotyping."[7]

That risk of embarrassment and sexual stereotyping is perhaps best captured in the widely cited case of *Burns v. McGregor Electronic Industries*.[8] In that case, at the conclusion of trial, the district court[9] ruled that although the plaintiff had established an unwelcome sexually hostile work environment, including sexual advances and that her supervisor called her a "bitch," "asshole," "slut" and "cunt," she could not have been offended because plaintiff had posed nude in another job for a national magazine.[10] Such

reasoning epitomizes the prejudice of improper sexual stereotyping that Rule 412, extended the year after *Burns*, seeks to prohibit. The court of appeals reversed, explaining that the plaintiff's "private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer," and that, "plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'"[11] The district court in *EEOC v. Donohue* articulated the dangers yet more bluntly:

> Defendants' implicit suggestion that they are entitled to discover whether plaintiff-intervenor has engaged in or been exposed to "banter" involving sexual behavior, desires or innuendo at her current place of employment, and if so, information bearing on her willingness to perpetuate or participate in such behavior and/or her reaction to it, is insidious . . . Seeking to discover evidence about plaintiff's propensity to engage in particular behavior involving sexual conduct, innuendo or desires in other settings, such as her current workplace, is not probative to these issues and amounts to little more than a thinly veiled attempt to generate evidence of propensity or character trait that would be prohibited by Federal Rule of Evidence 404(a).[12]

Using Rule 412 in Discovery to Protect the Plaintiff

Most lawyers know they can seek a protective order under Federal Rule of Civil Procedure 26(c)(1) to shelter their client from "annoyance, embarrassment, oppression or undue burden or expense." Such orders may foreclose certain types of discovery and forbid inquiry into certain matters. The same holds true under the Colorado Rules of Civil Procedure Rule 26(c), which allow courts to issue orders "that [] disclosure or discovery not be had" on grounds similar to those found in the Federal Rules. Comparable safeguards are found in Federal Rule of Civil Procedure 30(c)(2) and 30(d)(3) and Colorado Rule of Civil Procedure 30(d)(3) with respect to depositions, which allows counsel to instruct a deponent not to answer questions and move to limit deposition questioning on the grounds that the questioning is "in bad faith or [being done] in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." Although it was possible to use these Rules in the past to prohibit discovery into Rule 412 matters, what was once implicit is now explicit.

Under Rule 412, sexual conduct or history refers to a broad swath of conduct and activities. A plaintiff's mode of speech and dress, lifestyle, sexual behavior, predisposition, non-workplace sexual conduct, fantasies, dreams, and information with sexual connotations is irrelevant and presumptively inadmissible at trial.[13] For this reason, although Rule 412 theoretically governs the admissibility of evidence and not the scope of discovery, courts have regularly relied on the Rule in discovery decisions, "in order not to undermine [its] rationale."[14] Indeed, the Advisory Committee Notes of 1994 on Rule 412 state:

> In order not to undermine the rationale of Rule 412, . . . courts should enter appropriate orders pursuant to Fed.R.Civ.P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery.[15]

Given the presumption of inadmissibility of such evidence at trial, it is the defendant's burden to establish the relevance of any private sexual conduct and that the value of the evidence sought substantially outweighs the danger of harm or prejudice to the victim.[16]

After the extension of Rule 412, courts have frequently used it to preclude discovery into sexual conduct. In *Macklin v. Mendenhall*, for example, the district court issued a protective order precluding the defendants from propounding written discovery for information about the plaintiff's off-duty, off-site sexual conduct, history, intentions, and/or desires with anyone other than the two alleged workplace harassers.[17] In *EEOC v. Willamette Tree Wholesale, Inc.*, the district court precluded deposition questioning of third-party witnesses about the plaintiff's sexual and romantic history, finding that such questioning was not clearly relevant to the parties' claims and defenses, and that "inquiries into [the plaintiff's] sexual or romantic history would intimidate [her] needlessly."[18]

Notably, courts have squarely rejected arguments that such evidence is relevant to challenge the plaintiff's emotional distress or her credibility.[19] Courts have similarly rebuffed the argument that a sexually sophisticated victim is less likely to be subjectively offended by sexual harassment at her workplace.[20] "A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment at work."[21] Even a plaintiff's consensual relationship with another coworker is irrelevant. As explained by the Tenth Circuit: merely because a plaintiff has a relationship with one colleague, it does not mean that she "somehow invited the other

