EMPLOYMENT LAW
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Rifkind for Employment Lawyers

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You filed your first employment case, a righteous sexual harassment claim, against Evil Corp. and its owner, Phil A. Steen. You've read some practice guides, you've talked to knowledgeable, experienced employment lawyers, you were stuck in an airport with nothing but ***Trial Bar News***, so you've even read the Employment Law column. You spent hours preparing your client for her deposition and you, and she, are finally ready. The defense attorney, after lengthy and tedious admonitions, asks, "Can you tell me all the facts that show you were sexually harassed." Your client's eyes well up, her voice cracks, and she says, "Well . . . he touched me." When asked if there's anything else, she says, "No. I don't know . . . I guess not." You're getting angry at that heartless defense attorney for making her cry, when suddenly you have the feeling the best case you've taken all year may be thrown out on summary judgment and you hope you wrote that letter to the client about the chance the defendants could recover their costs. What went wrong?

One of the most powerful cases for civil litigators, and especially for employment attorneys, is *Rifkind v. Superior Court* (1994) 22 Cal. App.4th 1255. Every civil litigator should read it along with the articles analyzing its reasoning. Briefly, in *Rifkind*, two attorneys had a money dispute and during deposition one was asked to state the factual basis of his affirmative defenses. That seems fair, right? He claimed he didn't owe money to the other lawyer so he better know the facts are supporting that, and he better start talking when asked about it under oath, right? Wrong.

The *Rifkind* decision made it clear that a deponent, even an attorney, cannot be asked to apply the facts to the substantive law which applies to his legal claims. It is perfectly permissible to ask a contention interrogatory like, "Please identify all facts (or witnesses or documents) which support Plaintiff's claim for sexual harassment." But that question cannot be asked at a deposition. For interrogatories, a party has time to review the evidence, and most importantly, has the help of her attorney when answering an interrogatory, but she has neither of those benefits when questioned at a deposition.

It is not only the encyclopedic test of recall which is unfair, it is tying the plaintiff's recitation of the facts to a specific cause of action. "Sexual harassment" is a term of art, along with "discrimination", "retaliation", and a host of others. These are legal claims in a complaint drafted by an attorney. Marshaling the facts to support these claims is the lawyer's job, not the client's.

Although you can invoke the *Rifkind* decision and steadfastly instruct your client not to answer without more, thinking about the legal basis of her claims helps show some of the reasons such questions are improper. Does the defense attorney mean *quid pro quo* or hostile environment harassment? Harassment which subjects the individual, the company, or both, to liability? Facts which show the conduct was unwanted? Does it mean the foundational facts which do not themselves establish liability, but show notice to the company, or a continuing violation? Parsing "sexual harassment" like this makes a defense attorney realize even he could not answer the question, but if he doesn't, you and your client will still sit quietly while he fumes, turns red, threatens to "call the judge", and tells the court reporter to "mark that".

If you feel like working to return civility to civil litigation, and the opposing attorney is not too defensive or uptight, you may suggest questions you will allow her to answer, *i.e*., factual contention questions. He may ask, "When was the first time the boss had you in his office alone? How many times did he show you naked pictures on his computer? Did you have the dress tested for DNA?" But he may not ask, "Do you think he harassed you?" Distinguishing proper factual questions from disguised contention interrogatories may be difficult, but it is best to err by refusing to allow an answer to any question which has plaintiff attempting to apply facts to a specific legal claim.

The critical part of establishing liability in virtually all employment cases is the employee's testimony. Although this may seem obvious, it is not necessarily true in other kinds of cases. The victim of a rear end collision may never see the other car, the patient isn't asked how the doctor cut his sciatic nerve, and nobody thinks the former fast food fan should know how the *E. coli* got into his Jumbo Jack.

While a plaintiff testifying she has no facts to support her claims can be a problem in any case, it is deadly in an employment case. Because the plaintiff's own testimony must often establish her claims, the consequence of insufficient answers will often be a successful summary judgment motion.

Supplying the facts which prove each element of a legal claim is hard enough when a plaintiff and her lawyer respond to interrogatories together. To do it during a deposition is impossible for most and unfair for all. That is why, during the deposition of every plaintiff in every employment case, you will hear the name *Rifkind* ringing out many times. Or at least you should.