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By Iris Weinmann

I hear you knocking but you can't get it in – or can you?

Bringing and responding to motions in limine in employment cases

It is virtually inevitable that shortly before the trial of an employment-discrimination or wrongful-termination lawsuit, plaintiff's counsel will be served with a slew of motions in limine, seeking to exclude evidence from being presented at trial. Often, it seems that the number of motions in limine served is proportional to the size of the defense firm. Indeed, one appellate court has noted that, "the use of motions in limine has become more prevalent, primarily by defense counsel." (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669 [56 Cal.Rptr.2d 803].)

In addition to opposing the motions in limine served by the defendant, plaintiff's counsel needs to evaluate whether the plaintiff should file any motions in limine to exclude evidence. This article addresses arguments to be made in response to many of the commonly seen motions in limine filed by defendants in employment cases and suggests some types of evidence that plaintiff's counsel should consider trying to exclude through motions in limine.

The purpose of motions in limine: To preclude or limit the introduction of inadmissible and prejudicial evidence, not as an alternate means of summary adjudication

A motion in limine is the procedure a party may use to preclude or limit the introduction at trial of evidence deemed inadmissible and prejudicial. (*Kelly v. New West Federal Savings, supra,* 49 Cal.App.4th at p. 669.) The purpose of the motion "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337 [145 Cal.Rptr. 47].) Because these motions are generally made before trial, "[t]hey permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial." (*Kelly v. New West Federal Savings, supra,* 49 Cal.App.4th at p. 669-670.)

A party may not use a motion in limine as a substitute for a motion for summary judgment or summary adjudication of issues. (See, e.g., Super. Ct. L.A. County, Local Rules, rule 8.92(b) ["A motion in limine shall not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure Section 437c and court rules pertaining thereto"]; *R&B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 371-372 [44 Cal.Rptr.3d 426] (con. opn. of Rylaarsdam, P.J.); *Amtower v. Photon Dynamics, Inc.* (Jan 17, 2008, H03086, H030477) __ Cal.App.4th __ [2008 D.A.R. 820] ["What in limine motions are *not* designed to do is to replace the dis-

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positive motions prescribed by the Code of Civil Procedure"] (emphasis in original).)

Thus, when reviewing a purported motion in limine, counsel should consider carefully what evidence the defendant is seeking to exclude and whether the defendant is instead trying to summarily adjudicate certain matters. For example, if the defendant is seeking to exclude all evidence of harassment against the plaintiff or all evidence of economic damages suffered by the plaintiff, then the defendant is improperly attempting to use a motion in limine as a motion for summary adjudication.

Like other motions, motions in limine must be supported by a factual showing

Motions in limine are like any other pretrial motion in that, to the extent they rely on assertions of fact, those facts must be supported by admissible evidence. (*Kelly v. New West Federal Savings, supra,* 49 Cal.App.4th at p. 671, fn.3.) Unless the defendant makes "an appropriate factual showing to support the motion, the court should not entertain the motion." (*Ibid*.)

The court cannot rule on motions in limine in a vacuum

Often, the defendant will file generic motions in limine seeking to exclude vague or broad categories of evidence without specifying in any detail what the testimony or other evidence will be. Unless the defendant has set forth specific items of evidence it believes would necessitate undue consumption of time or create substantial danger of prejudice, the motion is improper. A trial court cannot rule on a motion in limine in a vacuum without knowing what the testimony or other evidence is going to be. (*See, Kelly v. New West Federal Savings, supra,* 49 Cal.App.4th at p. 670.)

An example of a generic motion is where the defendant files a motion in limine to exclude any and all evidence at variance with the pleadings, but does not indicate what such evidence may be. Another instance may be where the defendant seeks to preclude duplicative testimony of witnesses, but does not identify what items of duplicative testimony are expected. These motions should be opposed on the grounds that the court cannot rule on said motions in a vacuum.

Common motions in limine filed by the defendant in employment cases

• Motion to exclude evidence of discrimination or harassment against other employees

In cases involving violations of the California Fair Employment and Housing Act (FEHA), the defendant generally seeks to try to exclude evidence of discrimination or harassment against employees other than the plaintiff. This may include other lawsuits brought against the employer alleging discrimination.

Such evidence is often vital in discrimination cases, since direct evidence of discrimination is so rare and the plaintiff often must rely on circumstantial evidence to meet his or her burden of proving that unlawful discrimination occurred. (See, e.g., *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662, 670 [8 Cal.Rptr.2d 151]; *Mixon v. Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884].)

