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Eyewitness Evidence Critique May Help In Harassment Defense

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The New Jersey Supreme Court issued a lengthy, sweeping decision on August 24th on the standards for evaluating eyewitness testimony in criminal cases that is garnering national, and even international, attention. See NY Times report by clicking [here](#); Wall Street Journal report by clicking [here](#); Reuters report by clicking [here](#). Though the case entitled *State v. Larry Henderson* and its companion case entitled *State v. Cecilia*, both available [here](#), involved eyewitness identification testimony, the Supreme Court dealt at great length with more general issues eyewitness testimony and “how memory works.” Those parts of the opinion may be especially helpful in challenging the memory of plaintiffs and witnesses in employment cases generally, and in hostile environment claims in particular.

Why would that be the case? Well, the Supreme Court reviewed a wide variety of scientific studies on memory and eyewitness recounting of events to note that “an array of variables can affect and dilute memory.” The scientific literature divides these variables into what are known as system variables (those which define the structure or structures in which the event is reported or recounted) and estimator variables (those which relate to the witness and the specific experience(s) being recounted). Understanding the latter may be quite helpful in undermining witness credibility and memory in a hostile environment case.

It is important to note that the New Jersey Supreme Court has essentially come out against the notion of perfect recall or photographic memory:

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master’s finding that memory is a constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition -- “the perception of the original event”; retention -- “the period of time that passes between the event and the eventual recollection of a particular piece of information”; and retrieval -- the “stage during which a person recalls stored information.” Elizabeth F. Loftus, *Eyewitness Testimony* 21 (2d ed. 1996). As the Special Master observed,

[a]t each of those stages, the information ultimately offered as “memory” can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather “get[s] the gist of things and constructs a “memory” on “bits of information . . . and what seems plausible.” The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness’s retrieval of stored “memory” can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.

[Internal citations omitted.]

...Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory...

Memories fade with time. And as the Special Master observed, memory decay “is irreversible”; memories never improve...

Understanding some of the variables recognized by the Court can be important when dealing with the hostile work environment plaintiff and witnesses.

Think about the hostile work environment case. It is usually one in which any number of different circumstances, statements, actions and inactions over a course time involving any number of participants move in and out of relevant events, and it is often a case in which the differing perspectives of parties and witnesses mean much. The differences in perspective as to what was said or done, and more importantly what it meant or was intended to mean, are at the heart of such cases. Thus, anything which impacts on a plaintiff’s or other witness’s perception and memory of what occurred will influence the testimony and therefore outcomes.

For instance, the Supreme Court noted that “confirmatory feedback” makes witnesses much more confident in correctness of their perception and recollection of events, even though the person or persons providing such feedback may not themselves have shared the same experience as the witness. What that means in the harassment context is that such feedback to a person raising a question as to whether what they just experienced was actionably hostile may be influenced to now “recall” it as hostile based on the feedback rather than experience itself if a friend, family member, or lawyer provides feedback of that sort to the initial report. This is the process through which an ambiguous event becomes a more certain memory.

Likewise, the Supreme Court noted that scientific research confirms that stress can diminish an eyewitness’s ability to recall” and that stress can impact negatively on the ability of a witness to recall details. That presents defense counsel in an hostile

environment case with a unique Catch 22 opportunity—when the plaintiff claiming a highly stressful work environment provides vividly detailed testimony, counsel has scientific and legal back up to now construct arguments that say if plaintiff was as stressed as plaintiff suggests, plaintiff was wrong on the important details, and that if plaintiff is so right about the details, then plaintiff could not have been that stressed.

Next, the Supreme Court observed that “[s]tudies show that witness memories can be altered when co-witnesses share information about what they observed” and that “co-witness feedback may cause a person to form a false memory of details that he or she never actually witnessed.” In noting that this impact is more likely to take effect among witnesses with an existing or ongoing relationship than among witnesses that are strangers to one another, the Court noted that witnesses who have such ongoing relationship “were significantly more likely to incorporate information obtained solely from their co-witnesses into their own accounts.” This phenomenon can be particularly problematic in a hostile environment case where “pervasiveness” is often proven by multiple witnesses testifying to having experienced the same conduct or circumstance independently and repeatedly. When the psycho-social “group memory” dynamic of a group of close knit coworkers could influence one or more witnesses to incorporate into their individual memory something they themselves did not actually experience, the testimony provided may suggest a degree of pervasiveness that actual experience does not support. Defense counsel that understands that possible dynamic can structure discovery and trial to expose facts and arguments that will benefit his or her employer client.

Whether or not counsel ever has reason to expressly cite *State v. Larry Henderson* in defending an employer in harassment or discrimination case, employers’ counsel are well advised to understand what the New Jersey Supreme Court has said about witness memory and eyewitness testimony. Understanding these statements will help counsel structure examinations and arguments that will help their clients.