



We all have a story to tell

TIPS FOR PREPARING AND TAKING DEPOSITIONS IN AN EMPLOYMENT CASE

The story goes something like this... Employee ("EE") was a certified machine operator, she had 10 years of prior experience and loved being a machine operator. But her employer shut down, they laid everyone off and she was forced to find new employment.

EE found a new job through a relative. About six months into her new job, the foreman asked EE to drive forklifts as part of her regular job duties. EE was never trained and explained she had never driven a forklift and was not comfortable doing so. The foreman was aggressive and regularly pressured and intimidated EE to drive the forklift. EE was the breadwinner and could not afford to lose her job and hesitantly agreed. EE did not feel safe working the forklift, and knew it is against company policy. Ten months into her new job EE became ill and when she attempted to request a leave, she was fired. Employer ("ER") claimed performance issues.

Who are the witnesses you must depose?

The purpose of conducting depositions is not simply to check off the box of named defendants and then say, next! The purpose is to gather information in order to tell a part of your story through each witness. A story that your jury can connect with. This information can be gathered in depositions and from written discovery.

Begin with your client and ask her to give you a list of everyone she believes has knowledge of the facts of her case. Who liked her at work? Who did not like her at work? Who assigned her work? Who supervised her? Who hired her? Who fired her? Is she aware of anyone else forced to drive forklifts without training and without certification? Be prepared for all. Good and bad. Additional witness names will come to light as you delve into your case, this will be a running list, which can be cut down to the most relevant people.

In the above scenario immediately, you know that the following are key witnesses:

1. Person Most Knowledgeable regarding disability accommodation policies and practices
2. Person Most Knowledgeable regarding human-resources policies and practices
3. Foreman
4. Supervisor
5. HR director
6. Plaintiff's treating physician

A Person Most Knowledgeable ("PMK") is an individual who is designated by the corporation to testify on its behalf. If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.

PMK depositions should be the first depositions to take; include a request for production of documents with the deposition notices. PMKs will produce numerous documents that will help you put together the evidence/witnesses for your case.

In employment cases, PMK testimony from HR officials and documents obtained can be the most important testimony and evidence to present to the jury. Elicit testimony of the PMK regarding the company's interactive process; ask for the policies and procedures regarding that process. Does Company X have an interactive process policy? Did Company X engage in the interactive process, per their policy? Did they engage in any type of interactive process? When was it done? By whom? Is the information documented? Have they produced that documentation?

In disability-discrimination cases you can often hire experts such as vocational experts (expert witnesses who know about job availability in the current labor market and who can analyze your case and testify to the skills that are needed to perform EE's specific job), human-resource experts (expert witnesses who know about compensation and benefits, job training, California policies and procedures) and psychological experts (expert witnesses who know about the traumas associated with the loss of a job). Experts can be expensive, and if you cannot afford to hire an expert, then know that you can elicit testimony from the PMK HR officials for similar purposes.

A PMK HR official cannot testify as an expert, of course, but the PMK HR official will be your most important witness because you can use their testimony to help your jury understand when/how your client notified their employer of their need for accommodations, whether the employer engaged in the interactive process, the employer's own policies and procedures, state disability laws, and possibly even, how the employer failed to protect your disabled client's rights. Go through your jury instructions and elicit testimony from the PMK to fill in all the required elements to prove your client's theory.

The foreman's and supervisor's depositions are important to help establish their roles within the company, their interactions with the plaintiff and other employees, and the dynamics of the workplace environment. This information can provide context for the alleged harassment and help demonstrate the power dynamics at play.

Your client's treating physician deposition is important to take because their testimony will set the stage for understanding your client's disability, her physical limitations, and the type(s) of accommodation(s) your client required. In cases involving disability discrimination,

one of the most difficult issues we are faced with is the defendant's argument that plaintiff was on an indefinite leave and it could no longer accommodate because an indefinite leave is not reasonable.

The physician's testimony can help contradict any potential indefinite leave issues and, now that you have the policies and procedures regarding the interactive process, go through that list with your physician and see what he/she thinks about the job duties the employer was offering to the employee. Does the physician agree, based on his treatment of the employee, that she could have in fact performed those duties? This is a good way to prove a sham interactive process that took place. But you must know your case very well before doing this.

What is the story you want to present to your jury?

Here, you have a responsible worker. Someone who has extensive previous experience but felt pressured to do work she was not qualified for. She trusted her employer. She followed the foreman's instructions. And in the end, her employer betrayed her.

Now you must decide through which witnesses and documents you tell your story of betrayal.

What documents to request?

