

Cross-Examining Plaintiffs in Employment Harassment and Discrimination Cases: Strategies for Depositions and Trials

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Cross-Examining the Plaintiff in Employment Harassment & Discrimination Cases

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Deposition Goals: Employer



LEAVE NO STONE
UNTURNED—GOOD
OR BAD, YOU MUST
GET ALL THE FACTS



GATHER FACTS/LAY
GROUNDWORK FOR
SUMMARY JUDGMENT



“LOCK THEM IN” FOR
TRIAL



LEARN IF OTHER
AVENUES FOR
DISCOVERY EXIST



TESTIMONY CAN SERVE AS
GROUNDWORK FOR
MEDIATION/SETTLEMENT



PREVIEW OF THE
TRIAL'S ‘STAR
WITNESS’



ESTABLISH TRIAL
THEMES

Deposition Goals: Employer

Force plaintiff to make admissions that will help MSJ

- Pin down claims: narrow factual basis supporting them and seek admissions that undermine factual basis
- Use plaintiff's own words and actions (e.g., emails, statements to witnesses, policies that plaintiff signed, etc.)
- Lay ground-work for further discovery, such as additional documents to request

Build foundation for trial cross-examination

- Following rule “**never ask a question you don't know the answer to**” is made possible, in large part, by an effective deposition
- Plaintiff will have to either acknowledge admissions that hurt case, or risk being impeached in front of jury

Deposition Goals: Employer

Obsessive focus on summary judgment can be risky

- In many jurisdictions, state courts grant summary judgment in employment-related lawsuits less than 50%
- Success rate higher in federal court, but not materially different
- Focus on SJ means most time spent examining witness on claim elements
- If case not disposed of at SJ, other areas of examination become critical
 - E.g., damages

Deposition Goals: Employee



SURVIVE SUMMARY
JUDGMENT



DEVELOP
SYMPATHETIC/LIKEABLE
DEMEANOR



TESTIMONY CAN SERVE
AS GROUNDWORK FOR
MEDIATION/SETTLEMENT



ESTABLISH TRIAL THEMES

Use deposition testimony to develop a targeted plan for trial

- Synthesize admissions
- Develop areas for impeachment
- Keep the trial examination crisp

Keep trial cross-examination controlled

- Don't ask a question you don't know the answer to
- Be prepared to impeach on the spot
- Use a matrix to tie the plaintiff's testimony to the rest of the case

Deposition Cross- Examination vs. Trial Cross- Examination

Employees Usually Win at Trial

A 2009 DOJ study of civil trials during 2005 found that in employment discrimination cases:

- Plaintiffs won 65% of jury trials, and 60% of all trials
- 91% of employment discrimination cases that made it to trial were decided by a jury



Juries Can be Unpredictable

Having the law on your client's side is not always enough:

- Studies show jurors construct competing narratives and tend to decide cases based on which narrative they find more persuasive, rather than merely based on evidence and probabilities
- Showing weaknesses in plaintiff's case may not be enough if plaintiff has a compelling narrative that aligns with beliefs and experiences of individual jurors



Deposition Logistics: To Tape or Not to Tape; Attendance

General rule is “yes”

- Camera likely to make Plaintiff nervous (and, therefore, perhaps more truthful)
- Opposing counsel less likely to be obstreperous
- Enables absent persons (in-house lawyers and witnesses) to view and assess testimony
- Can provide devastating impeachment impact at trial
- Helpful for mock jury exercises
- But ... can be expensive

Deposition attendance

- Fact witness v. corporate representative

Deposition Logistics: Video or In-Person

If choice, always choose in-person

If no-choice, choose Zoom

- Only agree if ALL attendees are remote from each other
- Ensure that witness has sufficient bandwidth
- Obtain commitment from witness that she won't communicate in any form with counsel
- Video quality is generally average
- Veritext has a great exhibit-sharing feature obviating need to screen share

Preparation for Deposition

Take time to prepare thoroughly and plan deposition with trial in mind

- To best serve your client, you need to not only win, but to win quickly and inexpensively—effective depositions lead to strong MSJ
- Trials are not friendly to employers
- Recent social movements have likely made jurors even more friendly to plaintiffs

If case proceeds to trial, plaintiff's deposition can provide foundation for impeaching/discrediting him/her

Know Your Case—Case Theme

From outset, think about case “theme”

