

# Liability Lesson

**VIEWPOINT:** The use of an employment expert in sexual harassment cases can help jurors understand the reasonableness of investigatory processes.

BY AMY OPPENHEIMER

Using a liability expert in a sexual harassment case has become increasingly common. Over the past 10 to 20 years, a body of law has developed as to what type of sexual harassment prevention program and response is sufficient. The U.S. Supreme Court, in *Faragher v. City of Boca Raton* (1998) 524 U.S. \_\_\_ and *Burlington Industries v. Ellreth* (1998) 524 U.S. \_\_\_, and the California cases of *Cotran v. Rollins Hudig Hall Int'l Inc.* (1998) 17 Cal. 4th 93 and *Silva v. Lucky Stores, Inc.* (1998) 65 Cal. App. 4th 256 make the use of an expert in this area increasingly important.

*Faragher* and *Ellreth* established an affirmative defense for some types of sexual harassment. The affirmative defense applies if the employer can show it had adequate sexual harassment policies and the plaintiff unreasonably failed to use a complaint mechanism. Experts can be persuasive to establish that the employer's sexual harassment policies were or were not adequate under this legal standard.

*Cotran* and *Silva* addressed the adequacy of an employer's investigation of a sexual harassment complaint, finding that if an employer fires an employee for sexual harassment based on a fair and good faith investigation of the complaint, the employer is not liable for wrongful termination of the harasser. Other cases have protected employers from liability for defamation under similar circumstances. *Cruey v. Gannett Co.* (1998) 64 Cal. App. 4th 356 and *Bierbower v. FHP, Inc.* (1999) 1999 Daily Journal D.A.R. 1631. An expert witness could be used to testify as to the adequacy or inadequacy of an employer's investigation. This issue may also benefit from expert testimony in the context of the reasonableness of an employer's response to a complaint of harassment.

When should a plaintiff consider using an expert? Expert testimony can be helpful, perhaps even crucial, to a plaintiff's case when the employer failed to reasonably prevent or respond to the harassment allegation. This could be a result of an inadequate policy, poor implementation, a lack of training about the policy, or all three.

For example, employers should have clear and detailed policies which are distributed and adequately explained to all employees. Furthermore, supervisors and managers are expected to respond appropriately whenever they have any notice of possible sexual harassment. However, defenses to lawsuit are often based on the plaintiff's failure to complain about the harassment coupled with the existence of a policy prohibiting sexual harassment. However, if the policies were not thoroughly distributed or adequately explained, the employer might still be liable. In addition, if there were rumors about the harassment, or other evidence which could reasonably have been expected to put a well-trained supervisor on notice of a problem, the defense is weakened further. Here, an expert can be used to address, explain and mitigate the employer's deficiencies. Indeed, it can be difficult for a jury to determine what an employer could or should have done without the use of an expert in this regard.

An expert is not generally permitted to testify as to ultimate factual issues. If the primary issue in the case is one of credibility, an expert will probably not be much help. For ex-

ample, if the plaintiff is alleging serious harassment by a high level employee, liability will be fairly clear if the jury finds the conduct occurred as alleged. On the other hand, if in the same case the employer conducted an investigation and made a credibility determination that the conduct did not occur, an expert in investigation of sexual harassment allegations might be able to testify as to the reasonableness of that credibility determination, based on the evidence obtained through the investigation. If, in addition, there was evidence of bias, perhaps in favor of the employing company, on the part of the investigator, an expert could be even more useful.

When should the defendant consider using an expert? The defendant will want to use an expert to show that the employer's policies were equal to or better than what would be expected of another employer of similar size and other characteristics. An expert is also useful to the defendant to testify as to the employer's good faith in the manner in which an investigation was undertaken or other action which was taken.

The reality for employers is that no investigation is perfect. With the benefit of hindsight and a careful set of eyes, some flaws, perhaps serious ones, can usually be uncovered prior to trial. An expert who is an experienced investigator can often address, explain, and minimize problems by putting flaws in their proper context. Regarding training and prevention, a better program or policy almost always exists somewhere. The employer will want to be able to show, through expert testimony, that even

if it could have done better, its actions were well within reason and were done in good faith.

To be effective, the expert should have a significant amount of practical experience advising employers on sexual harassment prevention policies and programs. This could be an internal human resource employee, an outside consultant who provides such services or someone from an enforcement agency. Some employers will not retain an expert but rather use the internal human resource employee who responded to the plaintiff's complaint. While this may work in some instances, it is often better to have someone independent vouch for what the employer did. Furthermore, you will want to use someone who is articulate and comfortable in front of a jury. Frequently, internal human resources employees will not fit this bill. If the primary issue is the adequacy of an investigation, make sure the expert has done, or trained others to do, similar types of investigations. The skills and experience needed to investigate sexual harassment are different from the skills needed to investigate a case of theft, for example.

What are the risks of using an expert? The biggest risk of hiring an expert is that the monetary investment will not pay off. It is possible the judge will not allow the expert to testify or limit their testimony so severely that there is little benefit.

Practitioners should carefully evaluate whether the case is the type that is appropriate for expert testimony and be able to articulate why the jury would be assisted by the testimony. For example, hiring an expert to testify in a case involving a small employer, where the harasser is the owner, where no policy exists, will probably not be productive. The judge will likely determine that since the employer had no policy on sexual harassment, there was nothing about which the expert could testify. In this type of case, the main issue is credibility; if the jury finds the owner committed the acts alleged, the jury will likely find liability. There is little for an expert to add.

Another risk is that the expert will **Continued on Page 23**

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not support counsel's theory of the case to the extent hoped for and therefore undermine the case. Most experts testify for both the plaintiff and defense. Ethical experts will not want to contradict themselves, and this is a good way to effectively cross-examine an expert. Thus your expert may support some, but not all of your contentions. To guard against this, make sure you know, before you disclose, how your expert will respond to the weaknesses in your case. When hiring an expert, be sure to tell the expert all

the important facts of the case, not just the ones that support your position.

What should the expert review and what will it cost? Experts in employment matters have testified at trial for as little as \$3,000 and as much as \$20,000 or more. In the first scenario, experts were not deposed and the testified based on hypothetical questions. The expert reviewed very little prior to trial. Despite the modest investment, the testimony was helpful to the plaintiff's case and the jury came back with a sizable verdict. In the second case, the plaintiffs' attorney wanted the expert to review everything and to be present for most of the trial. Counsel felt he had a strong case and felt that the more the expert knew, the more it

would help the case. The investment paid off, as the jury came back with a verdict of close to \$2 million, a large portion of which was punitive damages. The amount of the verdict and the judge's decision to allow the expert to testify were affirmed on appeal.

Cases differ as to how much to invest. The more the expert reviews, the more it will cost, and the more helpful the expert can be both on direct and cross examinations. Don't hesitate to get the expert's opinion as to the value of reviewing depositions and documents.

Getting the most use from an expert is an important concern. An expert can be helpful not just by testifying at trial but by assisting in developing the case. This is especially true for practitioners,

perhaps tort lawyers, who do not regularly litigate sexual harassment cases. A good expert will provide a well-informed and unbiased evaluation of the case. The expert can also assist in the discovery process. Expert testimony is often hampered by a lack of useful information. Areas not pursued in discovery that could have been helpful. At the other extreme are practitioners who hire experts to assist from the beginning, knowing that they may decide not to disclose those experts, but they still want to use them to help develop the case. In considering using an expert, it is best to think through ahead of time how the expert could be useful and to get him or her involved as soon as possible.