[employee's] conduct."[22] As the district court in the District Court of the District of Columbia succinctly put it over a decade ago in *Howard v. Historic Tours of America*:

> To so conclude one would have to say that knowledge of a woman's engaging in a consensual relationship with a co-worker makes reasonable the perception that she welcomed other sexual advances at her place of employment… [w]hile such a perception might have been justified, in men's minds, in Victorian England and Wharton's "Age of Innocence" in America, when men discriminated between the women they married and the women they slept with, it has nothing to do with America in 1997. . .[23]

The Breadth of Rule 412

Another important tool for plaintiffs' lawyers to keep in mind is the breadth of conduct Rule 412 encompasses. Not only is discovery into sexual intercourse or physical relationships precluded, but so too are inquiries soliciting such information as the identity and addresses of former sexual or romantic partners and questions about the plaintiff's sexual fantasies, reputation, predisposition, modes of dress and speech, and other sexually suggestive information or information suggesting a propensity for sexual promiscuity. Thus, it is important to screen for discovery requests and deposition questions that may be misused to impugn or call into question the character or credibility of your client, even if the connection is not immediately apparent or the discovery may have more than one purpose. On this basis, the district court in Colorado issued a protective order in *EEOC v. Smokin' Spuds, Inc.*, precluding deposition questioning about the plaintiffs' sexual and marital relationships, marital status during childbirth, the chronology of plaintiffs' sexual relationships, and the addresses of former partners.[24] Ruling from the bench, the district court reiterated that

> [t]he case law is overwhelmingly clear that you, for instance, cannot ask, Do you have the same father for all your children? Where does he live? When is the last time you saw him? There are different fathers for all of your children?[25]

The court also declined to allow questioning about current and former partners' criminal histories, opinions from third-party witnesses as to plaintiffs' choices of former partners, and other similar matters, limiting questioning to on-duty, at work sexual interactions, and only those with the alleged harasser.[26] Accordingly, if subject matter protected by Rule 412 might be implicated, attorneys representing plaintiffs should confer with defense counsel about the type of information defense counsel seeks to elicit from the plaintiff or witnesses, and the intended scope of inquiry. If no agreement can be reached, it may be appropriate to seek a protective order before or during the plaintiff's deposition or those of third-party witnesses limiting questions about sexual and marital relationships or other prohibited subjects under Rule 412. Similarly, plaintiffs' lawyers should object on Rule 412 grounds to potentially unsuitable or abusive written discovery requests and seek a protective order if need be.

Lingering Confusion from *Meritor Savings Bank v. Vinson*

Despite overwhelming recognition that Rule 412 deprives the district court of discretion to introduce evidence of non-workplace sexual conduct at trial,[27] some lingering confusion remains as the result of passing language from *Meritor Savings Bank v. Vinson*, the 1986 decision in which the Supreme Court confirmed the viability of sexually hostile work environment claims (as compared to *quid pro quo* claims). In *Meritor*, the Court stated that plaintiff Michele Vinson's "sexually provocative speech or dress" was relevant to the inquiry of whether she found her supervisor's overtures unwelcome.[28] This holding has been frequently misappropriated by proponents to urge in favor of discovery of non-workplace sexual conduct. But the case history makes clear that the Court was referring to Vinson's sexual conduct **at work**, not her off-duty conduct. Specifically, the Court took issue with the Court of Appeal's directive that Vinson's "'dress and personal fantasies. . .had no place in the litigation.'"[29] In a footnote, the appellate court had opined "[t]he District Court did not elaborate on its basis for the finding of voluntariness, but it may have considered the voluminous testimony regarding Vinson's dress and personal fantasies."[30] That evidence is described in Judge Bork's court of appeals dissent: "[i]n this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to **other employees at the bank.**"[31] Justice Powell mentions in earlier drafts of the decision that Vinson "often wore provocative clothing **at work**, entertained bizarre sexual fantasies, and continually volunteered intimate details of her sex life **to other employees**."[32]

