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Discovery: Fights worth fighting

A LOOK AT WHAT EVIDENCE IS RELEVANT IN EMPLOYMENT CASES AND HOW TO GET IT THROUGH DISCOVERY

The parties' goal in discovery is to obtain evidence necessary to prevail on a motion for summary judgment and, ultimately, at trial. Discovery disputes can develop both when one side wants to prevent the other from obtaining certain information and when one side finds discovery requests met with objections.

Relevant evidence for the plaintiff

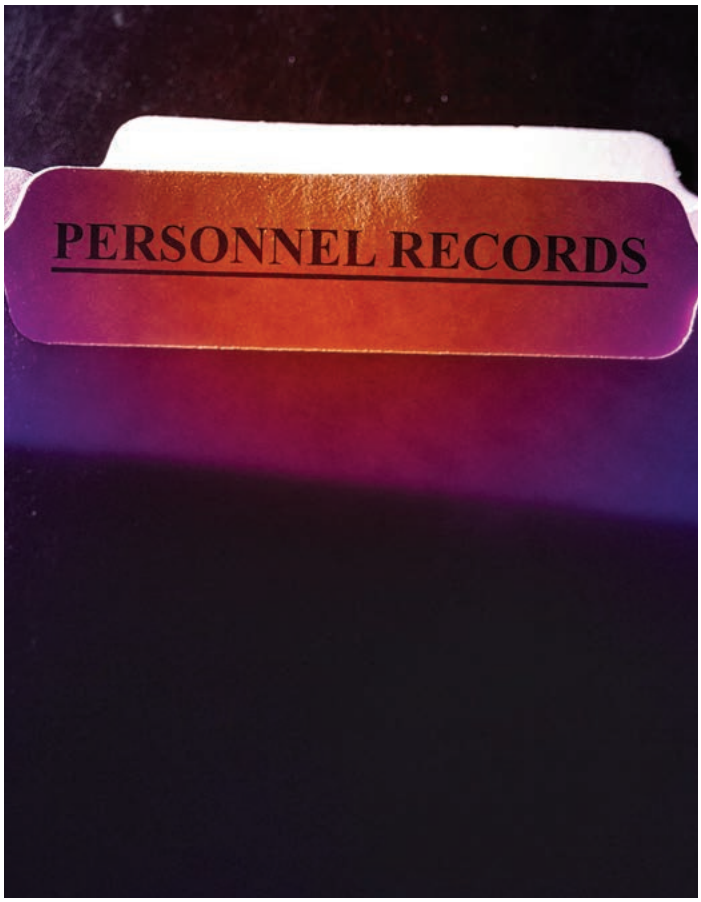
Relevant information about the plaintiff includes his or her personnel file, time records, wage records, performance evaluations, and communications.

Much of this information should be obtained without dispute from defense counsel, and in fact can be obtained even before the inception of litigation. By way of example, Labor Code section 1198.5 allows an employee to request his or her personnel file; Labor Code section 226 allows an employee to request his or her wage statements; and Labor Code section 432 allows an employee to request any signed instrument relating to the obtaining or holding of employment.

With respect to communications, counsel should carefully consider the potential source of communications, for instance, whether the plaintiff communicated with the employer or coworkers via company email and/or personal email; via text message on a mobile device; via instant message, such as WhatsApp; via internal messaging systems such as Microsoft Teams or Slack; or via social media, such as Facebook or Instagram. It is prudent not only to define "communications" as including these sources in the definitions of discovery requests, but also to request relevant communications from these sources of data in the discovery requests themselves to avoid the chance that defense counsel overlooked the breadth of that definition.

Separately, counsel should ensure that defense counsel took appropriate steps to collect relevant information. If the employer or any of its employees are left to collect data that they believe to be relevant on their own, it is likely that relevant and critical information will be missed. Press defense counsel on whether they used a vendor to collect mobile phone data. In some cases, it will be obvious that defense counsel did not sufficiently collect information if, for instance, they produce screenshots of messages rather than native file format (or PDF, if not using eDiscovery software) broken up by date and time.

