Using Social Science in Discrimination Lawsuit Development and Proof

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• Case Experience Focus: Primarily proof in sex discrimination and sexual harassment/hostile work environment cases

• Not specifically “bullying”, but analogues are present in the facts and law

• Using social science in connection with litigation aimed at regulating human behavior/group dynamics to avoid or mitigate the harm that arises from that mistreatment of members of minority groups
Focus: Primarily proof in discrimination and sexual harassment/hostile work environment cases

• Underlying project involved extensive use of social science research results and analysis.
• Direct collaboration conducted primarily with Dr. Susan Fiske, currently of Princeton;
• Work also involved consultation with many other social scientists whose work was cited – see amicus briefs PW and NAACP
• Publically reported cases relating to this discussion include:
Case 1: Hopkins v. Price Waterhouse [618 F. Supp. 1109; 490 U.S. 228, most relevant of the 6 reported opinions]

- Proof of discriminatory denial of partnership promotion on account of sex
- Went to US Supreme Court on question whether and how courts should interpret a circumstance of “mixed motive”; must proof of discrimination show that “but for” sex discrimination promotion would have occurred?
- Effectively affirmed the use of expert testimony based on sex stereotyping research

- Whether shipyards constituted a hostile work environment for women
- Including whether presence of soft porn pictures were a relevant and recognizable factor
- Question how to solve the problem of workplace hostility if liability were found
- Settled while on appeal pending decision
Price Waterhouse and Jacksonville Shipyards

• Included expert trial testimony in trial proof,
• Were “bench” trials (judge, not jury, served as the trier of fact)
• Both resulted in important written opinions by the decision-maker
• Were specifically focused on “discrimination based on sex”

In addition to the trial proof in these cases
• Collaboration informed much other legal work that did not ultimately involve expert court testimony.
• Much of the social science research applies directly to bias claims based on other protected categories, for example race, ethnicity, nationality, disability, religion, sexual orientation, etc.
Case 3: A third more recent, still pending, case is also part of this report: NAACP & NAPWF v. Horne et al. US Ct of Appeals 9th Cir. Decision pending

- Challenged statutory bans on abortion for “sex and race selection”
- Question whether legislation passed by publicity stigmatizing minority groups can be challenged by members of those stigmatized groups as unconstitutional based on denial of equal protection.
- Technical jurisprudential question is whether members of the targeted groups have standing. Does the case present a “real case or controversy” which translates in this case to the question “Is group stigma a concrete injury to group members?”
- Appellate amicus brief submitted on that question on behalf of 42 Social Scientists, led by Dr. Brenda Major. Joined by Dr. Mark Hatzenbuehler
- Part I used social science to explain how the legislation was passed through stigma and stereotyping and thus how it further stigmatized the targeted groups
- Part II reported recent research relating stigma to health, cognitive, emotional and social harms to stigmatized group members
Resources Citing the Social Science Provided in Your Materials:

1. Brief of the American Psychological Association as Amicus Curiae to the U.S. Supreme Court in Price Waterhouse v. Hopkins

Use of Social Science Research is a Critical, Much-Needed Educational Process

Cannot overstate the importance of getting this social science before key audiences like judges and the public:

• Starts Important Educational Conversations: E.g., Judges talk about ‘what’s interesting, new… ’ like anyone else
• Public Information Megaphone: Media picks up the narrative
• Feedback to Research Community: Motivates more research and inspires research that is more mindful of the real life challenges
Use of Social Science in Connection with Litigation relating to Human Behavior and Group Dynamics and Resulting Harm

- Perspective here is of the lawyer for the plaintiff/target/victim of discrimination
- Generally the three key uses of social science research in litigation are:
  - 1) case discovery - planning, research and development;
  - 2) case argument; and
  - 3) evidentiary presentation - trial proof

These are discussed in turn below.
Use 1: Case Discovery & Proof Planning: What evidence should we look for and where? Social science understanding of phenomenon offers implicit predictions of behavior and contextual features. Social science research sometimes also points to interventions and possible solutions.

