Employment Discrimination Trials

Top Ten Motions In Limine

By Kevin J. O'Connor and Lauren Rayner

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The motion in limine is a critical weapon for the attorney defending a client against employment discrimination claims. Trial is won or lost based on the evidence that the jury sees and hears, so properly limiting that evidence can determine the trial's outcome before the jury is even empaneled. This article provides an overview of the most important motions in limine defense counsel should consider. Because discovery lays the groundwork for the motion in limine, this list also provides guidance for discovery that should be pursued to support exclusion of certain evidence.

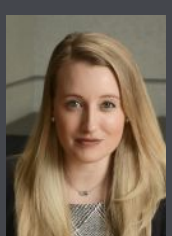
1. Reasonable Cause Determinations and Materials Submitted During EEOC Investigations

We have previously written on the thicket of evidentiary arguments regarding admissibility of reasonable cause determinations by the Equal Employment Opportunity Commission (EEOC or Commission) and admissibility of statements and other materials gathered during EEOC investigations. Because of the complexity of this topic, the reader is invited to review *The Evidentiary Impact of EEOC Reasonable Cause Determinations*, DRI In-House Defense Quarterly, Summer 2014, for a more thorough treatment of these issues, including a detailed table of cases by jurisdiction.

The standards applied by the courts in determining admissibility in these cases are inconsistent from jurisdiction to jurisdiction, and in some cases appear little more than whimsical. As the EEOC is reporting a backlog of charges, a need for additional investigators, and a shortage of funding, challenging the admissibility of reasonable cause determinations—at trial and on consideration of summary judgment—may be even more important.

Employers facing EEOC charges must take the investigatory process seriously and remain mindful of the lasting effects of a reasonable cause finding. If the EEOC determines that reasonable cause exists to believe discrimination occurred (and the conciliation process is unsuccessful), defense counsel must develop and implement a plan to exclude that finding from evidence—or at least, minimize its impact on the jury. The above-referenced article provides ample materials to consider in developing a plan, as well as case law that may be helpful in preparing a motion in limine.

One recent opinion from a federal district court in the Fifth Circuit provides detailed analysis of the rationale for determining admissibility of a reasonable cause determination. In *Nuccio v. Shell Pipeline Co., L.P.*, 506 F. Supp. 3d 382 (E.D. La. 2020), Shell moved for exclusion under Federal Rule of Evidence (FRE) 403, arguing that the reasonable cause finding was based on numerous factual and legal errors. The plaintiff argued that the finding was admissible under the public records exception to the hearsay rule. The trial court ruled that the reasonable cause finding was inadmissible. *Nuccio* demonstrates that a defense attorney need not sit back and allow an EEOC finding to be presented to the jury and to give the imprima-



▪ **Kevin J. O'Connor** is a shareholder with Peckar & Abramson, P.C., a national law firm, and focuses his practice on commercial litigation and employment defense, professional liability, D&O, and class action defense. He is resident at the firm's River Edge, New Jersey office. **Lauren Rayner Davis** is an associate with Peckar & Abramson who also focuses her practice on employment matters. The views expressed here are those of the authors and not necessarily those of Peckar & Abramson.

tur of government approval on a plaintiff's case where that finding contains misstatements of fact or law.

2. "Me Too" Evidence

If you have defended claims of harassment or discrimination in the workplace, you have likely encountered the vexing problem of a plaintiff who seeks to broaden the scope of discovery to include allegations of discrimination by non-plaintiff coworkers. This is colloquially referred to by some courts as "me too" evidence, another topic on which we have written extensively. *"Me Too" Evidence in Employment Cases*, For The Defense, January 2017 offers an extensive treatment of this evidentiary topic and a detailed description of the leading cases.

Defense counsel can limit admissibility of "me too" evidence if they have laid the groundwork to exclude it in discovery. If counsel can show that these other acts were not or could not have been known to a plaintiff, or are otherwise irrelevant to plaintiff's claims, a motion to exclude based on FRE 403 will be successful. Even if relevant, evidence can be excluded if its "probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 403's balancing test supports the exclusion of evidence that will lead to trial of a "case within a case" and otherwise protracted proceedings that distract the jury from the core issues.

