ADVANCED EVIDENTIARY CONCEPTS IN EMPLOYMENT ARBITRATION

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The intent of this note is to explore some of the more common evidentiary issues presented in the arbitration of employment discrimination cases within both a prehearing and hearing context. However, this note is not exhaustive, and advocates should conduct traditional research for a more comprehensive discussion. Historically, the goals of employment arbitration are significantly different than in a courtroom. While both are adjudicatory forums, parties who choose arbitration prefer to select the Arbitrator mutually based on qualifications, agree to a private forum, prefer an expedited process, desire an informal proceeding, and elect a binding award.

I. HYPOTHETICAL CASE

Last year, a new President (thirty eight years old) was hired into the company. He openly criticized the pre-existing culture and praised his own ability to build a new "team of innovators." In the past two years, several Department Managers openly referred to employees over fifty as "retirees." Recently, management implemented a performance management process and identified the bottom twenty percent of performers to be "blockers." Two weeks after the meeting, twenty professionals were laid off, of which twelve were over forty years of age, and seven were over fifty. One supervisor stated the reason for conducting the lay-off was the need for "new blood" in the company. Each of the ex-employees had a "satisfactory" performance

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evaluation. After the layoffs, all former employees were retroactively given a "not acceptable" performance evaluation. The ex-employees were rated as lacking in creativity. The company had recently sold a product line and contends the layoffs were objectively due to this change of direction. One year after the layoffs, the President distributed a memo to his staff concerning the elimination of "dead wood" engineers.

What are the key evidentiary issues in this fact pattern?

- Admissibility and relevance of statements
- Circumstantial evidence of timing and disparate treatment
- Relevancy of performance appraisals

II. WHAT IS EVIDENCE?

"All we want are the facts, ma'am." As many readers will recall, Sergeant Joe Friday memorably conveyed this remark in the classic television series Dragnet. With the same spirit, relevant evidence in the employment arbitration arena focuses on and refers to information having a "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without it."[1]

There are four traditional types of evidence: (1) testimonial evidence; (2) documentary evidence; (3) real evidence; and (4) demonstrative evidence. Testimonial evidence is oral evidence given by a witness under oath. Documentary evidence is evidence in writing such as a contract or performance warning. Real evidence conveys a firsthand impression, such as a map, jewelry, tape recording, or a weapon. Demonstrative (or prepared) evidence has "no probative value by itself, but serves merely as a visual aid to the fact-finder in comprehending the verbal testimony of a witness or other evidence."[2] One example is a cardboard blowup of key sections of a document such as performance evaluations, client complaints, or a timeline of key events leading to the discharge.

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[1] FED. R. EVID. 401.

[2] *See generally* GRAHAM M. CLEARLY, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE (1999).

The pre-hearing role of evidence in employment cases assumes a greater role when compared to other forms of litigation because of the prevalence of pre-trial motions such as the "Motion in Limine" and "Motion for Summary Judgment." Motions in Limine, i.e., to exclude evidence, have become a standard element of the pre-hearing battle. In addition, a Motion for Summary Judgment, typically filed by the employer, may be determinative and preclude a subsequent hearing. Many observers have astutely noted that these important evidentiary battles often resolve the entire war by allowing the parties to predict more accurately the trial outcome and then negotiate a fair outcome prior to hearing.[3] Accordingly, even the United States Supreme Court has noted that, "the question facing triers of fact in discrimination cases is both sensitive and difficult. The questions are also sensitive because it is a serious matter to charge an employer with flouting these fundamental prohibitions, and a difficult and emotionally challenging task to render a judgment about what really motivated an employer's decisions."[4] Each of these sentiments underscores the important and crucial role of evidence during the arbitration of employment disputes. And with those sentiments in mind, we can begin discussing the practicalities of how an Arbitrator applies the rules to specific disputes.

A. Rules of Evidence

The rules of evidence are basically rules of exclusion promoting predictability in the hearing.[5] The purpose of the rules is to shape a complete record based on reliable facts tending to prove or disprove the claims and defenses. Traditionally, employment arbitration avoided adherence to the federal rules of procedure, or any other formal rules of evidence. However, in the past ten years, many arbitration agreements have adapted a more formal setting and require the Arbitrator to apply the Federal Rules of Evidence, or applicable state rules.

