
Motions in Limine in Employment Litigation: Navigating Key Evidentiary Issues in Discrimination and Wage/Hour Claims

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Motions *in Limine* in Employment Litigation: Navigating Key Evidentiary Issues in Discrimination and Wage/Hour Cases

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Discussion Topics

- (1) What timing considerations should counsel take into account when filing motions *in limine*?
- (2) What steps should counsel take to preserve an objection for appeal following the denial of a motion *in limine*?
- (3) What categories of evidence may warrant a motion in limine seeking to admit evidence?
- (4) How can counsel leverage motions *in limine* to obtain dispositive rulings?
- (5) How should employers draft and present motions *in limine*?
- (6) What issues often are raised by employers/employees?

(1) Timing Considerations for Motions *in Limine*

- Each case requires balancing with respect to timing.
 - Too early can enable opponent to change strategy.
 - Too late can run afoul of the court's requirements or result in no decision prior to trial.
- Can provide much more detailed briefing on important evidentiary issues, especially those arising under FRE 403.
- A ruling on a motion *in limine* may signal how the court is likely to rule on related jury instructions (or legal conclusions if a bench trial or arbitration).
- Can facilitate settlement through exclusion of important evidence.

Timing Considerations for Motions *in Limine* (cont'd)

- A motion *in limine* is especially important if there is a reason why waiting until trial to resolve the evidentiary issue would be problematic.
- Can reduce costs for the parties.
- There may be a strategic advantage to filing the motion even if the court hints that it prefers to decide the issue at trial.
 - Request instruction prohibiting references in opening statements.
- Avoids disruption in a jury trial. Prevents multiple, distracting interruptions to excuse the jury so the lawyers and judge can address sensitive evidentiary issues.
 - Example: treatment of other employees who are not parties.

Timing Considerations for Motions *in Limine* (cont'd)

- Remember that motions *in limine* also may be used to request the *admission* of particular evidence rather than as a defensive measure.
- Motions *in limine* may be appropriate well in advance of a potential trial.
 - Resolution of a disputed issue in discovery may limit potential liability and/or damages, or facilitate an early resolution.
- Motions *in limine* also may be warranted after trial is underway.
 - Change in strategy where opponent does not commit to a position in advance of trial or your opponent raises an unanticipated issue in opening statements.

Common Bases For Moving To Exclude Evidence

- **Determinations by government agencies**
 - *EEOC and state agency determination*
 - Often left to the court's discretion
 - Focus on:
 - Quality and factual detail of the determination
 - Prejudicial impact; tantamount to admitting the opinion of an improper expert witness?
 - Invading the role of the jury and court
 - Waste of trial time focusing on the nature and extent of the investigation
 - *Unemployment compensation rulings*
 - Discrimination often is not the subject of the proceeding
 - Decisions are often issued under different standards that are quite favorable to employees

Common Bases For Moving To Exclude Evidence

- **Settlement offers as proof of liability**
 - FRE 407: voluntary remedial action is not admissible to prove negligence.
 - Efforts to eliminate discrimination are often be excluded.
 - Focus on underlying policy to ameliorate.
- **Hearsay**
 - FRE 801: out of court statement offered to prove the truth of the matter asserted.
 - Determine whether it is offered for any other purpose than the truth of the matter asserted.
 - Common hearsay objections in discrimination cases focus on:
 - Testimony by the plaintiff that others told her they were also sexually harassed by the same harasser or that the decision-maker was motivated by discrimination.
 - Statements made by individuals outside of the decision-making chain.
 - Statements where the identity of the declarant is unknown.
 - Statements that others were treated more favorably based on information from unidentified sources.

Common Bases For Moving To Exclude Evidence

- **Data related to affirmative action programs**
 - Federal contractors that conduct internal audits may create unfavorable data with respect to determining whether they met their affirmative action goals.
 - Other non-government contractors may do this as well.
 - Courts have granted motions to exclude such evidence because:
 - employers are encouraged to conduct such analyses, and
 - (there is no Title VII cause of action for failing to use an affirmative action program.)
- **Equitable damages**
 - Consider the benefit of avoiding jury exposure to damages.
 - Presentation of damages may influence view of liability or perspective on the case in general.
 - Backpay
 - Frontpay

Experts

- The court is a “gatekeeper” with respect to proposed evidence of an expert nature.
- FRE 702:
 - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - the testimony is based on sufficient facts or data;
 - the testimony is the product of reliable principles and methods; and
 - the expert has reliably applied the principles and methods to the facts of the case.

