"Law as theater" in California employment cases

Using demonstrative evidence, with actors, in employment cases that are difficult to prove

By Melanie D. Popper

Almost every plaintiff's employment lawyer will encounter cases for which there seems to be little evidence to support the claims, yet there "seems to be something there" worth pursuing. In the interest of preserving time, energy and financial resources, many of these cases get turned away and are never litigated. This article will provide guidance for attorneys wishing to use illustrative demonstrative evidence on behalf of their employment law clients with cases that are somewhat difficult to prove.

Examples of difficult-to-prove cases

Examples of such cases may be: a client who alleges that the workplace is permeated with racialized statements such as "you people," jokes about President Obama, derisive stereotypical references to different racial groups, and being the only person of their racial group in the company. This is a case that many attorneys would turn away without a second thought based on current case law interpreting what the "severe or pervasive" element of harassment cases requires.

A second example is a client who works in a diverse corporate environment, but none of the supervisory or managerial employees are of their race. The client is repeatedly passed over for promotions in favor of generally less qualified applicants not of their race. There are typically no direct references to race, and despite the circumstantial evidence standard set forth in *McDonnell Douglas v. Green* (1973) 411 U.S. 792, many attorneys will pass on representing this client at even the pre-litigation stage because of the apparent weakness at the outset of reviewing the facts.

A third example may be in the more blue-collar industries such as auto manufacturing, construction or food service, where some "rough" language may be tolerated and routinely used by even the clients themselves, thus possibly negating the "unwelcome" element in harassment cases (race and/or sex, especially) *even though the client is intensely uncomfortable, feels pressured to "go along" with the conduct in order to survive in the workplace, and/or is observing laughing uncomfortably*.

A final example may be an employee who attends an interview in which the employer checks credit history (even with limitations under Lab. Code, § 1024.5), criminal background (notwithstanding Lab. Code, § 432.7), only hires applicants who already hold a job, or relies upon a personal reference in hiring practices. These interview and hiring practices, as the EEOC has noted in recent publications, tend to decrease diversity in the workplace by disproportionately affecting minority applicants. Nevertheless, in all of these instances, exposure of the defendant-companies to liability may be difficult and expensive to prove. One way of approaching the matter to make liability exposure more apparent is to introduce an illustrative demonstrative video re-enactment or in-person theater re-enactment.

As set forth below, demonstrative evidence is generally any evidence other than testimony presented at any stage in litigation. Demonstrative evidence may include both actual evidence (e.g., the email, letter or text message specifically stating the reason, and motivated by animus, for termination, harassment or discriminatory practice) and illustrative evidence (e.g., videos, re-enactments, photographs and charts showing the workplace or scene and from which instances of animus can be drawn). Both types of demonstrative evidence may be admissible depending on the foundation laid and depending on the probative value versus the likelihood of prejudice.

Admissibility issues

Evidence Code 210, 351 and 352

When discussing demonstrative evidence with clients or other attorneys, the first question they usually ask is "Is that admissible?"

My response is typically, "Sometimes, but we use it anyway at different stages of the case, beginning at the pre-litigation stage." Demonstrative evidence is admissible for the purpose of illustrating and clarifying a witness's testimony. (*People v. Kynette* (1940) 15 Cal.2d 731, 755; *St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 816; see also Witkin, Cal. Evidence (2d ed. 1966) § 642, p. 604.) It is especially accepted where it will aid the jury in following the evidence, and to discern its materiality, force and effect. (*People v. Green* (1956) 47 Cal.2d 209, 211).

Because demonstrative evidence is used to illustrate testimony, it is generally authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the exhibit and testify that it fairly reflects what they saw or heard on a particular occasion, such as the location of people or things on a diagram. California law does not require demonstrative evidence to be exact, but only substantially similar and helpful to the jury. (*Andrews v. Barker Brothers Corp.* (1968) 267 Cal.App.2d 530, 537).

In *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521 the court examined the admissibility of an expert's reconstruction. The court found the evidence must meet the following requirements: (1) The reconstruction must be relevant (Evid. Code, §§ 210, 351); (2) the reconstruction must have been conducted under substantially similar conditions as those of the actual occurrence; and (3) the evidence of the reconstruction will not consume undue time, confuse the issues or mislead the jury.) The most likely objection for demonstrative evidence comes from Evid. Code § 352 for being more prejudicial than probative. The judge, however, has discretion to allow or not allow this exhibit into evidence, and that judge's decision will only be overturned on appeal for an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4d 153, 214).

Pre-litigation video re-enactments

Although admissibility at trial may be an issue in employment cases, it is possible to use video re-enactments in the pre-litigation phases, particularly as attached to a demand letter, a DFEH or EEOC investigation brief, or at mediations. Taking the time to find actors and actresses who will re-enact a few key scenes of the allegations (e.g., the key scenes of harassment or discrimination; plaintiff's complaint of harassment or discrimination or whistleblowing; the ongoing adverse action following the complaint or whistleblowing) tends to lend not only some credence to the merits of the case, but lets the opposing side know that plaintiff's attorneys are willing to put creative effort into the matter.