The Federal Rules of Evidence (FRE) are a lengthy and complex set of rules adopted by the United States court system. The rules reflect a

[3] *See generally* Edward Imwinkelried & Louis Jacobs, *Evidentiary Issues in Employment Discrimination Cases*, The Advocate, Supplement Fall 1998, National Employment Lawyers Association (1998).
[4] *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).
[5] *See generally* Martin Scheinman, EVIDENCE IN ARBITRATION (1975), Cornell University Press.

preference for the admission of reliable and relevant evidence. The FRE were similarly adopted to promote predictability of admission and to prevent juries from being misled by the advocates. The rules prohibit unreliable evidence concerning witness competence or hearsay. Further, the rules also prohibit admission of both relevant and reliable evidence, if that evidence violates some social or political judgments as set forth in the rules (pragmatic evidence).[6] Examples of these sensitive judgments include the admissibility of liability insurance, offers of settlement, evidence of subsequent remedial measures, and privileged communication. The rules also address two other areas of concern. One excludes relevant evidence if its probative value is outweighed by the danger of unfair prejudice. The second rule concerns efficiency and excludes relevant evidence, if the probative value is outweighed by undue delay or needless presentation of cumulative evidence.

The American Arbitration Association (AAA) has also promulgated the Employment Arbitration Rules and Mediation Procedures (AAA Rules).[7] These rules, most recently amended in 2010, articulate the authority of the Arbitrator in evaluating and admitting evidence.[8] Rule 30 of the AAA Rules, titled Evidence states, "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute … [t]he Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to the rules of evidence shall not be necessary." In applying these rules, the Arbitrator in an employment arbitration hearing must delicately balance the competing interests of the parties regarding admissibility and exclusion taking into account these standards and the individual nuances of the dispute in question.

Most evidentiary issues can be resolved by answering three questions:

1. Is the evidence relevant for the offered purpose?
2. Is the evidence reliable for the offered purpose?

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[6] *See* Thomas Mauet & Warren Wolfson, TRIAL EVIDENCE (2009).
[7] *See* American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures, amended and effective November 1, 2009*, 29—30 (2009).
[8] *Id.* at 26.

3. Is it right to allow the fact finder to receive the evidence for the offered purpose?[9]

In practice, there are three general styles of arbitration concerning admission of evidence. One style favors strict admissibility of evidence, and applies the rules at all times in the hearing, despite the absence of a jury. A second style applies the rules only to the most determinative issues in the trial, is open to receiving objections of evidence from advocates, and is focused on the fundamental fairness of the presented evidence. The third style of arbitrators favors "free admissibility" and allows evidence to be admitted "for what it is worth." Many experienced arbitrators approach this process with a tendency toward receiving as much evidence as possible so that they may evaluate the weight of the evidence while deciding the case. As stated by the late Arbitrator Harry Shulman, "[t]he more serious danger is not that the arbitrator will hear too much irrelevancy, but rather [that] he (or she) will not hear enough of the relevant."[10] With that said, even if the evidence is relevant and reliable, there may be important reasons to exclude it from the record.[11]

B. Key Concepts with Evidence in Employment Discrimination

There are two methods of proving intentional discrimination: (1) direct evidence; and (2) circumstantial evidence. Commonly, the prevailing claimant produces a convincing combination of direct and circumstantial evidence revealing the respondent's motivation.

1. Direct Evidence

Direct evidence of employment discrimination will prove the particular fact in question without reliance on inference or presumption. Primarily, direct evidence is found in comments made by a supervisor concerning an employee's protected class. The comments will typically demonstrate hostility or bias and a nexus to the supervisor's motivation or state of mind. They can include a demeaning joke, racial slur, or the admission of managerial bias such

[9] *See* Thomas Mauet & Warren Wolfson, Trial Evidence (2009), P. 2.
[10] Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1017 (1955).
[11] *See generally* Mauet & Wolfson, *supra* note 8.

as "women do not belong in construction." Direct evidence is the "smoking gun." The probative value of direct evidence depends on: (a) the lack of ambiguity; (b) the intensity of bias expressed; (c) the time elapsed between the indications of bias and the adverse action; (d) the frequency of the indications of bias; (e) whether the indications of bias came from management; and (f) the employer's response to the statements or incidents. Racially hostile epithets can constitute direct evidence. Clear statements of bias require no additional inference to conclude discrimination. However, only the most blatant slurs, whose intent could be nothing other than discrimination, constitute direct evidence of discrimination. Direct evidence may make it unnecessary for the claimant to rely on the inferential model of proving discrimination.[12]