Experts (cont'd)

- **Step 1:** Does the individual qualify as an “expert”?
 - Degree of specialized knowledge?
 - Objectivity?
- **Step 2:** Is the expert’s reasoning or methodology underlying the testimony scientifically reliable?
- **Step 3:** Is the testimony relevant and does it assist the trier of fact to understand the evidence or to determine a fact in issue?
 - Will the testimony assist the jury in a technical area where they need assistance?
 - Would the testimony usurp the jury’s function?
 - Courts are careful not to cross over into the role of fact finder
 - Admissibility vs. weight
 - It is not the trial court’s role to determine if the expert’s opinion is “correct”
 - Are legal conclusions being offered?

Experts (cont'd)

- ***Daubert v. Merrill Dow Pharmaceuticals, Inc. (S.Ct.)***: “Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
 - Court first determines, pursuant to Rule 104(a) whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. Court then determines admissibility.
- ***Kumho Tire Co. v. Carmichael (S.Ct.)***: extended these principles to testimony based on technical and other specialized knowledge, as well as scientific knowledge.
 - “The objective of [*Daubert’s* gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field..”

Experts (cont'd)

- Common types of experts offered in labor & employment cases:
 - Human Resources professionals
 - Social scientists
 - Labor economists
 - Statisticians
- Trend: increasing use of experts at the class certification stage, not just on the merits or at the damages stage.

Experts (cont'd)

- **HR professionals**

- HR policies

- Understanding why certain policies exist and how they are applied.
- E.g., standard sexual harassment policies and whether an employer's response to a sexual harassment complaint was reasonable.
- Whether employer deviated from the policies.

- HR best practices

- *E.g.*, what are common reasonable accommodations

- Often susceptible to challenges that they are invading the role of the jury or offering what amounts to legal opinions

- Sometimes used in Rule 23 context to show commonality or uniformity in policies

Experts (cont'd)

- **Social scientists**
 - **Social framework and stereotyping testimony:**
 - concepts of implicit bias based on the protected characteristic and how the existence of certain factors within a company may lead to discrimination.
 - Common focus on whether inherent or implicit bias infect discretionary or subjective decision-making
 - *Wal-Mart Stores, Inc. v. Dukes* (2011):
 - Plaintiffs argued through Professor William Bielby that there was a uniform corporate culture that permits unconscious bias against women subconsciously through discretionary decision-making.

Experts (cont'd)

- » Professor Bielby testified that: the company had centralized coordination, reinforced by a strong organizational culture, which sustains uniformity in personnel policy and practice; there are deficiencies in the company's personnel policies and practices; and those policies and practices make pay and promotion decisions vulnerable to gender bias.
- » Professor Bielby “conceded that he could not calculate whether .5% or 95% of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”

Experts (cont'd)

- Court found that plaintiffs failed to show commonality because their only evidence of a general policy of discrimination was Bielby's testimony. And the exercise of discretion is not evidence of a discriminatory policy.
- Common criticisms of social framework testimony:
 - Does this amount to legal conclusions?
 - Does this invade the role of the trier of fact?
 - Isn't discretionary decision-making inherently individualized?

Experts (cont'd)

- **Statisticians**
 - “*Trial by formula*” allows proof of liability or damages to be extrapolated from a sample of class members, presuming that all members are identical
 - *i.e.*, if the facts regarding a statistically significant subset of a class can be evaluated for a particular issue, then the results of the evaluation of the sample can be extrapolated across the class.
 - ***Tyson Foods, Inc. v. Bouaphakeo* (currently before the S.Ct.):** Focuses on whether the use of representative proof is an appropriate method for certifying a class under Rule 23.
 - Hourly workers allege that the company failed to compensate them for time spent dressing in protective equipment and walking to and from their work stations in violation of the FLSA and state law.

Experts (cont'd)

- Company argues:
 - “No court would allow an individual employee to meet his ‘burden of proving that *he* performed work for which he was not properly compensated by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform.”
 - Using averages to prove liability for the class as a whole conflicts with the ruling in *Wal-Mart* that class-wide liability cannot be based purely on extrapolation from unproven assumptions about individual class members.

Experts (cont'd)

- District court allowed plaintiffs to prove liability and damages by employing statistical evidence that presumed all class members were identical to an average employee and spent equal time on the tasks at issue. Eighth Circuit affirmed.
- Supreme Court will consider if a class may be certified: (1) where plaintiffs use statistical techniques that presume class members are identical to the average identified in a sample, despite that differences among class members exist; and (2) where the class contains hundreds of members who were not injured.

