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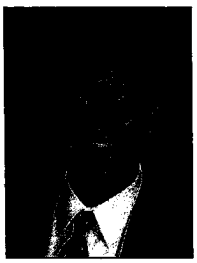
5 Must-Have Employment Defense MOTIONS IN LIMINE



by Michael E. Brewer

WHILE NO TWO EMPLOYMENT trials are alike, one constant is the importance of motions *in limine*. The exclusion (or inclusion) of particular pieces of evidence and testimony can have a dramatic effect on the jury's perception of the employer defendant and on the ultimate outcome of the case. What follows is a compilation of five frequently used in limine motions specific to employment trials. They are favorites among defense attorneys and offer significant strategic benefits both at trial and on appeal.

Courts have inherent power to manage the course of their trials, including the granting of appropriate motions in limine.[1] A motion in limine is a precautionary measure designed to prevent the prejudicial effect that may result when a jury is permitted to hear evidence that is later excluded through a sustained objection. The purpose of the motion is to *"avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury."*[2]

Motions in limine may be brought to exclude evidence on the same grounds as any evidentiary objection made at trial. They may be brought at any time before the evidence is offered at trial. Trial courts have inherent power to entertain and grant motions in limine.[3]

1 EVIDENCE OF MISCONDUCT AGAINST PLAINTIFF'S CO-WORKERS

Precluding *me too* testimony is critical to a defendant in an employment case. Often times a plaintiff will line up a host of witnesses whose sole purpose is to vent their subjective frustrations with the employer in the hopes that the jury will believe that the employer was generally malevolent, and therefore must have engaged in the bad acts alleged by the plaintiff.

In the employment context, courts will exclude as irrelevant evidence of claims by other employees, even where the same type of discrimination or harassment is alleged.[4]

Many courts have held that evidence of discrimination or harassment suffered by employees other than the plaintiff is irrelevant. In *Goff v. Continental Oil Co.* (5th Cir. 1982) 678 F.2d 593, 596, (overruled on other grounds *Carter v. South Cent. Bell* (5th Cir. 1990) 912 F.2d 832), the plaintiff alleged racial discrimination and sought to introduce testimony of three former employees to *"recount incidents in which they personally had been discriminated against by {the Company}."* The Court of Appeals upheld the lower court's exclusion of this testimony.[5]

Plaintiffs, particularly in discrimination cases, will argue vigorously against such motions by claiming that evidence of the existence of a pattern and practice is often appropriate. Exclusion of *me too* testimony will be more likely when the proffered testimony does not tend to establish a pattern and practice. For example, a court is more likely to use its discretion to exclude evidence of age discrimination in a race discrimination case, than to exclude race related conduct.

2 TESTIMONY OF EMPLOYEE'S OWN OPINION OF HIS OR HER JOB OR JOB PERFORMANCE

An employee may wish to introduce evidence of his own opinion about his job, job performance, or his opinion of how his performance should have been evaluated. Defense counsel will argue that this type of evidence should be excluded on the grounds that it is irrelevant and unhelpful to the jury.

Federal courts have consistently held in discrimination actions that a fired employee's *"perception of himself... is not relevant. It is the perception of the decision maker that is relevant."*[6] A plaintiff's opinions regarding the manner in which he was evaluated or the "correctness" of the employer's evaluation of him and/or his job performance is inadmissible because adverse employment decisions based upon an employer's assessment of unacceptable work performance do not constitute unlawful discrimination.[7]

The court's role is not to sit as a *"super personnel department that re-examines entities' business decisions."*[8] Thus, a plaintiff's opinions about his or her job, job performance, or the manner in which such performance should have been evaluated are arguably irrelevant.

3 TESTIMONY OF CO-WORKERS' OPINIONS OF PLAINTIFF'S JOB PERFORMANCE

In addition to soliciting a plaintiff's own opinion of his or her job performance, plaintiffs often will seek to introduce non-supervisory co-workers to testify that the plaintiff's job performance during his or her employment was exemplary in order to demonstrate that the asserted reasons for termination are a pretext for unlawful harassment, discrimination or retaliation. Such testimony should be excluded when the proposed witnesses either lack personal knowledge regarding plaintiff's performance as a whole or the specific issues that led to termination, or they are not aware of the plaintiff's job duties at the time of termination.

Because non-decision makers cannot speak with personal knowledge about a plaintiff's job performance or, more correctly, regarding an employer's perception of his or her job performance, their testimony should be excluded.