2. Circumstantial Evidence

As there is rarely direct evidence of discrimination, victims are also allowed to establish their case through circumstantial proof. Circumstantial evidence may take many forms, including bits and pieces of a corporate mindset, a discriminatory atmosphere, or the larger context in which the incident occurs; i.e., the facts as a whole picture. As described above, cases rarely involve eyewitnesses to the employer's mental process. Admissions of liability are rare. By contrast, a more common method for demonstrating circumstantial evidence of discrimination is through the disparate treatment of similar employees, i.e., treating two identical or similar workers differently. Evidence of the presence of an atmosphere of discrimination may also be highly probative. Language not amounting to direct evidence, but showing some racial bias, may be significant evidence of pretext once the claimant has introduced a prima facie case. However, conversational jabs or statements by supervisors in a merely casual setting unrelated to the adverse action do not constitute

[12] For example, in a cause of action arising under the Age Discrimination in Employment Act (ADEA) or the Americans with Disabilities Act, as amended (ADA), the employee can prove his case under the direct method or the indirect method of proof, and can rely, under either method, on circumstantial evidence to meet his burden. *See, e.g.*, Age Discrimination in Employment Act of 1967 § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C.A. § 12112(a); *see also Silk v. Bd. of Trustees of Moraine Valley Community College, District No. 524*, 46 F. Supp. 3d 821 (N.D. Ill. 2014).

probative evidence.[13] General bigotry by managers is also not actionable until the bigotry is linked to an adverse employment action and results in actual injury and harm to the claimant.[14]

3. Application of Evidence to Causes of Action in Discrimination Cases

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, national origin, and sex. Through additional legislation and administrative interpretation, this list has grown to include a prohibition on discrimination on the basis of age, gender presentation and the expression of sexual orientation, pregnancy, citizenship, familial status, disability, veteran's status, and genetic information. However, the Civil Rights Act of 1964 does not create a blanket prohibition against subjective, capricious or unfair actions against employees. Rather, it identifies discrete categories of discrimination that are forbidden under law.[15]

Allegations of discrimination due to gender, race, or national origin are disparate treatment claims. These claims focus on the intent of the decision-maker. Discrimination due to disparate treatment occurs when the employer intentionally treats an employee differently because of an unlawful criterion. To prevail, the employee must show that other similarly situated employees outside of the protected class were treated more favorably because of the presence or absence of that legally protected status.

Employment law also prohibits employers from retaliating against employees for filing charges or for opposing unlawful employment practices.[16] To prevail, the plaintiff-employee must prove: (a) some

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[13] *See* Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 131-132, (2011) (discussing judicial trend of excluding stray remarks and "stray comments" as irrelevant evidence).

[14] *See* Autumn George, *"Adverse Employment Action" – How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075, 1094-1095 (2008) ("[the] general proposition adhered to be all circuits is that mere inconvenience or de minimus employer actions do not satisfy the harm element of § 703.")

[15] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15, *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

[16] Mary C. Dollarhide, *Developments in Equal Employment Opportunity Law*, State Bar of Arizona, Employment and Labor Law Section, 116—117 (2012) (unpublished).

protected activity; (b) the employer's knowledge of the protected activity; (c) an adverse action by the employer; and (d) a cause and effect relationship between the two elements. The causal connection is evidence that draws an inference, often based on timing, between the protected conduct and subsequent adverse action.[17] Logically, any adverse action taken against an employee prior to the employee's first act of opposition cannot be retaliation.

A claimant may also raise an issue concerning a hostile work environment.[18] Courts have emphasized that Title VII of the Civil Rights Act is not a general civility code. However, a hostile work environment will be found where the employer's conduct is unwelcome, related to a protected category, offensive both to the recipient and to a reasonable person, and severe or pervasive. Not only must the claimant find the harassing conduct unwelcome, but a reasonable person in the employee's position must find the conduct or comments offensive. In many cases, Respondents will often admit to minor misconduct but deny the misconduct was sufficiently severe or pervasive.

