Griselda S. Rodriguez
RODRIGUEZ & TRAN, LLP

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Person most knowledgeable depositions in employment disability discrimination

YOU CAN USE PMK TESTIMONY IN PLACE OF EXPERT TESTIMONY TO DEMONSTRATE HOW THE EMPLOYER FAILED TO PROTECT A DISABLED EMPLOYEE'S RIGHTS

The California Fair Employment and Housing Act ("FEHA"), the Unruh Civil Rights Act, and the Disabled Persons Act are state laws that protect people from discrimination based on disability. In California, disabilities are broadly defined as conditions that limit a major life activity, including physical and mental disabilities, as well as medical conditions such as cancer or HIV/AIDS. California definitions and protections can be broader than protections under federal law.

Disability discrimination occurs when an employer treats a qualified employee or applicant unfavorably because she has a disability. It is also unlawful to treat a qualified employee or applicant less favorably because of a history of disability, because of the employer's belief that the individual may have a disability, or because of the individual's relationship with a person with a disability. The law also requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship"). (https://www.dfeh.ca.gov/people-with-disabilities/)

Many of my cases are disability-discrimination cases, where clients have suffered an injury. Whether or not the injury causing the disability occurred outside of work or is work-related, injured employees may often require an accommodation from their employer. These accommodations can be anything from sitting/standing restrictions, weight restrictions, limitations on the number of hours worked, required time off for doctor visits, surgery…the list goes on.

If there is a question of what accommodation is possible or whether it will allow an employee or applicant to do the job, employers are required to engage in a timely, good-faith interactive process with the person who needs accommodation or her representative. This process can clarify what job functions are essential, what accommodations are possible, and whether accommodating an employee with disability will be an "undue hardship" to the business operation. (https://www.dfeh.ca.gov/people-with-disabilities/)

"The employer is required to engage in the interactive process, to discuss with the employee or their

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representative, their options and accommodations based on their physical and/or medical needs. Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.'" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th at, 766.)

"Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities.'" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)

Targeting the disabled worker

Disabled employees may frequently be viewed as a liability to the employer; their work has become limited, they are likely to incur another injury, or aggravate their current injury, maybe they have gotten older and now work even slower. In those instances, employers start targeting those employees.

For example, an employer may begin by accommodating employees' restrictions, but then, they may move the employee to a different department, which requires more physical labor, or a more demanding task, or the employee may get placed with stricter managers, or be required to do work without training. Put simply, they set the employee up for failure. In this way, employees are often placed in specific situations that will jeopardize their health and ultimately their job.

However, employees have a few options: say nothing, go against their doctor's orders and quietly keep working (possibly aggravating their injury) and keep their job, or take a medical or personal leave in hopes they will not be terminated, or speak up and insist that they be accommodated. If the employee resorts to the latter, they have become a headache for their employer. In many instances, because the injured employee is now a target, alleged policy violations arise. Employers then conduct sham investigations, if they investigate at all.

In these types of cases human-resource officials' depositions are *crucial* because they will set the stage for jurors about what should have happened per company policy; what actually happened; and why what happened was a clear violation of their company's own policies and California disability laws, medical leave laws or private leave plans offered by the employer.

Setting the stage with the person most knowledgeable

An important purpose in any deposition of a person most knowledgeable ("PMK") is to solicit testimony from the person who has the most knowledge about your specific topic, for the relevant period. A human-resources PMK is 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.

In deposing the PMK, the goal is to elicit testimony that demonstrates the employer did not follow its own policy for conducting workplace investigations, did not follow policies regarding the good-faith interactive process, did not reasonably accommodate the employee, and the company policy was not consistent with the mandates of California disability laws or medical leave laws. Most importantly, the testimony elicited from the PMK should corroborate your theory of the employer's willful disregard for the employee and his/her legal rights.

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. (Code Civ. Proc., § 2025.230.)

The "reasonable particularity" language "in the statute implies a requirement such categories be reasonably particularized from the standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made." (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 218, 222.)

