

# Effective Direct and Cross Examination in a Compensatory Damages Hearing

Presented by:

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# The Goal of Damages Evidence

- Convince the judge that the Complainant suffered emotionally due to the discrimination/retaliation by the Agency.
- Achieve the goal largely through witness testimony.

Examination of witnesses should be focused on 2 primary issues:

1. Proving or challenging proof of actual harm; and
2. Proving or challenging proof of causation

# Proof of Harm

Alleged harm from the discriminatory treatment should have been identified in discovery.

Examination of witnesses regarding proof of harm should focus on the nature, severity, and duration.

# Proof of Causation

In most instances, the focus of hearing or trial tends to be on the issue of causation; complainants generally establish the harm but whether it was caused by the employer's conduct is the true battleground.

Examination of witnesses regarding proof of causation should focus on whether the discrimination was the proximate cause of the harm or if there were other causes

# Cross Examination of the Complainant

# Examination of Complainant

Explore:

1. Evidence of Eggshell Skull
2. Other Possible Causes of Emotional Harm
3. Preexisting Injuries

# Evidence of Eggshell Skull

Are there experiences in the complainant's past (not a medical condition) that make the complainant unusually susceptible to emotional harm?

# Evidence of Eggshell Skull

Once Mr. Jones was reassigned to another facility, what did you think would happen if you returned to work?

# Explore Evidence of any Preexisting Conditions

# Evidence of Preeexisting Conditions

Have you ever received  
treatment for any mental health  
or psychiatric impairments in the  
the past?

# Evidence of Preeexisting Conditions

Have you ever taken medication  
for depression?

Have you ever taken medication  
for anxiety?

# Other Potential Causes of Emotional Harm

Have you ever taken medication  
for depression?

Had you ever taken medication  
for anxiety?

# Other Possible Causes of Emotional Harm

Had you previously received  
treatment for any mental health  
or psychiatric impairments?

# Other Possible Causes of Emotional Harm

Had you previously received  
treatment or been prescribed  
medication for high blood  
pressure?

# Other Possible Causes of Emotional Harm

Financial Problems in the recent  
past?

Bankruptcy?

# Other Possible Causes of Emotional Harm

Relationship problems?

Separation, Divorce, Domestic  
Violence or Break-up from Long  
Term Relationship?

# Other Possible Causes of Emotional Harm

Other Domestic Problems?

Abortion or Unwanted  
Pregnancy?

Fire, Vandalism or Theft

# Other Possible Causes of Emotional Harm

- Discipline Problems with Children?
- Child failing, disciplined or expelled from school?
- Child arrested, abusing drugs or confronting serious health issues?

# Other Possible Causes of Emotional Harm

- Recent Automobile Accidents??
- Death of parent ?
- Child arrested, abusing drugs or confronting serious health issues?

# Challenging Expert Witnesses

Professional credentials

Personal bias if the expert has a relationship with the complainant

Ask about compensation arrangement (e.g. “gun for hire”)

# Challenging Experts

- The single best way to challenge expert witnesses is on their knowledge of the facts. The expert's testimony comes only from Complainant's report of the facts.
- Create hypotheticals such as, "Would your opinion change if you knew this employee was struggling

# Challenging Expert Witnesses

- Explore weaknesses with regard to the:
  - **NEXUS** – can the expert testify definitively about the causal connection between the discrimination and the harm
  - **EXACERBATION** – can the expert testify definitively that the discrimination exacerbated a pre-existing condition

# Lay Witnesses: Family Members & Friends

Do not be over-confident if Complainant is only calling lay witnesses. Medical provider testimony is not required. The EEOC has long held that evidence from a health care provider is not a prerequisite for recovery of compensatory damages. *See, e.g., Carpenter v. USDA*, EEOC Appeal No. 01945652 (July 17, 1995).

# Family Members & Friends

Family members are best placed to have first-hand knowledge of the Complainant's changes of personality, emotional state, or interactions (e.g. social isolation).

# Litigation Strategy with Family Members

To avoid surprises during the damages hearing, Agency representatives should take the opportunity during discovery to depose lay witnesses who will testify about damages.

# Challenging Family

- Bias
  - “You love your husband?”
  - “You believe him because of your relationship, though you never saw what happened?”
  - “You want his suffering to end?”
  - Negative impact of the case on the witness & wanting it to end.

# Challenging Family Member Testimony

- Financial Bias
  - Complainant's loss of income has impacted you negatively
  - Medical/legal expenses
  - You will recover money if Complainant prevails

# Challenging Family Member Testimony

- Knowledge of other causes of emotional harm (especially with children of the complainant, who may not be aware of other stressors such as financial or marital problems)
- Ask for access to family members' social media pages (happy pictures with the Complainant during the time the Complainant was supposedly depressed)

# Lay Co-Workers

- May testify about the changes in the Complainant at work (e.g. performance, work habits, mood or isolation at work)
- Challenge co-workers on the facts, as you would with expert witnesses.
- Also challenge co-workers on other stressors, as you would with family members. They may not be aware of marital, financial problems, etc.

# Challenging Co-Workers

- “You also work for the alleged responsible management official? You think she has also discriminated against you? You are hoping if Complainant wins, the responsible management official will be disciplined or lose her job?”
- “You have your own EEO complaint and believe Complainant’s success will be used as evidence in yours?”

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