4. Substitutes for Evidence

There may also be times when evidence can be entered into the record without the traditional requirement of a witness or document.[19] The first example is a stipulation of fact. There are two types of evidentiary stipulations of fact. Advocates may agree upon the existence of a certain fact or that certain events occurred at specific times. In theory, the stipulation ends the advocate's burden to prove the point through relevant evidence. The second type of stipulation is one of expected testimony. In this case, the parties agree that if a certain person was present as a witness, the person would testify to certain facts. However, the stipulation does not suggest the proffered testimony is admissible, truthful, or correct, so the evidence remains susceptible to impeachment.[20]

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[17] Richard T. Seymour, *Trends in Employment Discrimination Law*, Arizona State Bar Conference, Sedona, Arizona, 48 (2010) (unpublished); *See also* Carolyn Wheeler, Comments on Pretext in Employment Discrimination Litigation, Wash, and Lee L. Rev. 459 (2004).
[18] *See* Dollarhide, *supra* note 17 at 55.
[19] *See generally* Edward Imwinkelried, *Evidentiary Foundations* (2005).
[20] *Id.* at 15.

Judicial notice is another alternative to the presentation of evidence.[21] The Arbitrator relieves the parties of the duty to present evidence by noting a fact for the record. Rule 201(b) of the FRE provides that a fact being offered through judicial notice must either be generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[22] Some examples of judicially cognizable facts include metric units of measurements, historical dates, and other undisputed events.

Occasionally, an advocate believes that an oral description or photograph of a scene or a machine is inadequate to portray the context of the disputed incident. Attorneys in such a position will typically request time from the Arbitrator during the hearing to have the Arbitrator personally inspect the site of the incident. Here, the advocate will submit a motion for the Arbitrator to directly and personally observe the object or location: often referred to as a "site visit." Such a motion must generally establish that the scene or property still exists; that it is relevant to the claims in dispute; that it remains in substantially the same condition as it was prior to the incident; that the evidence cannot be adequately explained otherwise during the hearing; and that the site visit will not mislead the Arbitrator.[23]

III. COMMON EVIDENTIARY ISSUES IN EMPLOYMENT ARBITRATION

A. Stray Remarks

Stray remarks by a manager – for example, "hey grandpa" – can constitute direct evidence of discriminatory motive if directed at the claimant, made by a person of authority, and performed in close proximity in time to the adverse action.[24] With that said, stray remarks are commonly given less probative weight when the remark is made by non-decision makers, made at a time unrelated to an adverse action, and if they could be susceptible to multiple interpretations.

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[21] *See* Mauet & Wolfson, *supra* note 8 at 163.
[22] *See* FED. R. EVID. 201(b); *see also* Imwinkelried, *supra* note 20; Imwinkelried & Jacobs, *supra* note 5.
[23] John W. Cooley and Steven Lubet, *Arbitration Advocacy, 51—52* (2003).
[24] *See* Dollarhide, *supra* note 17 at 72.

When combined with other facts, stray or isolated remarks may also constitute probative evidence of unlawful intent, particularly when the remarks are also related to an individual claimant, are expressed by managers, and overheard by managers and not stopped. For example, a generally bigoted or sexist remark made at an off-duty dinner by the Vice President of Marketing (who had no connection to the subsequent adverse action) would likely be found to have no probative value. However, a stray remark by the company president stating that "older employees have more trouble with the company's new business model" is relevant of potential animus. While stray remarks alone *might* not rise to the necessary level of being determinative in and of themselves, disparaging comments by co-workers or supervisors can remain useful in demonstrating the overall mosaic as to whether the company culture has the "intent to discriminate."[25]

B. Same Actor and Short Time Inference

Common sense suggests that if the same decision-maker (supervisor) makes two employment decisions with respect to the same person over a short period of time, the presence or absence of discrimination in the first decision is probative of the presence or absence of discrimination in the second decision. In simpler terms, a manager hiring or investing in a protected, i.e., minority, employee, and then firing the same protected employee in a short time, is less likely to have a discriminatory intent. Since intervening factors may change the intent of the original decision-maker, the shortness of time between hire and discharge is an important factor.[26]

C. Similarly Situated Employees (Comparators)

Claimants in discrimination cases commonly contend they were treated differently than other employees who are colleagues or peers.[27] As noted above, a common method of proving discrimination is through the employer's inconsistent treatment of similarly situated employees. However, it is not discrimination to treat differently situated employees differently. For example, in a department of nine men and one woman who share the same supervision, only the female

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[25] *See* Imwinkelried & Jacobs, *supra* note 5 at 26.
[26] Imwinkelried & Jacob, *supra* note 5 at 23—24.
[27] *See* Seymour, *supra* note 18 at 53.