Importantly, any remaining ambiguities arising from the *Meritor* decision can be put to rest because Congress amended Rule 412 to extend its protections to civil cases well after the *Meritor* decision. Thus, any reading of *Meritor* that allows for discovery of non-workplace sexual conduct has been superseded, as noted in such cases as *Mackelprang v. Fid. Nat'l Title Agency of Nevada.*[33] In *Mackelprang*, the

defendant, believing them to include evidence of post-employment extra-marital affairs, sought direct access to private messages on the plaintiff's MySpace accounts.[34] In refusing to grant access, the district court observed that "Fed.R.Evid. 412(a), **which was amended after *Meritor Sav. Bank, supra,*** generally provides that evidence offered to prove that any alleged victim engaged in other sexual behavior or to prove the alleged victim's sexual predisposition is inadmissible in any civil proceeding involving alleged sexual misconduct. . ."[35]

Colorado Revised Statutes § 13-25-138

Colorado has not yet adopted a state analogue to Federal Rule of Evidence 412. Thus, Rule 412 should be argued as controlling in state court. Lending weight to this logic, the Colorado state legislature last year enacted House Bill 18-1243, which extended the state's criminal rape shield laws to victims of sexual misconduct in civil cases.[36] The Colorado Revised Statutes § 13-25-138 now expressly states that: "Evidence of specific instances of the victim's prior or subsequent sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is **presumed irrelevant and is not admissible** in a **civil proceeding** involving alleged sexual misconduct." The law includes only two narrow exceptions, the first being evidence of the victim's prior or subsequent sexual conduct with the defendant and the second being specific instances of sexual activity showing the source of origin of semen, pregnancy, or any similar evidence of sexual intercourse for the purpose of showing the acts alleged were or were not committed by the defendant. The statute requires the defendant to initiate an in camera procedure and make an offer of proof, with the burden of establishing admissibility falling squarely on the defendant. Such procedures and allocations of proof resemble those found in Rule 412. In this sense, it is safe to assume that Colorado now effectively has a state equivalent to Federal Rule of Evidence 412, and that federal case law determining the scope of Rule 412's protections and applying those to discovery is persuasive.

Conclusion

As plaintiffs' attorneys we should remain vigilant throughout litigation to protect victims of harassment from needless invasions of privacy, embarrassment, and humiliation. Rule 412 and local laws are important tools for doing so. Thus, no matter which court system you are in, whether state or federal, be mindful of the utility and overwhelming legal support for preventing the discovery of your client's non-workplace sexual conduct and conduct with anyone other than the alleged harasser. This is true for a diverse range of behaviors and activities and should not be understood as limited to sexual intercourse or physical sexual intimacy. ▲▲▲

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Endnotes:

[1] Pub L. No. 103-322 § 40141, 108 Stat 1919 (1994), codified at 28 U.S.C. Fed. R. Evid. 412 (1994).

[2] *Mitchell v. Hutchings*, 116 F.R.D. 481, 485-86 (D. Utah 1987).

[3] *Id*. at 484-85.

[4] *Id*. at 485.

[5] Fed. R. Evid. 412 advisory committee's notes (1994).

[6] *EEOC v. Donohue*, 746 F. Supp. 2d 662, 667 (W.D. Pa. 2010) (quashing third party subpoenas seeking information about plaintiff's personal matters and responses to banter); *Macklin v. Mendenhall*, 257 F.R.D. 596, 604 (E.D. Cal. 2009) (and cases discussed therein recognizing potential chilling effect).

[7] *Williams v. Bd. of Cnty. Comm'rs*, 192 F.R.D. 698, 703 (D. Kan. 2000).

[8] *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993).

[9] Title VII originally did not provide for jury trials. This was changed by amendments to the Act in 1991.

[10] *Burns,* 989 F.2d at 961-64.

[11] *Id*. at 963.

[12] *Donohue*, 746 F. Supp. 2d 662, 666 (W.D. Pa. 2010) (citing *Macklin,* 257 F.R.D. at 605 (Rule 412 and its underlying policies bar discovery seeking to elicit information bearing on the plaintiff's sexual conduct, history, intentions, and/or desires occurring outside the workplace and not involving the named defendants)).

[13] *Truong v. Smith*, 183 F.R.D. 273, 274-75 (D. Colo. 1998) (presumptively inadmissible); *Socks-Brunock v. Hirschvogel, Inc*., 184 F.R.D. 113, 119 (S.D. Ohio 1999) ("evidence subject to Rule 412 is presumptively inadmissible, even when offered to disprove "unwelcomeness" in a sexual harassment case.").

[14] *Williams v. Bd. of Cnty. Comm'rs*, 192 F.R.D. 698, 704 (D. Kan. 2000); *Donohue*, 746 F. Supp. 2d at 665; *Ratts v. Board of County Comm'rs*, 189 F.R.D. 448, 451 (D. Kan 1999).