In *Estes v. Dick Smith Ford, Inc.* (8th Cir. 1988) 856 F.2d 1097, a race and age discrimination suit brought under Title VII, the Court of Appeals held that it was reversible error for the district court to exclude evidence such as the makeup of defendant's workforce, and prior acts of discrimination by the defendant. (Because the objectives of the FEHA and Title VII of the Federal Civil Rights Act are identical, California courts have routinely relied upon federal law to interpret the FEHA.)

The court explained that:

> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives… Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive. (*Id.* at p. 1103.)

Similarly, in *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480, other claims of sexual harassment were found admissible to prove discriminatory intent in the plaintiff's discharge, and that the proffered reasons for the termination were pretextual. (See also, *EEOC v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 897-898 [evidence of an employer's sexual harassment of female employees other than the plaintiff and derogatory remarks made about women were properly admitted to establish a motive for the plaintiff's termination]; *Phillip v. ANR Freight Systems, Inc.* (8th Cir. 1991) 945 F.2d 1054, 1056 [in age discrimination case under the Age Discrimination in Employment Act, it was error to exclude evidence of other age discrimination suits against the defendant]; *Spulak v. K Mart Corp.* (10th Cir. 1990) 894 F.2d 1150, 1156 ["As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent"].)

In addition, evidence of unlawful treatment of other employees may be admissible to establish that the defendant failed to take all reasonable steps to prevent discrimination and harassment from occurring. The FEHA requires an employer to take all reasonable steps to prevent discrimination and harassment from occurring. (Gov. Code, § 12940, subd. (k).) Failing to take such reasonable steps constitutes a separate unlawful employment practice for which the defendant can be held liable. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040 [6 Cal.Rptr.3d 441].) Thus, for example, evidence of discrimination against other employees that occurred before the unlawful conduct against the plaintiff is directly relevant to the employer's failure to take reasonable steps to prevent dis-

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crimination and harassment from occurring. To the extent the employer knew of discrimination occurring in its ranks and did nothing to investigate, remedy the problem, or take other reasonable steps, the employer violated Government Code section 12940, subdivision (k). Where applicable, the plaintiff must be provided the opportunity to show that this omission contributed to his or her unlawful treatment.

Finally, evidence of the unlawful treatment of other employees may also establish the employer's knowledge of the unlawful conduct and its failure to take corrective action. This is relevant to the plaintiff's claim for punitive damages. (Civ. Code, § 3294.) In *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 989, 991 [16 Cal.Rptr.2d 787], overruled on other grounds, *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109].) the court allowed the introduction of a harasser's sexual misconduct with other female employees into evidence as an operative fact because it demonstrated the employer's knowledge of the harasser's behavior and complaints about that behavior.

In *Gober v. Ralphs Grocery Company* (2006) 137 Cal.App.4th 204 [40 Cal.Rptr.3d 92], the court discussed the factors to be considered in assessing the appropriateness of the amount of punitive damages awarded against a defendant. The court recognized that the degree of reprehensibility of the defendant's misconduct is the most important factor to be considered in assessing the reasonableness of a punitive damages award. (*Id*. at p. 219.) Five subfactors are considered in assessing the degree of reprehensibility: (a) whether the harm was physical as opposed to economic; (b) whether the conduct evinced an indifference to or a reckless disregard of the health or safety of others; (c) whether the victims were financially vulnerable; (d) *whether the conduct was an isolated incident or repeated*; and (e) whether the tortfeasor acted with intentional malice. (*Ibid.*)

The employer's history of engaging in discrimination is, thus, relevant to determining whether its conduct was an isolated or repeated incident, and whether the defendants acted with intentional malice. Accordingly, evidence of other discrimination is admissible and should not be excluded.

The defendant often argues that evidence of discrimination against employees other than the plaintiff is prejudicial. Evidence Code section 352 provides that the court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Evidence regarding the defendant's unlawful treatment of other employees is not unduly prejudicial. Generally, what the defendants seek to exclude by their motions in limine is potentially *damaging* evidence – not prejudicial. The difference is well-documented by the courts:

> [A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which *uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'* (*People v. Yu* (1983) 143 Cal.App.3d 358, 377 [191 Cal.Rptr. 859] (emphasis added).)