employee did not receive a performance evaluation for three years. Reasonableness of similarity is the touchstone.[28] In this same light, proper "comparators" at the executive level must have similar job titles, job responsibility, customers, and job expectations. While it is not required for the manager to be the same for both the claimant and the comparator, it is a factor. Some courts require proof that the similarly situated employee is similar "in every significant respect." This may be difficult to prove if every employee performs a different job. Other courts define "similarly situated" in terms of who reports to the same decision-maker. Employees with similar responsibilities who report to the same or higher superior would qualify as similarly situated in these courts.[29]

D. Cat's Paw Theory

The "Cat's Paw" theory of discrimination provides that the ultimate decision maker, i.e., a supervisor deciding and implementing a decision to fire an employee, may be acting unlawfully if the decision maker is "blindly relying" on biased information conveyed by a lower level supervisor.[30] Such conduct can still result in potential liability for an employer. In other words, a manager cannot simply serve as a "conduit, vehicle, or rubber stamp" through which another supervisor achieves a discriminatory result. In this way, an employer can be liable even though the ultimate decision-maker was not biased and did not act on any unlawful bias because that decision-maker was "duped" to rely on biased and untruthful reports.[31] Hence, the decision is tainted with bias. In response to a "Cat's Paw" theory, the defense must establish that the decision to discharge the claimant was made prior to the allegedly biased conversation, or the decision maker

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[28] *See* Dollarhide, *supra* note 17 at 3.

[29] *See Pollis v. New School for Social Research*, 913 F. Supp. 771, 781 (S.D.N.Y. 1996); *see also* Philip C. Eschels & Mark J. Gomsak, *Defending Employment Cases: Pretrial Litigation Issues and Strategies*, ABA Section on Labor and Employment Law Conference, 18—19 (2008) (unpublished).

[30] *See* Dollarhide, *supra* note 17 at 11.

[31] For example, the United States Circuit Court of Appeals for the 2nd Circuit recently adopted a broad standard for employer liability as a consequence of discrimination by employees. The standard opens the door to substantial liability for companies as a result of "cat's paw" discrimination claims. *See, e.g., Vazquez v. Empress Ambulance Service, Inc.*, --- F.3d ---, 2016 WL 4501673 (2nd Cir. 2016) (reversing district court's dismissal of sexual harassment and retaliation claim and finding employer liable for "imputed" intent to retaliate against claimant.)

did not rely solely on the opinion of the allegedly biased supervisor, or the decision maker conducted an independent investigation.[32]

E. Joking in the Workplace

Testimony concerning insensitive or offensive jokes in the workplace is often raised in discrimination suits.[33] All harassers claim they were "just joking" when confronted with their conduct. Innocent joking by co-workers is not probative evidence. Sometimes the comments were just intended to be jokes and have an innocent explanation.[34] The jokes may be stated either by a member of management or by a co-worker. Such jokes may simply be in poor taste and of an innocent nature or they may be otherwise indicative of a larger prevailing culture of discrimination. For example, calling an older employee "Mr. Alzheimer's" or "Pops" may be probative of a stigmatizing stereotype. In another case, calling an employee "Osama" may be probative of discrimination due to national origin.[35]

F. Remote History

This rule of evidence examines the relevance of an incident occurring a substantial amount of time prior to the triggering event. The concept speaks to the issue of temporal remoteness. The greater the amount of time between incidents the less relevancy and weight it generally carries. For example, an incident of sexual harassment by a supervisor occurring 24 months ago might be found to be too remote in time to be probative of an adverse action that occurred recently.[36] Moreover, a racial slur by a manager made 36 months ago (and not subsequently repeated) may also not be probative. In addition, evidence of a minor discipline (occurring 24 months prior to discharge) was barred as too remote to be probative. Finally, a memo from the President referring to "dead wood" and "career blockers" was not probative as it was issued a year after the disputed discharge.[37] These are just a few examples of cases where remote history has been applied.

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[32] The "Cat's Paw" theory and analogy borrows from an old fable in which a conniving monkey convinces a cat to reach into a fire to get roasting chestnuts. The cat is duped, burns its paw, and the monkey enjoys the chestnuts with no harm.
[33] *See* Imwinkelried & Jacobs, *supra* note 5 at 23.
[34] *Id.* at 24.
[35] *Id.* at 23.
[36] *Id.* at 20.
[37] *Id.* at 25.

