

The Importance of Psychological Testing Evaluations of Emotional Distress Claims in Employment Litigation

The addition of a psychologist skilled in forensic testing adds immeasurable value to the assessment of emotional damages claims in employment litigation. Psychological testing done by an astute, forensically trained psychologist can be pivotal in establishing whether or not the examinee suffers from one or more psychiatric diagnoses that may be relevant to the claims of a given case. As is true of all medical testing, psychological testing provides objective evidence to answer a membership question. In other words, on the basis of their test responses, which group of independently diagnosed individuals does the examinee most closely resemble?

Tests should be selected for with their diagnostic utility, while keeping in mind their value in a forensic setting. Each test used by a forensic psychologist should contain embedded methods of assessing the accuracy of the examinee's responses, which are known as Validity Scales. Furthermore, the tests utilized should be well accepted in the scientific community, should be supported by solid and rigorous scientific evidence. Tests selected using these criteria do a good job of measuring the psychological symptoms, traits and diagnoses in question and provide objective evidence to corroborate (or challenge) the differential diagnoses derived from clinical interviews and a review of medical and legal records.

There are two major categories of tests that assess personality functioning. In the case of self-report tests (also known as endorsement tests), the individual is given the opportunity to describe him or herself by either endorsing or rejecting a potentially self-descriptive sentence. The patterns of responses given are then compared by sophisticated algorithms with those of other groups of individuals who have taken the test. This allows for the construction of a test "profile" that can be used to develop a description of each respondent. Two self-report tests that are commonly employed in forensic contexts are the Minnesota Personality Inventory, 2nd Edition (MMPI-2), and the Personality Assessment Inventory (PAI).

The MMPI-2 (1989) is the revised version of a self-report inventory that has been utilized for over 70 years and is arguably is the most frequently employed, and most extensively researched personality test in the world. It consists of 567 true or false questions and is used in a wide variety of settings to assist in the diagnosis of mental disorders. The MMPI-2 contains eight validity scales, ten clinical scales, and a great variety of supplementary and content scales that can be utilized to provide a very sophisticated assessment of response style and degree of similarity to various identified clinical groups.

The Personality Assessment Inventory (PAI, 1991) is a very well researched and valid self-report questionnaire which provides information relevant to clinical diagnosis. The PAI also has been found to be very useful in the detection of feigning, and symptom exaggeration. The PAI consists of 344 items that are answered on a 4-point scale (false, not at all true; somewhat true; very true). The responses are then scored to provide 4 validity scales, 11 clinical scales, 5 treatment scales and 2 interpersonal scales.

Self-report tests offer the opportunity for the individual to describe themselves in more direct and unambiguous terms. However, they are fairly transparent, or obvious in their intention. As a result, self-report tests potentially can be susceptible to both intentional as well as unconscious manipulation. As a result, it is important that only the most reliable self-report tests that contain the most scientifically sound validity scales be selected for use in forensic settings.

In contrast to self-report questionnaires, projective tests utilize a variety of techniques designed to elicit characteristic responses to ambiguous stimuli, such as pictures of people in different situations, or ink blots. The answers that are provided are felt to provide more or less disguised examples of the individual's characteristic perceptions, conflicts, concerns and problem solving styles. Responses on the tests have been found to correspond to more typical or characteristic responses to the complexity of everyday life. It rarely is obvious what "appropriate" responses might be to a projective test, which makes these tests harder to influence for either conscious or unconscious reasons. Projective tests, such as the Rorschach Inkblot test, often are able to get below the defensive "radar" of individuals who may present themselves as psychologically impaired, or conversely, as more psychologically intact on self-report tests.

The Rorschach Inkblot Test (Rorschach) is one of the most highly researched and widely used projective test. A scientifically derived analysis of the individual's responses to the inkblots allows for a numerical comparison to be made with a data set constructed from thousands of other respondents. In this manner, the current respondents' answers can be contrasted to patterns that have been shown to be associated with a range of personality traits, symptoms and disorders.