Preparing the PMK depo notice

In preparing your PMK deposition notice, be meticulous in your selection of the topics covered. The deposition notice must state the topics about which that witness should be expected to testify. For example, a PMK regarding anti-discrimination policies should be able to testify about:

- The defendant's implementation of its anti-discrimination policies with plaintiff during his/her employment;
- Other jobs that were open at company during the last three years of plaintiff's employment;
- All documents reflecting any attempt made by defendant to find alternative positions for plaintiff; and
- Any and all of defendant's anti-discrimination policies regarding employees who have disabilities.

The topics must be easy to interpret and must be focused. Do not make the mistake of mixing different topics on one PMK deposition notice.

Maldonado v. Superior Court (2002) 94 Cal.App.4th 1390, is illustrative. In that case, defendants produced a human resource ("HR") manager for a PMK deposition. The company was undergoing bankruptcy and had to lay off several more knowledgeable HR managers. The HR manager the company produced at deposition was unable to identify key documents, such as plaintiff's personnel file. Below is the court's discussion:

> It is apparent from the record in this matter that the individuals selected by ICG [Plaintiff's former employer] to represent the company at the depositions knew very little about the topics specified in the notices. That is understandable since, as ICG

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explained, many of the employees who supervised or worked with petitioners are no longer employed by the company. What cannot be so easily overlooked was the cavalier attitude displayed at the depositions concerning information that should have been readily available to the witnesses. Haley, as a human resources manager, should, for example, have been able to identify a personnel file when one was shown to her – particularly since it was the personnel file she was asked to produce. In addition, she should have been familiar enough with the contents of the file that when a specific question was asked – such as when the subject employee was hired or terminated or what positions he held at various times – she could answer by referring to information contained in the file. Similarly, in her position, she should have had knowledge about general employment policies, such as the company's policy toward terminating workers who were out on disability because they were injured on the job, or whether termination decisions made in field offices had to be examined or approved by human resources personnel.

We are particularly concerned about the fact that the witnesses appeared at depositions at which document requests were made with no documents in their possession and no knowledge of whether or not documents responsive to the requests existed anywhere in the company's files. Certainly, no single person is expected to be familiar with the total contents of a corporation's files. When a request for documents is made, however, the witness or someone in authority is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held. We are sympathetic to the fact that ICG's counsel was handicapped by the loss of personnel and the pending bankruptcy proceedings. But that did not justify appearing at the depositions without documents that were readily available, such as Boria's personnel file or the current footprint map, with no explanation as to whether other responsive documents existed or when they would be produced.

(*Id.*, 94 Cal.App.4th at pp. 1396-1397.)

Practice tip: Prepare and serve numerous PMK deposition notices as soon as the statute permits, 20 days after service of complaint. (Code Civ. Proc., § 2025.210.) In a disability-discrimination case, a few relevant PMKs are: PMK re anti-discrimination policies, PMK re termination, PMK re human resources and policies, and PMK re accommodations. Defendants may select one individual to be the PMK for all the topics; however, if they have different individuals, they have the burden of producing the precise individual for each topic. By noticing the various PMK depositions separately, you will have a very focused deposition wherein the defendants have had the opportunity to tell you whether there are numerous individuals that qualify as a PMK or where only one individual is key. This will help avoid foundational objections at each PMK deposition.

Documentation is essential to proving your case

Tailor the requests to the PMK you are deposing. Important documents to request in disability discrimination cases are below. The list is non-exhaustive:

- Documents that identify the employer, such as W-2 statements issued to plaintiff;
- Complete personnel file of the plaintiff;
- Complete personnel file of the supervisor whom the plaintiff reported to during the relevant period;
- Complete personnel file of the human resources official who authorized or rejected the medical leave;
- Training materials received or conducted by supervisors during the relevant time period;
- All company policies and procedures related to the harassment, discrimination, equal employment opportunity, affirmative action, and disciplinary policies and procedures during the relevant time period;
- 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; specifically, the Equal Employment Opportunity Commission ("EEOC") or FEHA;
- All records, communications, documents concerning the plaintiff's requests for accommodations to the employer; and
- All records, communication, documents concerning what the employer did after receiving the accommodation requests.

