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Finding and using evidence to win your employment case

EVIDENCE CAN BE TESTIMONY ABOUT WHAT SOMEONE SAW OR HEARD OR SMELLED. EVEN SOMEONE'S OPINION

The challenge of employment cases is that the facts do not usually revolve around one incident that occurs over seconds or minutes. The successful litigation of an employment case requires you to get intimately familiar with your client's workplace, their job duties, and your clients themselves. In most cases, you are going to need a client who was dedicated to their job duties, communicated reasonably, did a reasonably good job, and is honest.

When evaluating whether to take on the case, try to speak with coworkers on or off the record, review your client's written communications, and spend enough time with them so you can evaluate how they will be as a witness. Remember, most jurors have had jobs and one thought you can count on is them thinking about whether they would want to work with your client.

Find out the whole story through discovery

It is rare that you will know the whole story when you interview your client. They rarely have all the behind-the-scenes emails and other communications, so it is critical to get these early in the litigation and analyze them. If there are bad facts in those documents, get your client's take on them. Try to show any negative comments about your client reflect bias and that he or she is being held to a double standard.

It is important to give your client plenty of time to review key documents prior to deposition as getting through that deposition with the case intact is a key step in employment litigation. When preparing your client, discuss the themes of the case and what needs to be proved. While contention interrogatories are not permitted in deposition, it is important for your client to explain how they were discriminated against or harassed.

When taking the defendant's witnesses, question them on the company policies, but there is rarely a time when you need to show the policies to them. Demonstrating that the company is the one who broke the rules is often a key to success.

Defendants will create their narrative of events and will make false allegations against your client; however, it is important to stick to your themes of the case and keep them in mind when drafting your opening, questions for the witnesses, and closing.

The exemplar, *Nicole Birden v. The Regents of Univ. of Cal.*, No. B302956 (Cal. Ct. App. Aug. 12, 2021), was a race-harassment case where the allegations involved Latina phlebotomists harassing an African-American phlebotomist which involved all of these challenges.

Dig deep into the documents

When defendants produce emails that, at first glance, do not favor your client and very well could undermine the case, dig deep into the emails and work on trying to dispel the emails in some way.

For instance, in the *Birden* case, we used them as further proof of the harassment. Some ways to attack this testimony and emails are: (1) If the email is complaining about your client, point out what is not in the email with regards to the facts in your case. Use your client's version of the events and any witnesses, especially "me too" witnesses; (2) Compare how defendants respond to your client's complaints and the other employee's complaining email about your client. For instance, in the *Birden* case, plaintiff sent two complaint emails that were ignored, while an immediate investigation was conducted regarding the other employee's complaint email about plaintiff; and (3) When deposing the author of the email, question them in

detail about the email, including whether they ever did what they are accusing your client of doing. You will be surprised at some of the answers as bullies go by the motto "do as I say not as I do."

Demonstrative evidence

During discovery when there is a key piece of evidence that defendants know will substantiate plaintiff's claims, push for it. After the initial set of discovery is received and defendants do not produce it, press them – meet and confer and give them a reasonable amount of time to produce. If they ultimately do not produce, file a motion to compel. If the judge grants the motion and orders defendants to produce the evidence, you are still not out of the woods, as sometimes defendants will produce evidence with redactions or exclude information to hide the damning evidence. Therefore, if that happens, meet and confer again requesting that the documents be produced unredacted. Defendants will assert all types of objections – third-party privacy, relevance, etc.

Motions to compel are often needed in employment cases. For example, in the *Birden* case, plaintiff and the "me too" witness were assigned a disproportionate amount of blood draws compared to the other non-African American phlebotomist on their shift. So, requesting blood draws for each of the phlebotomists working the same shift as plaintiff was a key piece of evidence for plaintiff's case to prove the disproportionate blood draws.

Then at trial, prepare a demonstrative illustrating the evidence. In the *Birden* trial, besides redacting names, defendants neglected to include the blood draws for two of the harassers. So here, the demonstrative showed the disproportionate number of blood draws of the listed names and the omitted names were added with a blank count.

As defense attorneys frequently object in depositions, “the document speaks for itself.” This type of demonstrative definitely will speak for itself!

Witnesses’ credibility

When it’s the defendants’ turn to introduce their witnesses and it turns out it is a witness you did not depose, do your due diligence. Once you get the witness list, do some investigating into the witnesses. Ask your client and any favorable witnesses for any information about the person as well as looking them up on social media. In the *Birden* case, it turned out that defendant’s star witness had been previously terminated for throwing out blood samples of an African-American phlebotomist and then rehired. His testimony was undermined when he denied it, but admitted he was terminated for mislabeling blood samples and then was rehired. His credibility was toast. When dealing with a witness with such a glaring negative piece of evidence against them, there will most likely be more evidence to discredit them with as you continue your line of questioning.

Deposition testimony is a great tool to impeach witnesses at trial. There is a saying: “A liar never remembers

what they say.” Thus, for key questions asked at deposition, be prepared to ask those same questions to impeach the witnesses.

Evidence can come in many forms

CACI 202: Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone’s opinion.

The standard of proof in most civil cases is “a preponderance of the evidence” (i.e., that it is more likely than not) defendant(s) is/are responsible for plaintiff’s harm.

Employment trials can consist of several mini dramas when there has been conflict between employees, especially where the harassment is racially or sexually charged. Credibility is key, and having a client testify truthfully and consistently is critical in getting a favorable verdict. Undermining the testimony of employees who may be lined up to testify against your client is equally important.

Having a good “me too” witness to testify on plaintiff’s behalf who witnessed the harassment as well as evidence that they experienced the same type

of harassment can be a game changer, especially when it comes to harassment based on race or sex. Emphasize the lack of bias of the “me too” witness and how this witness is actually risking retaliation if they are a current employee by coming in and testifying against coworkers and supervisors. If you have good witnesses, emphasize that testimony is evidence and use CACI 107 to emphasize how the jury should evaluate witness testimony.

Bringing truth to light can be very empowering

Litigating employment cases can be very rewarding. We spend so much time at work – it’s necessary to survive, and people often identify deeply with the jobs they perform. Bringing the truth to light for your client can be very empowering and with cases that go to trial, the hard work is rewarded with a compelling attorneys’ fees motion.

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