

NOTE

PROTECTING THE PRIVACY OF SEXUAL HARASSMENT PLAINTIFFS: THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND RECOVERY OF EMOTIONAL DISTRESS DAMAGES UNDER THE CIVIL RIGHTS ACT OF 1991

I. INTRODUCTION

The woman in the sexual harassment suit should be a virgin who attended church every Sunday, only ten thousand miles on her back and forth to the pew. Her immaculate house is bleached with chlorine tears. The woman in the sexual harassment suit should never have known a man other than her father who kissed her only on the cheek, and the minister who patted her head with his gloves on. The woman in the sexual harassment suit is visited by female angels only, has a platinum hymen protected by Brinks, is white of course as unpainted plaster, naturally blonde and speaks only English. The woman in the sexual harassment suit wears white cotton blouses buttoned to the throat, small pearl clip-on earrings, grey or blue suits and one inch heels with nylons. Her nails and lips are pink. If you are other than we have described above, please do not bother to complain. You are not a lady. We cannot help you. A woman like you simply cannot be harassed.¹

The American legal system subjects women² who bring sexual harassment actions against the creators of their hostile work environments to harsh invasion and assault upon their private selves. The psychological and physical effects of sexual harassment can disable women. Victims of harassment often suffer from depression, nervousness, hysteria, insomnia,

1. Marge Piercy, *The grey flannel sexual harassment suit*, in *WHAT ARE BIG GIRLS MADE OF?* 41-42 (1997).

2. This Note refers to sexual harassment plaintiffs generically as women because the majority of sexual harassment plaintiffs are women who allege sexual harassment by men. Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 521 (1994). However, it is important to note that men may also be subject to workplace sexual harassment.

weight changes, fatigue, nausea, and emotional breakdowns.³ In addition, bringing suit exposes women to intense examinations of their past sexual history, their personal life, and their mental stability.⁴ To tear further into the lives of sexual harassment victims, defendants will often request disclosure of plaintiffs' mental health records.⁵

The Supreme Court established the psychotherapist-patient privilege to protect against the undue invasion into therapy relationships built upon confidentiality and trust.⁶ Although the Supreme Court created this privilege to ensure protection of mental health records, courts have discretion to waive the psychotherapist-patient privilege if they deem it necessary to the cause of action. Courts, however, remain unclear in their determination of whether a claim for emotional distress damages constitutes a waiver of the privilege because the plaintiff has placed her mental state at issue.⁷

Many federal courts have held that a sexual harassment plaintiff seeking compensation for mental distress waives her psychotherapist-patient privilege and exposes her mental health records to examination because she has placed her mental state at issue in the litigation.⁸ Whether damages for emotional distress serve as a waiver is especially important to sexual harassment plaintiffs seeking redress under the Civil Rights Act of 1991.⁹ The amended act allows a victim of sexual harassment to recover compensatory damages for mental anguish and emotional distress resulting from a hostile work environment.¹⁰ Although Congress enacted Title VII to create redress for civil rights grievances, many courts treat the damages provision as an additional tort-based claim, requiring additional evidence of a

3. Patricia Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, in 4 WORKING WOMEN'S INSTITUTE RESEARCH SERIES REPORT NO. 3 (1979). See also CARROLL M. BRODSKY, *THE HARASSED WORKER* 40 (1976).

4. Ann Davis, *Ruling May Halt Defense Strategy of Using Plaintiffs' Pasts in Suit*, WALL ST. J., Dec. 29, 1997, at B5 (quoting a defense attorney asserting that inquiry into a plaintiff's life history is necessary because "the company has the right to see what else has happened in [her] life" when she is seeking damages for emotional distress stemming from alleged harassment).

5. For a more detailed discussion of judicial determinations concerning a defendant's request for disclosure of a plaintiff's mental health records, see *infra* Part III.B.

6. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996). For a detailed discussion of the case and its creation of a federal psychotherapist-patient privilege, see *infra* Part III.A.

7. For a discussion of judicial determinations of claims for emotional distress damages as waivers of the psychotherapist-patient privilege, see *infra* Parts III.B.1-2.

8. For a description of the rationale of courts that have addressed the damages provision of the Civil Rights Act of 1991, see *infra* Part III.B.3.

9. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (codified as 42 U.S.C. § 1981a (1994)).

10. 42 U.S.C. § 1981a(a)-(b) (1994). See also H.R. Rep. No. 40(I), 102d Cong., 64-65 (1991), reprinted in 1991 U.S.C.C.A.N. (105 Stat.) 49, 602-03 (detailing the rationale for amending the damages provisions of Title VII).

sexual harassment plaintiff's emotional distress.¹¹

No consensus exists for finding waiver of the privilege. Therefore, this Note proposes that in cases filed under the Civil Rights Act of 1991, courts considering waiver of the psychotherapist-patient privilege should carefully balance the costs and benefits of opening mental health records to scrutiny. In most instances, this balancing test will favor protection of the sexual harassment plaintiff over waiver of the privilege. Part II of this Note examines the development of the sexual harassment cause of action, describing how the law has advanced from not recognizing sexual harassment to addressing the universal problem of gender-based discrimination. Part II explores the historical development of the federally recognized psychotherapist-patient privilege. This part focuses on how courts addressing emotional distress claims resulting from employment discrimination have resolved the waiver issue. It also notes that although only a few courts have addressed emotional distress damages under the Civil Rights Act of 1991 for sexual harassment, there is no clear consensus among the courts for finding a waiver of the psychotherapist-patient privilege.

Part IV discusses provisions in the Federal Rules that, like the psychotherapist-patient privilege, are designed to protect the sexual harassment plaintiff from undue invasion of privacy. This part analyzes both Federal Rule of Civil Procedure 35¹² and Federal Rule of Evidence 412¹³ and how those Rules protect the sexual harassment plaintiff's privacy in a Title VII action. This analysis is important because it demonstrates why courts determining whether the psychotherapist-patient privilege should be waived should follow the guidance of the Federal Rules' protection of the privacy of the sexual harassment plaintiff. Part V enumerates factors that courts should consider when determining waiver of the psychotherapist-patient privilege. This part argues that the social policies contained in the Civil Rights Act of 1991, the comparable judicial policies recognizing protection of the sexual harassment victim, and the privacy interests of the plaintiffs outweigh the probative value of the mental health records to the defendant and the judicial fact-finding process. Part V then proposes measures to reconcile the sexual harassment plaintiff's right to privacy with the defendant's right to address sexual harassment claims.

11. For a more complete discussion of the treatment of the damages provision in the Civil Rights Act of 1991, see *infra* Part III.B.3.

12. FED. R. CIV. P. 35.

13. FED. R. EVID. 412.

II. THE DEVELOPMENT OF THE SEXUAL HARASSMENT CAUSE OF ACTION

Litigation of the sexual harassment claim has developed as a legal cause of action over time. Since women entered into the workforce, they have been subjected to sexual harassment.¹⁴ However, the legal system did not recognize sexual harassment as a problem until the late 1970s.¹⁵ This part will begin by examining the treatment of sexual harassment under the common law. It will then follow the establishment of sexual harassment as sex discrimination under Title VII of the Civil Rights Act of 1964.¹⁶ This part will conclude with a discussion of the Civil Rights Act of 1991 and the intent of the legislature behind its enactment.

A. *Sexual Harassment Claims Under Common Law*

The purpose of tort law is to redress private wrongs.¹⁷ Thus, it would seem natural to find remedies in tort law¹⁸ for the repercussions¹⁹ of sexual harassment. Prior to the recognition of sexual harassment as actionable sex discrimination, common law remedies provided the only compensation for sexual harassment victims.²⁰ However, because even today, no common law tort specifically remedies discrimination, sexual harassment does not fit into a traditional tort category.²¹ Tort law does not provide sexual harassment plaintiffs with backpay, job reinstatement, or injunctive relief against the

14. See KERRY SEGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993* PASSIM (1994) (documenting sexual harassment of working women prior to the industrial revolution).

15. "Sexual harassment" first entered the nation's vocabulary in 1975. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 27, 250 n.13 (1979).

16. 42 U.S.C. § 2000e (1994).

17. A tort is defined as a "private or civil wrong or injury, . . . for which the court will provide a remedy in the form of an action for damages." BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

18. Victims of sexual harassment in the workplace have multiple common law remedies available to them including: "infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, misrepresentation, breach of public policy, implied contract and covenant of good faith and fair dealing, tortious interference with contractual relations, loss of consortium, and negligent hiring or retention." BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 351-52 (1992).

19. See Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1475 (1986) (noting that tort law provides more relief than Title VII when a sexual harassment complainant suffers physical, psychological, or dignitary harm).

20. MACKINNON, *supra* note 15, at 161 (stating that while sex discrimination has a long history in women's lives, the recognition of sexual harassment as sex discrimination lacks a history in the common law).

21. See, e.g., *Smith v. Prudential Fin. Servs., Inc.*, 739 F. Supp. 1042, 1044 (D.S.C. 1990) (recognizing no common law cause of action for sexual harassment).

discriminatory conduct. Therefore, although sexual harassment plaintiffs have used tort actions to recover compensatory and punitive damages not fully available under Title VII,²² the common law has not produced the means to enable victims of workplace sexual harassment to combat their harassment in one cohesive action.²³

Before the creation of the sexual harassment cause of action, women brought claims for assault and battery and intentional infliction of emotional distress against their harassers.²⁴ However, these tort actions insufficiently rectify workplace discrimination. Such discrimination often consists of verbal harassment without threatened or actual contact, which is required in order to recover assault and battery damages.²⁵ Victims of verbal abuse can also seek redress for creation of a hostile work environment in actions for intentional infliction of emotional distress.²⁶ Although each of the tort actions confer damages for some harm caused, these claims do not make victims of sexual harassment whole because women cannot recover for societal sex discrimination perpetrated by their harassers.

