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Experts May Testify on Harassment Policies and Procedures of Employer

By Amy Oppenheimer

Attorneys bringing and defending workplace-harassment lawsuits should consider using expert witnesses in the liability phase. Practitioners routinely use economists or psychologists in the damages phase; experts are less common, but equally important, in the liability phase. While not every case will benefit from an expert, courts permit liability experts to testify on a wide range of issues.

Harassment cases under Title VII or the California Fair Employment and Housing Act often are good candidates for expert testimony. A central issue in many of these cases is whether the employer failed to act as a reasonable employer would have acted to prevent or respond to harassment.

While a court will not allow an expert to invade the jury's province and testify about whether the harassment itself occurred, it may permit an expert to testify about whether the employer's policies and procedures for preventing and responding to harassment are what should be expected and are consistent with "good human-resources practice."

Generally, experts may testify if their testimony is both reliable and relevant. See *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Although courts allowed experts on preventing and responding to sexual harassment to testify before 1998, the decisions in *Faragher* and *Ellerth* can bolster the basis of such testimony. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

Faragher and *Ellerth* established an affirmative defense for hostile-work-environment harassment by a supervisor. With the defense, an employer can avoid liability if it shows that it had reasonable policies that the plaintiff unreasonably failed to use and/or that it acted reasonably in its response to a complaint.

Thus, experts on human-resources practice in the area of preventing and responding to workplace harassment can assist juries in determining whether the employer acted reasonably.

Although *Faragher* and *Ellerth* were sexual-harassment cases, the same standards should apply to any workplace harassment that violates Title VII. See EEOC Guidance, "Vicarious Employer Liability for Unlawful Harassment by Supervisors," Notice No. 915.002, June 18, 1999.

Even before *Faragher* and *Ellerth*, courts allowed expert testimony about human-resources practices in sexual-harassment cases. *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311 (1989), allowed testimony by a human-resources consultant that the employer conducted a reasonable investigation and took prompt remedial action.

Kimzey v. Wal-Mart Stores Inc., 107 F.3d 568 (1997), allowed expert testimony that the employer had not trained its employees adequately regarding the investigation of sexual-harassment complaints. *Shrout v. Black Clawson Co.*, 689 F.Supp. 774 (S.D. Ohio 1988), admitted testimony that the company's sexual-harassment policies and procedures were inadequate.

In *Robinson v. Jacksonville Shipyards Inc.*, 760 F.Supp 1486 (M.D. Fla. 1991), the court permitted an expert to testify on the elements of a comprehensive, effective sexual-harassment policy, the patterns of, and responses to, sexual harassment and the remedial steps that employers can take in response.

Contrast these cases with *Lipsett v. University of Puerto Rico*, 740 F.Supp. 921 (D. P.R. 1990), in which the court did not allow a well-regarded expert to testify on whether sexual harassment or a hostile work environment was present.

The lesson of these cases is that the crucial issue is not so much whether the expert has sufficient expertise. Rather, courts consider whether the proffered testimony goes to issues that either invade the jury's province or do not need expert assistance to understand.

Thus, the *Lipsett* court did not permit an individual with excellent credentials to give testimony that went to whether the work environment was intimidating, hostile and offensive, a determination that would usurp the prerogative of the jury.

On the other hand, courts generally allow testimony that focuses on the employer's policies and practices. The court in *Coates v. Wal-Mart Stores Inc.*, 976 P.2d 999 (N.M. 1999), stated, "[T]he expert testified regarding the minimum standards for an effective sexual harassment corporate policy. She also testified as to how an employer should enforce its sexual harassment policy in a manner likely to protect employees. Wal-Mart, as a defense, had claimed that it had good sexual harassment policies. The expert's testimony was relevant to refute Wal-Mart's defense and assist the jury in understanding the issue."

There is no question that an expert can have an impact on the value of the case. In *Weeks v. Baker & Mackenzie*, 63 Cal.App.4th 1128 (1998), the jury returned a huge punitive-damages award of \$6.9 million (reduced

to \$3.5 million), even though the damages award was relatively small (\$150,000).

The *Weeks* expert gave very damaging testimony about the law firm's lack of proper policies to prevent and respond to harassment. The fact that the case was against the largest law firm in the United States no doubt influenced the jury as well. But without expert testimony about what policies and procedures are standard, the jury could not have determined how far off the standard the law firm was.

Another issue in sexual-harassment cases about which experts can testify is whether the employer did an adequate investigation. Employers are not guarantors of a harassment-free workplace, nor can an investigation always uncover the truth. But employers must act reasonably and use best practices to address harassment.

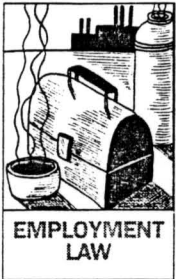
The cases of *Cotran v. Rollins Hudig Hall International Inc.*, 17 Cal.4th 93 (1998), and *Silva v. Lucky Stores Inc.*, 65 Cal.App.4th 256 (1998), are useful for the employer that argues that, while it may have come to the wrong conclusion in a harassment investigation, the methods used were fair and reasonable and, thus, no liability exists for the result.

Both *Cotran* and *Silva* held that the employer conducted a reasonable investigation (reasonably concluding that the harassment occurred) and, therefore, that it was immune from liability to the employee terminated for harassment.

Human-resources experts can assist defendants in establishing that their actions were consistent with good practice. Likewise, experts can testify for plaintiffs where there was an inadequate investigation or no investigation at all.

Experts on investigating, preventing and responding to harassment can assist plaintiffs in proving that an employer did not meet the standard of care in the industry or assist defendants in showing that these standards were met.

Proper use of experts can make a significant difference in the outcome of litigation, in terms of both liability and the amount of damages awarded.



EMPLOYMENT LAW

Amy Oppenheimer co-wrote "Investigating Workplace Harassment: How to be Fair, Thorough and Legal" (Society for Human Resource Management 2002) and testifies as an expert witness on employer practices in preventing, responding to and investigating workplace discrimination and harassment.