Generally, the discovery process for the plaintiff begins 10 days after the complaint is served. The defendant, however, may send discovery any time after the lawsuit is filed. A request for production is one way to obtain evidence in the discovery process. In a disability-discrimination case, request documents concerning the plaintiff's requests for accommodations to the employer and what the employer did after receiving the accommodation requests. In a harassment case, requests documents that demonstrate the employer's awareness of the harassment. Request:

- 1) Documents that identify the employer, such as W-2 statements issued to plaintiff;
- 2) Complete personnel file of the plaintiff;
- 3) Complete personnel file of the

supervisor whom the plaintiff reported to during the relevant period;

- 4) Complete personnel file of the foreman who harassed the plaintiff during the relevant period;
- 5) Complete personnel file of the human resources official who authorized or rejected the medical leave;
- 6) Complete medical file of the plaintiff: This is different than the file that can be obtained from the treating physicians. Many companies create a separate file they name a "medical file" wherein they store all of the employee's doctor notes that she submitted to her employer;
- 7) Training materials received or conducted by supervisors during the relevant time period;
- 8) All company policies and procedures related to the harassment, equal employment opportunity, affirmative action, and disciplinary policies and procedures during the relevant time period;
- 9) All records of requests for accommodation and investigations performed by the human resources department as to allegations of failure to accommodate filed with any governmental agency;
- 10) All records, communications, documents concerning the plaintiff's requests for accommodations to the employer; and
- 11) All records, communication, documents concerning what the employer did after receiving the accommodation requests;
- 12) All records, communications, documents concerning the plaintiff's complaints of foreman and/or supervisor to the employer.

Request personnel file of the harasser

It is important to discover the personnel file of the alleged harasser because it can include employment history, performance reviews, disciplinary records, training records, correspondence, emails, complaints made by other employees regarding the alleged harasser(s), including investigations, witness statements, and

sometimes remedial actions taken by the employer.

Locating and examining the contents of the personnel files of relevant individuals, including the alleged harasser(s), can be crucial for several reasons. For example, information found within the employment history and performance evaluations of the alleged harasser(s) can help establish their roles within the company, their interactions with the plaintiff and other employees, and the dynamics of the workplace environment. This information can provide context for the alleged harassment and help demonstrate the power dynamics at play.

Also, the information contained in the personnel file of the alleged harasser(s) can be crucial evidence in establishing patterns of behavior; demonstrating the employer's awareness of the harassment, and showing a lack of appropriate action taken by the employer to address the issue. Government Code section 12940, subdivision (j)(1) requires an employer "to take immediate and appropriate corrective action" upon notice of co-worker harassment, and to "take all reasonable steps to prevent harassment from occurring." The evidence discovered can also be crucial to the issue of punitive damages due to reprehensibility of the defendant's conduct and evidence of others harmed by the same unlawful policies and practices.

Third-party objections to request for production of harasser personnel file

When requesting the personnel file of the harasser, one is often met with objections due to privacy rights. However, privacy rights are not absolute, the California Supreme Court ruled that privacy rights must be balanced against other compelling interests that warrant disclosure of information. (*Valley Bank v. Superior Court* (1975) 15 Cal.3d 652.)

The California Supreme Court, in *Britt v. Superior Court* (1978) 20 Cal.3d 844, further elaborated on the principle that privacy rights are not absolute and

may be subject to disclosure under certain circumstances. Even if information is considered to be within the “zone of privacy,” meaning it pertains to private matters protected by privacy rights, disclosure may still be required under specific conditions.

The court in *Britt* outlined two main criteria that must be met for disclosure to be mandated: The party seeking disclosure must demonstrate that the information they are requesting is directly relevant to the matter at hand. Meaning, the information you are seeking must have a clear and significant bearing on the issues being litigated. And the sources used to obtain the information must not be overly intrusive. Once you satisfy the requirements of direct relevance and non-overly intrusive sources, the court must balance the competing public interests that way in favor of disclosure against the private interests that suggest against disclosure.

Overall, *Britt* reaffirms the principle articulated in *Valley Bank* that privacy rights must be weighed against countervailing interests, such as the need for disclosure in legal proceedings, and that disclosure may be required under certain circumstances when specific criteria are met. It ultimately falls to the court to weigh these factors and under this analysis, determine the harasser(s) personnel file must be produced based on the specific circumstances of the case.

What documents can you link to each witness?

You want to serve each named defendant with written discovery requests for Form Interrogatories – General, Form Interrogatories – Employment, Special interrogatories.

Form interrogatories are preprinted sets of questions, wherein you simply check the box of the questions you wish to ask, that one party in a lawsuit asks the opposing party once the discovery process begins.

Special interrogatories are specially prepared questions that are relevant to the subject matter of your lawsuit. There

is a limit of 35 specially prepared interrogatories, and they do not all need to be propounded at the same time, it can be in different sets. (Code Civ. Proc., § 2030.030.) If you intend to propound more than 35 special interrogatories, you must attach a supporting declaration, meeting the criteria of Code of Civil Procedure section 2030.040.