Examples of predictions:

- If sex stereotyping were occurring, gendered references, patterns of discounting/ignoring presence of positive attributes that are sex inconsistent, disapproving contranormative females (not feminine enough), devaluing competence/success as gender inconsistent for females
- If soft porn pictures contribute to hostile work environment other than “offending” the female, would they have an observable impact on the behavior of males? Day in the life narrative – where are the pictures, how might males in the presence of the pictures or having viewed the pictures behave differently toward females?
Use 2: Case Argument
Drafting of pleadings, briefs, opening and closing arguments, evidentiary objections and ultimately appellate briefing

• Social science is key to thinking about persuading the decision-maker (judge) and trier of fact (jury or judge, depending on case)(hereinafter “j/j”)

• Bias of the trier of fact: This consideration cannot be addressed with expert testimony at trial – we cannot put on an expert witness to tell the trier of fact how s/he is biased. However, we can be informed by social science about bias and try to contradict it by techniques of presentation and advocacy
Use 2: Case Argument, continued – Anticipating Trial Decision-Maker’s Sources of Bias

Specific social science that helps here:

- **Status quo bias** – are there ways to talk about the context that helps the “status quo” be seen by judge/jury to work in the plaintiff's favor?
- **Loss aversion** – what losses might the judge/jury imagine facing in deciding this matter? Are there ways to mitigate the perception of potential loss?
Use 2: Case Argument, continued – Anticipating Trial Decision-Maker’s Sources of Bias

- **Attribution re Person and Situation** (e.g., Lee Ross and Richard Nisbett research): What pleading, argument and evidence do we need to present so j/j understand and identify with the circumstance/situation of the target/victim, minimizing the likelihood that j/j will attribute bad outcomes to the target’s “personality” or the target’s group’s characteristics? Notably trial proof offers powerful tools to accomplish this.

- **Just world theory**: In judging this situation, will j/j see it as “their world” and resist seeing injustice as a result? What can we do to get J/j to disidentify with that “world” so they are more comfortable/neutral sitting in judgment?

- Attribution interacts with **perception research**, particularly, **token/solo status**. See later discussion on solo status.
Use 2: Case Argument, continued – Anticipating Trial Decision-Maker’s Sources of Bias

• **Ingroup/outgroup dynamics**: the ease and speed with which ingroup identification can be created; the devaluing of outgroup (resume/inbox studies)

• **Stereotypic perception research**: same behavior perceived differently based on individual’s group membership

• **Categories, metaphors and frames**: are there powerful cognitive schema or sets that have to be managed or can be used beneficially or detrimentally to the plaintiff?
Use 2: Case Argument, continued – Anticipating Trial Decision-Maker’s Sources of Bias

All of the foregoing categories of research, and possibly other research, can help the lawyer plead, brief and argue the case in a manner that minimizes trial decision-maker taking a biased view against the client. They also help guide interviewing and preparing witnesses, selection of other proof and planning order of proof, evidentiary objections and form of courtroom presentation.

This use is obviously different from, but interacts with, using science as science directly to guide the trial decision-maker in deciding outcome. Which brings us to trial proof.
Use 3: Case Proof: Evidentiary presentation and Expert Testimony

Important that some of the research used was based on experimental and quasi-experimental design – because causation was a central issue

But also important that research observations had confirmation in field literature – because of the need to generalize research to real life contexts.

• Liability:

  • Proving causality: the central proof concern in discrimination cases – Was the harm done “because of” the target/victim’s protected group membership. If not, there would be no basis for legal liability.

  • This was the key purpose of Dr. Fiske’s testimony in Price Waterhouse.

  • Research explicitly referenced included perception and priming research, and specific research on sex stereotyping
Use 3: Case Proof, continued: Evidentiary Presentation and Expert Testimony – Liability

• The partnership’s decision process was important in Price Waterhouse – for example, long form evaluation was filled out by those who knew Hopkins personally and well. Those who knew Hopkins barely or not at all used the short form evaluation – so research on group dynamics in decision-making was relevant in evaluating how and why the non-promotion decision was based on Ann Hopkins’ sex. It was a collegial decision-process in which any negative weighed far more heavily regardless of the weight of the evidence/knowledge on which that negative was based.

• Tokenism/solo status research figured here: Fiske testified that Hopkins was undoubtedly in a solo status as the only female candidate in 88 total candidates.

• The solo status research was also key in the Jacksonville Shipyards case. Fewer than 10 women in a workforce of over 200. This was pertinent in understanding perpetrator behavior and the experience of target solos.

• The primary problem of token/solo status is the perception and attention by the perpetrators and those who fail to regulate the perpetrators. Targets, being different, are readily observable, as well as lacking power, also figured significantly in the wrongful harassing conduct and the workplace failure of regulation. But often the targets’ “difference” becomes the explanation for the abuse.
Use 3, continued: Case Proof: Evidentiary Presentation and Expert Testimony - Liability

• The extreme pressure of being highly observable and always scrutinized by majority members is a significant feature in understanding the stress and hostility of the environment.