The common law fails to address fully the social issues surrounding the sexual harassment of women in the workplace. Even if a specific tort action existed for sexual harassment in the workplace, it would only address the personal effect on the victim²⁷ rather than the societal problem that led to the harm alleged.²⁸ If the law recognizes sexual harassment only as an individual

22. *See, e.g.*, *Phillips v. Smalley Maintenance Servs., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983) (accepting jurisdiction over state law claims pendant to plaintiff's Title VII claim).

23. Schoenheider, *supra* note 19, at 1485-94 (proposing the adoption of a specific tort claim for sexual harassment because of the incomplete remedies provided by tort law and Title VII).

24. *See, e.g.*, *Ragsdale v. Ezell*, 49 S.W. 775, 776 (Ky. 1899) (finding assault and battery when a man squeezed a woman's breast and touched her face); *Martin v. Jansen*, 193 P. 674 (Wash. 1920) (awarding damages to a woman who claimed the defendant lewdly and lasciviously fondled her without consent).

25. Assault occurs when a person "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . the other is thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21 (1965). Battery requires unwelcome intentional contact that is harmful or offensive. *Id.* § 18.

26. Intentional infliction of emotional distress occurs when an individual acts outrageously, and in so doing, intentionally or recklessly inflicts severe emotional distress upon another. *Id.* § 46.

27. MacKinnon writes:

[S]uggestions that sexual harassment be treated as a tort—a private harm—applies, unstated, the view that the interest to be protected is not so much an interest of women as a sex in employment opportunities as it is a personal interest. Torts best redress injuries to one's person, here to individual sexuality as an aspect of the self, rather than to public and shared social existence, here sex in employment.

MACKINNON, *supra* note 15, at 88.

28. MacKinnon notes:

To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment, by treating the incidents as if they are outrages

cause of action, (that is, one employer's treatment of one woman), then it fails to address the gender discrimination pervasive throughout society that connects with sexual harassment and hinders the advancement of women in employment.²⁹ The creation of a specific legal cause of action that recognizes sexual harassment will acknowledge that the sex discrimination permeating society infiltrates the workplace. To aid in the recognition of sexual harassment as pervasive sex discrimination throughout society, Catherine MacKinnon and other feminist scholars argued for a legal cause of action for sexual harassment under federal civil rights law.³⁰

B. Sexual Harassment as Sex Discrimination Under Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sex,³¹ race, color, religion, or national origin.³² Because courts lacked legislative guidance as to what constituted discrimination based on gender,³³ federal courts initially held that sexual

particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.

MACKINNON, *supra* note 15, at 88.

29. In the workforce, women remain concentrated in traditional "pink-collar" occupations. *See* J. RALPH LINDGREN & NADINE TAUB, *THE LAW OF SEX DISCRIMINATION* 235-41 (1988). The disparity of women's wages compared to men's wages for the same or comparable job is another problem. While the earnings gap has diminished somewhat over the past two decades, women earned 75.4% of what men earned in 1992. *THE AMERICAN WOMAN 1994-1995*, at 308-09 (Cynthia Costello & Anne J. Stone eds., 1994) (citing Bureau of Labor Statistics, *Employment and Earnings* tbl. 56 (1993)).

30. *See* Cass Sunstein, *Feminism and Legal Theory*, 101 *HARV. L. REV.* 826, 829 (1988) (reviewing CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)). The idea that sexual harassment is a form of sex discrimination, "for which MacKinnon is given too little credit, seemed bizarre and radical to many when initially put forward. Remarkably, MacKinnon's basic position was accepted in 1986 by every member of the Supreme Court . . ." *Id.* For an assessment of the impact of sexual harassment of working women, see Holly B. Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 *U. MICH. J.L. REFORM* 475 (1990).

31. One commentator wrote the following:

The statute's prohibition on gender discrimination was a last minute addition, made through an amendment on the floor of the House of Representatives. The amendment, adding 'sex' to Title VII's list of prohibited bases for discrimination, was proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill.

Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 *GEO. L.J.* 399, 409 n.62 (1996).

32. 42 U.S.C. § 2000e-2(a) (1994) states that "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

33. *See* *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."). *See also* Meritor Sav.

harassment was not sex discrimination under Title VII. Although most courts were reluctant to define sexual harassment as sex-based discrimination, one district court in 1976³⁴ found that sexual harassment violates Title VII. Other courts began to follow suit.³⁵

1. *Quid Pro Quo Sexual Harassment*

The first claims actionable under Title VII were for quid pro quo sexual harassment when an employer conditions an employment practice upon sexual relations.³⁶ In quid pro quo sexual harassment, an employer or fellow employee either makes sexual activity a condition of a woman's employment or affects the employment status of a woman who refuses sexual activity.³⁷ Women whose supervisors had fired them for refusing sexual advances brought the first successful Title VII quid pro quo sexual harassment suits.³⁸

2. *Hostile Work Environment Sexual Harassment*

In the 1980s, courts found that a sexual harassment claim might exist when an employer creates or condones a substantially discriminatory work environment regardless of whether the complainant lost tangible job benefits as a result of the harassing environment.³⁹ In 1982, the Court of Appeals for

Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (stating that the last minute addition of sex-based discrimination to Title VII left the Court with "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

34. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (holding that retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitute sex discrimination under Title VII of the Civil Rights Act).

35. See, e.g., Tomkins v. Pub. Serv. Elec. Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032 (4th Cir. 1977).

36. "If an employer threatens to dismiss, demote, or eliminate some employment opportunity unless the employee engages in sexual relations, the employer violates Title VII. Similarly, promising an employee an employment opportunity in exchange for sexual relations is a violation." Fechner, *supra* note 30, at 488-89.

37. The Equal Employment Opportunity Commission states:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

EEOC 1980 Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1995).

38. See, e.g., Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (finding that plaintiff was harassed and fired for refusing supervisor's sexual demands); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (finding that complainant's job that was abolished after refusing to accept superior's sexual advances constituted quid pro quo harassment).

39. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d

the Eleventh Circuit in *Henson v. City of Dundee*⁴⁰ defined the elements of a prima facie hostile work environment case: (1) the employee belongs to a protected group,⁴¹ (2) the employee was subjected to unwelcome conduct of a sexual nature, (3) the harassment was based on sex, (4) the harassment affected a term or condition of employment,⁴² and (5) the employer is responsible for the harassment. The Supreme Court in *Meritor Savings Bank v. Vinson*⁴³ held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment.”⁴⁴ To establish the hostility of a work environment, the sexual harassment must be both unwelcome⁴⁵ and sufficiently pervasive to alter the conditions of employment.

In 1993, in *Harris v. Forklift Systems, Inc.*,⁴⁶ the Supreme Court further defined the requirements of proving a hostile work environment under Title VII.⁴⁷ Because Title VII does not require mental injury, the Court rejected inquiry into a plaintiff’s “concrete psychological harm, an element Title VII does not require.”⁴⁸ Instead of examining the mental injury suffered by the

934 (D.C. Cir. 1981). EEOC 1980 Guidelines on Sexual Harassment instruct that “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a)(3).

40. 682 F.2d 897, 903-04 (11th Cir. 1982).

41. *Id.* at 903 (following the guidance of the Civil Rights Act of 1964, a plaintiff belongs to a protected class if the individual suffers discrimination due to his or her race, color, religion, sex or national origin).

42. *Id.* at 904 (holding that psychological well-being is a term, condition, or privilege of employment).

43. 477 U.S. 57 (1986).

44. *Id.* at 66.

45. “The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

46. 510 U.S. 17 (1993).

47. Prior to the Supreme Court’s decision in *Harris*, there was a split in the circuits concerning how hostile a defendant’s actions, or how severe a plaintiff’s injury, had to be to recover under Title VII. In *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), the Sixth Circuit applied a two-part test for evaluating a hostile work environment. The court held that the plaintiff must prove (1) that the harasser’s conduct was objectively unreasonable and would “affect seriously the psychological well-being of [a] reasonable person under like circumstances” and (2) that the plaintiff suffered “some degree of injury as a result of the abusive and hostile work environment.” *Id.* at 620. The EEOC specifically disagreed with the *Rabidue* approach to examining a hostile work environment claim, stating that a plaintiff need not prove actual psychological injury to state a claim. EEOC Policy Guidelines on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, 405:6690 n.20 (Mar. 19, 1990).

Following the EEOC’s recommendations, the Ninth Circuit in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), found that the proper focus for the determination of a hostile work environment is on the harasser’s conduct rather than evidence of injury to the accuser. The court stated that “Title VII’s protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.” *Id.* at 878.