Relatedly, it can be difficult to authenticate communications where electronic timestamps showing the date and time of each message are not visible. If the defense is pressed to do a proper data collection, these communications can typically be produced in a format that shows the date and time of each message.



Relevant evidence for the bad actor

Relevant information about the bad actor includes complaints by other employees about conduct similar to the plaintiff's allegations, disciplinary records, and training records.

With respect to other complaints, defense counsel will almost always push back on the use of the term "complaints" in written discovery requests. Counsel should take steps to preempt this dispute by defining "complaints" in the definitions of discovery requests to include both the colloquial definition of that word – i.e., an expression of grief, pain, or dissatisfaction (see *complaint*, Merriam-Webster.com Dictionary, available at (https://www.merriam-webster.com/dictionary/complaint) – and the legal definition of that word – i.e., the initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis

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for the plaintiff's claim, and the demand for relief (see *complaint*, Black's Law Dictionary (11th ed. 2019)).

It is likely that defense counsel will object to the colloquial definition as overbroad and unduly burdensome. In that case, counsel should remind defense counsel that this objection is only valid if the burden is undue – meaning "the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (See Code Civ. Proc., § 2017.020, subd. (a).)

Be prepared to offer keyword searches, Boolean searches, date ranges, and key players to lessen that purported burden and because, in some cases, the court will require it. (See, e.g., *Apple, Inc. v. Samsung Electronics Co. Ltd.*, No. 12-CV-0630-LHK (PSG), 2013 WL 1942163 (N.D. Cal. May 9, 2013) [stating "the proper and most efficient course of action would have been agreement . . . as to search terms and data custodians prior to . . . electronic document retrieval" and "selecting search terms and data custodians should be a matter of cooperation and transparency among parties and non-parties"] (internal brackets omitted); see also *Pyle v. Selective Ins. Co. of Am.*, No. 2:16-CV-335, 2016 WL 5661749, at *2 (W.D. Pa. Sept. 30, 2016) ["Among the items about which the court expects counsel to reach practical agreement without the court having to micro-manage e-discovery are search terms, date ranges, key players and the like."] (internal quotation marks omitted).)

With respect to disciplinary records, these are often located in the bad actor's personnel file. Defense counsel will frequently push back on producing these kinds of documents with objections of privacy, confidentiality, and the like. Always meet and confer over these objections by citing to California case law that permits a plaintiff to obtain the personnel file of the individual alleged to have committed unlawful employment practices against the plaintiff.

By way of example, in *Bihun v. AT&T Info. Systems, Inc.*, the defendant employer failed to produce the harasser's personnel file at trial pursuant to a demand. (See *Bihun v. AT&T Info. Systems, Inc.* (1993) 13 Cal.App.4th 976, 993.) The trial court instructed the jury on willful suppression of evidence. On appeal, the court affirmed this instruction in part because "it was reasonably probable [the harasser's] performance evaluations and any complaints of sexual harassment would be in his personnel file" and, thus, those documents were admissible. (*Id.* at 994.)

Similarly, in *Ragge v. MCA/Universal Studios*, the court allowed the plaintiff to obtain the personnel files of the named defendants over objections of privacy and relevance. (See *Ragge v. MCA/Universal Studios* (C.D. Cal. 1995) 165 F.R.D. 601, 604-05.) There, the court held that the defendant employer's "assertion that the documents are irrelevant is without merit," reasoning that "[c]learly there may be information in the named defendants' personnel files which is relevant . . . to the employer's knowledge of a hostile work environment." (*Id.* at 604.) The court also rejected the employer's alternative objection on privacy grounds. It held that "[e]ven if the requested documents in defendants' personnel files are protected by defendants' privacy right, that right may, nevertheless, be invaded for litigation purposes." (*Ibid.*) Thus, the court ordered the defendant employer to produce all documents in the named defendants' personnel files relating to "performance evaluations and reviews, promotion or demotion records, disciplinary actions, and complaints by other employees or customers in the personnel files." (*Id.* at 605.)