• The perception and stress effects happen to people who are solos/tokens in a given context even if they are majority group members in the outside world.

• Context was important in Jacksonville Shipyards – dispersed work sites, employees typically working without supervisors present, sexual pictures at key places where employees gathered to get work assignments, also appearing at remote sites especially when a female employee was assigned there.

• Once we developed the “day in the life of the shipyard worker” factual narratives to illustrate in detail what was happening there, we then capped the trial presentation with citation to a particular “priming” research study. 50% of soft porn males behaved in ways that focused on female’s “debriefers’” sexual/physical attributes. A negligible number of the Canadian parliament control did so.
Use 3: Case Proof, continued: Evidentiary Presentation and Expert Testimony - Deep Pocket

Proving responsibility for the misconduct: deep pocket - whether someone other than the actual perpetrator is legally responsible for the harm.

- In employment cases, the deep pocket is the employer, of course. Typically it is the employer who controls work policy and procedure as well.

- Typical questions: Was the harmful act performed by an agent? If not by a supervisory agent, but occurring in the employer’s workplace – e.g., coworker harassment -- did the employer know or should employer have known? If so, did the employer fail to take prompt and effective remedial action? Were there policies and procedures in place to effectively monitor or to allow complaints through meaningful procedures? All of these questions were present and critical to answer in Jacksonville Shipyards, because of the decentralized work arrangements. Social science could speak to “knew or should have known”, “prompt and effective remedial action”, and effectiveness of complaint procedures.

- Price Waterhouse raised a similar question: “Was the sex stereotyping ‘intentional’?” The social science answer turned this into a question of employer oversight liability.
Use 3: Case Proof, continued: Harm/Injury/Damages

- Proof of “bad behavior” not enough to win a lawsuit

- No legal liability exists if harm was not actually done.
  - Note, however, in reference to persuading the decision-maker: Social science and common sense counsel focusing on harm/injury later in case presentation – we tend to despise the victim and to be repelled by harm.

- Law is a poor social problem solver: it tends to:
  - Acknowledge only physical injury,
  - Discount emotional and reputational injury
  - Provide only monetary compensation for injury
  - Hold victims to a high standard for “mitigation” of injury

Social science helps us fight the uphill battle to get beyond those tendencies.
What were the injuries in the 3 focus cases?

- Price Waterhouse was denial of partnership and related lost income. Ultimate solution was court-ordered reinstatement of partnership, lost pay (with a heavy mitigation requirement) and attorney’s fees.

- Jacksonville Shipyards the harm to women arose from working daily in a corrosively demeaning environment. Ultimate court-ordered remedy was declaration of that as a legal fact, injunctive relief against future hostile conditions combined with policies and procedures to prevent/cure. Nominal monetary damages and attorney’s fees.

- NAACP v. Horne has not proceeded yet as a viable lawsuit. Immediate remedy, if achieved, would be reinstatement of the dismissed complaint and an opportunity to present the case. Ultimate remedy in resolution of the case from the plaintiff’s perspective would be a ruling that the “sex and race selection” abortion ban statute will be struck down as an unconstitutional denial of equal protection.
• **The amicus brief in NAACP v. Horne provides a good summary presentation on the harm of stigma:**

  • Part I: Social science evidence on the dynamics of stereotypic decisions-making – how the law got passed using stigma reinforced stigma of the plaintiff group members

  • Part II: The concrete injury rendered by stigma

The research cited in Part II of the NAACP v. Horne brief provide a rich resource on proving harm from acts of disrespect that don’t directly impose physical injury but that can be traced to negative outcomes in the material world – illness, depression, poor work or school performance, ultimately earlier mortality

Harm is documented as arising in two ways:
• disrespect directed to the individual
• disrespect directed to the group of which an individual is a member
**Conclusion:** Group dynamics, social cognition, cognitive bias, attribution, stereotyping and stigmatic harm, among other, research offer powerful learning to guide policy and law. While expert testimony is one very direct vehicle for its use, we must also integrate social science learning into case and policy planning and into the framing of persuasive presentations. This is particularly true in solving problems where thinking, perception and inferences of decision makers are likely guided by the same social and cognitive biases that are present in the social wrongs we are trying to cure.