G. Adverse Action

Evidence of an adverse action by an employer must also be significant in order to be cognizable. This means that the action must be more than a mere inconvenience or alteration of job responsibilities.[38] There are three general categories of adverse actions: (a) an action affecting financial terms; (b) lateral transfers with no pay change; and (c) an action (without a pay change) where conditions are changed in a way that subjects the victim to a humiliating, degrading, unsafe, or unhealthy work environment.[39] For example, the loss of a bonus is not an adverse action if the bonus is not an entitlement. A change in job title and duties is also not an adverse action where the employee retains the same salary, benefits and chance for promotion.[40]

H. Constructive Discharge

Constructive termination is a claim that the employer's conduct toward the employee's working conditions renders them so unbearable that he or she was forced to resign rather than continue employment. In this situation, a resignation does not conclusively bar an award of damages, including back pay.[41] A terminated claimant cannot plead constructive discharge.

I. Stereotypical Remarks and Slurs

Stereotypical remarks and slurs are generally defined as assumptions made about a group of people and applied to individuals irrespective of their personal characteristics because of their affiliation with those groups. Ordinarily, a stereotype is an overgeneralization that attributes identical characteristics to everyone in a group. An example of such a stereotype would be that blonde-haired people are less intelligent. A stereotype is a fixed impression, often culturally reinforced, which generally has few facts to support its assertion. They can be based on hearsay, rumors, or anecdotes. Stereotypes can be positive, negative or neutral. Many common stereotypes are

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[38] *See* Seymour, *supra* note 19 at 26.
[39] Dollarhide, *supra* note 16 at 2.
[40] *Maclin v. SBC Ameritech*, 520 F.3d. 781 (7th Cir. 2008).
[41] *See* Seymour, *supra* note 19 at 18; *see also* Eschels & Gomsak, *supra* note 31 at 16—17.

derogatory in that they are based on negative references to a person's ethnicity and race, age, gender, politics or sexual orientation. For example, some men hold the stereotype that women are too emotional at work. Similarly, some older employees believe that younger employees are lazy. These "mental labels" may be habitual and unconscious.[42]

Slurs or epithets are offensive comments, typically concerning some racial, ethnic or gender-based reference.[43] An illustration would be "you must be a terrorist," "you bitch," or "you are over the hill." Slurs can be stated by co-workers, supervisors, customers, or vendors. Slurs are common in popular entertainment — movies, television, and music. Some members of minority groups use racial slurs in conversation among themselves in a way which is intended to be inclusive rather than offensive. In most of these cases, only if a "concerted pattern of harassment" exists and where the racial slurs are "excessive and opprobrious" will certain slur or epithet-related situations be found to independently violate the law. With that said, the presence or absence of the behavior continues to be probative within the context of other claims. The importance of slurs or biased remarks uttered in the workplace has become more critical as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial precedent.[44]

J. "Me Too" Claims

With respect to "me too" claims, a claimant may often seek to admit evidence from other alleged victims of discrimination who claim to have been victimized in the same or similar manner.[45] "Me too" evidence is critical to employees who must often rely on circumstantial evidence to prove any alleged bias that occurred behind closed doors. For example, a discharged claimant alleging age discrimination may seek to admit testimony of five former employees, all of who claim age discrimination, but worked for different supervisors. A claimant may seek to establish a culture of tolerance for discrimination by company supervisors. Courts have generally been skeptical of the probative value of such evidence. Those courts

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[42] *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1264 (N.D. Cal. 1997).
[43] Seymour, *supra* note 18 at 62.
[44] *Ryder v. Westinghouse Electric Corp.*, 128 F.3d.132 (3d. Cir. 1997).
[45] Dollarhide, *supra* note 17 at 170.

have viewed "me too" evidence of discrimination as problematic unless the non-parties have the same supervisors, worked in the same department, and heard discriminatory remarks in the same chain of command.[46]

K. Hearsay Evidence

The hearsay rule of evidence has confused advocates for decades.[47] Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered for admission as evidence to prove the truth of the matter asserted.[48] The underlying rationale of the rule with respect to hearsay is clear. The prohibition provides that where the out of court statement is offered to prove the truth of the matter asserted, the opposing party must have an opportunity to cross-examine the declarant. Otherwise, the statement could be false. As observed by the late trial professor Irving Younger, "hearsay is evidence that depends for its probative value on the veracity of the declarant."[49]