48. *Harris*, 510 U.S. at 22.

victim, Title VII focuses on the employer's conduct to determine whether it created an objectively⁴⁹ hostile or abusive work environment⁵⁰ and whether the plaintiff subjectively perceived a hostile work environment.⁵¹ By refusing to place the sexual harassment plaintiff's mental health under a microscope, the Court further tailored the means by which Title VII would work for the eradication of workplace sex discrimination.⁵²

C. *The Civil Rights Act of 1991*

Title VII originally permitted a prevailing plaintiff to recover back pay, job reinstatement, an injunction against the discriminatory conduct,⁵³ and certain litigation costs.⁵⁴ However, many sexual harassment victims found that bringing a Title VII action against an employer did not compensate for the embarrassment, humiliation, and other psychological problems that they suffered due to the sexual harassment.⁵⁵

In 1991, Congress amended the Civil Rights Act to allow victims of sexual harassment to recover compensatory damages.⁵⁶ Since its amendment, prevailing plaintiffs in a claim for intentional discrimination under Title VII may seek compensatory damages for "emotional pain, suffering,

49. The circuit courts are split on what test is appropriate for determining an objectively hostile work environment. Some courts apply a reasonable woman standard. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). Other courts apply a reasonable person standard. *Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170 (2d Cir. 1996); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995); *Hirschfeld v. N.M. Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *superseded on other grounds*, 900 F.2d 27 (4th Cir. 1990); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

50. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21.

51. *Id.*

52. Kent D. Streseman, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1289 (1995).

The "actual injury" test compromised Title VII's power to transform workplaces by unduly focusing inquiry on the mental fortitude of discrimination victims. *Harris* cements the notion that a primary aim of Title VII is to eradicate gender-based hostility from the workplace, and that judicial inquiry in sexual harassment actions must focus on that goal.

Id. (footnote omitted).

53. 42 U.S.C. § 2000e-5(g) (1988).

54. *Id.* § 2000e-5(k).

55. See LINDEMANN & KADUE, *supra* note 18. Victims of sexual harassment experience more than losing their jobs or salaries. They often suffer severe psychological and physical consequences that are not addressed by the Civil Rights Act of 1964. *See id.*

56. 42 U.S.C. §§ 1981a(a), (b) (1994).

inconvenience, mental anguish, [and] loss of enjoyment of life.”⁵⁷ In enacting the Civil Rights Act of 1991, Congress intended for “citizens to act as private attorneys general”⁵⁸ working against workplace discrimination. Victims of sexual harassment would be made whole⁵⁹ by recovering compensatory damages for the “terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”⁶⁰ However, to recover compensatory damages, plaintiffs must “prove actual injury or loss.”⁶¹ Because the Civil Rights Act of 1991 puts mental injury at issue, this requirement may operate as a waiver of the federal psychotherapist-patient privilege for analysis of a sexual harassment plaintiff’s mental health records.⁶²

III. JUDICIAL REGULATION OF THE FEDERAL PSYCHOTHERAPIST-PATIENT PRIVILEGE

The requirement that Title VII sexual harassment plaintiffs prove actual mental anguish to recover compensatory damages harms the protective purpose of the psychotherapist-patient privilege. Defendants will move to waive the privilege and delve into the mental health history of their accusers to attempt to debunk the claims of emotional distress.⁶³ To access the mental

57. Under the Civil Rights Act of 1991, the total amount of compensatory damages awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the total punitive damages awarded for each complaining party shall not exceed: (1) \$50,000 for employers with more than 14 and fewer than 101 employees, (2) \$200,000, for employers with more than 200 and fewer than 501 employees, and (3) \$300,000 for employers with more than 500 employees. *See* 42 U.S.C. § 1981a(b)(3).

58. H.R. REP. NO. 102-40(D), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

59. *Id.* The House of Representatives Committee on Education and Labor recognized the need for monetary damages as a means “mak[ing]discrimination victims whole.” *Id.* “All too frequently Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability.” *Id.* at 68, *reprinted in* 1991 U.S.C.C.A.N. 549, 606.

60. *Id.* at 65, *reprinted in* 1991 U.S.C.C.A.N. 549, 603. “Victims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination.” *Id.* at 66, *reprinted in* 1991 U.S.C.C.A.N. 549, 604.

61. *Id.* at 72, *reprinted in* 1991 U.S.C.C.A.N. at 549, 606 (emphasis removed). “Strict standards limit the recovery of damages by plaintiffs with meritorious claims. Plaintiffs must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages.” *Id.* (emphasis added).

62. For a discussion of the treatment of waiver of the psychotherapist-patient privilege in a damages claim under the Civil Rights Act of 1991, see *infra* Part III.B.3.

63. Defendants might use the mental health records of their accusers to establish that psychological injury existed prior to the harassment. Defendants could use these records to allege either that their victims were overly sensitive due to other mental health problems, or that the victims were trying to get compensation for emotional damages stemming from previous occurrences.

health records of an adverse party, the movant must show that the adverse party has waived the federal psychotherapist-patient privilege.⁶⁴ Federal courts have held that plaintiffs who claim damages for emotional distress place their mental state at issue and thereby constructively waive their privileges over their mental health records.⁶⁵ However, the courts have failed to answer definitively the question of whether a Title VII claim of gender-based discrimination serves as a waiver of the psychotherapist-patient privilege.⁶⁶

A. *Development of the Federal Psychotherapist-Patient Privilege*

Federal Rule of Evidence 501 mandates that federal privilege⁶⁷ law “shall be governed by the principles of the common law . . . in light of reason and experience.”⁶⁸ Federal Rule 501 fails to recognize a specific psychotherapist-privilege. Nine specific privileges,⁶⁹ however, were included in the original draft of the Federal Rules.⁷⁰ Because Rule 501 fails to establish guidelines concerning specific privileges, federal courts adopted different means for adjudication of the psychotherapist-patient privilege claims.⁷¹

64. *Jaffee v. Redmond*, 518 U.S. 1, 15 n.14 (1996).

65. *See infra* Parts III.B.1-2.

66. *See infra* Part III.B.3.

67. A privilege is “a rule that gives a person a right to refuse to disclose information to a tribunal that would otherwise be entitled to demand and make use of that information in performing its assigned function.” 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5422, at 667 (1980).

68. Federal Rule of Evidence 501 provides in full:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

69. The nine specific privileges contained in the original Federal Rules are: privilege for statutorily privileged required reports, attorney and client privilege, psychotherapist and patient privilege, husband and wife privilege, communications to clergy privilege, political vote privilege, trade secrets privilege, secret of state privilege, and identity of informer privilege. 46 F.R.D. 161, 248-79 (1969). The psychotherapist-patient privilege was originally contained in Proposed Rule 504. The Proposed Federal Rule 504 defined the terms “confidential”, “psychotherapist”, and “patient”. The Rule stated the general rule of psychotherapist-patient privilege, who could claim the privilege, and three exceptions to the general rule. *Id.* at 257-59.

70. *Id.* at 243-84.

71. Federal courts exhibited confusion over the existence of a federal psychotherapist-patient privilege under Federal Rule of Evidence 501. The Fifth, Eleventh, and Ninth Circuits refused to recognize a psychotherapist-patient privilege under federal law because it did not exist at common law. Three other circuits applied a balancing test to determine the relevance of the psychological records

In *Jaffee v. Redmond*,⁷² the Supreme Court established an absolute federal psychotherapist-patient privilege.⁷³ The Court compared the psychotherapist-patient privilege to both the attorney-client⁷⁴ and spousal⁷⁵ privileges and reasoned that all three are “‘rooted’ in the imperative need for confidence and trust.”⁷⁶ The Court focused on a patient’s willingness to disclose fully facts and feelings for successful psychotherapy and noted that the possibility of disclosure might hinder the communication between patients and psychotherapists.⁷⁷ The decision in *Jaffee* rejected balancing the patient’s privacy interest with evidentiary need⁷⁸ and established that the

compared to the plaintiff’s right to privacy.

In *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976), the Fifth Circuit stated that “[a]t common law, no physician-patient privilege existed and, therefore, we recognize no such privilege.” Similarly, the Eleventh Circuit in *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), held that because the common law does not create any type of physician-patient privilege, the court would not recognize the psychotherapist privilege. Finally, the Ninth Circuit held that the psychotherapist-patient privilege “does not exist at common law. Because our discretion under Rule 501 is limited to the development of privileges extant in the common law, we affirm the district court’s denial of the motion to quash subpoenas of Doe’s psychiatric records.” *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989).

Comparatively, the Sixth, Second, and Tenth Circuit each employed a balancing test in their case-by-case determination of whether the psychotherapist-patient privilege was existed. In *Zuniga v. Pierce*, 714 F.2d 632 (6th Cir. 1983), the Sixth Circuit focused on the necessity of therapeutic relationships in its determination of the existence of a psychotherapist-patient privilege. The court found that society’s interests in successful psychotherapy “outweigh the need for evidence in the administration of criminal justice.” *Id.* at 639. The Second Circuit in *United States v. Diamond*, 964 F.2d 1325 (2d Cir. 1992), employed a balancing test to recognize a “highly qualified” psychotherapist-patient privilege. *Id.* at 1328. The court rationalized that in its case-by-case determination “the privilege amounts only to a requirement that a court give consideration to [an individual’s] privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses.” *Id.* at 1329. Similarly, in *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994), the Tenth Circuit employed a balancing test in its case-by-case determination of the existence of a psychotherapist-patient privilege

72. *Jaffee v. Redmond*, 518 U.S. 1 (1995).

