

A Litigator's Guide to Human Resources Management Trial Testimony

What an Attorney Should Expect

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Employment litigators most often encounter human resources (“HR”) specialists because they are the “go to” people for employment law compliance on behalf of their employers. Compliance responsibilities can be an “add-on” or an integral part of HR’s core task: to serve employees and help managers get work done through better people-management techniques. Principles of human resources management have evolved as a result of the needs of HR specialists to practice their craft in a way that is consistent with ethical standards and legal responsibilities. These principles, while not preserved in a single written body, are advanced by numerous influential sources including professional societies/associations, skill development programs, and academic institutions that offer degrees in HR management.

HR principles appear in litigation, directly or otherwise, when HR witnesses and management decision-makers are called in trial or when HR records are important items of evidence. Testimony about HR policies and practices most often assists litigators in presenting or attacking the framework for the employer’s response to employee problems and complaints. Defendants use HR witnesses to explain employer policy and procedure and show how it was applied to a plaintiff’s situation. Plaintiffs’ lawyers critically examine the same witnesses to challenge the adequacy of employer policies and/or the fairness of applying them to their client’s circumstances. Accordingly, both sides are well advised to be familiar with principles of HR management and to understand the role of HR staff in the employer organization they are challenging or defending.

Jurors, particularly those who have worked for large employers, typically expect HR witnesses and documents to answer important questions regarding employer policies and employee communication. Jurors want to know if the employer has good policies and whether those policies were followed. Jurors tend to listen carefully to the who, how, when and why testimony regarding all employer communications with the plaintiff. Litigators should expect the HR witness to identify and illustrate the applicable HR management principles to help jurors understand the significance of this evidence.

Litigators facing the prospect of suing or defending an employer when an employee says that he or she was unfairly treated should pay careful attention to four key areas during their case preparation: 1) assessing the relative compliance focus of HR in the employer’s organization, 2) analyzing the degree of control HR asserts in the employer’s compliance effort, 3) establishing the precise record of communication occurring with the plaintiff; and, 4) preparing a thorough discovery plan (or providing for a thorough and neutral internal investigation if you are representing the employer) to find helpful or problematic HR documents and witness’ accounts.

How Compliance-focused is HR?

Employer organizations will vary widely on the degree of responsibility and extent of resources they confer to HR in support of the compliance. Litigators need to discover the priority that an employer organization gives to compliance with employment laws and regulations in order to determine how they can best defend or attack witnesses who perform HR management tasks. Employers who set a high value on compliance in their approach to HR will typically emphasize thorough and timely investigations by HR of personnel problem situations before decisions are made. HR in these organizations will usually be augmented by extensive training in HR topic areas given to department managers. Where compliance is a lower priority, HR will perform clerical or counseling tasks without a sufficient degree of independence to approve or challenge managerial decisions about personnel. In these cases, a good HR witness for the plaintiff can be very effective.

The relative independence of HR to review managerial decisions and, potentially, to reverse those that don't meet HR scrutiny is a hallmark of organizations that permit HR to strike a balance between serving as an advocate for employees and acting as a member of management. Litigators need to learn if, or how, an employer defendant equips its HR staff to strike this difficult balance so the jury can assess HR's role in relation to internal organizational conflicts and manager-employee disputes. Jurors often expect HR to perform a "check and balance" function as a guarantee of fairness and equity.

Plaintiff attorneys are likely to find information about HR's relative compliance priority when they interview or take the deposition of the "person most knowledgeable (PMK)" for employee policy development, employee discipline and complaint resolution. PMKs can be housed in one or more of the typical sub-specialties within the HR unit of a large organization: recruitment, employee relations, EEO/Affirmative Action, training, compensation and employee benefits administration. Security and safety units may also be organized under HR's supervision. Smaller employers, sub-divisions of large employers, and "downsized" organizations combine these functional areas within the job description that is held by one or more HR staff referred to in the field as "generalists."

What Control Does HR Assert in the Compliance Effort?

Litigators need to know how far the reach of HR policies and procedures extends when decisions are made about dealing with employees. An employer's organizational culture (a term of art that attempts to describe the impact of both formal structure and informal influences) will dictate whether the model for HR authority is centralized or decentralized. Organizations with a culture favoring the centralized HR authority model establish the HR function as the central resource for all actions and decision approvals. Cultures with a decentralized model of HR authority, such as those found in many start-up organizations, emphasize the importance of flexibility when managers deal with employees; at a manager's option, HR may or may not be consulted in all but the most serious employee status changes.

The presence of centralized HR authority tends to help litigators more easily find evidence that decisions were or weren't consistent from situation to situation.

Decentralized HR invites the use of managerial discretion and, thus, the specter of wide variances in employee treatment based on decision-making criteria that may not be systematic and/or traceable. Litigators can make inferences about the degree of centralized HR authority by asking witnesses how much latitude they have to make decisions and take actions in personnel matters. Managers in centralized organizations will have required procedures whereas their counterparts in decentralized organizations are likely to have guidelines.