Experts (cont'd)

- Another common consideration in attacking statistical reports: focus on the relevant labor market.
 - *Wards Cove Packing Co. v. Atonio* (S.Ct.): “the proper comparison is between the racial composition of [the jobs at issue] and the racial composition of the qualified ... population in the relevant labor market.”
 - Accordingly, where jobs require special qualifications or training, the relevant labor market consists of those who possess those qualifications.

Motion *in Limine* to Exclude/Limit “Me Too” Evidence

- Testimony or other evidence that other employees have been treated the same way (same discrimination, harassment or retaliation) by the employer
- FRE 404(b)(1): “Evidence of a . . . wrong or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. . . . (2) . . . evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .”
- *Wilson v. Muckala*, 303 F.3d 1207, 1217 (10th Cir. 2002): “evidence of prior bad acts is admissible only if (1) it is relevant under Fed.R.Evid. 401; (2) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under Fed.R.Evid. 403; and (3) the district court, upon request, instructs the jury to consider the evidence only for the purpose for which it was admitted.”

Motion *in Limine* to Exclude/Limit “Me Too” Evidence

- *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008): “The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. . . . Rules 401 and 403 do not make such evidence per se admissible or per se inadmissible . . .”
- *Hayes v. Sebelius*, 806 F. Supp.2d 141, 145 (D. D.C. 2011): Four factor test:
 1. Whether past behavior is close in time to the events at issue in the case
 2. Whether the same decision maker was involved
 3. Whether the witness and the plaintiff were treated in the same manner
 4. Whether the witness and plaintiff were otherwise similarly situated

Motion *in Limine* to Exclude/Limit Conduct or Statements Too Remote in Time

- Exclude evidence that this particular defendant harassed/discriminated/retaliated against this particular employee plaintiff, but the conduct occurred too long ago.
- Exclude evidence of any conduct that occurred outside the statute of limitations period.
- FRE 404(b)(1): Evidence of other act not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. BUT: FRE 404(b)(2): May be admissible for another purpose.
- FRE 401 & 402: Irrelevant. Evidence about acts that occurred long ago have no tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.

Motion *in Limine* to Exclude/Limit Conduct or Statements Too Remote in Time

- FRE 403: “[C]ourt may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”
- *Tennison v. Circus Circus Enterprises, Inc.*, 244 F. 3d 684 (9th Cir 2001): Sexual Harasser terminated in 1996. Court upheld exclusion of harassment before 1994. Appellate Court deferred to trial court’s FRE 403 balancing.
- But: Continuing Violation Doctrine can muddy the waters, particularly in hostile work environment cases. *See, Nat’l. Railroad Passenger Corp. v. Morgan*, 536 US 101 (2002).

Motion *in Limine* to Exclude/Limit Subsequent Remedial Measures (i.e., policy changes)

- Evidence that employer has changed an allegedly discriminatory policy after the conduct or plaintiff's complaint.
 - FRE 407: "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: . . . culpable conduct . . . But the court may admit this evidence for another purpose, such as . . . the feasibility of precautionary measures."
 - FRE 403: Probative value of evidence of policy change is substantially outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury.

Motion *in Limine* to Exclude/Limit Stray Remarks

- *Price Water-house v. Hopkins*, 490 U.S. 228, 277 (1989): Comments unrelated to the employment decision at issue or that were made by non-decision-makers should not be considered in deciding whether a plaintiff has met his or her burden of showing discrimination.
- *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115 (2d Cir.2007): “[T]he more **remote** and **oblique** the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination.... The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be.” (Emphasis added.)

Motion *in Limine* to Exclude/Limit Stray Remarks

- *Henry v. Wyeth Pharmaceuticals, Inc.*, 616 F. 3d 134, 149 (2nd Cir. 2010): Four factor test:
 1. Who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker);
 2. When the remark was made in relation to the employment decision at issue;
 3. The content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and
 4. The context in which the remark was made (i.e., whether it was related to the decision-making process).

Motion *in Limine* to Exclude/Limit Evidence of Plaintiff Employee's Job Performance

- Exclude evidence of plaintiff's own evaluation of his performance on the job.
 - FRE 401 & 402: In no universe could an employee's own impression of his job performance be relevant to a contested claim in an employment lawsuit.
 - FRE 403: Any potential relevant is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
 - *Smith v. Flax*, 618 F. 2d 1062, 1067 (4th Cir. 1980): The employee plaintiff "of course, testified that he had versatility, and that his competence as an analyst was not confined to the field of logistics. Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant."