3. Speculative Front-Pay Claims

Damages claims for front pay can be particularly difficult to address, even though they generally have the least evidentiary support. Like claims for backpay, front-pay claims tend to escalate with the costs of discovery as a case slowly winds its way through the court system, particularly if the plaintiff feels more emboldened. Because front-pay damages are equitable and inherently speculative, this is an area ripe for a motion in limine.

The need to exclude evidentiary support for front-pay damages may be more urgent in those jurisdictions where the jury and not the judge decides the amount of any front-pay award. In some states, the jury determines whether the plaintiff is entitled to any front pay *and*, if the answer is affirmative, the amount of front pay.

Even in federal court, the circuits are split on whether the issue of quantifying front pay goes to the jury. The Eighth and Ninth Circuits have held that front pay is a wholly equitable remedy, distinct from other compensatory damages and more appropriately awarded by a judge. *See Newhouse v. McCormick & Co., Inc., 110 F.3d 635, 641 (8th Cir. 1997); Traxler v. Mutnomah Cty.*, 596 F.3d 1007, 1012 (9th Cir. 2010); *accord Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (award of front pay should be made by the court); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985) (finding that selection of remedies is discretionary with the district court).

Other circuits put more discretion in the hands of the jury. *See Cummings v. Standard Register Co.*, 265 F.3d 56, 66 (1st

Cir. 2001) (affirming 14-year front-pay claim in age discrimination case and noting that the issue is for the jury); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985) (holding that amount of front-pay damages is a fact question for the jury); *accord Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *see also Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n.4 (7th Cir. 1987) (stating that authority and reason suggest that amount of front pay is a jury question), *vacated on other grounds*, 486 U.S. 1020 (1988).

In the Fifth and Sixth Circuits, the courts bifurcate the liability from damages for front-pay claims, with the court determining entitlement and the jury determining the amount. The decision to submit the claim to the jury is within the discretion of the judge. *Hansard*, 865 F.2d at 1470; *Arban v. West Publishing Corp.*, 345 F.3d 390, 406 (6th Cir. 2003).

Many jurisdictions explicitly recognize that an employee can only seek front pay where there are sufficient facts in the record to support the claim on a non-speculative basis. No employee is entitled to a "lifetime front pay award." *Dominic*, 822 F.2d at 1258. In age discrimination cases, the courts will typically look at the employee's earnings history, likelihood of remaining employed in that position, and likelihood of receiving pay increase to fashion a non-speculative front-pay remedy. The court will also look at issues of mitigation and overall employability. *See, e.g., Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985). Testimony from a qualified employability expert or economist has long been recognized as admissible even in age discrimination cases where an employee is claiming long-term unemployability. *See, e.g., Cassino v. Reichhold Chem.*, 817 F.2d 1338, 1346 (9th Cir. 1987); *Cummings*, 265 F.3d at 61.

In many harassment cases, plaintiffs will claim they are unable to return to the workforce at all because of psychological damage resulting from the harassment. These cases see the most litigation around front-pay damages. Such claims must be supported by expert testimony (through a psychiatrist or employability expert) to reach a jury on a non-speculative basis. Where a plaintiff has no employability expert (or psychiatrist where there is a claim of permanent psychiatric impairment), a claim for front pay is ripe for attack.

In both federal and state court, precedent for substantiating front-pay claims with expert testimony extends back decades. In *Kolb v. Goldring* for instance, the court held that the jury must not be encouraged to "pull figures out of a hat," and that front pay projections must be "based on expert testimony, patterns of past increases, or similar evidence." 694 F.2d 869, 873 (1st Cir. 1982). The court in *Gotthardt v. National R.R. Passenger Corp.* sustained a front-pay award where the plaintiff put on "extensive testimony" from her treating psychologist that the hostile work environment caused plaintiff post-traumatic stress disorder and that her "ongoing impairment would render her unable to perform any job." 191 F.3d 1148, 1156 (9th Cir. 1999). In the gender discrimination case *Haddad v. Wal-Mart Stores,* expert testimony supported an award of $733,000 for 19-years' front pay where the employee claimed her reputation had been harmed and she would never regain her prior economic status. 455 Mass. 91, 102–03 (2009). Finally, in *Salveson v. Douglas Cty. & Wisc. Cty. Mut. Ins. Co.*, a front pay award was reversed and reduced to one year, even in the face of expert testimony, where a jury was essentially left to "speculate as to the extent that Salveson's psychological injuries could be expected to affect her future earning capacity." 610 N.W.2d 184, 190 (Wis. Ct. App. 2000).

