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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2017 Issue

If I was you, I'd wanna have "me toos"

HOW TO OBTAIN EVIDENCE OF DISCRIMINATORY ACTS TOWARD OTHERS IN SEXUAL-HARASSMENT CASES AND GET IT ADMITTED AT TRIAL

Employment cases are inherently fact specific, and often rely on circumstantial evidence to prove the plaintiff's story in what is often a he-said-she-said situation. Evidence of the employer's discrimination or harassment toward other employees, known as "me-too evidence," can significantly increase the credibility of the plaintiff, and provide a basis for higher compensatory and/or punitive damages. Obtaining such information can prove challenging, and even if obtained, the plaintiff's attorney will have to overcome evidentiary objections to its admission at trial as impermissible character evidence. Fortunately, recently published cases will greatly assist the practitioner in defeating these obstacles.

This article offers practical guidance in obtaining me-too evidence and discusses how to defeat the evidentiary obstacles in the context of a sexual harassment case. Because a solid understanding of the bases for its admissibility instructs us as to what we should be looking for, this article addresses the relevant case law first, before discussing how to obtain the me-too evidence.

Admissibility of me-too evidence

Generally, evidence of a defendant's prior bad acts toward others is inadmissible under Evidence Code section 1101(a) when offered to prove that the defendant has a "propensity" to engage in the conduct alleged. This is for good reason: the defendant should be tried and held accountable for the conduct alleged, not for some other conduct.

However, the Evidence Code and California cases have long recognized several reasons why prior misconduct in harassment and discrimination cases would be admissible for reasons separate and distinct from character evidence. Section 1101(b) specifically permits evidence of misconduct when introduced to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident," or whether the alleged sexual predator "did not reasonably and in good faith believe that the victim consented." Subsection (c) permits prior misconduct as impeachment evidence "offered to support or attack the credibility of a witness."

In sexual-harassment cases, me-too evidence can support a number of these non-propensity factual issues, particularly in the context of the harasser's gender bias, the hostility of the plaintiff's work environment, notice to the employer, the lack of a meaningful anti-harassment policy, and more. This evidence is powerful ammunition not only to prove your case, but also to increase damages and obtain punitive damages. (Although this article focuses on sexual harassment, these principles are largely applicable to other forms of harassment, and may be applicable to discrimination and retaliation under different analyses.)

A hypothetical

Pamela Plaintiff brings a claim for sexual harassment against Company X and her harassing Store Manager, Bill O'Brother. Bill has repeatedly told her crass 'jokes,' whistled and made catcalls at her, tried to hold her hand and forcibly kiss her, and repeatedly asked her out on dates. Pamela's co-worker, Lorie Lovinterest, began dating Bill and soon thereafter received a promotion with a raise from him.

Pamela has also witnessed Bill make sexual advances at another employee, Co-worker Coraline. He whistled at her, tried to hold her hand, and called her "Foxy." Bill repeatedly harassed Coraline notwithstanding (and perhaps because of) Coraline's evident discomfort. Assistant Store Manager Adam has observed Bill's conduct toward Coraline.

Before Pamela's employment, Adam had also witnessed Bill try to hold and kiss former store employee, Irene Iquit, who was angry about it. Pamela has never met Irene. Both Co-worker Coraline and Irene Iquit expressed to Adam their discomfort with Bill's conduct. Irene wanted to formally report the conduct, but after Adam reported to Human Resources on her behalf, she heard nothing for weeks. Bill intimidated Irene, and she ultimately quit.

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In the first months of Pamela's employment, she learned that another co-worker, Tina Terminated, had reported to Human Resources that the Company X's District Manager Roger Rascal had been sexually harassing her. Tina was terminated soon thereafter. Pamela's co-worker, Frightened Franny, told her with much distress about the sexual harassment by Roger Rascal that both she and Tina were subjected to. Franny told Pamela to think twice before reporting sexual harassment at Company X.

On what basis would any of this evidence be admissible in Pamela Plaintiff's sexual harassment claims against Company X and Bill O'Brother?

Direct evidence of plaintiff's hostile work environment

Perhaps the most obvious directly relevant me-too evidence is the harasser's conduct that the plaintiff observes. Sexual harassment claims generally fall into two theories: quid pro quo and hostile work environment. For the latter, the fact finder must consider the totality of the circumstances to determine if the defendant created a work environment that was subjectively and objectively offensive. (*Fuentes v. AutoZone, Inc*. (2011) 200 Cal.App.4th 1221, 1226.) In our hypothetical, Pamela would have little problem establishing that Bill O'Brother's harassment of Coraline in her presence helped to create a sexually charged work environment.