An employee claiming discrimination, harassment or retaliation against an employer cannot be precluded from introducing the very unlawful practices that he claims he opposed and he reasonably believed were unlawful. As stated by the court in *Bihun*:

> We fail to see how a plaintiff can prosecute an action for sexual harassment against a corporate employer without introducing evidence of sexual harassment by an employee. To say this evidence is unduly prejudicial because it 'brands' the employee as an 'harasser' is like saying evidence the defendant committed a murder is unduly prejudicial because it 'brands' the defendant as a 'murderer.' (*Bihun v. AT&T Information Systems, Inc., supra*, 13 Cal.App.4th at p. 990.)

The same holds true in most discrimination and harassment cases.

• Motion in limine to exclude evidence not revealed during discovery

Another standard motion in limine is one to exclude evidence not revealed during discovery. Such motions in limine are inevitably too broad and should be opposed.

For example, if the plaintiff has information which was not requested in discovery or the plaintiff obtained additional information after discovery was concluded, the plaintiff should not be precluded from introducing such evidence at trial. Moreover, since the defendants generally make these motions as boilerplate without having any idea if any such evidence actually exists, the plaintiff should also oppose on the ground that the defendant's motion in limine is improper because it fails to present any factual support for its claim that the plaintiff will attempt to introduce any such evidence or elicit such testimony from any witness. (*Kelly v. New West Federal Savings, supra,* 49 Cal.App.4th at p. 670-671.)

In the event that the trial judge agrees with the defendant that any evidence not produced in discovery may not be introduced before the jury, the plaintiff should always request that any prohibition on the introduction of such evidence be mutual. That is, any such order must be applied with equal force to the defendant, so that it cannot introduce any evidence not disclosed during discovery, or introduce any documents not produced during the course of discovery.

• Motion to exclude the testimony of plaintiff's human resources expert

Evidence Code section 801 sets forth the standard for admissibility of expert witness testimony:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience,

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> training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates… (Evid. Code, § 801.)

The admissibility of human-resources expert testimony was discussed at length in *Kotla v. Regents of the Univ. of Calif.* (2004) 115 Cal.App.4th 283 [8 Cal.Rptr.3d 898]. Employers often cite *Kotla* for the proposition that human-resources expert testimony is not admissible in employment cases, because in that case a verdict for the plaintiff was reversed based on the expert's testimony. The reversal, however, was based on the fact that the human-resources expert opined that certain facts were indicators of or had a tendency to show that the employer retaliated against the plaintiff – testimony which invaded the province of the jury. (*Id.* at p. 293.) Although the specific expert testimony in that case exceeded the permissible bounds of expert-opinion testimony, the *Kotla* court made clear that it was *not* stating a general rule precluding the use of human resources experts in employment cases. (*Id.* at p. 294, fn. 6.) Rather, the court confirmed that "expert testimony on predicate issues within the expertise of a human resources expert is *clearly permissible*." (*Ibid.,* emphasis added.)

The court further explained the type of subjects on which the opinion testimony of a human-resources management expert may be helpful to the jury in a retaliation case:

> For example, evidence showing (or negating) that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support (or negate) an inference of retaliation. Opinion testimony on these subjects by a qualified expert on human-resources management might well assist the jury in its factfinding. (*Kotla v. Regents of the Univ. of Calif., supra*, 115 Cal.App.4th at p. 294, fn. 6.)

Additionally, it is appropriate for an expert to opine regarding whether the employer conducted an appropriate investigation. (See, e.g., *Silva v. Lucky Food Stores, Inc.* (1998) 65 Cal.App.4th 256, 263 [76 Cal.Rptr.2d 382] [in which the court, in affirming the grant of summary judgment against the plaintiff employee, noted that the plaintiff had not presented any expert witness testimony addressing the objective reasonableness of the employer's finding that the employee had engaged in misconduct or whether the employer had conducted an appropriate investigation].)

While the proper scope of a human resources expert's testimony will depend on the facts of a particular case, in general, such testimony is admissible in employment cases.

• Motion to exclude evidence of profits or financial condition

Another standard defense motion in limine is one brought to exclude evidence of the employer's profits or financial condition.

The defense will, inevitably, bring a motion to bifurcate trial so that the amount of punitive damages is determined in a separate phase of trial and only after the jury has made a finding that the defendant acted with malice, fraud or oppression. (Civ. Code, § 3295, subd. (d).) The defense will then argue that evidence of profit or financial condition is irrelevant unless and until the punitive damages phase of trial begins.

