

Weaving Together Expert Testimony in Employment Cases

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Increasingly, employment litigation involves the use of expert witnesses. Some of the different types of expert witnesses used were explained in the November 2015 issue of *The Advocate* by April Linscott.¹ This article advances Linscott's line of thought by expanding on the various types of experts, how they support each other, and how they can help build an effective plaintiff or defense case. In planning appropriate expert witness testimony in an employment law case, attorneys must consider:

- The different types of employment litigation attorneys available
- The facts of the particular case
- The rise in acceptance of employment practices and vocational experts
- The elements of each claim or defense
- The type of evidence available to support expert testimony
- How experts can complement each other
- The ethical considerations of using experts

Each of these topics will be explored further to give a broad view of attorneys' utilization of expert witnesses, especially in employment law.

Expert witnesses are important in assessing liability and damages in employment claims. In some areas of expertise, the standards for assessment, the type of knowledge required, and the role of the expert is clearly defined. In other types of expertise, these issues are not as clearly defined, but are emerging. As an example of how experts can be used in employment cases, we discuss two types of experts (employment practices and vocational), how their

Types of Employment Litigation Experts

Below is a list of experts more commonly used in employment litigation:

Causation Experts

- Employment Practices
 - Americans with Disabilities Act (ADA) Interactive Process
 - ADA Reasonable Accommodation
 - Diversity Training & Policies²
 - Employment Recordkeeping
 - Prevention & Correction of Discrimination
 - Human Resources Policies & Practices
 - Procedural Due Process (for public employers)
 - Punitive Damages (egregious behavior)
- Behavioral (stereotyping; social science)³
- Cultural (explaining cultural norms)

- Gender Differences & Biases (social science)⁴
- Psychological (common responses to stimuli)
- Statistical (patterns of discrimination)⁵
- Vocational Rehabilitation (job tasks, accommodations)

Damages Experts

- Economist or Certified Public Accountant (lost wages, benefits)
- Expert in Industry (employability)
- Medical, Non-Treating (injury)
- Psychological Damage (medical professional or mental health expert)
- Treating Medical Professionals (injury)
- Vocational Rehabilitation (vocational diagnosis and function, pliability, occupational/labor market, skills, mitigation)

respective areas of specialty have developed, and how their expertise can complement and enrich aspects of the attorney's story and strategy.

Consider the facts of the case

In determining what types of experts will enhance the case, consider the facts and whether each potential expert will help explain to the jury the client's actions/position. Idaho Rule of Evidence 702 requires that the scientific, technical, or other specialized knowledge of an expert "will assist the trier of fact to understand the evidence or determine a fact in issue" Those who serve as experts must be qualified by "knowledge, skill, experience, training, or education" to offer an opinion.

For employment experts, the rise of the human resource profession, and the advent of a host of employ-

ment practices imposed by employment law directives, has given rise to a need to explain the intricacies of the employer response to the most common employment dilemmas. For example, where there is a complaint of workplace harassment, the employment practices expert can examine internal policies and opine on their effectiveness, assess the employer's response, examine the effectiveness of the investigation conducted internally, and provide insight into how employers resolve such complaints.

The Article's Origin

This article is based on a presentation under the same name given by the two authors at the IARP/ISLCP Annual Conference in Pittsburgh, PA in October 2016.

The vocational expert can opine on the liability and damages aspects of cases. For causation, the vocational expert could examine the workplace, sometimes by performing an onsite position analysis or reviewing documents specific to the job requirements, and matching that data to the plaintiff, opine as to the required job tasks, or examine accommodations that were or could have been considered.

On the damages side of the case, the vocational expert examines the individual and then compares the results of the assessment with the requirements of jobs, either with the employer in question or within the occupation or relevant labor market. The vocational expert could also discuss how the plaintiff's skills and vocational functioning are relevant, any mitigating actions the plaintiff could perform, and the impact of those actions on the plaintiff's employability or placeability currently or over the worklife.

The rise of vocational experts

In considering whether to retain an expert in an employment case, the attorney should consider the benefits, but also anticipate potential barriers or challenges to specific kinds of expert witness. Some attorneys and judges may be unfamiliar with the use of employment experts, and the attorney may need to educate others about the availability and appropriateness of the selected experts.

One concern is whether the expert will opine on legal issues. Rule 704 allows an expert to testify about an ultimate issue, but care must be taken to ensure that the expected testimony does not cross over into something that should best be addressed in jury instructions. There is a sense of resistance in the acceptance of expert testimony when the area of expertise is considered "new."

Employment practices experts are likely the most recent development in the employment litigation experts. The rise of regulation, and development of associated human resource practice and standards, led to certain required management practices. Employment practices experts develop knowledge in these various practices, and can opine whether the employer followed or failed to follow the proper procedures or best practices.

