

AAPL: Ask the Experts-July 2012

Robert Sadoff, MD
Neil S. Kaye, MD

Neil S. Kaye, MD, and Bob Sadoff, MD will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send question to nskaye@aol.com.

This information is advisory only for educational purposes. The authors claim no legal expertise and should not be held responsible for any action taken in response to this educational advice. Readers should always consult their attorneys for legal advice.

During the evaluation of a civil case involving alleged discrimination/harassment/retaliation at work, (1) to what degree can/does/should the examining forensic psychiatrist make judgments as to the actual facts and what occurred and (2) how is the issue of the plaintiff's perception best handled?

1. To what degree can/does/should the examining forensic psychiatrist make judgments as to the actual facts and what occurred?

Sadoff: The examining forensic psychiatrist, as I have written many times before, is an investigator. The psychiatric examination is essential, but not sufficient in these cases. The psychiatrist must have other information to either support or negate the contention of the plaintiff. This other information includes legal, medical, school, health, personal and other records that may be available. Also, there are statements and deposition transcripts from plaintiff and from the defense, usually denying the allegations. One has to take into account the balance between what the plaintiff says and what is said by the defense. Sometimes, in cases of work harassment, discrimination or retaliation, I visit the workplace to see whether the plaintiff's contention is realistic.

When there is no definitive evidence to support plaintiff's allegations, I utilize the subjunctive case in giving my opinion, rather than a declarative statement affirming the veracity of the allegations made by the plaintiff. For example: "If what the plaintiff says is true and based on fact, then her symptoms are related to the stress she alleges occurred from the

harassment/discrimination/retaliation.” There may be factors in her childhood that make her vulnerable to such harassment if it occurred. For example, she may have been sexually abused as a youngster or raped as an adolescent or young adult. These prior experiences may have made her more vulnerable to the alleged claims.

The forensic psychiatrist is not the finder of fact; that is the prerogative of the judge and/or jury. However, the forensic psychiatrist must have an opinion as to whether or not there is some truth or veracity in the claims made or the symptoms may be referable to other causes, or perhaps even malingered. It does not do the field of forensic psychiatry a service for a “hired gun” expert to routinely declare that the plaintiff was harmed by the alleged discrimination/harassment or retaliation, when the expert has no evidence that it actually occurred. We must be cautious and careful in the way we word our opinions based on the facts we have and the evidence that is available.

Kaye: As our faithful readers are aware, Dr. Sadoff and I generally agree on most points, as is the case here. While not officially finders of fact (in the legal sense,) forensic psychiatrists are at times investigators. As we don't have police powers, our methodology limits this ability. Nonetheless, in this complex situation, the forensic psychiatrist must make some judgment as to the fact pattern and to the validity and plausibility of the claims/allegations. This is because a correct diagnosis is predicated on such a conclusion. If the examiner believes the story is fabricated, she might diagnose malingering; if the examiner believes the story is genuine, she might diagnosis PTSD; and if the examiner believes the story is unrealistic but not malingered, she might diagnose a psychotic thought process/disorder. As the reader can see, these very different diagnoses depend on the examiner drawing conclusions as regards at least some of the alleged “fact” pattern.

2. How is the issue of the plaintiff's perception best handled?

Sadoff: I have often put in my reports that the symptoms were based on the plaintiff's perception of the events alleged. I do not know that they occurred, I do not know to what extent they may have occurred, but can record the perception of the plaintiff as she reveals it during the examination. Psychological testing may also be helpful to determine whether there is exaggeration, malingering or actual lying during the

investigation of her claim. It is always safer to utilize the word “perception” so the expert is not caught, on cross-examination, agreeing that the perception is actually based on fact. One must keep in mind that there are several levels of “truth.” One is the truth the plaintiff wants the world to believe, the second is the actual truth the plaintiff believes to be the truth, and the third is the truth that is actually based on fact rather than perception alone.

That being said, one then must consider the symptoms revealed by the plaintiff are always based on the perception the plaintiff has of the events, as she believed they occurred. Even though her perception is not based on actual fact or evidence by objective observers, her emotional (and sometime physical) reaction will be based on her beliefs and her perceptions of what had occurred. These perceptions are often colored by her prior experiences, as noted above. One who has been raped and/or sexually abused, as a youngster will be more vulnerable to incidents at work that might not significantly affect women who have a stronger personality and have not been previously sensitized to such events. Thus, questions #1 and #2 are clearly related, and one must keep in mind the plaintiff’s perception, based on her prior experiences, when considering the alleged damage to her by what she claims to have occurred in the workplace.

Kaye: When there appears to be a significant discrepancy between the plaintiff’s perception and the “facts” as I understand them to be, I will also use the subjunctive language and “perception” approach to help explain the reaction being claimed. For many people, “perception is reality” and indeed there can be more than one correct perception of the same incident or series of events. The law struggles with the idea that there can be two truths and that these may even be contradictory, but science is able to accept such a reality.

Sadoff/Kaye: Take home point: Cases involving alleged discrimination/harassment/retaliation at work are some of the most emotionally laden and hardest fought cases a forensic psychiatrist will ever be called to assess. Often the fact patterns are little more than “he said-she said” claims and counterclaims. Remaining professional can be challenging under the heat of cross-examination and the emotions of the claim. Remaining calm and striving to preserve the dignity and decorum of our profession is advised.