- Most important thing at trial will be telling the story you want judge/jury to hear
- What is this case about?
 - Is plaintiff just a money-grabber? Is plaintiff an excuse-maker?
 - Was employment decision fair and consistent?
- Early identification of theme is crucial—and using discovery to find facts supporting theme will help build a winning case

Be willing to modify and adapt throughout discovery

- A theme without any evidentiary support is just as bad as having no theme!
- Use plaintiff’s deposition to develop the theme, and prepare for deposition with this in mind

Deposition Preparation: Find the Facts

Review the documents

Review productions from Plaintiff and client

- Plaintiff's personnel file
 - Performance reviews, disciplinary write-ups
 - Complaints made by or about the plaintiff
 - Pay history, employment application, and other materials re job history
- Employee handbooks and policies
 - Did the plaintiff follow procedure? Was there an investigation?
- Other documents
 - Emails written by the plaintiff, about the plaintiff, or about the incident
 - Incident reports and other HR documents

Review non-party production

- Pre-employment and post-employment records
- Medical records
- EEOC materials

Review “harmful” documents with Plaintiff beforehand

Build chronology

Deposition Preparation: Find the Facts

Interview the players

- Manager/supervisor and co-workers
- Visit client's work environment, office layout—where and how did things transpire?
- Know any 'bad facts' going in



Deposition Preparation: Understanding The Plaintiff

Learn all that you can about the plaintiff

- Employment history
- Litigation history
- Criminal history
- Medical history
- Financial situation (e.g. has plaintiff filed for bankruptcy)
- Social media

Use interrogatories to set up examination

Consider using PI firm to investigate plaintiff further if suspect lack of candor



Master the Chronology

During preparation sessions, counsel should ensure that witnesses/plaintiff has the timeline of the case down cold

It is important for witnesses/plaintiff to know dates, or approximate dates, and the order of events as they occurred to provide specific answers to counsel's questions

Deposition Preparation: Know the Law

Prepare “cheat sheet” of claim elements

Prepare “goals sheet” showing defenses to causes of action

Prepare questions using language from cases decided by your judge
(or the pertinent federal circuit or state appellate courts)

Bring a rule book and contact info for court

- To review in case disagreements arise during deposition

Deposition Preparation: Seek Info With Claim Elements in Mind

Determine what plaintiff must establish

- What are the core elements in plaintiff's case?
- Look for information speaking to plaintiff's awareness of HR policies/ procedures
 - Did plaintiff ignore policies? What did the employer do in response?
- Look for contemporaneous statements, emails, or social media posts to determine what plaintiff told others at the time

Administrative Charges

- Do plaintiff's statements to EEOC or other regulatory body contradict his/her current position?
- EEOC recommends that employees claiming discrimination keep a diary of what happens at work
 - Diary (if it exists) could be a source of impeachment, or could help refute claims about frequency and nature of conduct at issue

Deposition Preparation: “Knowing the law” Means Knowing More Than Claim Elements

Track recent cases in appropriate jurisdiction to see how law is evolving and how courts are applying it

Especially helpful to read cases decided by your judge, as it can help inform your strategy for plaintiff’s deposition, providing insight into what arguments and admissions will help win summary judgment

Follow current developments outside the law that might affect how judges and jurors will think about case



Plaintiff: Review Facts

Review facts and claims

- Plaintiff should review the complaint and facts asserted therein
- Review timeline of events
- Review claims asserted
 - Know what claims are and are not based on
 - “Why were you terminated?” “Because of disability discrimination and retaliation for my complaints of discrimination.”



Plaintiff: Prepare for All Possible Lines of Questioning

Plaintiff should be prepared for questions on all possible topics that may arise during his/her deposition, including:

- Educational history and job qualifications
- Work history with prior employers
- Involvement in prior litigation (if any)
- Performance history with defendant-employer
- Details involved in the plaintiff's allegations, including dates and witnesses
- Any internal notes, diary entries, or memos to file that the plaintiff took
- Plaintiff's history with accused harasser or discriminator
- For sexual harassment plaintiffs,
 - Any actions plaintiff took that defense might argue demonstrated "welcomeness"
 - Whether plaintiff availed himself/herself of employer's workplace reporting procedures
- Subsequent job search and mitigation efforts
- Emotional distress, including how a gap in jobs has affected plaintiff's sense of self

Plaintiff: Mentally Prepare Client

During plaintiff's cross-examination, defense counsel's main goal will be to attack credibility