73. *Id.* at 8-10. The Supreme Court affirmed the Seventh Circuit’s recognition of the federal psychotherapist-patient privilege. *Id.* (citing *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995)).

74. The purpose of the attorney-client privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

75. The spousal privilege “furthers the important public interest in marital harmony.” *Trammel v. United States*, 445 U.S. 40, 53 (1980).

76. *Jaffee*, 518 U.S. at 10 (quoting *Trammel*, 445 U.S. at 51).

77. “Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Jaffee*, 518 U.S. at 10.

78. 518 U.S. at 17-18.

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of

psychotherapist-patient privilege could not be qualified by consideration of evidentiary need.⁷⁹

B. Judicial Determination of Claims of Emotional Distress as Waiver of the Federal Psychotherapist-Patient Privilege

The *Jaffee* court stated that “like other testimonial privileges, the patient may of course waive the protection”⁸⁰ of the psychotherapist-patient privilege. However, the Court provided no guidance on the question of how a waiver might occur.⁸¹ The Court also failed to address whether a mental-state-at-issue claim constitutes a waiver of the privilege.⁸² The only example the Court provided of a situation in which the privilege must yield is when a patient or others could avoid a serious threat of harm by the therapist’s disclosure.⁸³

1. Claiming Emotional Distress Damages and Waiving Your Psychotherapist-Patient Privilege

Following the establishment of the federal psychotherapist-patient privilege, several courts have found that a plaintiff automatically waives her privilege by bringing damages claims for emotional distress related to employment discrimination.⁸⁴ In finding waiver of privilege, the court in

the privilege is to be served, the participants in the confidential communication “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

Id. (citing *Upjohn v. United States*, 449 U.S. 383, 386 (1981)).

79. *Id.* at 11-12.

80. *Id.* at 15 n.14.

81. *See id.*

82. Federal courts accept the rule that plaintiffs who claim damages for emotional distress place their mental state at issue and thereby waive their privilege in communications with their psychotherapist. *See, e.g.*, *Topol v. Trustees of Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995).

83. *Jaffee*, 518 U.S. at 18 n.19. *See* Alexandra P. West, *Implying Plaintiffs’ Waivers of the Psychotherapist-Patient Privilege After Jaffee v. Redmond*, 59 U. PITT. L. REV. 901, 905 (1998). The Supreme Court’s has stated that one potential example waiving the psychotherapist-patient privilege might be when “the extreme nature of the situation lends support to the argument that courts should give the privilege substantial weight in the waiver formula.” *Id.*

84. *See, e.g.*, *Sidor v. Reno*, 1998 WL 164823, at *2 n.3 (S.D.N.Y. Apr. 7, 1998) (holding that “while not dispositive,” the greater number of cases have found waiver of the psychotherapist-patient privilege by seeking damages for emotional distress); *McKenna v. Cruz*, 1998 WL 809533, at *2 (S.D.N.Y.) (finding a waiver of privilege because the majority of post-*Jaffee* cases hold that any claim for emotional or psychological injury waives the privilege); *Kerman v. City of New York*, 1997 WL 666261, at *3 (S.D.N.Y.) (relying on the multiple courts, that have applied the exception of proposed Federal Rule of Evidence 504 and holding that privilege is waived when a plaintiff places her mental condition at issue).

*Sarko v. Penn-Dell Directory Co.*⁸⁵ relied upon *Jaffee's* analogy of the psychotherapist-patient privilege to the attorney-client privilege,⁸⁶ which is waived when the advice of counsel is placed at issue.⁸⁷ In *Sarko*, the U.S. District Court for the Eastern District of Pennsylvania reasoned that "allowing a plaintiff 'to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.'"⁸⁸ One year later, in *Fox v. Gates Corp.*,⁸⁹ the U.S. District Court for the District of Colorado waived the psychotherapist-patient privilege after relying upon the exception⁹⁰ provided in the Proposed Federal Rule of Evidence 504 that "there is no privilege as to communications relevant to the mental or emotional condition of the patient in any proceeding in which the patient relies on the condition as an element of the patient's claim or defense."⁹¹ The rationale of the Eastern District of Pennsylvania, in finding waiver of the privilege in *Lanning v. Southeastern Pennsylvania Transportation Authority*,⁹² rested simply on the fact that

85. *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 127 (E.D. Pa. 1997). The plaintiff alleged that her former employer had not made reasonable accommodations for her clinical depression. *Id.* Plaintiff brought suit under the Americans with Disabilities Act. *Id.* at 129. She alleged that it was difficult for her to wake up in the morning due to the medication prescribed to treat her condition and that her employer fired her for coming to work late due to her disability. *Id.*

86. "[T]he Supreme Court specifically analogized the policy considerations supporting recognition of privilege in *Jaffee* to those underlying the attorney-client privilege." 170 F.R.D. at 130.

87. The court reasoned that, like the attorney-client privilege, the psychotherapist-patient privilege would be waived when the patient places her mental condition at issue. *Id.* The court held that the plaintiff waived the psychotherapist-patient privilege because she placed her mental condition directly at issue. *Id.* The court determined that the plaintiff's contention, that she was a member of a protected class due to her clinical depression, placed her mental condition directly at issue. *Id.* The plaintiff's medical records are necessary to determine whether she suffered from clinical depression and whether her condition necessitated medication. *Id.*

88. *Id.* at 130 (quoting *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993)).

89. *Fox v. Gates Corp.*, 179 F.R.D. 303 (D. Colo. 1998). Plaintiff sought compensatory damages for emotional distress, pain and suffering, humiliation, embarrassment, and anguish in connection with her claim under the Americans with Disabilities Act. *Id.* at 304. The court held that the plaintiff had waived her psychotherapist-patient privilege to her mental health records by bringing a claim for emotional distress damages along with her employment discrimination action. *Id.* Although the plaintiff had no intention of calling her health care providers to testify, the court determined that defendants could compel discovery of her mental health records because she had placed her mental condition in issue. *Id.*

90. *Id.* at 305-06. The court relied upon the decision in *Dixon v. City of Lawton*, 898 F.2d 1443 (10th Cir. 1990), which had been decided prior to *Jaffee*. In *Dixon*, the court found that the plaintiff had waived her privilege, "as those communications may lead to the discovery of admissible evidence regarding plaintiff's present claim for emotional distress damages." *Fox*, 179 F.R.D. at 306. The *Fox* court decided that *Jaffee* did not require a different result because the *Dixon* decision had not been determined based upon the balancing test that *Jaffee* overruled. *Id.*

91. *Id.* (quoting proposed FED. R. EVID. 504(d)(3)).

92. 1997 WL 597905 (E.D. Pa. Sept. 17, 1997). The court's decision does not reveal the basis for the plaintiffs' cause of action, except that among the claims was one for emotional distress relating to employment discrimination. *Id.* at *2. The defendant's motion to compel plaintiffs' psychological and

although the plaintiffs stipulated that they would not seek damages for psychological injury or recovery for treatment of emotional distress, and had not alleged an independent claim of emotional distress, their emotional distress damages sufficiently placed their mental state at issue.⁹³

2. *Claiming Emotional Distress Damages?: Additional Circumstances May Waive Your Psychotherapist-Patient Privilege*

Other courts have found that waiver of the federal psychotherapist-patient privilege will not occur merely by bringing claims for emotional distress damages related to employment discrimination.⁹⁴ The U.S. District Court for the District of Massachusetts, in *Vanderbilt v. Town of Chilmark*,⁹⁵ reasoned that the mental state at issue waiver eviscerates the certainty of the existence of the psychotherapist-patient privilege mandated by *Jaffee*.⁹⁶ Because *Jaffee* analogized the psychotherapist-patient privilege to the attorney-client privilege, the *Vanderbilt* court determined that waiver of the privileged

psychiatric records was granted because the court determined that the plaintiffs' mental condition was at issue. *Id.*

93. *Id.* at *2. The court stated that "[d]espite plaintiffs' attempts to limit damages regarding emotional distress, the claim for emotional distress remains a part of plaintiffs' action." *Id.*

94. *See, e.g.,* Jackson v. Chubb Corp., 193 F.R.D. 216, 227 (D.N.J. 2000) (holding that when a plaintiff places her mental condition at issue by asserting other than a "garden-variety" claim, the psychotherapist-patient privilege to current and ongoing mental health records is waived); Booker v. Boston, 1999 WL 734644 at *1 (D. Mass. Sept. 10, 1999) (holding that privilege is not waived by a claim for emotional distress unless the plaintiff makes positive use of the privileged material in the prosecution of her case); Hucko v. City of Oak Forest, 185 F.R.D. 526, 531 (N.D. Ill. 1999) (holding that plaintiff did not waive psychotherapist-patient privilege by seeking emotional distress damages where he did not put at issue the consultations he had or treatments he received from mental health professionals); United States v. Doyle, 1 F. Supp.2d 1187, 1190 (D. Ore. 1998) ("The relevance of an issue to a proceeding does not operate to waive privileges the law confers on protected conversations about that issue. In the typical case, the privilege is waived by the privilege holder's volunteering statements or testimony about the content of the protected communication.").

95. 174 F.R.D. 225 (D. Mass. 1997). Plaintiff was an employee of the Town of Chilmark. *Id.* at 226. She alleged that she was discriminated on the basis of her gender because of a disparity in the wages received by a male employee who was in a comparable position to her. *Id.* She sued the town for violation of federal and state discrimination laws. *Id.* Her complaint sought damages for emotional distress. *Id.* The court stated that it is unclear when a plaintiff has in fact placed her mental state at issue. *Id.* at 228. The court determined that the claim may have placed her mental state at issue, but it did not waive the privileged nature of her communications with her psychotherapist. *Id.* at 230.