Yet as all lawyers know, there are dozens of exceptions to the hearsay rule.[50] When a hearsay statement has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Hearsay statements are commonly entered for reasons other than the fundamental truth of the statement. For example, a hearsay statement may be admitted to provide background information, reveal the declarant's state of mind, or to demonstrate that individuals had

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[46] *See* Imwinkelried & Jacob, *supra* note 5 at 32—34.
[47] *See* Imwinkelried, *supra* note 20 at 401.
[48] *See* FED. R. EVID. 801(c). For more information concerning prior conduct of plaintiff, *see* Lynne Hermle, *Select Evidentiary Issues in Employment Cases*, ABA EEOC Midwinter Meeting (not published) (2006), at 2; *see also Chamblee v. Harris and Harris, Inc.*, 154 Supp. 2d 670 (S.D.N.Y. 2001) (holding that "[e]vidence regarding the plaintiff's work as a call girl and her sex life outside of work [was] precluded pursuant to federal rule 412, while evidence that she failed to pay taxes on the income she earned as a call girl was admissible as bearing on her credibility."); *see also* Imwinkelried & Jacobs, *supra* note 5 at 35.
[49] Irving Younger, HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET (1988); *see also*, Jane Aiken, *Protecting Plaintiffs' Sexual Past: Coping with Preconceptions through Discretion*, 51 EMORY L. J. 559 (2002).
[50] Mauet & Wolfson, *supra* note 8 at 163.

knowledge of the statement. Arbitrators commonly admit hearsay statements and evaluate the weight to be given those statements.[51]

L. Surreptitious Recording of Conversations

Occasionally, claimants in employment disputes secretly record conversations with their supervisor, or record derogatory comments against them by peers.[52] In other similar cases, the claimant may tape record phone calls with a manager within the same state, or phone calls to human resources between two states. Typically, the first question concerns authenticity of the tape recording: is the recording a real conversation arising from a date certain. The second question concerns legibility: can you understand the recording. The third question concerns spoliation and the reliability of the evidence: if the claimant destroyed parts of the recording, or failed to disclose parts of the recording which is still on his or her computer, and if so what effect should that have on questions as to its weight or admissibility. Within cases involving interstate phone conversations, there may be applicable state-specific wiretapping, recording, or privacy laws that come into play. As is commonly the case, such surreptitious tape recordings are used as a tool to impeach the testimony of the manager through a prior inconsistent statement after having the manager first deny making any slurs during his or her testimony.[53]

M. Evidence of Prior Sexual Conduct, History, or Predisposition

Federal Rule of Evidence 412(a) was designed to prevent abuse of a claimant's sexual history in cases involving alleged sexual misconduct.[54] For example, in a sexual harassment case, the

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[51] *See* Jay E. Grenig and Rocco M. Scanza, *Grenig & Scanza on Arbitration*, AAA Journal, Summer 2016, 102—103 (2016) (unpublished). Also see generally, Michael Green, No Strict Evidence Rules in Labor and Employment Arbitration, Texas Wesleyan Law Review, Vol. 15, p. 533, 2009.

[52] Dollarhide, *supra* note 16, at 172.

[53] *See Woodhouse v. Magnolia Hospital*, 92 F. 3d 248, 253 (5th Cir. 1996) (discussing fact pattern where the claimant tape recorded a conversation with hospital management concerning the intent to lay off older workers in the future and holding that the recording was admissible for the impeachment of the manager); *see also* Past Sexual Conduct in Sexual Harassment Cases, Lisa Dowlen Linton, Chicago-Kent Law Review, Vol. 75, Issue 1, December 1999. This note examines the admissibility of a plaintiff's past sexual conduct in a sexual harassment case under the Federal Rules of Evidence.

[54] FED. R. EVID. 412(a); *see also* Eschels & Gomsak, *supra* note 31 at 1—2.

Respondent may seek to introduce evidence of the Claimant's sexual behavior or sexual predisposition.[55] By doing so, the Respondent is trying to show the sexual proclivity of the claimant. The ultimate goal of the Respondent is usually an attempt to reduce their percentage of liability. While this may be a rational objective for the Respondent, it may not have a great impact for their success in the case. The purpose of the rules as to this point was to protect the claimant's sexual history so that it could not be used against him or her. This applies not only in a court of law but any other forum. Rule 412 reverses the usual approach on admissibility by requiring the evidence's probative value to "substantially outweigh" any prejudicial effect.[56] For example, fact-finders have even excluded proffered evidence that the claimant was sexually insatiable, engaged in multiple affairs, and suffered from a sexually transmitted disease, because the probative value failed to outweigh the prejudicial effect of the statement.[57] In summation, such evidence is viewed with a high degree of scrutiny and should be reviewed consistent with the provisions and policy of the rules.