Finally, counsel should be sure to request the training records of the bad actor. For claims of failure to prevent harassment, discrimination, or retaliation, evidence that a bad actor never received training on those areas can provide crucial evidence to prove that claim. That is particularly true in cases of sexual harassment, because California law requires all employers of five or more employees to provide one hour of sexual harassment and abusive conduct prevention training to nonsupervisory employees, and two hours of that training to supervisors and managers once every two years. (See Gov. Code, § 12950.1.) If documents about this issue are not forthcoming, consider propounding requests for admission that the training was not conducted at all, or was not conducted during the requisite timelines.

The conduct at issue

Relevant information about the conduct at issue includes communications about the conduct, as well as documents pertaining to any investigation, findings or conclusions, etc.

With respect to communications about the conduct at issue, counsel should again carefully consider the potential source of communications, and be prepared to offer keyword searches, Boolean searches, date ranges, and key players when the parties meet and confer over the discovery requests.

With respect to investigative documents, be sure to define "investigation" in the definitions of the requests to avoid an objection that the term is vague and ambiguous. (See, e.g., *investigation*, Black's Law Dictionary Black's Law Dictionary (11th ed. 2019) "The activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical treatment or use of the scientific method".)

When the parties meet and confer over the defendant's responses or production, ensure that defense counsel searched for relevant information both internally (e.g., an investigation by human resources) and externally (e.g., an investigation by a third party). If a third party was used to conduct an investigation, counsel should issue a subpoena seeking

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all documents related to that investigation, such as the complete file on the investigation, all communications about the investigation, notes (whether handwritten, electronic, or otherwise), audio and/or video recordings, and all drafts of the final memorandum and/or report on the investigation. Often, documents produced in response to the third-party subpoena will reveal gaps in the defendant's production.

Other victims or "me too" evidence

Other victims (sometimes called "me too" evidence) includes other instances of discrimination or harassment against other employees by the alleged bad actor or the same employer. "Me too" evidence is used to show that others have experienced the same actions and claims as those alleged by the plaintiff.

Defense counsel will almost always object to requests for "me too" evidence on the basis of privacy and relevance. Counsel should immediately meet and confer by citing to the extensive case law allowing discovery of that evidence. (See, e.g., *Johnson v. United Cerebral Palsy/Spastic Children's Found. of Los Angeles and Ventura Counties* (2009) 173 Cal.App.4th 740 [holding that "the 'me too' evidence presented by the plaintiff in the instant case is per se admissible under both relevance and Evidence Code section 352 standards"]; *Pantoja v. Anton*, (2011) 198 Cal.App.4th 87 [holding that the "me too" evidence "was admissible to show intent under Evidence Code section 1101, subdivision (b), to impeach (the bad actor's) credibility as a witness, and to rebut factual claims made by defense witnesses"]; *Bihun, supra,* disapproved on other grounds by *Lakin v. Watkins Assoc. Indus.* (1993) 6 Cal.4th 644, 664 [holding "me too" evidence was relevant, not hearsay, not unduly prejudicial, and not improper character evidence].)

The value of this evidence cannot be overstated. In the absence of direct evidence of discriminatory animus, "me too" evidence provides persuasive circumstantial evidence of discriminatory intent.

Relevant policies

Relevant policies include the employee handbook and any standalone policies pertaining to the causes of action alleged in the complaint.

Employee handbooks and standalone policies can generally be obtained without dispute from defense counsel, but be wary when defense counsel tries to only produce policies it deems are relevant to the plaintiff's claims. As one example of the importance of reviewing all relevant policies, sometimes an employee handbook will use the statutory definition of harassment in one policy, and in another policy will give specific examples of harassment (e.g., examples of harassing conduct, words, images, etc.).

When those examples mirror the plaintiff's own allegations, a useful tactic is to ask the defendant's person most qualified to affirm that the handbook's example is in fact prohibited harassment, and then to ask that witness to affirm that by extension, the plaintiff's allegations (if true) must likewise constitute prohibited harassment. The witness is then put into the untenable position of answering in the affirmative, thereby helping to prove the plaintiff's case, or by answering in the negative, thereby reducing his or her credibility.