Likewise, Pamela's awareness of Lorie Lovinterest's promotion – which suggests quid pro quo advancement in return for sexual favors – contributed to the hostility of Pamela's work environment and is therefore admissible. The California Supreme Court has recognized that widespread sexual favoritism and harassment can permeate the work environment and take a significant mental toll on the victim, even when the victim is not the target of the conduct. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 451, 469-70 ["In these circumstances, a message is implicitly conveyed that the managers view women as sexual playthings, thereby creating an atmosphere that is demeaning to women."]; see also, *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706 [the work environment may become intolerable because the harassment, whether verbal, physical or visual, communicates an *offensive message* about the employee's place in the workplace].)

But what of the conduct that Pamela heard about during her employment but never observed? What if Pamela was aware of Irene Iquit's experience, who quit before Pamela began working? This evidence is bound to elicit objections that the plaintiff has no "personal knowledge" of me-too harassment that she did not witness. Fortunately, the case of *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519, flatly rejects this narrow definition of personal knowledge. The *Beyda* court held that even if the plaintiff "does not personally witness" the conduct, her knowledge of it is nonetheless relevant to determining whether a complaining employee *perceived a hostile environment*. Her "work environment is affected" by the treatment of others because "[a] woman's perception that her work environment is hostile to women will obviously be reinforced" if she has knowledge of the harassment of other female workers. (*Id.*; *accord*, *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, at 111-112 [conduct unseen by plaintiff also relevant to gender bias].)

Pamela should therefore be allowed to introduce evidence of Bill O'Brother's sexually charged conduct toward former employee Irene Iquit, as well as his conduct toward Co-worker Coraline and Lorie Lovinterest, because all of these facts contributed to the totality of circumstances that made her work environment objectively and subjectively hostile. Arguably, Pamela's awareness of District Manager Roger Rascal's sexually harassing conduct toward female employees at Company X, and Company X's apparent shielding of Roger Rascal from reprimand contributed to the hostility of Pamela's work environment. Frightened Franny's distress and warnings to Pamela reinforced Pamela's perception that Company X created a sexually charged atmosphere degrading to women. It would be direct evidence of a climate of bias at Company X.

Discriminatory intent, gender bias and absence of mistake

Just as important as showing what's in the plaintiff's mind, me-too evidence can be critical to showing what's in the defendant's mind. No case does more to illustrate this point than *Pantoja v. Anton*, *supra*, 198 Cal.App.4th 87, a case that every employment attorney should read. To prevail in her sexual harassment claim under the FEHA, the plaintiff must show that she was subjected to unwelcome conduct "because of his or her sex [or] gender" resulting in harassment so severe or pervasive that the conditions of her employment were altered. (Gov. Code, § 12940, subd. (j).) This means that Pamela must show Bill O'Brother's discriminatory intent, i.e., that gender bias motivated his conduct. (*Pantoja, supra*, 198 Cal.App.4th at 114-115.) Although this differs from the level of intent in a claim of discriminatory hiring and firing, the defendant's discriminatory mental state is still relevant – indeed a "crucial" element of the case. (*Ibid.* [citing and distinguishing *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279].)

In *Pantoja*, the defendant, an attorney, claimed that he was not addressing his female staff with profanities as alleged, but addressing *situations* with profanities. The trial court excluded proffered me-too evidence that Anton had called them "bitches," leered at them and their bodies, inappropriately touched them, and made sexually degrading comments about their clothes and bodies. The trial court limited the me-too evidence to events that Pantoja "perceived or was affected by." (*Pantoja, supra*, 198 Cal.App.4th at 94, 97-99.) This was reversible error, not only because the proffered evidence impeached Anton's non-discriminatory explanations for his conduct, but also because it was affirmative evidence of the discriminatory animus he harbored when sexually harassing Pantoja. It did not matter that Pantoja did not observe or

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was even aware of the prior conduct when she was employed. (*Id.* at 114-116.) Unlike the defendants in the *Lyle* case – the so-called "Friends" case, the evidence showed that Anton's gender bias motivated his conduct toward Pantoja. (*Id*. at 129-132.)