A 2005 publication by the Board of Trustees of the Society for Personality Assessment (*The Status of the Rorschach in Clinical and Forensic Practice*, Journal of Personality Assessment, 85 (2), 219-237) notes that a comparison of over 125 meta-analytic and 800 multi-method studies have demonstrated that psychological tests can be as effective as measures in medical specialties such as EEGs, mammography, MRI, dental radiography, Pap smears, PET scans and

serum cholesterol level testing. Within the area of psychological tests, an extensive history of meta-analytic studies have found that the Rorschach's usefulness, validity and reliability have been found to be similar to other commonly used assessment instruments, such as the MMPI-2 and intelligence tests.

The following case example of Ms. Jones involves a recent employment case which helps illustrate the value of psychological testing in helping to evaluate the veracity of claims of emotional damages. This employment matter involved a plaintiff who alleged experiencing sexual discrimination and sexual harassment in the workplace, along with claims of significant emotional distress due to the development of a post-traumatic stress disorder.

Psychological testing indicated that Ms. Jones was very likely to have overestimated the severity of her symptoms and to have understated the role of her own behavior and psychological vulnerabilities on paper and pencil personality questionnaires. There was considerable evidence that the plaintiff was prone to converting psychological distress into physical symptoms, and had difficulty coping with everyday problems that most people could take in stride. She appeared to be at risk for recurrent episodes of anxiety, tension and irritability, along with bouts of impulsive and/or unpredictable behavior. Additionally, the Rorschach suggested that Ms. Jones was prone to a high level of idiosyncratic thinking and to oddities in her perceptual focus that would lead her to draw inaccurate conclusions about a third of the time. Her responses on the Rorschach indicated a strong tendency to hold onto her beliefs and inability to modify her opinions and perceptions based on input from other people.

In concert with the plaintiff's idiosyncratic thinking and perceptual style, the high level of social discomfort, difficulty establishing trust and intimacy also indicated by her psychological testing profile, these difficulties were likely to have contributed significantly to the frequent misunderstandings and conflict that Ms. Jones experienced in the workplace. Furthermore, despite allegations to the contrary, the plaintiff's clinical history and responses on both questionnaires and projective testing were not supportive of the presence of PTSD.

In addition to expert testimony based on objective evidence regarding the likelihood that the claimed damages are present or absent, the psychological expert can opine about the reliability, and validity of the test data. Has the plaintiff been consistent in her or his responses, or are their contradictions, or even "consistent inconsistencies"? Is there fact-based evidence in the testing that helps to establish whether the plaintiff is trying to create either an inaccurately favorable impression, or may be trying to appear more

psychologically impaired than is actually the case? Is there evidence of feigning or malingering psychological impairment, or does the test evidence indicate that the plaintiff is responding in an honest, consistent, and straightforward manner?

The case of Ms. Smith illustrates an employment matter in which concerns regarding test reliability and validity were particularly salient. This employment litigation, which involved an individual working abroad in an accounting job, involved a number of legal issues, among them an emotional distress claim of post-traumatic stress disorder produced by experiences in an employment setting. Psychological tests assessing symptom validity and psychological functioning suggested that it was highly likely that the plaintiff was exaggerating and/or feigning her symptoms of psychological distress to some degree and might meet diagnostic criteria for a diagnosis of Malingering. The high likelihood of symptom exaggeration and or feigning seen in the protocol made it impossible to confirm the presence or absence of a “true” post-traumatic stress disorder.

Despite evidence of exaggeration overall, Ms. Smith’s testing profile revealed relatively greater symptoms and disturbances in a number of specific areas. These included the probable presence of a somatization disorder involving a level of focus on physical functioning and symptoms in the absence of relevant medical findings, and significant levels of depression and anxiety. There were indications that Ms. Smith was experiencing impairments in perception and reality testing, as well as notable degree of sexual preoccupation.

In addition, Ms. Smith’s test results strongly suggested the presence of a mixed constellation of pervasive and inflexible personality traits that are characteristic of a Personality Disorder. Personality Disorders by definition emerge in the late teens and early adulthood. Although they clearly impact adult functioning, personality disorders are not “caused” by experiences in adulthood, and cannot be claimed as a consequence of employment related claims. In other words, Personality disorders are as “proximate” a cause of post-event symptoms as are the alleged circumstances giving rise to the litigation. Also relevant in this case is these conclusions were strengthened by the finding of a high degree of similarity between the current test findings and those obtained from an assessment completed three and a half years earlier.

