AMY OPPENHEIMER

Using Liability Experts in Employment Discrimination Cases

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The Fair Employment and Housing Act

- Employers are to take all reasonable steps to prevent harassment and discrimination from occurring.
- California Government Code Section 12940(k)
  - Unlawful for employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

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Title VII

- Also requires employers to take all steps necessary to prevent harassment from occurring. 29 CFR Section 1604.11(f)
  - EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) – available at:
    - www.eeoc.gov/policy/docs/currentissues

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Taking appropriate preventative measures can allow an employer to avoid or reduce liability

- *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v Ellerth* – 1998 US Supreme Court cases
  - If the employer has good policies and procedures there is no liability for a victim who unreasonably fails to complain
- State Department of Health Services v. Superior Court (McGinnis) – California Supreme Court 2003
  - In California there is strict liability for supervisor harassment but damages are cut off previous to the time the victim complained if the employer had good policies and procedures including an adequate complaint mechanism.

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A fair and thorough investigation can prevent liability

- *Cotran v. Rollins Hudig Hall*, 17 Cal. 4th 93 (1998) and *Silva v. Lucky Stores, Inc*. 65 Cal. App. 4th 256 (1998)
  - A reasonable and fair investigation of a sexual harassment complaint that led to plaintiff's termination for violating the sexual harassment policy gives the employer a qualified immunity for liability for wrongful termination.

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A biased/unfair investigation can makes things worse

- *Mendoza v. Western Medical Center of Santa Ana*, __ Cal App. 4th __ (2014)
  - Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcoming in the investigation conducted by defendants following plaintiff's complaint. An inadequate investigation is evidence of pretext.

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NOT taking preventative measures can lead to punitive damages.

- *Weeks v. Baker & McKenzie* – California Appellate court case – 1998
  - $225K compensatory damages and $6.9 million punitive damage award against law firm that had prior complaints/notice about partner who harassed females and failed to act.

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What are preventative measures?

- Policies
- Training
- Procedures
- Complaint mechanisms
- Investigation of complaints
- Appropriate remedial action

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What types of complaints **might** they apply to?

- All types of harassment
- All types of discrimination
- Retaliation for bringing a complaint
- Whistleblowing
- Bullying
- Violence or threats of violence

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How does a jury know if an employer has or has not taken appropriate action?

- Common sense?
- Argument of counsel?
- Employer's internal HR as fact witness regarding what was done?
- Plaintiff and/or defendant's expert witness testimony as to what the standard is compared to what occurred in this case?

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Should you use an expert?

- Depends on:
  - The issues:
    - Are employer practices and actions at the core of the case?
    - How obvious are the strengths or weaknesses of those actions?
  - For the defendant: Can the internal HR employee serve the function of an expert? Ask:
    - How knowledgeable are they?
    - Will they be comfortable testifying?
    - Will the jury like them?
    - Would it help to have an expert "shore up" what they did?

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Is Expert Testimony Admissible?

- California Evidence Code Section 801(a) – admissible if:
  - Beyond the experience of ordinary witness
  - Helps the trier of fact
  - Is provided by a person with special knowledge, skill, experience, training, and education in the proffered topic; and
  - Is based on information that is considered to be reliable.

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Federal Rules of Evidence

- Rule 702 – A witness qualified as an expert may testify if:
  - The testimony is based on sufficient facts or data
  - The testimony is the product of reliable principles and methods, and
  - The witness has applied the principles and methods reliably to the facts of the case.

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What will the expert be allowed to testify about?

- Standard/typical/good practices relating to:
  - Policies to prevent harassment & discrimination, including complaint mechanisms;
  - Training programs; and
  - Investigations – were they timely, thorough and fair?

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What will the expert NOT be allowed to testify about?

- Ultimate fact – as in whether there was discrimination, harassment or retaliation (these are for the judge/jury to decide
  - *Kotla v U.C. Regents*, 115 Cal. App. 4th 283 (2004)
- Conjecture
- "Best" practices (as opposed to meeting a standard of care – "good enough")
  - *Humphreys v. U.C. Regents*, 2006 US Dist. Lexis 47822 (N.D. Ca. 2006)

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Whom should you choose as an expert?

- Attorney/investigator
  - Defense side attorneys who also do investigations (Weeks case)
  - Attorneys who are full time neutrals doing investigations
- HR professional – depending on level of experience
- Someone who trains HR investigators
- Investigator who worked for governmental agency

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What typically will the expert testify about?

- Prevention
  - Harassment and other policies – contents and delivery
  - Whether the policies are adhered to
  - Training – AB 1825 plus training for investigators
    - Meaningful training materials and delivery?
  - Complaint mechanism
    - Choices of whom to complain to
    - Reputation for being taken seriously

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What typically will the expert testify about?

- Response
  - Investigation
    - Timely?
    - Done by the “right” investigator?
      - Training and experience
      - More authority than complainant and respondent
      - Lack of bias
      - Knowledge of bias issues

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What typically will the expert testify about?

– Investigation reasonably thorough?
- Spend time speaking to both complainant and respondent?
- Come back to the parties for follow up?
- Speak to relevant witnesses?
- Review relevant documents (including collection of electronic data)?
- Lines of inquiry cover each issue fully?
- Good enough is good enough!

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What typically will the expert testify about?

– Based on the information collected, were the investigation findings fair and reasonable?
  - Investigator know and utilize the correct standard of proof? (Usually preponderance of the evidence)
  - Any apparent bias?
  - Investigator weigh both sides and show this?
  - Alternate theories considered?
  - Any significant information ignored or downplayed?

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Cases addressing the use of experts in this field

- Summary Judgment denied based on an expert's report that said the employer's response to harassment was "rife with instances indicating a failure to exercise reasonable care in dealing with the instances of harassment"
  - *EEOC v. Scolari Warehouse Markets*, 488 F. Supp. 2d 1117 (D. Nev. 2007)

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Excluding testimony

- The expert testimony was excluded because the facts were not so complicated as to require the testimony of an expert.
  - *Wilson v. Muckala*, 303 F. 3d 1207, 1218 (10th Cir. Okla. 2002)

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Admitting testimony

- Expert testimony used as basis for finding employer's policies and procedures were inadequate and formed basis for order for employer to institute policies and procedures that were monitored by the court.
  - *Robinson v. Jacksonville Shipyards, Inc*. (N. Dist. Fla.) 790 F. Supp. 1486 (1991)

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Ways to work with a liability expert

- Preparing the case
  - Theories of the case
  - Discovery needed
  - Taking/defending the internal HR employee's deposition
- Bringing summary judgment
- Defeating summary judgment
- Mediation – declaration
- Trial/arbitration testimony

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Thank You for Participating in this Seminar!

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