4. Bifurcating Liability and Damages

In some cases, it may be beneficial to seek bifurcation of the liability and damages phases of the trial pursuant to Federal Rule of Civil Procedure (FRCP) 42(b) ("Separate Trials") to "avoid prejudice, or to expedite and economize." An example is a case where liability is tenuous but the plaintiff has significant emotional distress as a result of life stressors unrelated to employment, such as an abusive relationship. If liability and damages were tried together, there may be a substantial risk that the jury would award damages based on sympathy and not any fault of the employer.

Bifurcation of liability and damages in an employment discrimination case is commonly sought. *See generally* Cathy Beveridge, *ABA Employment Litig. Handbook*, at 180-81 (2d ed. 2010); *Mineo v. City of N.Y.*, No. 09-cv-2261, 2013 WL 1334322, at *2 (E.D.N.Y. Mar. 29, 2013) (granting bifurcation of liability and damages in civil rights case); *Evans v. State of Conn.,* 168 F.R.D. 118, 121 (D. Conn. 1996) (granting bifurcation of liability and damages in employment discrimination case); *Gafford v. General Elec. Co.*, 997 F.2d 150, 171-72 (6th Cir. 1993) (holding that bifurcation of claims in employment discrimination context is entirely appropriate); *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 978, 988 (N.D. Iowa 2007) (finding bifurcation of liability and damages appropriate in discrimination case); *Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc.*, 867 F. Supp. 686, 689 (N.D. Ill. 1994) (allowing bifurcation in an age discrimination case); *Lieberman-Sack v. Harvard Community Health Plan of New England*, 882 F. Supp. 249, 257 (D. R.I. 1995) (bifurcating liability from damages in suit alleging federal and state law claims for gender and religious discrimination); *Buscemi v. Pepsico, Inc.*, 736 F. Supp. 1267, 1272 (S.D.N.Y. 1990) (bifurcating liability from emotional distress damages in age discrimination case, and finding that "evidence of harm to a plaintiff, regardless of the cause, may result in sympathetic jurors more concerned with compensating plaintiff for his injury than whether or not defendant is at fault.").

5. Expert Testimony by Treating-Physician Fact Witnesses

Plaintiffs often make claims of emotional distress damages without obtaining an expert. They may identify treating physicians as witnesses in discovery but fail to obtain an expert or to comply with the burdensome pretrial requirements for experts. Under these circumstances, it would be error to allow a plaintiff to call a treating physician as an "expert" to support a claim of emotional distress. A plaintiff should not be allowed to establish a diagnosis, causation, or permanency through the plaintiff's own self-serving testimony or by arguing from the records of a treating physician who has not been established

as an expert. A motion in limine in this case should raise the question of whether a treating physician has been properly disclosed, designated, and has otherwise met all procedural requirements for expert witnesses—or is simply a fact witness.

Again, courts disagree on this score. *See In re Fosamax Products Liab. Litig.*, 647 F. Supp. 2d 265, 279–80 (S.D.N.Y. 2009) ("The question of whether to consider treating physicians as expert witnesses or fact witnesses is somewhat unsettled."). Resolution of the issue turns on the specific facts of the case, the nature of the purported testimony, and the reason why plaintiff retained the physician in the first place. *Id.; Turner v. Delta Air Lines, Inc.*, No. 06-cv-1010, 2008 WL 222559, at *1 (E.D.N.Y. Jan. 25, 2008) ("[I]f the witness testifies only to the opinions formed in providing plaintiff medical care, such opinions are considered an explanation of treatment notes and the physician may properly be characterized as a fact witness."); *Cruz v. Henry Modell & Co.*, No. 05-cv-1450, 2008 WL 905356, at *12-14 (E.D.N.Y. Mar. 31, 2008) (permitting treating psychologist to testify as a fact witness regarding the cause of plaintiff's psychological disorders).