Motion *in Limine* to Exclude/Limit Evidence of Plaintiff Employee's Job Performance

- Exclude evidence of nonsupervisory co-workers' opinions of plaintiff's job performance.
 - FRE 801 & 802: Hearsay
 - FRE 401 & 402: Relevance
 - FRE 403: Balancing
- Exclude evidence that employer did not accurately or fairly evaluate the plaintiff.
 - *Phipps v. Gary Drilling Co., Inc.*, 722 F. Supp. 615, 620 (ED Cal. 1989): The trier of fact will not sit as a "super personnel department that re-examines entities' business decisions."

Motion(s) *in Limine* to Exclude/Limit Evidence Unique to Sex Harassment Cases

- Exclude certain terms, i.e., “rape,” “harasser,” “predator”
 - FRE 403 – Not probative at all, very prejudicial
- Introduce evidence of plaintiff’s sexual history/conduct
 - Prohibited, except FRCP 412(b) Court “may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.
 - Motion, notice and *in camera* hearing required before admission.
- Exclude evidence of alleged harasser’s consensual relationships with others in the workplace.

Motion *in Limine* to Exclude Premature Evidence of Financial Condition

- Exclude evidence of employer's actual financial condition, as disclosed in discovery or on public records.
- Preclude references to employer as a "wealthy, thriving, large company," or to the employee as "the little guy," or to the parties as "David and Goliath."
- FRE 401 & 402: Irrelevant unless/until punitive damages are determined appropriate.
- FRE 403: Probative value substantially outweighed by a danger of unfair prejudice.

(5) Drafting and Presenting Motions *in Limine*

- Review local rules and each judge's preferred practice
- Consider advantages and disadvantages of an omnibus motion
 - Fewer pages to address critical issues, and may understate importance of certain arguments.
 - Often, an omnibus motion is easier for the court or arbitrator.
- What should the motion *in limine* include?
 - Identify the evidence that you have reason to believe your opponent is likely to raise, and why the opponent will do so.
 - Explain why this evidence is inadmissible.
 - Explain why it is important and necessary to resolve the issue *prior to trial*.

Drafting and Presenting Motions *in Limine* (cont'd)

- Consider using the motion to request a protective order barring any reference to the topic in the jury's presence.
 - A very fact-specific inquiry, but this can be particularly important in a jury trial.
 - Contempt sanctions or mistrial for violations.
- Consider practical limitations in motions *in limine*.
 - There often are too many evidentiary issues to raise them all in motions *in limine*. Pick the most important ones and seek only to exclude that evidence. Targeted vs. shotgun approach.
 - If you succeed in excluding an unhelpful document, how might this adversely affect the presentation of your case-in-chief?
 - Seek to exclude portions of a document?

Drafting and Presenting Motions *in Limine* (cont'd)

- Note distinctions between a jury trial versus a bench trial or arbitration that may impact your strategic decisions.
 - Jury trial raises significant concerns about jury confusion, prejudice and other concerns addressed by Rule 403
 - But Rule 403 is inapplicable in bench trials and arbitrations. *United States v. Preston*, 706 F.3d 1106, 1117 (9th Cir. 2013) (“Rule 403 is inapplicable to bench trials.”); *Solis v. Seibert*, 2011 WL 398023, at *6 (M.D. Fla. Feb. 4, 2011) (same).
 - Unlike many courts, some arbitrators tend to allow in late-produced discovery.
- Recall that a ruling is considered an advisory opinion.
 - Possible reversal of ruling at trial.

(6) Potential Motions *in Limine* for Employers

- Examples of motions *in limine* that employers should consider in defending employment discrimination and/or wage and hour cases:
 - EPLI or other insurance coverage
 - Personnel decisions not involving the plaintiffs
 - Employer practices at other facilities
 - *Gomez v. Tyson Foods, Inc.*, 2013 WL 991494, at *4 (D. Neb. Mar. 13, 2013) (“Tyson’s motion to exclude evidence relating to Tyson Foods’ other plants, including evidence of pay practices at defendant’s non-union production plants is granted.”).
 - Discriminatory statements or conduct by persons not involved in the termination decision
 - *Saulsberry v. St. Mary’s Univ.*, 318 F.3d 862, 867 (8th Cir. 2003) (upholding exclusion of evidence because “the ‘Shaft’ and ‘black dog’ comments were made by nondecisionmakers”).