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4 TESTIMONY OF H.R. EXPERTS

In cases where plaintiffs have disclosed human resources experts, defense counsel should consider bringing a motion in limine to preclude opinions that employers' human resources practices amounted to discrimination, harassment or retaliation.

Section 801 of the California Evidence Code provides that expert witness testimony may only be offered if it is "*(r)elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.*" Thus, expert opinion should be excluded "*when the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.*"[9] Likewise, expert witness testimony should be excluded where the expert does nothing more than offer his opinion as to how the case should be decided, thereby supplanting the role of the jury.[10] The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.[11] Expert witness testimony is properly excluded by way of a motion in limine.[12]

In *Kotla v. Regents of the University of California*, 115 Cal. App. 4th 283 (2004), the court specifically recognized the danger presented by testimony by human resources experts in discrimination cases.[13] Note that the fact that *Kotla* hasn't put these experts out of work is frequently cited by both sides in motions to exclude such testimony, and makes important reading for its guidance on how far such testimony can go without invading the province of the trier of fact.

5 INTRODUCING EVIDENCE OF THE EMPLOYER'S FINANCIAL CONDITION

In employment cases, plaintiffs may want to introduce evidence of an employer's financial condition in the absence of a motion in limine or a motion to bifurcate the liability and punitive damage phases of the trial. Defense counsel should consider trying to completely exclude evidence of the employer's financial condition completely and, at a minimum, bring a motion to bifurcate. This is especially true in light of the questionable constitution- ▶

ality of allowing evidence of financial condition as a factor in determining the amount of punitive damages following the Supreme Court's decision in *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426. Punitive damages awards cannot be justified by evidence of the defendant's wealth and, instead, must be tied to the harm sustained by the individual plaintiff. ◆

— Littler Mendelson's Mike Brewer practices a wide range of employment and labor law litigation with an emphasis on wrongful discharge litigation and discrimination litigation.

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[1] *Luce v. United States*, 469 U.S. 38, 41, 105 S.Ct. 460, 463, n.4.

[2] *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 337 (1978).

[3] *See C.J.E.R. (Judge's Bench Book, Civil Files)*, section 3.112, *et seq.*, 3 Witkin, *California Evidence* (4th ed. 2000) § 368, p. 455.

[4] *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 520 (affirming trial court's granting of motion *in limine* to exclude allegations of others concerning harassment).

[5] *See also Jardien v. Winston Network, Inc.* (7th Cir. 1989) 888 F.2d 1151, 1156 (holding trial court did not abuse its discretion in excluding as irrelevant evidence regarding other employees of defendant); *Haskell v. Kaman Corp.* (2d Cir. 1984) 743 F.2d 113, 122 (holding "even the strongest jury instruction could not have dulled the impact of a parade of witnesses, recounting his contention that defendant had laid him off because of his age . . ."); *Schrand v. Federal Pacific Electric Co.* (6th Cir. 1988) 851 F.2d 152, 156 (stating *"if the jury was concerned that the testimony of {other employees} . . . was truthful, there was a distinct danger that the jury would assume a connection that was never proven between the terminations of the two witnesses and that of {plaintiff} Schrand"*).

[6] *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980).

[7] *Douglas v. Anderson*, 656 F.2d 528, 533 n.5 (9th Cir. 1981) (court not concerned if employer was correct in determining employee's performance unsatisfactory, only concerned if determination is legitimate reason for termination); *Gonzalez v. MetPath, Inc.*, 214 Cal. App. 3d 422, 423 (1989) *("{E}mployers must be given wide latitude to make independent, good faith personnel decisions without the threat of a jury second guessing their business judgments.")*

[8] *Phipps v. Gary Drilling Co, Inc.*, 722 F. Supp. 615, 620 (E.D. Cal. 1989).

[9] *People v. McAlpin*, 53 Cal. 3d 1289, 1300 91991).

[10] *Summers v. A.I. Gilbert Co.*, 69 Cal. App. 4th 1155, 1182-1183 (1999).

[11] *Downer v. Bramet*, 152 Cal. App. 3d 837, 841 (1984).

[12] *Summers*, 69 Cal. App. 4th at 1185.

[13] *Id.* at 293 (testimony by a human resources expert in a retaliation case *"created an unacceptable risk that the jury paid deference to {the expert's} purported expertise when in reality he was in no better position than they were to evaluate the evidence concerning retaliation"*).