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In the 1990s, there was a rise in the types of social science experts who could speak to common patterns of responses to harassment and discrimination (complainant, supervisor, workgroup response). With this new type of expert, there has been increased attention to the standards that will be used to assess the actions taken by the employer, and the knowledge and proficiency of the expert in those areas.

The attorney should assure that the expert will be speaking from the perspective of knowledge of industry standards, and applications of accepted principles of human resources or other social science discipline. One method of ascertaining the expertise of an employment practices

expert is verifying credentials in an area of human resources practice.

An example of a credential is the Senior Professional in Human Resources through HR Certification Institute⁶ or the Society of Human Resource Management Senior Certified Professional certification through Society for Human Resource Management.⁷ The knowledge and competencies required for the latter certification is extensive and sets a high professional standard.⁸ Both certifications assure that the expert has the type of knowledge and skill to overcome objections under Rule 702, and also assure that the expert will understand other areas of expertise (e.g., social science, vocational) and the complementarity to another expert's opinions.

Although employment practices experts are recent as a forensic specialty, vocational experts have been testifying in different forms of litigation for nearly a century.⁹ In the advent of Social Security case law in the early 1960s, the use of vocational experts spread dramatically across all types of litigation, including employment law cases. As the forensic subspecialty professionalized, formal structures began to develop for assessment, research, and presentation of opinions. For example, over the last four decades, there have been 20 published models of how to perform forensic vocational rehabilitation evaluations,¹⁰ as well as literature as to the specific issues for vocational experts to consider in employment law cases.¹¹

Today, most vocational experts come from the specialties of rehabilitation counseling or rehabilitation psychology and are credentialed as Certified Rehabilitation Counselors through the only rehabilitation counseling certification body in the world, the Commission on Rehabilitation Counselor Certification, or as a Fellow or Diplomate by the American Board of Vocational Experts. For

nearly 25 years, the minimum educational requirement for credentialing has been a master's degree.

Understand the elements of the claim or defense

To determine how to weave together expert testimony, the attorney must understand the elements of proof of a claim. For example, if the attorney is defending a claim of failure to accommodate under the ADA, understanding the interactive process required in accommodating disabilities in the workplace is essential to comprehending how employment policies contribute to a defense of such cases. This knowledge is pivotal to grasping the types of possible accommodations that were available and offered given the plaintiff's physical, mental, or cognitive function as defined under the ADA. Such a case might require engaging an employment practices and a vocational expert as members of the forensic expert team.

If the attorney is defending a complaint of constructive discharge based on supervisory harassment, the attorney must prove to the jury that the employer took reasonable care to prevent (human resource practices to prevent harassment) and correct promptly (human resource practices to promptly and thoroughly investigate and apply corrective action) the complaint of harassment. That proof may require an employment practices expert to explain the standards for these common types of employment actions. The plaintiff may require a social scientist or psychologist to speak to common responses to harassment, to justify the plaintiff's need to resign.

What types of evidence are available to support expert testimony?

In considering how to weave together the various types of experts needed in a case, attention should

EVIDENCE	
PRIMARY (Expert Collects)	SECONDARY (Others Collect, Used by Expert)
Interviews (e.g., structured, semi-structured, unstructured, group)	Documentation (e.g., employee file, medical records, income taxes, evidence-based peer-reviewed articles)
Observation (e.g., testing, research studies performed for case, behavioral analysis)	Archival (e.g., raw data from EEOC, Census, private sources)
Participant-Observation (e.g., observations with expert as participant, such a position analysis)	Physical artifacts (e.g., durable medical equipment, bullets, product produced or in question)

be given to the categories of evidence available, and the evidence experts could rely upon to enhance the case presentation. Barros-Bailey developed a simple chart, based on case study research methods, of the various types of evidence used by experts:¹²

Evidence for all types of experts

In deciding what types of experts to use, determine the types of evidence each expert needs to rely upon and how that evidence exists or needs to be collected for the case. For example, a vocational expert may need to interview and observe the plaintiff (primary evidence) while an employment practices expert may be able to rely upon deposition testimony (secondary evidence) for information needed for the opinion.

The evidence the expert relies upon must be identified as something that the expert has become personally aware of, or which is personally observed. Idaho Rule of Evidence 703 does not require that the evidence the expert relies upon be admissible if it is of a type "reasonably relied upon by experts in the particular field."

How will the experts complement each other?

Next, consider the correlation and complementarity of retained experts, and how their testimony will build upon and enhance the testi-

mony of the members of the expert team.

For example, an employment practices expert will rely upon behavioral experts, social scientists, and other types of bias or cultural experts. The true employment practices expert provides a foundation for the psychologist to opine on emotional harm, and, in turn, for the statistician to opine upon the impact of policies and practices affected statistically. The employment practices expert who opines on employer policies and the interactive process in an ADA case relies upon a vocational expert's evaluation of the potential accommodations and level of disability; in turn, the vocational expert provides the foundation for the psychologist to speak about the psychological impact of the job accommodation.