While the defendant is correct that in such a situation, evidence of financial condition cannot be introduced in the first phase of trial solely to establish the employer's net worth or to show the jury that the employer is a deep pocket, there will be situations in which the company's financial performance is independently relevant to the plaintiff's claims. For example, where the employer asserts that the employee was terminated, not for discriminatory or retaliatory reasons, but because of poor performance, evidence of the employee's performance may be inextricably intertwined with the company's financial performance. If the employee was a manager of a region, and that region's financial performance substantially increased under his or her management, evidence of the region's financial performance during the employee's tenure certainly must be admitted. Similarly, where a salesperson claims he or she was not paid all the commissions earned under the company's commission plan, evidence of the sales generated by that salesperson is clearly relevant and admissible.

Thus, when faced with a motion to exclude evidence of profits or financial condition prior to the punitive damages phase of trial, plaintiff's counsel should carefully evaluate whether any aspect of the company's finances is relevant to proving the plaintiff's case or disproving the employer's asserted reasons for the plaintiff's termination.

• Motion in limine to exclude evidence regarding the composition of the defendant's workforce

In discrimination cases, the plaintiff may want to introduce evidence regarding the composition of the defendant employer's workforce, in order to establish an inference of discrimination against individuals in a protected class.

For example, the plaintiff may seek to introduce evidence in an age discrimination case that there are no individuals over the age of 40, or in a gender discrimination case that there are no women in management positions. Inevitably, the defendant will seek to have such evidence excluded. Plaintiff's counsel should oppose on the ground that statistical evidence of discrimination is one accepted method of establishing discriminatory intent.

Courts have long recognized that direct evidence of an employer's discriminatory intent is extremely difficult to obtain. (See, e.g., *Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 662, 670; *Mixon v. Fair Employment and Housing Commission, supra,* 192 Cal.App.3d at p. 1317.) Thus, it has been uniformly held that discriminatory intent may be proven by circumstantial evidence, which may include statistical evidence of discrimination, and a pattern or practice of discrimination against individuals in the protected class. (*Los Angeles*

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County Dept. of Parks & Recreation v. Civil Service Comm. (1992) 8 Cal.App.4th 273, 284 [10 Cal.Rptr.2d 150].)

In *Buscemi v. Pepsico, Inc.* (S.D.N.Y. 1990) 736 F.Supp. 1267, an age discrimination action brought under the Age Discrimination in Employment Act, the defendant sought to exclude evidence regarding the ages of persons fired by the company as irrelevant and prejudicial. In denying the defendant's motion in limine, the court explained that the statistical evidence which the plaintiff sought to introduce was relevant, and "if believed, would support an inference of discrimination when juxtaposed with plaintiff's other offerings." (*Id.* at p. 1270.) The *Buscemi* court also explained that testimony or other evidence regarding discriminatory treatment of other employees would be probative of a discriminatory termination policy. (*Id.* at p. 1271.)

A plaintiff cannot establish a statistical analysis without referencing that other individuals in the protected category, i.e., over the age of 40, were also terminated. To deny plaintiff the opportunity to refer to the impact of the employer's policies against other employees in the protected class would be to preclude the plaintiff from fully presenting his or her case.

Motions in limine plaintiff's counsel should consider filing in employment cases

There are no motions that are automatically applicable in all employment cases, and an evaluation of what motions may be applicable must be made on a case by case basis, depending on the facts. However, there are certain matters that routinely arise in employment cases meriting motions in limine to prevent the defendant from introducing irrelevant and potentially prejudicial evidence before the jury.

• Motion in limine to exclude evidence of performance history at other employers

Often, an employer will seek to introduce evidence of an employee's performance at prior places of employment. Plaintiff's counsel should bring a motion in limine to prevent such evidence from being presented to the jury.

Records of an employee's performance at past employers is inadmissible as a matter of law on the issue of his or her performance with the defendant employer, since it would constitute inadmissible character evidence. Evidence Code section 1101, subdivision (a) provides, "evidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Thus, in *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1120 [267 Cal.Rptr. 503], overruled on other grounds, *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397]), the court relied on section 1101, subdivision (a) in excluding evidence concerning the defendant doctor's performance at past employers, finding such evidence inadmissible to prove that the doctor performed poorly on the occasion at issue. Evidence that the plaintiff performed poorly at prior employers is inadmissible to show that his or her performance at the defendant employer was somehow deficient.