Workers' compensation exclusivity

Employers often allege that, because the employees were injured on the job, their injuries fall exclusively under the workers' compensation laws. Labor Code section 3600 provides all of the essential conditions that must exist for the exclusivity rule to apply.

Under certain circumstances, the workers' compensation exclusivity rule does not apply, and the employee may assert a claim against their employer for a work-related injury. First one must look at the act leading to the injury, not the injury, to determine whether workers' compensation exclusivity applies. Discrimination and harassment are outside the compensation bargain. Discrimination is not a normal or expected incident of employment. (*City of Moorpark v. Sup. Ct.* (1998) 18 Cal.4th 1143, 1154-1155 [finding that Workers' Compensation "does not preclude [plaintiff's] FEHA and common law causes of action"]; *Bagatti v. Department of Rehabilitation* (2002) 91 Cal.App.4th 344, 366-367 [finding that "just as discrimination on the basis of disability falls outside the compensation bargain, so too the employer's commission of another statutorily unlawful employment practice . . . falls outside the compensation bargain."]; and *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418 [finding that wrongful termination claims are outside of the exclusivity provision of the Workers' Compensation Act because they advance a substantial public policy].)

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Putting together your deposition outline – what to ask

For each deponent, 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 he/she was in dire need of an accommodation? Are they the one whom your client's supervisor relied on to make the determination of your client's future? Pick three points that you want to hone down through that deponent and lock them down as best you can.

Questions 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 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 their termination.

Most terminations involving disabled employees are pretextual. There is often the reasoning that the employee was terminated due to a policy violation. If that is your case, learn the policy very well and ask centralized questions revolving that very issue from all of your PMKs.

Know what policies your client allegedly violated and ask the PMK, in their capacity, about their interpretation and implementation of the policies. Suggested questions follow:

- What is his/her interpretation of the policy?
- What types of situations qualify as a violation of the specific policy?
- What was the procedure, during the relevant time period, in regard to a violation of that policy?
- What is the current procedure, regarding violation of that policy?
- Who else has been terminated for violating that specific policy?

Next, focus on the specifics to your case:

- Have the PMK explain exactly what your client did that violated that policy;
- 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?
- Was the investigation documented?
- How was the investigation documented?
- Does the company require investigations to be documented? Has it been provided? If not, why not?

Don't worry if you have limited funds

In employment cases, PMK testimony from HR officials and documents obtained at their deposition or in response to the deposition can be the most important testimony and evidence to present to the jury.

If you cannot afford to retain an expert, the PMK will be your most important witness because you can use them to help your jury understand your client's injury, when/how your client notified their employer of their requests for accommodations, the employer's own policies and procedures, California disability laws, and 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. Specifically, that defendant knew plaintiff had a physical condition that limited a major life activity, plaintiff was able to perform the essential job duties with reasonable accommodation for his/her physical condition, plaintiff's physical condition was a substantial motivating reason for defendant's decision to terminate plaintiff, plaintiff was harmed, and defendant's conduct was a substantial factor in causing plaintiff's harm. (CACI 2540.)

Conclusion

Do not take PMK depositions lightly. They are as important, if not more important, than deposing defendants. PMK depositions are crucial in employment- discrimination cases. PMKs can set the stage as to what should have happened (per company policy), what state laws require, and what actually happened. It is essential to devote a significant amount of time to knowing the policies that apply to your specific case, understanding the employer's policies and procedures vs. applicable state laws and regulations, preparing your case-specific deposition questions, and tying it all up by using your jury instructions to fill-in all the elements.

Griselda S. Rodriguez is the managing partner & lead trial lawyer at Rodriguez & Tran, LLP *in Los Angeles. Ms. Rodriguez is a 2016 graduate of the Consumer Attorneys Association of Los Angeles Plaintiff Trial Academy. She is active with the Los Angeles Trial Lawyers Charity and is currently a board member. She received her Juris Doctor from Glendale University College of Law and Bachelor of Science degree in Sociology from Cal State Northridge. www.rodrigueztran.com.*