As another example, anti-retaliation policies are often referenced throughout an employee handbook even if that document has a standalone anti-retaliation policy. Counsel should have the opportunity to review all of those policies to use in depositions and at trial.

The proper defendant(s)

If there is any question as to the proper defendant, relevant information includes the entity that employed the plaintiff, the bad actor (for causes of action with individual liability, e.g., harassment), joint employers, and successors in interest.

As a general matter, counsel should investigate the proper defendant prior to filing the complaint. However, discovery will sometimes reveal that one entity was considered the employer of the plaintiff, but another entity entered into an agreement to share an employee's services or interchange employees, or actively participated in the control and/or management of the plaintiff. In that case, it is important to conduct discovery into the extent of that relationship and, if appropriate, amend the complaint to add an additional defendant on a theory of joint employer. Similarly, in cases under the Family Medical Leave Act or the California Family Rights Act, counsel should investigate whether the employer had a "successor in interest," which will determine successor liability for violations of the predecessor. (See, e.g., 29 C.F.R. § 825.107 ("Successor in interest coverage").)

Relevant evidence for the defendant

For the defendant, the categories of relevant evidence will typically include information about the plaintiff's mitigation of economic and emotional distress damages, earning history, alternative stressors, history of emotional distress and treatment.

Information relevant to show mitigation of economic damages can include wage statements and IRS Form W-2s. While wage statements are generally produced without objection, some plaintiffs' attorneys routinely object to the production of W-2s or 1099s under the tax return privilege. (See, e.g., *Brown v. Superior Court* (1977) 71 Cal.App.3d 141, 143 [holding W-2 forms are within California's tax return privilege].)

Given that wage statements are sometimes not maintained by employers, and given that it can be difficult to discern exactly how much an employee was paid in any given year in a wage statement, a W-2 can be a useful alternative way to succinctly show that information. In this instance, plaintiff's counsel could consider whether the fight over the production of W-2s is worth having.

Emotional-distress damages are noneconomic damages and frequently include things like diagnosed psychiatric

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conditions, loss of sleep, mental anguish, reputational harm, and strained personal relationships. As such, information relevant to show mitigation of emotional distress damages frequently includes the plaintiff's medical records.

Discovery disputes over medical records frequently arise when the scope of the defendant's request is overbroad, or when the medical records contain information the plaintiff does not want shared with the defendant. This is because the plaintiff's claim to damages is weakened where there is evidence of alternate stressors, or where there is a risk that a jury will be prejudiced by a plaintiff's history (e.g., of drug use or diagnosis of a loathsome disease). While these battles may frequently be worth picking, plaintiff's counsel should consider the converse. If the medical records show that a plaintiff does not have a history of emotional distress and the psychiatric condition developed as a result of the conduct at issue, an effective tactic in settlement negotiations can be to point to the lack of incriminating information, alternate stressors, and the like.

The conduct at issue

Relevant information about the conduct at issue includes the facts, witnesses, and documents relating to the plaintiff's allegations.

While the facts, witnesses, and documents relating to the plaintiff's allegations will largely be discoverable without objection, the parties may object to the disclosure or production of witness interviews and witness statements on the grounds of attorney work product. (See, e.g., *Coito v. Superior Court* (2012) 54 Cal.4th 480 [holding that "witness statements procured by an attorney are entitled as a matter of law to at least qualified work product protection"]; *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217 ["A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements"]; *Soltani-Rastegar v. Superior Court*, 208 (1989) Cal.App.3d 424 [holding that statements made to an attorney's agent "for the sole purpose of defending" against claims were protected by the attorney-client privilege].)

While plaintiff's counsel may wish to preserve witness statements for use in a motion for summary judgment, counsel should consider the benefits of disclosing those statements early. If the statement is strong, and the witness is not at risk of being contacted by or speaking with defense counsel outside of depositions, consider producing the statements as a tool to encourage early resolution.

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