In the absence of an expert report, a treating physician's testimony will be limited to opinions formed during treatment. *Williams v. Regus Mgmt. Grp.*, LLC, No. 10-cv-8987, 2012 WL 1711378, at *3 (S.D.N.Y. May 11, 2012); *Motta v. First Unum Life Ins. Co.*, No. 09-cv-3674, 2011 WL 4374544, at *4 (E.D.N.Y. Sept. 19, 2011). "Courts in the Second Circuit have regularly held that this includes opinions on causation." *Romanelli v. Long Island R. Co.*, 898 F. Supp. 2d 626, 631 (S.D.N.Y. 2012) (noting that treating physicians must also demonstrate that their conclusions are backed by a scientifically reliable method). In other words, unless the medical records of the treating provider support a factual and medical basis for opining on diagnoses and causation, the treating provider may not be permitted to testify as an expert without adhering to the expert disclosure requirements.

A helpful summary of applicable law is found in *Puglisi v. Town of Hempstead Sanitary District No. 2*, No. 11–cv–0445, 2013 WL 4046263, at *6 (E.D.N.Y. Aug. 8, 2013). There the court granted defendant's motion to preclude the testimony of a treating physician who was not properly disclosed as an expert. *Id.* The court stated that a treating physician can testify without meeting the requirements for an expert witness as long as the testimony is based on personal knowledge obtained from consultation, examination, and treatment of the plaintiff (and provided the physician was specifically identified in disclosures). *Id.* As a fact witness, the treating physician was permitted to testify to "diagnosis, treatment, prognosis, and causation . . . [and] damages, but only to the extent [the opinion] was based upon information that was acquired as part of his treatment…and not through this litigation." *Id.* at *7.

6. Time-Barred Evidence

The authors once defended a federal discrimination case where the plaintiff complained of harassment while she was working for a prior employer (other than the defendant) and for alleged discriminatory acts going back eight years. Her complaint did not allege any "continuing violation" theory.

In *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993), the court addressed analogous circumstances and recognized the rule that, where claims are time-barred, earlier acts of alleged discrimination "may constitute relevant background evidence." *Id.* at 1211 (quoting *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977)). However, the rule cited in *Malarkey* requires that this evidence be independently evaluated under Rule 403's "ordinary evidentiary standards of probity and prejudice." *Id.* Defense counsel should scour discovery for evidence in support of stale claims—and any other evidence that does not meet Rule 403's balancing test—and move to exclude such evidence at trial.

7. Criminal History of Defense Witnesses

If a defense witness has any history of a criminal offense, you can be sure that plaintiff's counsel will try to get this in front of the jury.

FRE 609(a)(1) allows the admission of evidence of a prior criminal conviction for purposes of impeachment if the crime is punishable by death or a term of imprisonment for more than one year. Before admitting evidence via Rule 609(a)(1), courts are required to balance the following factors: (1) the impeachment value of the prior crime, (2) the remoteness of the crime, (3) the similarity between the crime and the conduct at issue, and (4) the importance of the witness's credibility. *Daniels v. Loizzo,* 986 F. Supp. 245, 250 (S.D.N.Y. 1997); *U.S. v. Hayes,* 553 F.2d 820, 828 (2d Cir. 1977). Of utmost importance in considering admissibility of a prior conviction is whether the crime is probative of truthfulness. *U.S. v. Ortiz,* 553 F.2d 782, 784 (2d Cir. 1988). Defense counsel must delve into the elements of the offense to determine if a conviction meets the criteria of the rule and to effectively argue for exclusion of evidence of the conviction at trial.

8. Testimony Not Based on Personal Knowledge

A motion in limine should target anticipated testimony that is not based on the witness's personal knowledge. "Anticipated testimony" at minimum includes deposition testimony designated in plaintiff's FRCP 26 pretrial disclosures.