The distinction that this is more than impeachment evidence is important. Admissibility does not depend on the defendant's exculpatory explanations placing his intent at issue. His gender bias is an element that the plaintiff has the burden of proving. Short of an admission or stipulation that the defendant acted toward the plaintiff with gender bias or discriminatory intent (which would never happen), it remains at issue. The plaintiff is entitled to present *all* evidence supporting this element. (*Id*. at 117.)

Showing gender bias

Under this theory, Pamela Plaintiff can introduce evidence of Bill O'Brother's harassment of Co-worker Coraline as well as Irene Iquit (even if Pamela was fully unaware of Irene's case), because it shows his gender bias and tends to prove that he acted with discriminatory intent against Pamela. She can present evidence of Bill's quid pro quo favoritism toward Lorie Lovinterest, because it too "tends to show employer's 'general attitude of disrespect toward his female employees and his sexual objectification of them.'" (*Pantoja*, 112-113, 115 [citing to *Heyne v. Caruso* (9th Cir.1995) 69 F.3d 1475, 1479-1480] [Evidence of one type of discriminatory conduct can be probative of a defendant's mental state in engaging in another type of conduct.].) Pamela is entitled to present this testimony regardless of whether Bill gives nondiscriminatory reasons for his conduct or categorically denies all of Pamela's allegations.

The defense may argue that discriminatory intent need not be presented here because Pamela's claim is based on allegations that, if proven true, need no further explanation. *Pantoja* flatly rejected this reasoning, adopted by the trial court, and held that "Pantoja was entitled to present evidence of all the elements defendants did not admit, even if the court thought proof of one element (Anton's harassing conduct) would imply another element (Anton's discriminatory intent or bias)." (*Pantoja, supra*, 198 Cal.App.4th at 117.) Pamela is entitled to present me-too evidence of Bill's discriminatory intent; including me-too evidence that she was unaware of while employed.

Impeachment of harasser's credibility

Of course, when the defendant gives testimony that he (or she) would "never" engage in the type of conduct alleged by the plaintiff, or that he "always" conducts himself professionally in the workplace or "always" treats female employees with respect (as defendants are often compelled to do), he opens the door to impeachment under Evid. Code, § 1106(c). While impeachment and discriminatory intent are "inseparately intertwined" as bases for me-too evidence, it is wise to assert both theories. (*Pantoja, supra*, 198 Cal.App.4th 118.) Your judge may fail to apply the holding in *Pantoja* but allow the evidence under the more commonly recognized theory of impeachment. Though failure to follow *Pantoja* as binding precedent is reversible error, an ounce of prevention at trial is worth a pound of appellate cure.

Here, if Bill denies that he ever tried to hold Pamela's hand or anyone else's hand at work, Co-worker Coraline's directly contradicting testimony should come in as impeachment evidence. Note, however, that if Bill denies that he ever tried to kiss Pamela, this might not suffice to open the door to Coraline's testimony that Bill tried to hold Coraline's hand. Your judge might find that it does not directly contradict Bill's statement. In written discovery and depositions, try to get the defendant to make broader blanket denials of any misconduct toward female employees, which can be more broadly impeached. Assert discriminatory intent as a separate basis, which can be shown by different types of discriminatory conduct. (*Pantoja, supra*, 198 Cal.App.4th at 115.) Although these two separate bases of admissibility generally overlap, they are not identical, and should both be asserted whenever possible. (*Id.* at 118.)

Direct evidence that the employer was on notice

The FEHA holds every employer liable for its employee's unlawful harassing conduct if it (a) "knows or should have known of this conduct" and (b) "fails to take immediate and appropriate corrective action." (Gov. Code, § 12940(j)(1)). When the harasser is the plaintiff's supervisor, the employer is strictly liable for the unlawful conduct, regardless of what corrective action it took in response. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.)

Separately, the employer is liable under the FEHA if it "fail[s] to take all reasonable steps necessary to prevent . . . harassment from occurring." (Gov. Code, § 12940(k).) The duty to prevent harassment is heightened when the employer is on notice of perpetrator's sexual misconduct toward others in the workplace. If the employer does not take measures to prevent further harassment, the victim has a claim against the employer for a separate cause of action under subsection (k) for failing to prevent harassment. As such, Bill's conduct toward Co-worker Coraline and Irene Iquit is material evidence of Company X's knowledge that Bill was sexually harassing employees, which triggers its duty to prevent Bill's further harassment of employees. Note that if Bill's supervisor status under the FEHA is not contested, resulting in a strict liability standard, notice may not be at issue under Subsection (j), but it's still at issue for this separate cause of action under Subsection (k). A good reason to assert it!