N. Independent Medical Examinations

If the claimant's mental or physical condition is at issue, the defense may also request an "Independent Medical Examination" (IME) by an independent doctor.[58] This is especially true in claims alleging severe mental distress. By alleging mental injury and seeking damages, the claimant places his mental condition into direct controversy which often provides good cause for the IME.[59] For example, the IME might be probative as to whether other pre-existing conditions could be contributing to the claimant's current psychiatric condition.[60] With that said, most Arbitrators are reluctant to mandate an IME unless the desired evidence is absolutely necessary to the fact-finding process.[61]

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[55] Imwinkelried & Jacobs, *supra* note 5 at 35.
[56] FED. R. EVID. 412(a).
[57] Hermle, *supra* note 47 at *2; see also Chamblee v. Harris and Harris, Inc.*, *supra* note 47 at 671.
[58] FED. R. CIV. PROC. 35 (b); *see also Simpson v. Univ, of Colorado*, 220 F.R.D. 354, 363, (D. Co, 2001) (discussing the fact that the purpose of Rule 35 is to level the playing field for the parties contesting a motion for an IME).
[59] Hermle, *supra* note 47 at 2.
[60] Paul Grimm, Charles Fax & Paul Mark, *Discovery Problems and their Solutions*, American Bar Association Section on Litigation, 72—73 (2005); *see also* Eschels & Gomsak, *supra* note 31 at 13—14).
[61] Hermle, *supra* note 47, at 14.

O. Damages

The assignment of damages (i.e., some defined loss) in employment arbitration remains a controversial issue. Typical employment arbitrations unfold in two stages. First, the claimant argues the liability of the employer through unlawful conduct. Second, the claimant argues he or she has suffered significant damages. Generally, damages must be established by testimony or documents. Damages are commonly argued as back pay, front pay in lieu of reinstatement, compensatory damages, or emotional distress.[62] In assessing these damages, claimants often feel they are due a lot more in damages than what they actually will receive. Evidence establishing back pay may also be offered in the form of payroll stubs, tax returns, job search activity-related documentation, and attempts to mitigate damages by seeking interim comparative employment. Evidence concerning compensatory damages may be offered in the form of medical expenses, a diagnosis of depression, injury to financial credit, testimony of suffering, loss of sleep, relocation expenses, and post-traumatic stress.[63] In some federal circuits, testimony is sufficient to establish some forms of damages.

IV. CONCLUSION

Employment litigation, with its focus on motive, bias, and unfair treatment among employees who are allegedly similarly-situated, remains a fascinating area of law.[64] Most discrimination cases settle after the parties understand the evidence and have exhausted motion practice. This note has conveyed the variety of evidentiary concepts and issues commonly raised in the process of employment arbitration. Each of these issues requires the Arbitrator to carefully evaluate, weigh, and make decisions with important consequences for both the pre-hearing and hearing portions of the litigation.

Now that the reader understands the more common rules and types of evidence in an employment dispute, what does the Arbitrator or

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[62] GARY M. GILBERT, COMPENSATORY DAMAGES AND OTHER REMEDIES IN EMPLOYMENT DISCRIMINATION CASES (2003); *see also* Barbara Johnson, *Types of Damages Available in Employment Cases*, ABA Section of Labor and Employment Law Conference, 1—2 (2011) (unpublished).
[63] *See* Johnson, *supra* note 63 at 7—8.
[64] *See* Eschels & Gomsak, *supra* note 31 at 1—2.

advocate need to prepare for the arbitral hearing? First, fully comprehend the theory of each party to the dispute. Next, one should consider what evidence is required by each advocate to prevail under their theory. How does each piece of evidence fit into the mosaic of persuasion? Third, advocates must cut through the clutter of evidence presented during the arbitration. Generally, only two-thirds of the evidence is determinative. The rest is duplicative or was presented for unclear purposes. Can you decide whether a relevant and material fact more probably exists than does not? With those things in mind, you should be well prepared and on your way to being a competent, collegial, and effective party.