96. The court relied upon the statement in *Jaffee* that "[i]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *Id.* at 227 (quoting *Jaffee*, 518 U.S. at 18). The court focused on the differing responses of other courts in determining when and how patients place their mental state at issue. *Vanderbilt*, 174 F.R.D. at 227. Under the differing determinations of the mental state at issue waiver, patients entering therapy would not know with certainty whether their communications would later be privileged. This uncertainty could eviscerate the certainty of the privilege required by *Jaffee*. *Id.* at 229.

communications would occur if the mental health records were an issue in the litigation, not if they were merely relevant.⁹⁷ In *Fritsch v. City of Chula Vista*,⁹⁸ the U.S. District Court for the Southern District of California reasoned that waiver of the privilege occurs only where the patient either calls her therapist as a witness,⁹⁹ or introduces into evidence the substance of any therapist-patient communication.¹⁰⁰ The *Fritsch* court stated: "To hold that merely claiming emotional distress damages in a civil lawsuit would constitute a waiver of the privilege would . . . be contrary to the spirit and clear intent of *Jaffee*"¹⁰¹ that the privilege not be waived easily.¹⁰² In *Ruhmann v. Ulster County Department of Social Services*,¹⁰³ the U.S.

97. The court stated that the attorney-client privilege is waived when the privileged communications are placed at issue in the trial. *Id.* at 229. This is the case when, for example, a client claims reliance on an attorney's advice as a defense or sues her attorney for malpractice. *Id.* However, merely seeking attorney fees does not waive the privilege. *Id.* Similarly, "[a] patient whose cause of action relies on the advice of findings of her psychotherapist cannot claim the privilege." *Id.* at 229. However, seeking damages for emotional distress is similar to seeking attorney's fees. *Id.* "The fact that a privileged communication has taken place may be relevant. But the fact that a communication has taken place does not necessarily put its content at issue." *Id.* at 229.

98. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999). The plaintiff, who was a former assistant city attorney, was fired for refusing to submit to a psychiatric evaluation. *Id.* at 615. The plaintiff alleged employment discrimination under the Americans with Disabilities Act and retaliatory action. The plaintiff also alleged violation of the California Fair Employment and Housing Act, invasion of privacy, breach of an implied contract of employment, and defamation. *Id.*

99. *See, e.g., Doolittle v. Ruffo*, 1997 WL 151799 (N.D.N.Y. Mar. 31, 1997). The plaintiff moved for the return of all medical, hospital, and psychological records pertaining to the case. *Id.* at *1. She also moved the court to reverse an earlier order permitting the defendants to use deposition testimony and records of the plaintiff's therapist. *Id.* The court stated that "[f]rom the outset [the plaintiff] has argued that defendants' actions caused her to suffer a breakdown which has prevented her from returning to work." *Id.* at *2. In addition, the court stated that plaintiff's intention to call her therapist to testify at trial and the extreme nature of her emotional damages claims necessitated a waiver of the psychotherapist-patient privilege. *Id.* at *3.

100. *Fritsch*, 187 F.R.D. at 629. After an extensive review of the post-*Jaffee* cases addressing when a court can compel discovery of a patient's privileged communications with a psychotherapist, the court determined that a number of other courts found waiver when the party intended to call the therapist as a witness, when the substance of the communications were at issue, or when the patients claimed that they suffered from a mental illness. *Id.* The court reasoned that in *Sarko*, *Doolittle*, and *Kirchner*, fairness required a finding of waiver of privilege to the communications. *Id.* However, the *Fritsch* court determined that these courts did not give enough weight to the psychotherapist-patient privilege because they determined that the privilege was waived because the mental state was "at issue," rather than looking to the facts of the case. *Id.*

101. *Id.* at 630.

102. The *Jaffee* court intended for the federal psychotherapist-patient privilege to create confidential relationships for successful treatment. *Id.* It intended the privilege to be reliable for the good of the patients, rather than easily waived to allow "fishing expeditions" that might discover whether or not evidence of psychological injury existed. *Id.* at 631.

103. 194 F.R.D. 445 (N.D.N.Y. 2000). A former employee took a leave from his position at the county department of social services and brought suit against the department for disability discrimination in violation of the Americans with Disabilities Act. *Id.* at 446-47. Plaintiff alleged that the county defendants perceived him to be disabled and discriminated against him based upon that perceived disability. *Id.* at 446. Defendants sought plaintiff's medical and psychiatric records. *Id.*

District Court for the Northern District of New York held that a plaintiff does not put her mental condition in issue by merely seeking incidental “garden-variety”¹⁰⁴ emotional distress damages.¹⁰⁵ The court stated: “To condition recovery for emotional distress incidental to the violation of federal constitutional and statutory rights upon the surrender of the protection of the psychotherapist privilege is also antithetical to the purpose of the laws that provide redress for such violations.”¹⁰⁶

3. *Psychotherapist-Patient Privilege and Emotional Distress Damages Under the Civil Rights Act of 1991: No Clear Consensus*

Very little case law exists concerning the application of the federal psychotherapist-patient privilege in Title VII sexual harassment claims for emotional distress damages. A number of courts have reasoned that a claim for emotional distress damages serves as an automatic waiver of privilege because the plaintiff has put her mental state at issue.¹⁰⁷ In *Equal Employment Opportunity Commission v. Danka Industries, Inc.*,¹⁰⁸ the U.S. District Court for the Eastern District of Missouri reasoned that the plaintiffs mental condition is significantly related to the issue of damages so as to waive the psychotherapist-patient privilege because they sought damages for emotional distress resulting from the alleged sexual harassment.¹⁰⁹ The U.S.

104. The court stated as follows:

“Garden variety” means ordinary or commonplace. Garden-variety emotional distress, therefore, is ordinary or commonplace emotional distress. Garden-variety emotional distress is that which simple or usual. In contrast, emotional distress that is not garden-variety may be complex, such as that resulting in a specific psychiatric disorder, or may be unusual, such as to disable one from working.

Id. at 449 n.6 (citations omitted).

105. 194 F.R.D. at 449-50.

106. *Id.* at 451. “Moreover, a finding that seeking incidental emotional distress damages places mental condition at issue, requiring a plaintiff to disclose psychotherapist communications would be inconsistent with the purpose of the psychotherapist-patient privilege.” *Id.*

107. *See, e.g.,* Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000) (relying on case law espousing different views and without analysis, holding that a claim under the Civil Rights Act of 1991 places mental condition at issue, waiving the psychotherapist-patient privilege).

108. 990 F. Supp. 1138 (E.D. Mo. 1997). The EEOC and employees brought a sexual harassment action against their employers under Title VII alleging that a supervisor had committed verbal and physical acts of sexual harassment. *Id.* at 1140. Citing *Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc.*, 976 F. Supp. 346, 349-50 (C.D. Ill. 1997), and *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Pa. 1997), the court observed that other courts have found waiver of the privilege when the patient’s mental condition is made an issue in the litigation. *Id.* at 1142. The court held that a Title VII emotional distress claim for sexual harassment places a patient’s mental condition at issue in the litigation, so as to waive the privilege. *Id.*

109. The court stated that the mental condition of the plaintiffs is directly related to the damages they seek. *Id.* at 1142. “Defendant is entitled to discover to what extent the plaintiffs’ mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which

District Court for the Northern District of New York, in *Cleveland v. International Paper, Co.*,¹¹⁰ reasoned that because the plaintiff sought compensation based on her emotional distress from the alleged sexual harassment, it should waive the privileged communications between plaintiff and her therapist in order to determine whether prior psychological damage influenced her subjective perceptions of the harassment.¹¹¹

Comparatively, other courts have found that waiver of the psychotherapist-patient privilege will only occur with the addition of other claims to the civil rights action or the introduction of the therapist's and patient's mental health records as evidence.¹¹² The U.S. District Court for the District of Maryland, in *Vasconcellos v. Cybex International, Inc.*,¹¹³ balanced the claims brought by a plaintiff in sexual harassment litigation against the defendant's evidentiary need of mental health records. The court concluded that if the plaintiff withdrew the additional damages claims for severe emotional pain and suffering,¹¹⁴ no waiver of the privileged nature of the communications would occur¹¹⁵ because her mental state was no longer at issue. The court refused to grant the defendant's motion to compel the plaintiff's privileged mental health records because the plaintiff has a privacy

they now seek [damages]." *Id.*

110. 1997 WL 309408 (N.D.N.Y. June 5, 1997).

111. *Id.* at *2. "Defendant is entitled to information tending to show that Cleveland's alleged emotional distress 'was caused at least in part by events and circumstances that were not job related.'" *Id.* (citing *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 223 (S.D.N.Y. 1994)). Therefore, the court granted discovery of the plaintiff's mental health records. *Int'l Paper Co.*, 1997 WL 309408, at *2.