Potential Motions *in Limine* for Employers (cont'd)

- Changes in policy/procedures, especially for reporting complaints about discrimination, harassment, wage issues, etc.
- Prior settlement offers in the case
- Existence of other employment litigation, including outcomes:
 - *Guyton v. Tyson Foods, Inc.*, No. 07-cv-00088 (Dkt. 265) (S.D. Iowa Apr. 4, 2012) (excluding evidence of prior settlement as irrelevant in wage/hour class action where prior case involved a different location as well as a different type of processing facility); *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-04009 (Dkt. No. 253) (N.D. Iowa Sept. 8, 2011) (same)
 - *Nwegbo v. Borough*, 2013 WL 3463504, at *3 (E.D. Pa. July 10, 2013) (excluding evidence of other lawsuits filed against defendant because “[t]his court will not waste the jury’s time conducting mini-trials regarding the allegations in the other cases.”)
 - *Ross v. Am. Red Cross*, 2012 WL 2004810, at *5-6 (S.D. Ohio June 5, 2012) (excluding evidence “invi[t]ing mini-trials about facts and circumstances that may not be similar”)

Potential Motions *in Limine* for Employers (cont'd)

- Attorney-client privileged discussions
- Charges of discrimination and determinations by EEOC or state agencies
- Unemployment compensation proceedings
- Comments made by decision-makers long after or well before the challenged decision
- Time-barred actions or statements
- Statistical evidence that is not relevant or probative
 - Insufficient sample size
- Expert witnesses and/or expert reports (or portions thereof)
 - Lack of qualifications
 - Issues that are not sufficiently technical or complicated to usurp a jury's fact-finding role

Employers Opposing Motions *in Limine*

- Plaintiffs often seek to exclude: (1) evidence of their prior jobs or termination; (2) disciplinary action taken by the defendant; (3) failure to report or complain about unpaid work; (4) evidence that plaintiff agreed with the hours worked and for which he was paid; (5) prior arrests or criminal convictions; and (6) sexual conduct in sexual harassment cases.
- All of these motions may be successfully challenged by an employer.
 - Termination: *Smith v. Specialty Pool Contractors*, 2009 WL 799748 (W.D. Pa. March 25, 2009) (denying motion *in limine* to exclude plaintiff’s prior employment termination because “[t]he Court agrees with Defendant that character evidence as to Plaintiff’s truthfulness and credibility will be particularly relevant in this case”).
 - Disciplinary action: *El-Bakly v. AutoZone, Inc.*, 2008 WL 1774962, at *3 (N.D. Ill. Apr. 16, 2008) (disciplinary record and history of former employee “are relevant to potential bias of [the employee] against AutoZone and therefore may affect his credibility before the jury. Bias is not a collateral issue.”); *Wink v. Ott*, 2012 WL 1979461, at *1 (M.D. Pa. June 1, 2012) (same); *Fitzpatrick v. City of Montgomery*, 2008 WL 3075855, at *2 (M.D. Ala. Aug. 5, 2008) (same).

Employers Opposing Motions *in Limine* (cont'd)

- Failure to report or “agreement” regarding unpaid work: *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1249 (7th Cir. 1992) (noting in FLSA case that the doctrine of impeachment is “a well-established, if slightly uncommon, subcategory of impeachment by contradiction.”)
- A plaintiff’s assertion that his/her failure to report time worked should be excluded generally affects only the *weight* that a fact-finder purportedly should afford to the evidence, not its *admissibility*.
- Criminal convictions: FRE 609 or applicable state evidentiary rules should govern. *See also Gomez v. Tyson Foods, Inc.*, 2013 WL 991494 (D. Neb. Mar. 13, 2013) (“The Plaintiffs’ motion to exclude evidence of any arrest, criminal prosecution or conviction of Plaintiffs or other class members is overruled to the extent that a felony conviction is involved.”).
- Sexual conduct: May be relevant to rebut whether plaintiff subjectively believed the workplace was hostile.

Employers Opposing Motions *in Limine* (cont'd)

- Other general arguments that employers can cite:
 - Federal Rule of Evidence 611(b) guarantees a party the right to cross-examine on “matters affecting the witness’s credibility.”
 - “Proof of bias or motive to lie is admissible impeachment evidence.” *United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009).

Questions?

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