

PTSD Claims Pose Unique Employment Litigation Risks

Law360, New York (January 27, 2014, 4:31 PM ET) -- The employment defense bar has recently seen a sharp rise in the number of plaintiffs in employment discrimination, harassment and retaliation cases who claim to have suffered Post-Traumatic Stress Disorder as a result of the employer's conduct.

PTSD is a serious disorder that results from the experience of a traumatic, life-threatening event, such as war-time combat or other extreme trauma. Those afflicted with PTSD can experience potentially debilitating long-term suffering as a result. However, the diagnosis is increasingly invoked by plaintiffs who allege PTSD caused by even relatively mild alleged workplace discrimination or retaliation. While attorneys who specialize in representing employers in litigation are well-accustomed to defending generalized claims of emotional distress, a PTSD diagnosis poses unique litigation risks. By following practical strategies geared specifically to defending PTSD claims, defense counsel can help manage those risks.

The Criteria For a Bona Fide PTSD Diagnosis

There is a high threshold for a bona fide PTSD diagnosis. The authoritative reference on psychiatric disorders, the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), provides a specific set of diagnostic criteria for PTSD that includes, for example, "[e]xposure to actual or threatened death, serious injury, or sexual violence." American Psychiatric Association, Diagnostic And Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") at 271. The DSM describes the "essential feature" of PTSD as "the development of characteristic symptoms following exposure to one or more traumatic events." *Id.* at 274.

The DSM provides a nonexhaustive list of examples of traumatic events that includes exposure to war, threatened or actual physical assault or sexual violence, being kidnapped or taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters and severe car accidents. *Id.*

The Prevalence of PTSD Claims in Employment Cases

Despite the specific, rigorous diagnostic criteria for PTSD, it has now become common for plaintiffs to claim PTSD in employment litigation with little regard for whether these criteria are legitimately met. In some cases, a treating mental health professional makes the diagnosis, sometimes with little or no true expertise in the area of PTSD. Alternatively, a plaintiff may self-diagnose — perhaps with prompting by counsel — and then find an expert who will support the diagnosis in the litigation.

For instance, a plaintiff may claim PTSD as a result of sporadic offensive comments allegedly made by a supervisor or coworker, or as a result of an allegedly adverse action as mundane as transfer to a different department within the company, or reassignment to a different supervisor. Even plaintiffs with admittedly mild symptoms, or who attend no more than a few therapy sessions, may nevertheless claim to have suffered PTSD.

As employment defense counsel, it is critical to learn to distinguish the genuine PTSD claims, such as those that might result from serious bodily injury or sexual violence in the workplace for example, from those that simply do not meet the diagnostic criteria.

The Risk Posed by PTSD Claims

A PTSD diagnosis can significantly increase the exposure presented by a single-plaintiff employment discrimination or retaliation case. Plaintiff's counsel may try to use the PTSD diagnosis to extend the plaintiff's emotional distress indefinitely into the future, and thereby to increase damages. For example, plaintiff's counsel may argue that as a result of the PTSD, the plaintiff will experience a lifetime of "triggers," or experiences that remind the plaintiff of the alleged discrimination, and cause him or her to re-experience symptoms.

Jurors, having become accustomed to hearing the term PTSD used casually in popular culture, may have difficulty distinguishing a claim that is genuine from one that is not.

The diagnosis may also have the effect of bolstering the underlying claim of discrimination, harassment or retaliation. With encouragement by plaintiff's counsel, the jury may infer merely from the PTSD diagnosis itself that the employer must have engaged in unlawful conduct, and that the conduct must have truly traumatized the plaintiff.

In short, the PTSD diagnosis can help steer a lay jury toward a large verdict. Therefore, when the PTSD diagnosis is not scientifically valid, the employer's counsel should proactively seek out opportunities to challenge the PTSD claim both in discovery and at trial.

Effective Use of Discovery

The allegation of a PTSD diagnosis can serve as an effective hook for strategic discovery about the plaintiff's mental condition, including discovery of psychiatric and other medical records, and potentially an independent medical examination of the plaintiff under Fed. R. Civ. P. 35. Such discovery can be a very helpful tool in challenging the plaintiff's expert's diagnosis, and in providing material for a defense expert to develop an alternative view of plaintiff's condition. The discovered records may also reveal pre-existing psychological issues or traumas that are not attributable to the employer's conduct.