112. *See, e.g., Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc.*, 967 F. Supp. 346 (C.D. Ill. 1997). The plaintiff alleged that her former employer had engaged in unwelcome and offensive touching and had made suggestive comments to her. *Id.* at 347. She claimed that as a result of the alleged conduct, she lost her job and suffered emotional injury. *Id.* at 348. Relying on a case decided prior to *Jaffee*, the court determined that because the plaintiff was seeking damages for emotional distress, she had placed her mental condition at issue. *Id.* at 349. In addition, by calling her treating therapist as an expert witness to testify at trial, she waived her privilege to her communications with her therapist. *Id.*

113. 962 F. Supp. 701 (D. Md. 1997). The plaintiff alleged that she had been assaulted and sexually harassed by a co-worker and had required medical treatment for her mental and physical health. *Id.* at 703-04. The plaintiff brought suit for claims of sexual harassment under the Civil Rights Act, intentional infliction of emotional distress, and violations of the Family and Medical Leave Act. *Id.* at 704. The defendant sought to compel discovery of her mental health records. *Id.*

114. The plaintiff's claim for intentional infliction of emotional distress necessitated proof that the plaintiff actually suffered severe emotional distress. *Id.* at 708. The court also reasoned that because plaintiff was requesting a large amount of damages based upon the alleged emotional distress, her mental state was at issue so as to waive the privilege. *Id.*

115. The court stated that the plaintiff had the option to file an amended complaint that would withdraw the claim of intentional infliction of emotional distress as well as the requested damages from that emotional distress. *Id.* at 709. The court cited *Covell v. CNG Transmission Corp.*, 863 F. Supp. 202, 206 (M.D. Pa. 1994), for the proposition that "defendants claim that privilege was waived when mental state was placed in issue was rendered moot by plaintiff's withdrawal of claims for emotional pain and suffering." *Id.*

right to limit the discovery of the defendant to information narrowly tailored to relevant issues of the lawsuit.¹¹⁶ The U.S. District Court for the Northern District of Illinois, in *Allen v. Cook County Sheriff's Department*,¹¹⁷ refused to grant the defendant's motion to compel the mental health records of a sexual harassment plaintiff because she had not placed the substance of her communications at issue by claiming that "she has suffered emotional harm at the hands of the defendants by the sexually hostile work environment permitted by them to exist".¹¹⁸ However, the court cautioned that "[f]undamental fairness demands that the defendants should have ample opportunity to scrutinize the basis for the opinions of [the plaintiff's] therapists if she attempts to elicit therapist testimony or evidence to prove her damages caused by her alleged emotional distress."¹¹⁹ Similarly, in *Santelli v. Electro-Motive*,¹²⁰ the U.S. District Court for the Northern District of Illinois found that a plaintiff in a Title VII action had not waived her psychotherapist-patient privilege by seeking emotional distress damages limited to humiliation, embarrassment, and other similar emotions arising out of the alleged sex discrimination.¹²¹ However, the court reasoned: "Bare testimony of humiliation or disgust may prevent her from fully recovering for her alleged emotional distress. She may be better off disclosing her psychological records, which would allow her to make a broader damage claim."¹²²

116. 962 F. Supp. at 709. The plaintiff has a right to have discovery limited to matters relevant to the lawsuit and the defendant's request was too broad. *Id. See also* *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 223 (S.D.N.Y. 1994) ("[A]lthough the defendants will be permitted to inquire into plaintiff's personal histories, it must be emphasized that defendants may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of emotional distress. In other words, the scope of the inquiry must be limited to whether, and to what extent, the alleged harassment caused plaintiffs to suffer emotional harm.").

117. 1999 WL 168466 (N.D. Ill. Mar. 17, 1999). The plaintiff claimed that the defendants subjected her to a hostile work environment in violation of Title VII of the Civil Rights Act. *Id.* at *1. The plaintiff sought compensation for alleged emotional distress. *Id.*

118. *Id.* at *2.

119. *Id.* The court reasoned that although the plaintiff has not placed her mental state at issue in the litigation, she ran the risk of waiver if her mental condition was placed at issue. *Id.* If plaintiff "discloses her psychotherapist as an expert witness to establish that she has suffered emotional distress as a result of the alleged sexual harassment, then she opens the door to her confidential information." *Id.* (citing *Danka Indus., Inc.*, 996 F. Supp. at 1142, and *Sarko*, 170 F.R.D. at 130).

120. *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D. Ill. 1999). The plaintiff brought a Title VII action against her employer alleging sex discrimination and retaliation. *Id.* at 307. The defendant moved to compel production of plaintiff's mental health records and argued that her claim of emotional distress waived any privileges. *Id.*

121. *Id.* at 309. "[P]laintiff's communications to her psychotherapist are no longer relevant, or if relevant are only barely so." *Id.*

122. *Id.*

IV. COMPARABLE MEASURES TO THE FEDERAL PSYCHOTHERAPIST-PATIENT PRIVILEGE EXIST TO PROTECT THE SEXUAL HARASSMENT PLAINTIFF IN LITIGATION

The federal psychotherapist-patient privilege exists, in part, to protect a sexual harassment plaintiff from undue invasion of her private therapy sessions when the information lacks relevance to the litigated issue.¹²³ Similarly, Federal Rules exist that also serve as protection for the privacy interests of a sexual harassment plaintiff. Federal Rule of Civil Procedure 35 allows mental examinations of litigants when mental health is placed “in controversy” and the opposing party shows “good cause” for the order.¹²⁴ Many courts have protected sexual harassment plaintiffs because of the conclusion that Title VII claims do not satisfy the requisite “in controversy” requirement for mental health examinations.¹²⁵ Federal Rule of Evidence 412 protects the privacy of a sexual harassment plaintiff from exposure of her sexual history in civil cases because it is not relevant to the litigation.¹²⁶

A. *Compelled Mental Examinations of Sexual Harassment Plaintiffs Under Federal Rule of Civil Procedure 35*

Rule 35 of the Federal Rules of Civil Procedure allows a party to obtain a court order forcing another party to submit to a mental examination by a doctor or psychiatrist.¹²⁷ Whether a court will allow a compelled mental examination depends upon the extent to which a party’s condition is in controversy and if good cause is shown.¹²⁸ *Schlagenhauf v. Holder*,¹²⁹ the

123. See *Bridges*, 850 F. Supp. at 223.

124. FED. R. CIV. P. 35(a).

125. See *infra* Part IV.A.

126. FED. R. EVID. 412.

127. FED. R. CIV. P. 35(a) provides in relevant part:

ORDER FOR EXAMINATION. When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

128. FED. R. CIV. P. 35 advisory committee notes of the 1970 Amendment state that “before a court order may issue, the relevant physical or mental condition must be shown to be ‘in controversy’ and ‘good cause’ must be shown for examination.”

129. 379 U.S. 104 (1964). The plaintiffs were passengers injured when their bus collided with a truck. In answer to a cross-claim, the defendant truck company charged that the bus driver had not been “mentally or physically capable” of driving the bus safely. *Id.* at 107. The truck company moved for an order compelling the bus driver to submit to both a mental and physical examination. *Id.* The Supreme Court overruled the order of the district court for the bus driver to submit to examinations in

only U.S. Supreme Court case to construe the scope of Rule 35, found that the “good cause” and “in controversy” requirements of the Rule create a greater burden than the requirements for relevancy.¹³⁰ The Court stated that the requirements are:

not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.¹³¹

While a movant must produce sufficient evidence to justify an examination, the Court held that when the plaintiff asserts a physical or mental injury in a negligence action, the pleadings themselves will place her mental condition in controversy.¹³²

Courts have generally determined that sexual harassment plaintiffs who seek relief under Title VII do not place their mental condition in sufficient controversy to compel examination,¹³³ whereas those seeking tort remedies generally do.¹³⁴ Courts have recognized that disallowing unnecessary mental examinations serves to protect the privacy interests of the sexual harassment plaintiff¹³⁵ and the public policy concerns behind the enactment of Title VII.¹³⁶ In this same regard, many courts have refused to extend to the Civil

internal medicine, ophthalmology, neurology, and psychiatry. *Id.* at 119. While there was some evidence that the driver might have some vision impairment, the Court determined that this was not enough to place the driver’s mental condition in controversy. *Id.*

130. *Id.*

131. *Id.* at 118.

132. *Id.* at 119.

133. See *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525 (M.D. Fla. 1988); *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D. Mass. 1984) (holding that allegations of sexual harassment under Title VII do not place a plaintiff’s mental condition in controversy to warrant a mental examination). See also *Vinson v. Superior Court*, 740 P.2d 404, 409 (Cal. 1987).

A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not create a controversy regarding plaintiff’s mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition.

Id.

134. See *Cody v. Marriott Corp.*, 103 F.R.D. 421, 423 (D. Mass. 1984) (stating that when a plaintiff “refers to specific mental and psychiatric injuries, the plaintiff is affirmatively placing into controversy a mental condition” which allows the ordering of a mental examination). See also, e.g., *Zabkovicz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) (ordering mental examination because claim for intentional infliction of emotional distress placed plaintiff’s mental condition in controversy); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 298-99 (E.D. Pa. 1983); *Brandenberg v. El Al Israel Airlines*, 79 F.R.D. 543, 546 (S.D.N.Y. 1978).

135. *Robinson*, 118 F.R.D. at 531.