[15] Fed. R. Evid. 412, Advisory Committee Notes (1994).

[16] *Truong*, 183 F.R.D. at 274; *A.W. v. I.B. Corp*., 224 F.R.D. 20, 24 (D. Me. 2004).

[17] *Macklin.*, 257 F.R.D. at 604-06.

[18] Civ. No. CV-09-690, 2010 WL 11583063, *5 (D. Or. July 8, 2010); see also *Ratts v. Board of County Comm'rs*, 189 F.R.D. 448, 450-55 (D. Kan 1999)

(district court issued a protective order precluding wider questioning into plaintiff's general sexual affairs or relationships, limiting questioning to sexual history with the alleged harasser); *Barta v. Honolulu*, 169 F.R.D. 132, 136 (D. Hawaii 1996) (defendants not permitted to inquire into plaintiff's sexual conduct while she was off-duty, outside of the workplace and which did not involve the conduct of the named defendants).

[19] *See Truong*, 183 F.R.D. at 275-76; *Mitchell v. Hutchings*, 116 F.R.D. 481, 485 (D. Utah 1987); *Donohue*, 746 F. Supp. 2d at 666-67; *Mackelprang v. Fid. Nat'l Title Agency of Nev.*, Civ. No. 2:06-cv-00788, 2007 WL 119149, *2-9 (D. Nev. Jan. 9, 2007) (precluding social media discovery into private email messages on the suspicion that they may contain sexually explicit or promiscuous content).

[20] *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000) ("[w]hether 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.").

[21] *EEOC v. Wal-Mart Stores*, Civ. Nos. 97-2229, 97-2252, 1999 WL 1032963, *3 (10th Cir. Nov. 15, 1999) (quoting *Winsor v. Hinckley Dodge*, 79 F.3d 996, 1001 (10th Cir. 1996)); *A.W.*, 224 F.R.D. at 26 ("[c]ourts have held…that the probative value of evidence of a victim's sexual sophistication or private sexual behavior with regard to the welcomeness of harassing behavior in the workplace does not substantially outweigh the prejudice to her." (quoting *B.K.B. v. Maui Police Dep't*, 276 F. 3d 1091 (9th Cir. 2002)); see also *Morton v. Steven Ford-Mercury of Augusta, Inc.*, 162 F. Supp. 2d 1228, 1239 (D. Kan. 2001) ("use of foul language or sexual innuendo in a consensual setting does not waive [plaintiff's] legal protections against unwelcome harassment." (citing *Rahn v. Junction City Foundry*, 161 F. Supp. 2d 1219 (D. Kan. 2001)); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) ("plaintiff's use of foul language and sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment."), abrogated on other grounds.

[22] *Winsor*, 79 F.3d at 1001 (as discussed, rejecting argument that victim's relationship with one sales manager at work invited the harassment of other salesmen and managers).

[23] *Howard v. Historic Tours of America*, 177 F.R.D. 48, 52 (D.D.C. 1997); *see also Winsor*, 79 F.3d at 1001 (rejecting argument that victim's relationship with one sales manager at work "somehow invited the other salesman's [sexually harassing] conduct."); *Truong*, 183 F.R.D. at 275 ("when both identity of persons and similarity of circumstances are removed, probative value all but disappears.").

[24] ECF No. 80, Civ. No. 14-cv-02206 (D. Colo. June 18, 2015).

[25] *Id.* at Hearing Transcript of June 18, 2015.

[26] *Id*.

[27] *Truong*, 183 F.R.D. at 275.

[28] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986).

[29] *Id.*

[30] *Vinson v. Taylor*, 753 F.2d 141, 146 n. 36 (D.C. Cir. 1985).

[31] *Vinson v. Taylor*, 760 F.2d 1330, 1331 (D.C. Cir. 1985).

[32] *Powell Papers*, 10-1985, *Meritor Savings Bank v. Vinson*, available at Washington & Lee University School of Law Scholarly Commons, Supreme Court Case Files, https://scholarlycommons.law.wlu.edu/casefiles/244/.

[33] *Mackelprang v. Fid. Nat'l Title Agency of Nevada*, 2007 WL 119149, at *3.

[34] *Id*. at *2.

[35] *Id*. at *3.

[36] Available at https://leg.colorado.gov/sites/default/files/2018a_1243_signed.pdf.