Company X may argue that Coraline, unlike Irene, never filed a formal complaint, so it never had any notice of Bill's conduct toward her. Company X would be wrong. Assistant Store Manager Adam, who observed the conduct, was a supervisor under the FEHA even if he was not Bill's supervisor, so long as he directed other employees.(Gov. Code section 12926(t), defining "supervisor" as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote,

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discharge, assign, reward, or discipline other employees, or the responsibility to direct them . . . or effectively to recommend [any of these] action[s]".)

A "lead" employee can also be considered a "supervisor" under section 12926(t) if you can establish that they had the authority to even direct employees. When a supervisor knows of the individual's harassing conduct toward others, the "[supervisor]'s knowledge is imputed to [the employer] regardless of whether he was questioned. (See § 12940, subd. (j)(1).)" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 593.) All too often, well-meaning lower-level managers do not report all of the harassment they witness up the chain of command. They may not have much faith in their direct manager, or in human resources' commitment to addressing sexual harassment, or they may wish to protect the affected employee's privacy. Regardless of the reason, supervisors have an affirmative duty to take action, and should at a minimum report all sexually harassing conduct to those in charge of investigating. Under the FEHA, the supervisor's knowledge *is* the company's knowledge. A good trial strategy is to present the sympathetic supervisor's shortcomings as a manifestation of the company's dysfunctional prevent-and-correct protocol.

Rebutting employer's alleged anti-harassment policy

Almost invariably, the employer's trial narrative will include evidence of its "zero tolerance" or anti-harassment policy and its robust reporting and investigation protocol. Indeed, as of April 1, 2016, employers with five or more employees are required to distribute the DFEH's sexual harassment brochure to all employees and develop a prevention policy that spells out the company's complaint mechanism. (2 Cal. Code Regs. section 11023.)

The company's failure to effectively address sexual misconduct that its supervisors had notice of becomes relevant rebuttal evidence. The more the employer elaborates on its mechanism, the more open it is to rebuttal. If your judge is not convinced that notice to Company X is at issue, or that Adam's knowledge of the unreported acts toward Co-worker Coraline is imputed to Company X as discussed above, be sure to argue this separate basis for admissibility.

Additionally, Roger Rascal's sexual harassment toward Tina Terminated and Frightened Franny is powerful evidence that Company X does not take its anti-harassment policies seriously. (*Pantoja, supra*, 198 Cal.App.4th at 112 [harassment of others admissible to show a "climate of bias" and a "general attitude of disrespect toward female employees"].) Tina's termination suggests that Company X instead protects the harasser and retaliates against victims who make trouble. Expect a vigorous opposition to the "prejudicial effect" of this evidence involving a different harasser under Evid. Code § 352 for its "incendiary" nature, confusion of the issues, and waste of court resources for "having mini-trials within a trial." *Pantoja* warns against the overuse of Section 352 in a way that undervalues the probative value of me-too testimony, particularly when a limiting instruction can address undue prejudice concerns. (*Id*. at 118.)

Failing to report: Explaining plaintiff's state of mind

Although the FEHA does not allow for the federal "*Faragher/Ellerth* defense" as a complete defense to liability when the employee unreasonably fails to take advantage of the employer's reporting mechanism, it does allow for the affirmative defense of avoidable consequences to limit damages. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, See CACI 2526.) Even if the defendant does not plead or pursue the avoidable consequences defense, it may present evidence of the plaintiff's failure to report in order to attack the plaintiff's credibility or suggest that the conduct was not so offensive after all.

Pamela might not have reported Bill's conduct because she figured that Company X already knew of Bill's ways and had no interest in rectifying it. She might in fact be afraid to report, given Tina's termination after reporting Roger Rascal's conduct. After all, Frightened Franny warned Pamela against reporting harassment. For these reasons, potentially all of the me-too evidence in our hypothetical is relevant and admissible, both as evidence that Company X tolerated sexual harassment and as evidence that Pamela believed it to be true.

Be aware, however, that under this theory a court may be inclined to limit such testimony by only having the plaintiff testify about what she heard or was aware of without having the me-too witnesses testify to their experience. Or worse, a judge may (erroneously) limit testimony to what she personally observed, or split the difference by only letting her state she feared retaliation because of "things I heard." Be prepared to argue that personal knowledge is not limited to what the victim observed, as discussed above, and to advocate for your client's right to fully convey the strength and veracity of what she knew.

