

## REBUTTAL: MENTAL HEALTH TESTIMONY IS KEY TO FINDING TRUTH

News

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In her guest article “How Mental Health Testimony Revictimizes Plaintiffs” in the Dec. 14, 2016, edition of Law360 Expert Analysis, Chloe J. Roberts criticizes the defendant’s use of forensic psychiatric testimony in the recent sexual harassment trial involving [SpaceX](#) in Los Angeles. The psychiatrist testified that he diagnosed the plaintiff with borderline personality disorder, which provided an explanation for why the plaintiff saw co-workers as “all good” or “all bad” and fabricated stories that were mutually inconsistent, contradictory or not true. The jury returned a defense verdict in the case.

Roberts wrote: “When courts allow expert mental health testimony to go beyond the traditional context of proving the reasonable amount of emotional distress that a plaintiff has faced, the court is essentially condoning the secondary revictimization of plaintiffs in high-stakes sexual harassment litigation.” If this is the standard to be applied, why have a trial at all? To prevent a defendant from testing the veracity of the plaintiff’s claim in the name of avoiding “revictimization” is hardly consistent with our notion of due process.

Mental health experts have much to contribute in many harassment cases beyond simply establishing whether or not the plaintiff suffered emotional distress. Malingering does occur in some cases, and an experienced forensic psychiatrist or psychologist can unveil it. But a mental health expert can provide insight into other key issues as well.

One, such an expert can determine whether the plaintiff’s emotional condition is the result of workplace events, or is

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instead the result of unrelated causes. Just because a plaintiff was harassed and now experiences anxiety and depression does not mean that the former caused the latter. The condition might be chronic and pre-existing. There are many causes of anxiety and depression, moreover, including prior trauma or abuse, death of a loved one, substance abuse, personality disorders, poor life choices, and brain chemistry.

Two, a mental health expert can determine whether a diagnosis assigned by the plaintiff's expert or treating doctor really fits. There is a difference between being sad and worried after a job loss and having clinical depression. Post-traumatic stress disorder is commonly diagnosed in harassment cases but absent a terrifying, life-threatening physical or sexual trauma such a diagnosis is typically not valid.

Three, a mental health expert can highlight the problem of therapeutic bias if the plaintiff's treating doctor doubles as her expert. This presents an inherent conflict of interest. In the therapeutic realm, the clinician typically accepts the patient's account of symptoms. Rendering a precise diagnosis and assessing causation are not as important as helping the patient improve his or her functioning. Mental health professionals are trained to help people and are not typically trained to be skeptical of a patient's report of symptoms. In the context of litigation, by contrast, the evaluating mental health professional must play the role of detective. A skeptical approach is essential (regardless of which side has retained the clinician) if an objective appraisal of the plaintiff's condition is to occur. Unfortunately, many clinicians are uncomfortable in this role and the accuracy of their conclusions about a patient's condition may suffer as a result. This is a concept that is not immediately apparent to courts and juries so expert testimony can be helpful.

Four, a mental health expert can diagnose a personality disorder and describe its impact on the plaintiff's behavior and credibility. A personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of an individual's culture. It can manifest itself in the way a person interprets self, others or events, and in the range, intensity and appropriateness of a person's emotional responses.

A personality disorder may cause an employee to interact with a supervisor or co-workers in a way that results in the employee's later claim of victimization. Such an employee's own irritability, perfectionism, manipulation of others, inability to accept criticism, or sexually suggestive behavior is often the beginning of a chain of events that ultimately leads to a claim of wrongful termination, harassment or discrimination.

For example, an employee with a histrionic personality disorder might direct flirtatious comments or seductive conduct toward a supervisor and, when he responds in a friendly if not overtly sexual manner, she may misinterpret their relationship as being more intimate than professional. An employee with borderline personality disorder would tend to view others (particularly those in positions of authority) in extreme terms as either "all good" or "all bad." Such an employee may idolize her supervisor until he criticizes her work performance and then react with rage and accuse him of misconduct. These oscillations, known as "splitting," often happen suddenly and can be quite dramatic.

Personality disorders also tend to affect an employee's perception of events in the workplace. Individuals with personality disorders often interpret events in a distorted fashion. This frequently accounts for the diametrically opposite characterization of the very same event by plaintiff and defendant in so many employment lawsuits, particularly in "he said/she said" cases where there are no third-party witnesses to help break the credibility impasse. Employees with personality disorders tend to have relatively good contact with reality. Their accusations of supervisor or co-worker misconduct, although untrue, are not obviously bizarre and on the contrary may sound quite plausible. Often, to the personality-disordered individual, believing is seeing.

For example, if on account of a personality disorder an employee presumes that a co-worker is thinking in sexual terms, a variety of behaviors can be construed as sexual in nature such as choice of clothing, glances, a friendly smile, an inadvertent touch, a compliment or even an invitation to lunch with a group of colleagues. In cases where the plaintiff has a personality disorder a mental health expert can provide valuable insight to the trier of fact by explaining the impact of such a disorder on the workplace events in

question.

Roberts condemns the use of such testimony. She posits that “Borderline personality disorder is not considered a mental illness. It is hotly debated by mental health experts as a legitimate diagnosis.” Roberts is incorrect. When the [American Psychiatric Association](#) published the fifth and most recent edition of its “Diagnostic and Statistical Manual of Mental Disorders” (known as DSM-5) in 2013 following extensive scientific review and debate among mental health professionals, borderline personality disorder was included along with nine others. The prevalence of borderline personality disorder is estimated to range between 1.6 percent and 5.9 percent of the population, and 75 percent of the diagnoses occur in women.

A personality disorder diagnosis can be useful in assisting a court or jury to understand what really occurred in a harassment case where the parties tell very different stories and neutral witnesses are in short supply. Not everything in a harassment lawsuit is quite as it seems on the surface, and just because a plaintiff claims to have suffered terribly on account of what happened at work does not make it so. The involvement of a mental health professional as a defense expert witness should be no more distressing to a plaintiff than a probing interview by her own lawyer or a thorough deposition by opposing counsel.

In any event, if the goal of a trial is to get to the truth, a qualified and prepared mental health expert can make an important contribution toward that end. If the testimony of such experts were to be barred for fear of “revictimizing” the plaintiff, trials would become decidedly one-sided affairs.

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