136. *Id.* (stating that Congress intended that Title VII would encourage victims to bring claims of

Rights Act of 1991 an inference of a tort claim for emotional distress that would place mental condition in controversy.¹³⁷ Congress did not privatize Title VII with the new provisions, and it remains a civil rights cause of action with additional incentive to empower victims to act as “private attorneys general.”¹³⁸ Therefore, the claims of emotional distress that result from sexual harassment usually do not place the plaintiff’s mental condition in controversy to necessitate mental examinations without additional tort claims.¹³⁹

B. Protection of the Sexual Harassment Plaintiff Under Rule 412 of the Federal Rules of Evidence

To prove the existence of a hostile work environment, a sexual harassment plaintiff must prove both the unwelcomeness of the harasser’s conduct, and that she found the conduct undesirable.¹⁴⁰ The “unwelcomeness” requirement led some courts to allow the discovery and introduction of evidence of plaintiff’s appearance, dress, and sexual activities unrelated to interactions with the alleged harasser.¹⁴¹ Congress amended Federal Rule of Evidence 412¹⁴² to extend the criminal federal rape shield

sexual harassment rather than be frightened away from action by the threat of invasion of their privacy).

137. *See, e.g.*, *Turner v. Imperial Stores*, 161 F.R.D. 89, 97 (S.D. Cal. 1995).

“[E]motional distress” is not synonymous with the term “mental injury” as used by the Supreme Court in *Schlagenhauf v. Holder* for purposes of ordering a mental examination of a party under Rule 35(a), and [this court] specifically disagrees with those few cases holding that a claim for damages for emotional distress, without more, is sufficient to put mental condition “in controversy” within the meaning of the Rule. If this were the law, then mental examinations could be ordered whenever a plaintiff claimed emotional distress or mental anguish. Rule 35(a) was not meant to be applied in so broad a fashion.

Id.

138. *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 211 (N.D. Tex. 1996).

[A] sexual harassment claimant does not, by virtue of the nature of the claim itself, put her emotional state in controversy. That she alleges damages for emotional distress associated with working in a hostile environment does not of itself warrant a Rule 35(a) examination. Like the personal injury claimant who sues to recover damages for mental anguish associated with an injury, a Title VII claimant may seek compensatory damages for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Id.

139. *Bridges*, 850 F. Supp. at 222. Most cases where Rule 35(a) mental exams have been compelled have involved a separate tort claim for emotional distress or an allegation of severe ongoing mental injury. *Id.*

140. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

141. *Id.* at 69. “[I]t does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.” *Id.*

142. The relevant portion of the amended FED. R. EVID. 412 follows:

rule to civil actions to protect the privacy interests of sexual harassment plaintiffs.¹⁴³ The intention 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 fact-finding process.”¹⁴⁴ This protection is designed to encourage victims to come forward with sexual harassment claims by eliminating the threat of invasion of privacy,¹⁴⁵ similar to the intended purpose behind the psychotherapist-patient privilege.

V. ANALYSIS AND PROPOSAL

Courts disagree as to whether plaintiffs claiming emotional distress under Title VII waive their psychotherapist-patient privilege and, therefore, must disclose their mental health records.¹⁴⁶ There are multiple factors supporting both protection of a sexual harassment plaintiff’s mental health records and waiver of the psychotherapist-patient privilege.

A. *Policy, Privacy, and Parallel Provisions: Reasons Advocating for the Preservation of the Psychotherapist-Patient Privilege*

When addressing a defendant’s request for discovery of a sexual harassment plaintiff’s mental health record, courts should strive to preserve the psychotherapist-patient privilege.¹⁴⁷

Rule 412. Sex Offense Cases: Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition.

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions...

...

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.

143. FED. R. EVID. 412 advisory committee notes to the 1994 Amendments.

144. FED. R. EVID. 412 advisory committee notes.

145. See FED. R. EVID. 412 advisory committee notes. By protecting victims of sexual harassment from invasion of their privacy, the Rule encourages the victims to institute legal actions against the alleged harassers. *Id.*

146. See *supra* Part IV.B.3, comparing three Title VII court decisions that found waiver of the psychotherapist-patient privilege and one court decision that found that the privilege remained intact.

147. For a complete discussion of waiver of the psychotherapist-patient privilege, see *supra* Part

1. Title VII Created a Civil Rights Action Rather than a Tort Claim

Treating a claim for emotional damages under the Civil Rights Act of 1991 as a tort claim is logical. The 1991 Act appears to have created a tort action out of Title VII by allowing recovery of damages for proven mental anguish and suffering.¹⁴⁸ For a tort action, founded on proving causation of mental anguish, disclosure of a sexual harassment plaintiff's mental health records would appear necessary to establish the claim.

The Civil Rights Act of 1991, despite its tort-like damages provision, did not create a private remedy under Title VII. Title VII, as it always has been, is a civil rights action. Title VII's ultimate goal remains the empowerment of victims of discrimination to act as "private attorneys general"¹⁴⁹ to enforce antidiscrimination law in the workplace. The damages provision in the 1991 amendment serves as an additional incentive for victims of sexual harassment to pursue a civil rights action against an employer.¹⁵⁰

Title VII was created, in part, due to the recognition that sexual harassment injures the victim.¹⁵¹ Amending Title VII to allow claims of humiliation, emotional distress, and mental anguish further establishes the link between discrimination and actual injury of the victim.¹⁵² Rather than invading a sexual harassment plaintiff's mental health records to discover mental distress, courts can find evidence by looking to the hostile work environment itself or listening to the plaintiff's testimony on how the discriminatory conduct affected her well-being. For a successful Title VII action, a plaintiff must prove that her mental injuries resulted from a hostile work environment.¹⁵³ Congress intended for courts to focus on the hostile

III.B.

148. *See, e.g.*, 137 CONG. REC. S513,639 (daily ed. June 6, 1991) (statement of Senator Bob Dole) (claiming that the 1991 amendment to the Civil Rights Act "transform[s] Title VII into a national tort law").

149. H.R. REP. NO. 102-40(I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

150. *Id.* at 66-69, *reprinted in* 1991 U.S.C.C.A.N. at 604-07 (citing testimony of sexual harassment victims that although the original intention of Title VII was to make victims of discrimination "whole", usually "Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability"). *Id.*

151. *Id.* at 64-65, *reprinted in* U.S.C.C.A.N. at 602-03 ("Monetary damages . . . are also necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.").

152. *Id.* at 65-66, *reprinted in* 1991 U.S.C.C.A.N. at 602, 603-04. "Victims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination." *Id.* at 65, *reprinted in* 1991 U.S.C.C.A.N. at 604.

153. *Lahr*, 164 F.R.D. at 210-11 ("Like the personal injury claimant who sues to recover damages for mental anguish associated with an injury, a Title VII claimant may seek compensatory damages for

work environment rather than to invade the victim's privacy and mental health history to determine whether she sustained mental injury.¹⁵⁴

2. *Privacy Interests of the Sexual Harassment Plaintiff*

Bringing a sexual harassment claim under Title VII, without additional tort claims or introduction of privileged communications, should not permit the invasion of a victim's privacy by opening her privileged mental health records. The Supreme Court established the federal privilege to create trust in confidential therapeutic relationships without fear of disclosure.¹⁵⁵ Although the Court noted possible waiver of the privilege, the extreme situation used as an example implies that a simple claim of emotional distress would not warrant such a waiver.¹⁵⁶ Protection of the sexual harassment plaintiff's privacy and potential for healing, while still permitting the plaintiff to bring an action against the alleged harasser, necessitates the application of the psychotherapist-patient privilege in Title VII claims. Without the protection of the psychotherapist-patient privilege, individuals who seek therapy will be reluctant to bring suit or will not bring suit at all for legitimate claims of harassment out of fear that their mental health will be placed on trial. If courts determine that a victim waives the psychotherapist-patient privilege is waived when she bringing a civil rights action, then fewer victims will act as "private attorneys general"¹⁵⁷ for fear of invasion of privacy.

3. *Comparable Federal Rules Exist That Aim To Protect the Sexual Harassment Plaintiff*

Similar to the federal psychotherapist-patient privilege, other federal rules exist to protect a sexual harassment plaintiff from undue invasion into her

emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." *Id.* at 211.

154. "[I]t is not accurate to say that a plaintiff in an employment discrimination case has 'introduced' her mental 'condition' into the litigation by alleging emotional distress. It is more accurate to say that the defendant introduced it by discriminating against the plaintiff." David A. Robinson, *Discovery of the Plaintiff's Mental Health History in an Employment Discrimination Case*, 16 W. NEW ENG. L. REV. 55, 67 (1994).

155. *Jaffee*, 158 U.S. at 10.

156. One court stated the following:

It is evident from the comment that the privilege is not to be readily waived. The *Jaffee* court describes an extreme situation under which harm to the patient or others is likely to occur if the confidential communication is not revealed. Such a situation presents far more compelling circumstances than exist in the present case The *Jaffee* court clearly did not intend that this important privilege be waived or such a purpose.

Fritsch, 187 F.R.D. at 630-31.