Punitive damages

Last but certainly not least, me-too evidence can establish both the availability and the amount of punitive damages. An employer is liable for punitive damages if it: (a) had advance knowledge of an employee's unfitness and employed him or her with a conscious disregard of the rights and safety of others; (b) ratified the wrongful conduct for which damages are awarded or (c) personally acted with malice, fraud or oppression. (Civ. Code, § 3294(b)(2).) For corporate liability, the advance knowledge, ratification or personal acts of malice, fraud or oppression must be on the part of an officer, director or managing agent. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567 [managing agents have considerable discretion in making decisions which ultimately determine corporate policy].)

Pamela can establish ratification by showing that Company X's managing agent(s) (perhaps a high-ranking member of human resources) failed to take corrective action against Bill's conduct toward

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her or others in conscious disregard for the rights of others. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 621 ["ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee."]; *Bihun v. AT&T Information Systems, Inc*. (1993) 13 Cal.App.4th 976, 988-989 [me-too evidence was admissible as "operative facts" since "the issue of knowledge is relevant to the award of punitive damages."].) Since Assistant Store Manager Adam is probably not a managing agent, his failure to take action against Bill's conduct toward Pamela and Co-worker Coraline would not suffice to establish corporate ratification. But Irene Iquit's report, which Human Resources received and ignored, just might.

Arguably, Tina Terminated's report of Roger Rascal's conduct may be relevant if no disciplinary action was taken against Roger, even if Roger never harassed Pamela. This is because it is evidence that Company X tolerated sexual harassment and bred a climate of gender bias. This may have emboldened Bill to sexually harass with impunity while discouraging Pamela and others from reporting.

Furthermore, repeated corporate misconduct may justify the amount of punitive damages awarded. The California Supreme Court in *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 713 & 715-716, reduced a jury's $15 million punitive damages award to $2 million in part because the plaintiff presented no evidence that the supervisor's unlawful harassment was "the product of a corporate culture that encouraged similar supervisor misconduct." A colorable claim can be made that courts cannot fairly exclude this evidence and later limit punitive damages due to its absence. Arguably, if the defense succeeds in excluding me-too evidence involving other harassers, it waives the right to later claim that punitive damages were excessive because no repeated corporate misconduct was shown.

Investigation and discovery: Finding the me-too evidence

Talk to your client: Your primary source for finding me-too witnesses is of course your client. Don't rush this task. Your client may be eager to discuss those facts that have left a strong impression, but may have forgotten other facts that if remembered could lead to equally important evidence, such as facts establishing the employer's knowledge of misconduct early on. Less egregious examples of sexual misconduct are also important to establishing the *totality of the circumstances* that created the hostile work environment. Revisit these facts with your client after having collected information from me-too witnesses and other sources to address any minor discrepancies and flesh out additional facts that could refresh your client's recollection. Leave no stone unturned.

In preparing your client for deposition, go over the chronology of events and test her recollection. Anticipate defense counsel's questions aimed not only at undermining the testimony but also at undermining its foundational basis. For instance, defense counsel may seek a concession that what the plaintiff heard were mere "rumors," when such a term may not adequately convey the reliability or veracity of what she knows. Your client should be well prepared to resist any pressure to adopt defense counsel's language. As a general practice, have as many deposition prep sessions as necessary and include mock cross-examinations. It may be the most important task in securing a successful trial for your client.

Interview the me-too witnesses yourself: Some practitioners prefer to be in control of communications with witnesses at the outset. Others prefer the separation that an investigator provides in the event that the witness later recants and the interview becomes part of the evidence (though this already puts you in a very compromised position). Whether you or your investigator initiates discussions with the me-too witness, you should ultimately meet with them yourself in person. Do not wait to do this on the eve of trial. However skilled your investigator may be, chances are no one knows the facts of the case as well as you do. You may be surprised at how much more testimony your witness has to add to what is already on an investigation report or a declaration (s)he provided. As with any witness you intend to use, it is critical to observe how the witness presents in person before having them testify at trial.