Weaving together experts in employment cases

Based on this discussion, in thinking about expert witnesses in a current or next employment case, consider these questions:

- Do you understand the facts of your case, and areas where an expert might help the jury to better understand the employee or employer response?
- Do you understand each potential expert's role, scope, and the boundaries and overlap of each discipline?
- Have you examined how each expert can complement and enhance the work of others in telling your client's story?

- Are you assured that the use and development of expert witness testimony in your case, with your facts, will meet the admissibility and ethical standards?

Once, this analysis is complete, you are ready to construct the expert testimony strategy needed in the case.¹³

One last word: Ethics!

Attorneys should be familiar with the 2011 American Bar Association (ABA) Litigation Section's *Standards of Conduct for Experts Retained by Lawyers* which, while not formally adopted by the general assembly of the ABA, provide excellent guidelines for ethical retention of experts.¹⁴ The five areas of the *Standards* included in the code are: 1) Integrity and Professionalism; 2) Competency; 3) Confidentiality; 4) Conflict of Interest and Disclosure; and, 5) Contingency Compensation of Experts in Litigated Matters. While very little has been published about this code,¹⁶ it serves as another screener for the attorney to measure the value and worth of the expert's inclusion on the expert team.

Endnotes

1. *Expert Witnesses to Consider in Your Next Employment Case*, 58 Advocate 37 (November/December 2015).
2. See *Butler v. Home Depot, Inc.*, 984 F.Supp. 1257 (1997).
3. See stereotyping expert witness cited in United States Supreme Court case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
4. See Dr. William Bielby's "social framework analysis" analysis in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2004).
5. See, e.g., Professor Richard Drogin's statistical analysis in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2004) which was appealed to the United States Supreme Court on the issue of class certification in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011).
6. <https://www.hrci.org/our-programs/our-certifications/sphr>
7. <https://www.shrm.org/certification/>

[about/aboutshrmcertification/pages/shrm-scp.aspx](https://www.shrm.org/certification/Documents/SHRM-BoCK-FINAL.pdf)

8. <https://www.shrm.org/certification/Documents/SHRM-BoCK-FINAL.pdf>

9. Barros-Bailey, M. (2014). History of forensic vocational consulting. In R. Robinson (Ed.), *Foundations of Forensic Vocational Rehabilitation* (pp. 13-31). New York, NY: Springer Publications.

10. Robinson, R. H. (2014). Forensic rehabilitation and vocational earning capacity models. In R. Robinson (Ed.), *Foundations of Forensic Vocational Rehabilitation* (pp. 33-61). New York, NY: Springer Publications.

11. Heitzman, A. M., Amundsen, C., Gann, C., & Christensen, D. R. (2014). Consultation in employment law. In R. Robinson (Ed.), *Foundations of Forensic Vocational Rehabilitation* (pp. 363-378). New York, NY: Springer Publications.

12. See Barros-Bailey, M. (2016). *A content analysis of the Federal Rules of Evidence using a case study research evidence typology*. Manuscript in preparation. See also Barros-Bailey, M. (2016). *Evidence classification and practice in forensic rehabilitation: A content analysis of earning capacity models*. Manuscript in preparation. See also Barros-Bailey, M. (2015, October). *From Federal Rules to case study research methods: Evidence in forensic practice*. 2015 IARP Annual Conference, Unmask Your Potential: Connect, Grow, Learn – an Opportunity Jambalaya, New

Orleans, LA. See also Barros-Bailey, M. (2015, April). *Evidence-based practice and the federal evidentiary rules interface in forensic vocational rehabilitation*. National Council on Rehabilitation Education Spring Conference, Newport Beach, CA. See also Barros-Bailey, M. (2011, June). *Application of mixed methods research methodology in the evaluation of a single individual (N=1)*. 7th Mixed Methods International Conference, University of Leeds, Leeds, Yorkshire, UK.

13. For a more detailed discussion of evidentiary considerations and the types of employment law experts, see Wise, R. M., *From Price Waterhouse to Dukes and Beyond: Bridging the Gap Between Law and Social Science by Improving the Admissibility Standard for Expert Testimony*. 26 Berkeley Journal of Employment & Labor Law 545-582 (2005).

14. <http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2011-06-litigation-spring-leadership-council/101b-experts-ethics-spring2011.authcheckdam.pdf>

16. Barros-Bailey, M., & Carlisle, J. (2014). Professional identity, standards, and ethical issues. In R. Robinson (Ed.), *Foundations of Forensic Vocational Rehabilitation* (pp. 445-467). New York, NY: Springer Publications.

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