Even though most defense attorneys balk at any attempt by a plaintiff's attorney to introduce video re-enactments as evidence in court, it's my experience that defense attorneys, upon finding out that I represent the plaintiff in the pre-litigation phrase, have asked if I've done a video on the case and that I send it over for their review to make the case easier to explain to their clients. Additionally, preparing a video re-enactment also seems to lessen some of the personal attacks *between attorneys* because doing the video somehow creates a kind of objective space wherein we can discuss sensitive allegations as if we were mere observers and not personally invested in the outcome. I am not sure why this phenomenon occurs, but it has been my repeated experience and is beneficial to attorneys dealing with sensitive allegations in employment matters where there is some contention amongst attorneys at the outset. What I am speaking of here is an unspoken and secondary script of sexism which may arise between

attorneys when women represent a female plaintiff and men represent a male defendant, or other tense scenarios. Presenting video re-enactments, rather than having the effect of exacerbating those tensions, actually had the opposite effect of greatly lessening the likelihood of unconscious microaggressions taking place between the attorneys. This is, of course, a welcome and positive outcome reinforcing that traditional principle of objective detachment by judicial officers.

In order to prepare a video re-enactment, a plaintiff's attorney will need to obtain a video camera with USB upload. This can be reasonably done very affordably at most electronics retail stores. Additionally, most desktop computers (and many laptops) come with Microsoft MovieMaker version 10 which allows videos to be uploaded and edited onto the computer. The editing program is very easy to use, but investing in just an hour of training from a technician is well worth it. After having the client be present to direct the videos, actors and actresses (perhaps from local theater companies or schools) signing short releases and agreements to be subject to privilege and confidentiality, then the final video can be saved on a CD or DVD. A label should be created and the entire production sent to the opposing attorneys for review along with any supporting witness declarations. It is a simple process which can benefit many employment law attorneys in the pre-litigation phases.

Day-In-The-Life presentations

In addition to video re-enactments of key scenes, a plaintiff's attorney may also choose to provide a "Day-In-The-Life" video presentation showing plaintiff's daily life in order to demonstrate emotional distress where there is very little evidence of therapeutic or psychiatric care. Such presentations may aid in showing defendants that the case has substantial pain and suffering value due to other factors – decrease in normal or social activities, obvious symptoms of depression and/or anxiety, weight loss or weight gain, church withdrawal or greater attendance for support, what it is like to search for another job in a struggling economy, etc. Many attorneys will benefit from having these presentations because they humanize the plaintiff and shed light on emotional distress damages normally overlooked by defendants' attorneys. These videos are also more likely than the re-enactments to be admissible in court in order to prove emotional distress damages, so plaintiff's attorney should be familiar with the computer or other electronic presentation program in order to operate it effectively, make sure courtroom has sufficient outlets, assess whether a technician is needed, make sure the equipment gets to the courtroom, and finally, have a fallback plan in case there's an equipment failure or glitch.

Thinking outside of the box: Theater of the Oppressed

In addition to video-reenactments and day-in-the-life presentations, a plaintiff's attorney could also opt to introduce demonstrative evidence with a re-enactment at trial. The best way to get any important demonstratives into evidence is to notify the opposing side as early as possible. If you plan on having an exhibit that an expert uses to explain their testimony and theories, make sure to have it finished and provided with the expert for their deposition. This gives the other side the due process right to ask about the exhibit, any assumptions made and other questions. Providing to the other side right before the expert is going to testify potentially raises a fairness issue for the opposing counsel that can be avoided. Additionally, courts should allow their use if the demonstrative evidence has any value in assisting the jury to understand the case. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1388).

In terms of use of demonstrative re-enactment at trial, this is a powerful technique used effectively by the late Melvin Belli and has been enhanced by other legal scholars, including Brazilian Augusto Boal. Boal developed a form of theater called Theater of the Oppressed, where scenes of oppression are re-enacted and replayed repeatedly until the observers can see alternative outcomes and the oppression removed or transcended.

Conducting a Theater of the Oppressed re-enactment, which included how a matter *might have been resolved legally* instead of, as plaintiff alleges, resulted in a violation of law, is very powerful. Similar demonstrations were conducted in the Bernard Goetz trial involving a subway killing of young black men asking for money and in which the defense re-enacted the scene with some young black men who stood in front of the jury. This powerful re-enactment no doubt led to Goetz's acquittal on most of the counts (actually, he was acquitted on all but one count of criminal possession of a firearm).

In northern California there are several theater programs and schools with professionals and students willing to provide training to attorneys who would engage the clients and jury in this manner by bringing a re-enactment into the courtroom or pre-litigation. Additionally, experienced expert witnesses are also available, and make the evidence more likely to admissible at trial.


Popper

Melanie D. Popper is a plaintiff-side employment attorney with The Revelatory Center for Arts & The Law. *She focuses on harassment, discrimination and battery cases in California and the Caribbean. Ms. Popper was admitted in 2005 and is a member of the California Employment Lawyers Association and the National Lawyers Guild. She can be reached at melanie@revartslaw.com.*