There may be potential me-too witnesses you wish to speak to who are still employed with the company. So long as the employee is not an officer, director, managing agent, or person whose act or omission can legally bind the company, and the person is not represented by counsel, you may communicate with them without running afoul of the rule against ex-parte communications. (Rule 2-100 of the California Rules of Professional Conduct.) Defense counsel may nonetheless try to block communications once they are aware of your efforts. There are rules that govern what they can do (an analysis of which is beyond the scope of this article). In our hypothetical, if Adam is still employed with the company, it may be safer to depose him instead, as his failure to report all of Bill's sexually harassing conduct may create liability for Company X.

Obtain declarations. You may have to disclose the identity of known witnesses pursuant to written discovery, but you do not necessarily have to disclose whom you've obtained statements from or produce these statements, as this information is entitled to qualified if not absolute work product protection. (*Coito v. Superior Court* (2012) 54 Cal.4th 480.)

Include me-too evidence in written discovery requests: Obtaining this information on the first attempt is not always easy. You will be met with privacy and other objections, and may have to move to compel discovery. Calendar this expected motion practice accordingly. Form interrogatories for employment matters request prior civil actions filed against the employer. You should seek more than this, asking for prior internal

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complaints of harassment (limited to the same or similar type of harassment alleged by plaintiff and within a reasonable time period), whether or not they were investigated, and any investigation reports and corrective action taken.

Request the harassing individual's performance reviews, disciplinary actions and warnings, awards, complaints against the harasser, and evidence of any raises or bonuses received by the harasser (allowing for the actual amounts to be redacted). Additionally, seek employee handbooks, policy manuals, and documents provided to members of management and human resources which spell out the duties and processes for documenting complaints and conducting investigations. This may lead to another round of document requests once you become familiar with the defendant's database systems for maintaining these files. The more specifically the documents are identified, the better. Try to have these documents before deposing members of management and human resources in order to effectively use them at depositions.

Depose the harasser: Cover all facts related to the harassing defendant's conduct toward other employees. He (or she) will likely deny the conduct outright or give a nondiscriminatory explanation for it. These denials form the basis for impeachment and rebuttal evidence. Although opposing counsel may try to block your efforts, make multiple attempts to have the defendant explain his conduct. It is common for the defendant to answer even questions specifically related to interactions with the plaintiff with blanket denials of what they would "never" do or how they "always" conduct themselves. Cover the sexual harassment training they received, their understanding of the company's policies, and their duties to abide by them or implement these policies (including any reporting and/or investigation duties). This is only a springboard from which you can craft deposition questions creatively to find weaknesses in the defendant's testimony according to the facts of your case.

Depose management and human resources: These depositions are an integral part of any sexual harassment claim. As they relate to me-too evidence, obtain all information regarding what if any misconduct was known, what measures were taken to investigate, and what if any corrective action was taken. Prior to the deposition, seek authorizations for employee records and information from friendly me-too witnesses in order to overcome the defense's privacy objections. If investigations were conducted, seek to uncover potential evidence of unreasonable delay, lack of thoroughness, and unreasonable temporary (or permanent) measures such as transferring the complainant or putting her or him on administrative leave. Additionally, determine who contributed to and who made the ultimate conclusions and decisions pursuant to the investigation, and test the soundness of these decisions.

Look at in-house counsel: Note that if in-house counsel was involved in the investigation and/or their "recommendations" were mandatory, they may have waived the attorney-client privilege and subjected themselves to discovery.

Written protocol

In situations where complaints were not investigated or even documented, determine whether the company's own written protocol was followed. The witness may claim that the report was vague, or that they handled it without the need for a full investigation, but the written policy may require that all complaints be lodged in a database. Defense witnesses may have differing positions as to what discretion a manager has to document complaints. Furthermore, a policy allowing too much discretion may present opportunities for abuse, or show that the company is more interested in shielding itself from liability than in addressing unlawful harassment in a meaningful way.

Trial readiness

Finally, be prepared to address these evidentiary issues at trial by having trial briefs at your fingertips that set forth the relevant case law regarding me-too evidence. Be especially familiar with *Pantoja v. Anton*. Beyond establishing relevance, be prepared to defeat efforts to limit the scope of the information. For instance, a company representative's admission that it received (unspecified) complaints of misconduct from me-too employees may not suffice if the misconduct was egregious, because the degree of offensiveness determines the appropriateness of the response. Be sure to have carefully written limiting instructions to propose to the court in addressing Section 352 and 1101(a) concerns. Be sure to build a record of all offers of proof and arguments in case you have to appeal a ruling.

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