Moreover, if the defendant seeks to introduce evidence of the employee's performance at prior employers, the plaintiff would then be entitled to introduce evidence disputing that there were problems with his or her performance at that prior job. Plaintiff's counsel should argue that introduction of such evidence would require the court to conduct a mini- trial regarding the plaintiff's employment history, and would "(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

• Motion in limine to exclude evidence of dating relationships or sexual history

Evidence Code section 1106, subdivision (a), specifically precludes evidence of a plaintiff's sexual conduct from being introduced in a civil action alleging sexual harassment. The notes accompanying Evidence Code section 1106 explain the policy behind the enactment of this statutorily mandated exclusion of evidence:

> The Legislature finds and declares that it is the existing policy of the State of California to ensure that the causes of action for claims of sexual harassment, sexual assault, or sexual battery are given proper meaning. The discovery of sexual aspects of complainant's lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant or respondent inquiries, is unnecessary and deplorable. Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the "Catch-22" of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings ….
>
> The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial. (Stats 1985 ch. 1328, §1, pp. 4654-4655.)

Pursuant to the clear language of Evidence Code section 1106 and the policy behind that statute, evidence of the plaintiff's sexual history or dating relationships must be excluded. (Evid. Code, § 1106; See also, *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 411 [27 Cal.Rptr.2d 457] [trial court did not abuse its discretion in excluding evidence of the plaintiff's prior sexual history and any sexual conduct with individuals other than the harasser and other employees of the defendant employer].)

• Motion to exclude evidence of income from collateral sources

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Often, a plaintiff in an employment case will receive insurance benefits, such as disability insurance benefits, unemployment insurance benefits or medical insurance benefits. Depending on the source of such benefits, evidence that the plaintiff received insurance benefits from collateral sources may be subject to exclusion.

The collateral-source rule provides that, if an injured plaintiff receives some compensation for injuries from a source wholly independent of the wrongdoer, those amounts are not deducted from the plaintiff's award of damages. (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173].) In *Helfend*, the Supreme Court applied the collateral-source rule to permit the plaintiff to recover from the negligent transit company for medical expenses already paid for under the plaintiff's medical-insurance coverage. (*Id.* at p. 9-10.)

Similarly, unemployment-insurance benefits received by a wrongfully-discharged employee are not deducted from a monetary award compensating the plaintiff for his or her lost earnings. (*Monroe v. Oakland Unified School Dist.* (1981) 114 Cal.App.3d 804, 810-811 [170 Cal.Rptr. 867].) Unemployment-insurance benefits are not deductible from a back-pay award because such benefits are "intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee." (*Id.* at p. 810.)

The same should hold true with respect to disability benefits, since "the purpose of disability compensation is similar in part to that underlying general unemployment compensation." (*Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1436, fn. 3 [61 Cal.Rptr.2d 336]; See also, *Whatley v. Skaggs Cos., Inc.* (10th Cir. 1983) 707 F.2d 1129, 1138 [disability benefits are from a collateral source and therefore not offset against the defendant's liability for back pay in a Title VII action].)

The introduction of evidence regarding insurance benefits received by the plaintiff is irrelevant, would only confuse the issues or mislead the jury in its calculation of damages, and may unduly prejudice the jury against the plaintiff. Thus, such evidence must properly be excluded.

• Motion to exclude unpleaded affirmative defenses

Pursuant to Code of Civil Procedure section 431.30, an answer to a complaint must contain whatever affirmative defenses or objections to the complaint that the defendant may have, and that would not otherwise be in issue under a simple denial. Such defenses or objections are referred to as "new matter." (Code Civ. Proc., §431.30, subd. (b).)

In general, whatever the defendant bears the burden of proving at trial is "new matter" and thus must be specially pleaded in the answer. (*Cal. Academy of Sciences v. Fresno County* (1987) 192 Cal.App.3d 1436, 1442 [238 Cal.Rptr. 154].) A party who fails to plead affirmative defenses waives them. (*Ibid.*) If the employer failed to plead specific affirmative defenses, such defenses have been waived, and the introduction of evidence relating to these defenses is irrelevant. Thus, such evidence should properly be excluded.

Conclusion

The evidence that is presented before the jury is what makes or breaks a plaintiff's case. It is, thus, crucial for plaintiff's counsel to ensure that prejudicial, potentially damaging and irrelevant evidence is never seen or heard by the jury, and to ensure that all the evidence tending to prove the plaintiff's case is presented to the jury. Because decisions about what the jury will see or hear are, in large part, made at the motion in limine stage, plaintiff's counsel should not give these motions short shrift.

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