157. H.R. REP. NO. 102-40(I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 603.

mental and personal history. Federal Rule of Civil Procedure 35 allows mental examinations of litigants when mental health is placed “in controversy” and the opposing party shows “good cause” for the order.¹⁵⁸ Courts have determined that Title VII claims do not satisfy the requisite “mental health in controversy” requirement and, therefore, do not order mental examinations of sexual harassment plaintiffs.¹⁵⁹ Similarly, prying into the contents of a plaintiff’s mental health records is not necessary because a Title VII claim does not place mental state at issue. Instead, testimony of the plaintiff¹⁶⁰ and analysis of the hostile work environment are enough to determine whether the sexual harassment plaintiff experienced mental anguish. Mental health records, like Rule 35 mental examinations, open too many avenues into the plaintiff’s psyche that are not relevant or necessary in calculating damages for the suffering of a Title VII plaintiff.¹⁶¹

Federal Rule of Evidence 412 protects the privacy of a sexual harassment plaintiff from disclosure of her sexual history in civil rights actions.¹⁶² Courts recognize that the sexual behavior and sexual predisposition of a sexual harassment plaintiff are irrelevant and sometimes prejudicial in Title VII actions.¹⁶³ Similarly, mental health records often contain personal and private information wholly irrelevant to the civil rights claim. Waiver of the psychotherapist-patient privilege can expose the sexual harassment victim to a piece-by-piece analysis of her life. Not only is this damaging to the plaintiff, but also, like evidence of prior sexual history, it can be prejudicial to her claim of mental suffering.¹⁶⁴

B. When Should Courts Find Waiver of the Psychotherapist-Patient Privilege?: The Defendant’s Need and Additional Tort-Based Claims

When analyzing a sexual harassment plaintiff’s request for protection of the psychotherapist-patient privilege, courts should look to the evidentiary need of the defendant and the additional claims brought by the plaintiff.

158. FED. R. CIV. P. 35(a).

159. *See supra* Part IV.A.

160. The question remains whether a sexual harassment plaintiff would rather have her mental health records examined or consent to a Rule 35 mental examination. *See Fritsch*, 187 F.R.D. at 632 (“Many, if not most, people would undoubtedly prefer to submit to a mental examination, in which they have a degree of control over what information is revealed, than to have the records of their past psychotherapy sessions disclosed to their adversaries in litigation.”).

161. *See supra* Part IV.A.

162. FED. R. EVID. 412.

163. *See supra* Part IV.B.

164. *See* FED. R. EVID. 412 advisory committee notes.

1. Emotional Distress Information Necessary for a Good Defense

Because the plaintiff in a civil rights action is alleging that the defendant's conduct has caused her emotional distress, the defendant will seek to prove the contrary. The defendant will want to establish that the victim either suffered no mental anguish due to the hostile work environment, or that the plaintiff suffered from serious mental health problems prior to the sexual misconduct.¹⁶⁵ Reliance on the contents of a sexual harassment plaintiff's mental health records will help to establish the defendant's case, and, therefore, the defense will ask the court for waiver of the psychotherapist-patient privilege.¹⁶⁶ Although courts should not easily acquiesce to waiver of the privilege, courts should not seal off a defendant's access to the mental health records of the sexual harassment plaintiff. Fairness requires that when a plaintiff introduces portions of her mental health records or provides testimony of her treating psychotherapist to establish her emotional distress, she implicates the psychotherapist-patient privilege and must allow the defense access to those privileged communications.

2. Additional Tort-Based Claims Require Additional Evidence

It might be appropriate for courts to allow waiver of the psychotherapist-patient privilege when a sexual harassment plaintiff is claiming more than a Title VII violation. If the victim, in addition to the Title VII claim, brings a claim of intentional infliction of emotional distress or another tort-based action, then it might be permissible to explore mental health records.¹⁶⁷ In these instances, the plaintiff is asserting extreme mental anguish in addition to the distress caused by the hostile work environment. A court's waiver of

165. Robinson, *supra* note 154, at 68.

The "catch" is that on the one hand, if the plaintiff did *not* seek therapy during the time the discrimination was allegedly causing her emotional distress, or if she sought therapy for reasons having nothing to do with the job-related distress, the defendant will argue that the plaintiff must not have been bothered too much by the discrimination. On the other hand, if the plaintiff was already in therapy at the time the discrimination occurred, or even if she sought therapy as a result of the discrimination, she must have told her therapist about all kinds of other problems in her life, and the defendant will argue that these problems indicate pre-existing emotional instability.

Id.

166. See *Vinson*, 740 P.2d at 409 ("[B]y asserting a causal link between her mental distress and the defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress.").

167. See *Covell*, 863 F. Supp. at 206 (holding that when the plaintiff withdrew an additional claim for intentional infliction of emotional distress, the psychotherapist-patient privilege would no longer be waived and the defendant could not access mental health records not relevant to the litigated matter of emotional distress caused by a hostile work environment).

the psychotherapist-patient privilege does not compromise the purpose of Title VII as a civil rights remedy when an additional tort claim is attached.¹⁶⁸ The tort action creates a need to analyze more than the hostile work environment, which implies a deeper investigation of the plaintiff's mental condition.

C. A New Proposed Standard: Balancing the Plaintiff's Interests and the Value of the Mental Health Records

In determining whether waiver of the psychotherapist-patient privilege is appropriate, courts should balance the sexual harassment plaintiff's interest in privacy with the value of the mental health records to the defendant. When balancing these two interests, courts should use judicial restraint to protect the privilege and the sexual harassment plaintiff from undue invasion of her privacy.

Courts should begin their analysis by remembering the intent of the legislature that adopted the Civil Rights Act of 1991 and the value the Supreme Court has placed upon the confidential relationship between psychotherapist and patient. Courts should use restraint in determining that a Title VII cause of action has moved beyond a civil rights claim to mandate waiver of the privilege. Courts should protect the sexual harassment plaintiff and her privacy when she acts as a "private attorney general,"¹⁶⁹ as Congress intended.

The importance a court allocates the psychotherapist-patient privilege can be mitigated by the type of claim the sexual harassment plaintiff has brought. Occasionally a sexual harassment plaintiff will bring a tort-based claim in addition to her civil rights action. The tort cause of action will often be for a physical or mental injury sustained because of the sexual harassment. In each of these instances, the plaintiff is moving beyond the civil rights claim towards an injury-based claim. To prove her tort injury, the sexual harassment plaintiff will need additional evidence beyond the hostile work environment that an injury occurred. This injury, in addition to the sexual harassment, places the plaintiff's mental state at issue so as to waive the psychotherapist-patient privilege.

Another factor courts may use in finding waiver of the privilege is

168. "Simply put, where a plaintiff merely alleges 'garden variety' emotional distress and neither alleges a separate tort for the distress, any psychiatric injury or disorder, or unusually severe distress, that plaintiff has not placed his/her mental condition at issue to justify a waiver of the psychotherapist-patient privilege." *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 285 n.8 (D.N.J. 2000).

169. H.R. REP. NO. 102-40(J), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

whether the waiver is necessary to ensure that a defendant is not deprived of information important to the defense. To make this determination, courts should consider whether the plaintiff has placed the communication itself at issue. If the mental health records have been placed into evidence, or the plaintiff's psychotherapist testifies at trial, then the value to the defendant of the mental health records necessitates waiver. In addition, courts should consider the remoteness of events found in the mental health records. The defendant should not be permitted to engage in a fishing expedition into the history of the sexual harassment plaintiff in search of some defense to the claim of emotional distress.¹⁷⁰ Courts should weigh the plaintiff's need for privacy against the defendant's need for discovery when determining whether mental health records will be discoverable. If courts order the examination of a plaintiff's mental health records, the request should be narrowly tailored to fit the time period during and after the harassment in question. Any more intrusion would harm the very purpose behind the creation of the psychotherapist-patient privilege in protecting the private individual and the public good.¹⁷¹

Consider how Anita, a hypothetical sexual harassment plaintiff, and her mental health records will be protected by this proposed balancing standard. Anita's male supervisor constantly comments on her body, makes dirty jokes, and refers to pornography, leers at her when she passes by, and alludes to sexual fantasies he has about her. Although Anita complains to management, the harassment continues and even escalates, and Anita is forced to resign rather than endure the harassment. Anita sues her employer for sexual harassment under the Civil Rights Act of 1991. Because her civil rights claim alleges emotional distress due to discrimination, Anita will be asked through interrogatories or at her deposition whether she has undergone psychotherapy. She will answer yes. Defense counsel will then attempt to depose her psychotherapist and to obtain her mental health records. In determining whether to permit discovery of Anita's mental health records, the court should first focus on the type of claim Anita has brought against her employer. In this example, Anita is only bringing a claim under the Civil Rights Act of 1991, unaccompanied by claims of intentional infliction of emotional distress or physical injury. The court should then determine

170. *Bridges*, 850 F. Supp. at 223 ("[T]he scope of the inquiry must be limited to whether, and to what extent, the alleged harassment caused plaintiffs to suffer emotional harm.").

171. *Jaffee*, 518 U.S. at 11-12 ("In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.").

whether Anita plans to introduce her psychotherapy records into evidence. Here, we will conclude that Anita's sexual harassment claim will not include testimony by her treating psychotherapist or evidence from her mental health records, only evidence of the hostile work environment itself. Because Anita's civil rights action against her employer does not allege extreme mental anguish and does not rely upon evidence found in her mental health records, the court should find that she has not waived her psychotherapist-patient privilege and should protect Anita from her employer's undue invasion into her privacy.

VI. CONCLUSION

By restricting the waiver of the psychotherapist-patient privilege in Title VII sexual harassment claims, courts can further the congressional intent behind the Civil Rights Act of 1991 to eradicate workplace discrimination against women. More victims of sexual harassment will be willing to bring claims against their harassers with the knowledge that their private mental health records will remain unexamined.

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