In cases where the plaintiff has a history of prior psychological testing, the forensically trained psychologist also can be extremely helpful in providing a comparison, explanation and critique of any changes in the plaintiff’s test results over time. In addition, the forensic psychologist can offer opinions about test selection, administration and scoring, as well as the conclusions of other psychological experts.

The following case provides an illustration of these points. In this matter, a CEO, Mr. Smith, was claiming wrongful termination, in addition to asserting that the company had failed to follow the American Disabilities Act. These claims were being made on the basis of a finding by the plaintiff's psychological expert that the plaintiff suffered from a Learning Disability in Reading. It was claimed that the plaintiff was unable to read and understand his own employment contract with his company, and thus could not reasonably be terminated for a failure to uphold the terms of his contract.

However, thorough psychological testing of this individual did not substantiate the diagnosis of a Learning Disability in Reading, which requires the presence of a significant discrepancy between reading ability and intellectual functioning as measured by scientifically validated tests. A careful review of the opposing expert's data revealed a significant flaw in test scoring that produced incorrect results. This error led the opposing psychological expert to make an incorrect diagnosis of a Learning Disability when none was present. In addition, the plaintiff's expert's diagnosis had also relied on the use of a reading test that was not designed, nor validated for the purposes of establishing the diagnosis of a Learning Disability. The incorrect diagnosis of a Learning Disability in Reading which was the underpinning of the plaintiff's case could not have been refuted without a repeated testing assessment by a forensically trained testing psychologist.

Psychological testing provides crucial information by providing objective, scientifically valid data that is of great utility in the exploration of diagnostic issues central to the evaluation of negligent or intentional infliction of emotional distress (NIED or IIED) claims. However, it must be kept in mind that accurate diagnoses cannot be made on the basis of test data alone. A thorough review of medical records, employment records, legal and law enforcement records must be undertaken for evidence of personal history that may be relevant to supporting or refuting the current legal claims. In addition, an in-depth clinical interview that explores past and current functioning and the emergence and course of psychiatric symptoms is also essential.

Within our firm, we employ a model that allows our forensic team to work in a complementary and non-overlapping manner. The psychological testing, conducted by a forensic psychologist who is highly trained in sophisticated methods of psychological assessment, is almost always done prior to a psychiatric interview. Both are part of the same, single, Independent Medical (Psychiatric) Examination (IME). The clinical interview portion of the IME is then completed by a forensic psychiatrist who is an expert in both clinical and forensic medical matters. This practice approach allows the results of the psychological tests to inform and guide the psychiatric interview. In addition, if

there are any ambiguities or inconsistencies in responses to particular test questions, the forensic psychiatrist has the opportunity to make a more in-depth inquiry in those areas to optimize the accuracy of diagnostic conclusions and opinions.

It should be noted that each of the three examples used to illustrate the utility of psychological testing were defense cases. However, it is important to underscore that the test data for all forensic psychological assessments should stand on its own, completely independent of which side of the dispute has retained the expert. Test scoring is achieved through sophisticated computerized scoring programs that interpret the data according to multiple internal algorithms, and are compared to extremely large data bases of prior examinees. As a result, test results are not influenced by knowledge of the examinee's history, other than educational level, age, and gender, as well as any potential conscious or unconscious bias on the part of the examining psychologist. In addition, whenever possible, the use of standard test batteries can help to ensure that bias does not occur in the selection of tests for a particular examinee.

Finally, although forensic psychological and psychiatric expert opinions in civil litigation are offered to a level of proof of "reasonable medical (or psychological) probability", the psychological tests described here have statistical accuracy in the neighborhood of 90 percent. Therefore, when there is agreement between the psychological test data and the psychiatric interview the witness is in a position to offer expert psychiatric opinions with a very high level of confidence.

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