FRE 602 provides that "a witness may testify only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FRE 602 expressly requires that a witness possess personal knowledge of the subject matter of their testimony for their testimony to be admissible. *U.S. v. Hernandez,* 693 F.2d 996, 1000 (2d Cir. 1982) (noting that FRE 602 requires personal knowledge for testimonial admissibility). As recognized in *Romanelli v. Long Island RR. Co.,* the test is whether the proffered witness offers enough for a "rational juror' to conclude that the witness has personal knowledge. 898 F. Supp. 2d 626, 632–33 (S.D.N.Y. 2012) (excluding witness's bare conclusion that he had ingested "hazardous contaminants"); *Zokan v. Gates,* 561 F.3d 1076, 1088 (10th Cir. 2009) (co-worker's knowledge in Title VII case was challenged, voir dire conducted, and testimony stricken pursuant to FRE 602); *Quarranta v. Mgt. Support,* 255 F. Supp. 2d. 1040, 1049–50 (D. Ariz. 2003) (striking a coworker's testimony because she had no personal knowledge about how comparators were treated, let alone their names).

A motion in limine aimed at witness testimony can sometimes elicit useful information about the plaintiff's trial strategy. *Henry v. Wyeth Pharm., Inc*., 616 F.3d 134, 152 (2d Cir. 2010) ("It is not the district court's duty to attempt to extract from a party details about what evidence he plans to present. Nor is the court obliged to wait until trial, and see what kind of evidence he shows up with. Rather, when the opposing party has made a motion to exclude potential evidence, the burden falls on the nonmovant . . . to describe the content of the evidence and its relevance to the case.").

9. Determinations on Applications for Unemployment Benefits

An employee who has been fired for misconduct will often challenge that determination in a claim for unemployment benefits. Where the state agency issues a written determination favorable to the employee, you can expect the employee to try to weaponize that determination at trial. There is ample precedent, however, supporting exclusion of these determinations.

In the federal courts, the trial judge has discretion to decide whether to admit or preclude evidence of an administrative agency's finding. *See Paolitto v. John Brown E.&C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998) (affirming exclusion of an administrative agency's determination and noting that "the district court is in the best position to consider the quality of the report, its potential impact on the jury, and the likelihood that the trial will deteriorate into a protracted and unproductive struggle over how the evidence admitted at trial compared to the evidence considered by the agency").

District courts that have excluded these administrative determinations have done so under FRE 403, to prevent undue prejudice to the defendant-employers and to avoid confusion of the jury and waste of time. *See Chisholm v. Sloan-Kettering,* No. 09-cv-8211, 2011 WL 2015526, at *8 (S.D.N.Y. May 13, 2011) (excluding an administrative decision overturning the denial of Plaintiff's unemployment benefits).

In *Abramowitz v. Inta-Boro Acres Inc.,* the federal district court determined that the state agency's "Decisions do pose a significant risk of unfair prejudice to the defendants. The Decisions contain factual conclusions that, if taken at face value, might reasonably be construed as foreclosing deliberation on whether the firing of plaintiff was pretextual. Because its finding on this issue will determine the jury's ultimate finding on liability under the ADEA, the Decisions would function, in effect, as a kind of vouching for plaintiff's evidence on pretextuality." *Abramowitz,* No. 98-cv-4139, 1999 WL 1288942, at *8 (E.D.N.Y. Nov. 16, 1999). The court also noted that "a case in which it is appropriate to admit prior determinations by state administrative agencies that go directly to the merits of a pending [discrimination] claim, will be the rare exception." *Id*. at *25–26.

10. Hearsay

Quite often plaintiff's claims rest in part on impermissible hearsay. Deposition testimony —from the same or another witness—can establish that a witness's deposition testimony is hearsay. Witness statements filed in support of plaintiff's opposition to a summary judgment motion often rely on hearsay as well.

If a legal battle in front of the jury over admissibility of hearsay testimony could be so damaging as to undermine the employer's defense, defense counsel should file a motion in limine targeted at that hearsay testimony. While judges often reserve ruling on such issues, they may instruct plaintiff's counsel to refrain from making arguments in the opening statement or otherwise referring to the objectionable testimony until the court has ruled on its admissibility.