Once you receive defendant’s interrogatory responses, go through them carefully for names of potential witnesses. Sit down with your client and go through each witness one by one. Who is important? What does that witness have to say? Does your client know the witness? Has your client worked with the witness? If so, in what capacity?

Next, review the documents produced by sorting them out into categories (these can be various types of categories).

1. Policies, training manuals, training rosters, procedure manuals, employee handbooks, general job descriptions, etc.
2. Communications such as emails, texts, screen shots, social media profiles, social media posts, etc.
3. Doctor notes, medical records, etc.
4. Awards, certificates, performance evaluations, write-ups.

Ensure complete documents are being produced. In emails that are produced, does the email reference an attachment? If so, was that attachment produced? If not, immediately meet and confer and request defendants produce the missing document(s).

What to ask at deposition – Setting up your stage

Set the stage for each witness. Ask your client for their timeline of events and start working off that timeline to organize your documents and testimony. Next, match up the documents with your witnesses. Ask yourself, who can be used to authenticate the document? And who is best able to speak to the contents of the document? Remember that documents can be used on multiple witnesses.

Most terminations involving disabled employees are pretextual. Employers

often justify the termination by asserting that the employee was terminated due to a policy violation or that the employee wasn’t employed long enough to assert the right of certain protected leaves. Therefore, learn the policy very well and ask questions revolving around that specific policy and the violation involved.

For each witness, understand what role in your client’s story you want them to play. What is their purpose? Are they the one who terminated your client? Are they the one who your client went to when she was in dire need of an accommodation? Are they the one your client’s supervisor relied on to make the determination of your client’s future? Which witness has knowledge of others harassed/discriminated against? Pick three points you want to focus on, for each witness, and lock down their testimony as best you can.

For example, if you are taking the deposition of a supervisor you may want to ask:

1. At all relevant times, you were an employee of Company X, correct?
2. At all relevant times, you acted within the scope of your employment at Company X, true?
3. As a supervisor, you are knowledgeable of Company X’s policies regarding (enter whatever policy your client allegedly violated), right?
4. Company X has numerous policies and procedures, true?
5. Those policies and procedures are basically Company X’s rules, right?
6. *You* have to follow the rules, true?
7. As supervisor, it is also your responsibility to enforce the rules, correct?
8. Because in your position, as a supervisor, you must be able to ascertain when one of your employees is breaking those rules, right?
9. And, at all relevant times in your role as supervisor, you implement and help facilitate the company’s policies, correct?
10. But, it’s correct to also say that you have discretion to enforce those rules, true?
11. You are aware the plaintiff did not have prior experience driving a forklift, right?

12. You informed Foreman X plaintiff did not have prior experience driving a forklift, right?

13. You informed Foreman X plaintiff did not have certification to drive a forklift, correct?

14. You are aware Forman X pressured plaintiff to drive a forklift, right?

15. You are aware driving a forklift without proper certification is a violation of the law, true?

What you have done in that line of questioning is set up the stage and lock that witness into being a managing agent of Company X. You are also establishing a pattern of practice and work environment.

For an HR PMK, they are expected to know the company's policies, how those policies were communicated to their supervisors and employees, and the type of training supervisors and employees received about the policies and procedures.

Focus on the specifics to your case:

1. Have the PMK explain exactly what your client did that violated the policy;
2. You should have asked for copies of their handbook, go to the relevant policy

and go step by step. What was done in your client's case? By who? When?

3. Ask about how much discretion, if any, supervisors and foremen have to implement policies.

4. Ask whether foreman was investigated for forcing employees to break company policy. If so, when? If not, why not?

5. Ask whether OSHA has visited their facility. If so, when? And why?

6. Was any investigation conducted?

7. Was any investigation documented?

8. How was the investigation documented?

9. Does the company require investigations to be documented? Has it been provided? If not, why not?

Questions at deposition must be focused on the time frame that your client was employed. Many of us make the mistake of asking questions in the present time. We forget that although the present time may be helpful to show that the company continues with their illegal conduct, it is not relevant for the purpose of proving that those same policies and procedures existed at the time of termination. Always remember to stick to the relevant time period, (1) during the

time plaintiff was employed, and most importantly, (2) at the time of her termination.

Conclusion

It is key to remember that at deposition is the time to ask the difficult questions. Ask the "why" questions. Ask the "how do you know" questions. Ask all the questions that cause you to feel uncomfortable. For all the questions that you don't know what to expect, ask it at deposition. Never ask a question that you don't know the answer to, for the very first time, at trial. That is the purpose of a deposition.

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