Plaintiff's counsel should ensure that plaintiff is prepared for potentially aggressive and invasive questioning

- Allow defense counsel to embarrass himself/herself by beating up on a sympathetic plaintiff

Calmer and more confident plaintiff is, and the more accepting he/she is of inevitably damaging information that may emerge, the more credible he/she will appear

Plaintiff should be prepared to talk about his/her job search and appropriate level of jobs to target

- In jurisdictions that do not require a plaintiff to take any job, file a motion *in limine* to restrict defense counsel's cross-examination on this point
- Plaintiff is not required to take a job outside her field of expertise

Look to dispel stereotypes that defense counsel may apply to the plaintiff (e.g., older workers are not technologically knowledgeable)

Plaintiff: Emotional Distress Testimony

Plaintiff's counsel should carefully review plaintiff's medical records (including any therapist's notes) with plaintiff in advance of his/her emotional distress testimony

During cross, defense counsel will likely ask questions about personal issues in plaintiff's life to show that those other issues caused the emotional distress, and not adverse actions of defendant-employer

Instruct plaintiff that it is okay if he/she gets emotional "on stand"

- Real emotions may help demonstrate plaintiff's credibility
- More robust answers = higher emotional distress damages

1

Listen to question

2

Answer only what
is asked

3

Yes or no
questions: Do not
elaborate

- *Exception: Emotional Distress*

Plaintiff: Answering Cross-Examination Questions

Plaintiff: Preparing for Trial

Same preparation as for Plaintiff's deposition but also:

- Summarize Plaintiff's deposition testimony and review any negative testimony with Plaintiff and strategies for dealing with the same
- Prepare outline for Plaintiff's testimony in advance of trial and practice with Plaintiff

Admissions

Securing admissions is critical

- Workplace policies, procedures, codes of conduct are a good place to build a foundation of ‘agreement’ (i.e., admissions)
- Build upon that which is undeniable
 - Admit the dischargeable conduct
 - Admit she is not a ‘mind reader’—i.e., she does not know what management was thinking when they decided to do “X”
 - Admit certain allegations and beliefs are based upon “*speculation*”
 - Admit there are no documents that say “X”
 - Admit others who engaged in the same conduct were treated similarly. Conversely, admit she knows of no others who did “X”
 - Admit that certain statements in the Complaint are incorrect

Impeachment



Close the loops

Have you told us everything your manager said in that meeting about race?”



Use leading questions to get ‘yes’s’ and ‘no’s’.

“That’s the only time you complained to management about this, right?”



Demand clear answers – fight ‘selective memory’

Fight “*that’s all I recall right now*” variants

Don’t settle for an open door; be a bad cop if needed

Remind them this is your only chance to ask questions

Compare confidence in their recollection of other events



Build a clear record

Jumbled exchanges make for bad impeachment

Build precise Q&A ‘modules’ on key issues

Break out elements in questions

Demeanor

An effective demeanor – general tactics

- Professional politeness
 - You aren't the monster her lawyer said you were (at least not yet); build rapport
- Get them talking, and keep them talking
 - Use pauses and conversation cues to elicit information
- Keep eye contact
 - Avoid reading your questions
- Listen, listen, listen
- Play good cop and bad cop as needed
- Who's afraid of a 'bad' answer?
 - If it's out there, you need to know it. Now.
- Don't get drawn into a fight with counsel
 - But don't allow 'coaching' objections



Raising/Responding to Objections

Dealing with objections

- Consider the objection but don't get distracted by counsel
- Don't waste time arguing with opposing counsel about objections
 - Remind counsel that objections must be stated concisely and in a non-argumentative and non-suggestive manner
 - If counsel instructs witness not to answer, objects on privilege, or is obstreperous, build record before moving on

Effective Use of Exhibits

Know which documents need to be authenticated/introduced

Consider using calendars, meeting “invites” and other docs related to timing

Consider quality of the exhibit

Avoid using exhibits as a crutch

- Use only those that are necessary

Consider asking questions revealed by documents but don't introduce

- Unless needed to keep witness honest

Consider using continuous numbering system

Damages

Don't forget or run out of time to examine witness about damages!!

- Economic damages
 - Mitigation efforts
 - Post-employment wages
 - Unemployment comp benefits
 - Value of benefits
- Compensatory damages
 - Probe pre-existing mental/emotional injuries
 - Inquire about medical care/treatment



Q&A

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