Deposing a PTSD Diagnostician

If the plaintiff retains an expert, or if his treating mental health professional will testify on his behalf, defense counsel should take the opportunity to depose the witness, providing the litigation budget allows.

Prior to the deposition, and to the extent feasible, defense counsel should review everything publicly available that the expert has written, and review the cases in which the expert has testified, with a particular eye toward whether the expert has been impeached in prior cases. Counsel should study any available information regarding the witness' resume and credentials.

At the expert's deposition, defense counsel can challenge the proffered expert's qualifications, particularly in the specific area of PTSD. For example, in a deposition, a social worker who claims to be a PTSD expert may be forced to concede that he has no medical training. Primary care physicians may admit they have no specialized knowledge regarding PTSD. Even a trained psychiatrist or psychologist may not legitimately be an expert on this specific condition. Defense counsel should drill down on what, if anything, in the expert's education, training, publications or practice, deals expressly with PTSD and quantify that experience as specifically as possible.

At the deposition, and using authoritative references such as the DSM, defense counsel should seek admissions from the plaintiff's expert as to the precise medical definition of PTSD. Counsel should try to draw out concessions from the expert about what is and what is not bona fide PTSD, which criteria are met or not met by the plaintiff, and the severity of the traumatic event required for a legitimate PTSD diagnosis.

Defense counsel can also clarify the limits of the expert's testimony. For example, if the expert opines that some PTSD sufferers will continue to re-experience symptoms based on triggers for their traumatic event throughout their lifetime, counsel can push back as to whether there is any way to know if this plaintiff will experience those triggers.

Counsel can also clarify the extent to which the expert's opinion is rooted in actual knowledge of the plaintiff's condition specifically. Did the expert actually treat the plaintiff, and if so, how many times and how long ago? If not, did the expert accept others' opinions at face value, or make unwarranted assumptions? Did he accept non-critically the plaintiff's version of the alleged discrimination or harassment that purportedly caused the PTSD? Was the plaintiff contemporaneously diagnosed with PTSD by the treating professional, and prescribed specific medication or treatment for the condition at the time, or was the diagnosis generated for the litigation?

When to Counter-Designate an Expert

Depending on the exposure that the case presents, and the resulting litigation budget, the employer's counsel should consider whether to retain a defense expert. One option is to retain a consulting expert who can help reveal any flaws in the plaintiff's expert's PTSD diagnosis, and help prepare for the expert's deposition and cross-examination at trial. For cases involving significant alleged emotional distress, the employer may want to invest in retaining its own testifying defense expert to rebut the plaintiff's expert's conclusions, educate the jury as to the true definition of PTSD, and present a countervailing view on the plaintiff's diagnosis and future prognosis to the jury.

Managing the PTSD Diagnosis at Trial

Before trial, armed with evidence obtained in discovery, key concessions from the plaintiff's expert's deposition, and the scientific insights of the defense expert, counsel should consider whether there are grounds to file a motion in limine to preclude the expert's testimony on the theory that the expert is not qualified, that the offered opinion is not scientifically reliable, or that it will not assist the trier of fact. If the court cannot be persuaded to exclude the whole of the testimony, counsel should consider, while expressly preserving the objection to the testimony being admitted at all, proposing reasonable restrictions on the scope of that testimony. For example, the expert might be permitted to testify as to PTSD, but lacking a sufficient evidentiary foundation as to future effects of the condition, might be precluded from testifying as to such effects.

In cases in which PTSD will figure prominently in the trial, it may be advisable to consider asking prospective jurors about their views on PTSD in voir dire, to explore any preconceived notions about, training in, or experience with, the condition that potential jurors may have. In any specific case, counsel should weigh the benefits of such questioning against the risk of highlighting the diagnosis to the jury.

Finally, faced at trial with expert testimony on PTSD, counsel should use cross-examination to expose any deficits in the expert's training, or problems with the expert's credibility and methodology, to the jury and the court. If a defense expert has been retained, and the trial budget allows, ask the defense expert to sit in for the plaintiff's expert's testimony, to help identify areas of weakness, contradictions, and other ammunition for an effective cross-examination.

If the PTSD claim is before the jury, it is important that defense counsel confront the claim head-on. Counsel can help educate the jurors as to the real diagnostic criteria for PTSD, so that the jury can make a clear-eyed decision as to whether the plaintiff's evidence measures up.

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