What Communication Occurred with the Plaintiff?

HR witnesses and records are often the best place for litigators to probe the communication links between the plaintiff and his/her managers and/or other agents of the employer. During trial, the spotlight frequently shines on the oral and written communications that took place between the plaintiff and those who made the decision or took the action that preceded the employee's complaint. These communications, including their timing, content, tone and format, are often the subject of jurors' special interest.

When plaintiff's allegations include unlawful demotion or discharge, one type of communication that frequently becomes important to jurors involves the efforts, or lack thereof, made by the employer to confront the plaintiff with evidence of poor performance and/or unacceptable work habits. In general, jurors expect that employer representatives will have spoken to the plaintiff about the problems that placed his or her job in jeopardy. Juror expectations of pointed and specific criticism will increase in direct proportion to the length of the plaintiff's service especially when there are records of long periods of the plaintiff's acceptable or even laudatory performance. Critical communication to plaintiff that is not in writing will always be a red flag to jurors who may be inclined to be skeptical of the employer's motives.

Another oft-repeated comment by jurors who are interviewed after a verdict involves advance communication with plaintiffs about the way that company policies apply to the plaintiff's specific situation. Jurors want to know whether a plaintiff was advised in advance of his or her rights and duties when, for example, an employer's defense includes the claim that the employee never made a complaint or request pursuant to the requirements within the employer's policy.

Jury verdicts on retaliation claims, the most frequent cause of action in discrimination and harassment lawsuits, often turn on juror assessments about the timing of communication between a plaintiff and his/her managers. Thus, litigators are well advised to create timelines and use them to help the jury make or rebut the inference of causality between and among important events.

Discovery Plan: Where to Find Helpful or Problematic HR Documents?

Get ready to handle a lot of paper if you are planning to sue or defend an employer that uses an HR function to help manage more than a handful of employees. HR's detractors, and its truthful apologists, both say that HR compliance involves paper-pushing. In general, the larger the organization, the more paper a litigator will find.

Employment-related litigation generates the need for a thorough review of employer documents and the records, if there are any, of investigation efforts the employer made before taking personnel actions. Litigators who sue employer organizations with more than 50 employees, and those who defend them, almost always encounter a multi-location HR filing system when they ask for all records and compliance-related documents. Depending upon the size and competence of the organization, the paper trail for a given employee can be dispersed among different units and facilities. Some organizations with in-house legal departments may have additional records created in tandem with HR or as the result of earlier litigation. Smaller employers, at least those that are concerned with liability prevention, usually assign HR responsibilities including policy promulgation and file retention to a specific person who performs oversight from the HR perspective.

Depending upon the cause(s) of action, most of what HR does, outside of attorney communication, is retained in discoverable files. Some common and other less well-known repositories of HR working papers include:

- Personnel files (many organizations have more than one personnel file)
- “Desk” (aka ‘supervisor’s’) files organized to hold data for employees within a department
- Employee Manual/Handbook
- Work-related illness/injury policies, investigations, files and reports
- Attendance records
- Schedules and time-off requests
- Exit interview forms
- Recruitment files and candidate lists
- Supervisory procedures and training records
- Correspondence (including email records) between HR and supervisors, managers, executives
- Payroll records
- Classification studies (pursuant to Fair Labor Standards Act)
- Equal Employment Opportunity statistics
- Job descriptions
- Pay range and/or pay grade charts
- Affirmative Action Plans (if applicable)
- Disciplinary procedures and records
- Supervisory/management training documents (including those obtained from workshops and seminars attended by employees including HR staff)
- Investigation files
- Background-checking reports
- Job satisfaction surveys
- Performance appraisals

Evidence important to litigators may also be found in the employer’s written procedures and training records. HR typically adopts procedures for routine and repetitive tasks such as posting required notices, filing regulatory agency reports, and responding to employee

complaints. HR practitioners and many executives, managers and supervisors will have received training on HR topics; training records should exist in the form of binders, handouts, presentations and other reference materials. Some organizations will have written procedures for HR compliance actions including processing grievances and investigating Equal Employment Opportunity complaints.

In many cases, an HR consultant or expert can lend valuable assistance to employment litigators on the application of HR principles to fact patterns in a case. When HR experts are used in litigation, counsel need to ensure that they do not give opinions that invade the province of the jury. A recent California appellate court case, *Kotla v. University of California Regents* (2004) 115 Cal.App. 4th, 295, provides criteria in this important area.

Clear presentation of HR testimony and records is crucial in employment litigation. Judges and juries with a knowledgeable perspective of HR management principles are better able to evaluate evidence in relation to a plaintiff's complaint. Attending to the four key areas described above will equip litigators to analyze and logically present evidence in a trial relative to an employer's compliance efforts and the HR management principles that may or may not have guided those efforts.