Beyond Damages: Unconventional Experts In Employment Cases

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Experts in employment litigation are often predictable. In a "typical" case, the plaintiff designates an economist to testify about lost-wage and benefit damages or a psychologist to testify about the plaintiff's mental anguish. The employer proffers experts to rebut the plaintiff's, and maybe a vocational expert or labor economist to support a failure-to-mitigate defense. Finally, lawyers from each side designate themselves or one of their attorney friends as an expert on reasonable and necessary attorney's fees.

There are, however, more than just the typical experts. Given the numerous statutes, rules, and regulations governing the dynamic employer-employee relationship, the opportunities for creative utilization of expert testimony in employment litigation are diverse and significant. This paper endeavors to explore a few outside-the-box applications of expert testimony in employment litigation and recurring issues regarding the admissibility of that testimony.

Experts on Human Resources Policies or Actions

HR issues abound in employment litigation. Sometimes, the dispute is over an HR policy. For example, was a policy followed? Is the policy reasonable? Other times, an HR action might be at issue. For instance, was a workplace investigation adequate? The possibilities for the intersection of HR and employment litigation are truly endless. Given this interconnectedness, it is not surprising that employment litigants often designate "HR experts" to support their side of the story.

Parties that do so have had varying degrees success in surviving challenges to the "expert" nature of so-called HR "experts." While the nature of these challenges vary with the testimony at issue, there is a common theme to most. Proponents argue that HR policies and actions and their implications for a case are outside the common knowledge of jurors and that expert testimony will aid in jurors' understanding of the case. The counterpoint is that (most) jurors are also employees and, thus, HR issues are not inscrutably foreign. Another common concern is that expert HR testimony may be intended to instruct the jury whether the defendant did or did not violate the law and thereby improperly invades the province of the jury. A few examples are discussed below.

In *Miller v. UPS*, a package delivery driver was terminated after an investigation led the company to believe that the driver had falsely told supervisors that he attempted delivery of some packages and then tried to cover it up.[1] The plaintiff designated an expert who proposed to testify that "the investigation conducted by [the company] was not sufficient and was not compliant with 'recognized management practices.'" The court excluded this testimony because "the subject of human resources investigations is not so complicated as to require expert opinion." The basis for this conclusion was that "[v]irtually all judges and jurors have been employees or employers themselves."

In *Wilson v. Muckala*, a doctor and hospital were sued for sexual harassment.[2] The plaintiff proposed expert testimony regarding "the Hospital's response plan in cases of sexual harassment, and the reasonableness of the Hospital's response to [plaintiff's] claim." The district

[1] *Miller v. United Parcel Serv., Inc.*, No. C 03-2405 PJH, 2004 U.S. Dist. LEXIS 15809 (N.D. Cal. Aug. 6, 2004).
[2] *Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002).

court's decision to exclude this testimony was affirmed. The Tenth Circuit held that the "the issues to which [plaintiff's] expert would have testified were not so impenetrable as to require expert testimony."

Similarly, in *Wagner v. ABW Legacy*, the plaintiff claimed that he was unlawfully terminated for filing a workers' compensation claim.[3] The defendant countered that the plaintiff had abandoned his job by not informing the company that he intended to return to work. The plaintiff submitted an expert to testify that the return-to-work practices utilized by the defendant were "not consistent with the standard of care of appropriate human resource management practice." The court excluded this testimony because it was within the knowledge of jurors and because the court interpreted the testimony to be a thinly veiled attempt to opine that the defendant unlawfully terminated the plaintiff, which would improperly infringe upon the jury's role.

While there are a number of cases that hold similarly to *Miller*, *Wilson*, and *Wagner*,[4] there are certainly conflicting authorities. In *Oyarzo v. Tuolumne*, the court permitted the plaintiff's HR expert to testify that the defendants "failed to meet the human resources standard of care in the implementing the reduction in workforce . . . and failed to follow their own policies in disciplining [plaintiff]."[5] The court reasoned, "Plaintiff Hart is contending that Defendants retaliated against him in violation of the First Amendment and seeks to introduce evidence that Defendant Hart's discipline and termination were based upon pretextual reasons. Whether Defendants acted within the acceptable human resource standard is relevant to the issues to be presented here and Ms. De Lima's opinion will assist the jury in determining whether Defendants' actions were pretextual." A similar result was reached in *Maharaj v. Cal. Bank &Trust*, where the court allowed expert testimony that "Defendant treated Plaintiff in a manner consistent with appropriate human resources management practice."[6]

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[3] *Wagner v. ABW Legacy Corp., Inc.*, No. CV-13-2245-PHX-JZB, 2016 U.S. Dist. LEXIS 29376 (D. Ariz. Mar. 8, 2016).

[4] *See, e.g.*, *Brown v. West Corp.*, No. 8:11CV284, 2014 U.S. Dist. LEXIS 60617 (D. Neb. May 1, 2014) (granting motion to exclude expert's opinion that the defendant's treatment of the plaintiff "prior to his resignation was inconsistent with appropriate human resource management practice generally and its own policy" because the expert's report "offers only a conclusory statement without expressly establishing or applying an industry standard," and the "introduction of the expert report and testimony threaten to place too much emphasis on or lend undue credibility to the interpretation of certain evidence without aiding the jury's understanding of its significance or providing expertise that justifies the interpretation"); *Cook v. CTC Commc'ns Corp.*, No. 06-cv-58-JD, 2007 U.S. Dist. LEXIS 80849 (D.N.H. Oct. 15, 2007) (excluding expert testimony about adequacy of workplace investigation because it would not be helpful to the jury); *Rieger v. Orlor, Inc.*, 427 F. Supp. 2d 99, 101, 104 (D. Conn. 2006) (excluding expert's opinion that "the defendants' rationale for downsizing the plaintiff from her position as service advisor is inadequate" because his opinion provides a legal conclusion and "is based on his analysis of facts in the record, including the chronology of relevant events[;]" "[w]ithout more, this is an assessment the jury can make without assistance from an expert")

[5] *Oyarzo v. Tuolumne Fire Dist.*, No. 1:11-cv-01271-SAB, 2013 U.S. Dist. LEXIS 150367 (E.D. Cal. Oct. 18, 2013).

[6] *Maharaj v. Cal. Bank & Trust*, 288 F.R.D. 458 (E.D. Cal. 2013); *see also Equal Emp't Opportunity Comm'n v. Sierra Pac. Indus.*, No. 2:08-cv-01470-MCE-DAD, 2010 U.S. Dist. LEXIS 106261, (E.D. Cal. Oct. 5, 2010) (denying motion to exclude testimony of human resources expert stating the expert's testimony concerning "whether Defendant's management acted within the appropriate standard of care . . . may well assist the jury in reaching the ultimate conclusion in this matter: whether or not Defendant is liable for any discrimination . . . .").

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