

Interpretation Issues In Sexual Harassment Cases On Behalf Of Female Farmworkers

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CHAPTER



General Considerations Regarding Interpretation Issues

Sexual harassment cases can be extremely difficult for the claimant. She has often endured severe trauma as a result of the harassment or assault. Asserting one's rights through the legal system — with its seeming endlessness, punctuated by accusatory defense tactics — can be equally as traumatic for the individual as the original offense. Depending on the cultural background of the claimant, discussing issues related to sex, sexual violence or inappropriate sexual activity, particularly if the claimant is female and must discuss these topics with an unknown male, can not only be difficult but may also be culturally foreign to her.⁴ For the advocate, these cases can be challenging because one must balance the need to avoid further victimization of the client with the need to understand every detail of the harassment. The attorney recognizes that in each case a plaintiff must have actionable claims under the law which can survive the hurdle of summary judgment and probably prevail at trial. Potential language barriers can further complicate the need to balance the search for all of the facts and the desire to avoid re-victimizing the client. The appropriate interpreter, working with the advocate, client, witnesses and court system is a vital key in navigating successfully through a sexual harassment or assault case.

Many immigrant women do not speak any English at all when they arrive in the United States. Even for those who do speak English as a second language, communication problems are still likely to present themselves. A person's inability to communicate in English aids harassers in victimizing individuals. Harassers assume, often correctly, that language and cultural barriers will prevent a person from understanding his/her rights or from seeking help.

While immigrant women often have difficulty finding or accessing services because of language barriers, some do successfully assert their rights under the law. This process is not easy, particularly when the agencies, advocate, and judicial system do not have interpretation services available or information accessible in the range of languages

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⁴ This chapter specifically focuses on female immigrant farmworkers. We recognize that immigrant men may also share similar experiences with these women. However, this chapter has been tailored to focus on immigrant women.

that new immigrants speak. Pursuing claims in the face of language barriers becomes more difficult for these women and may appear insurmountable to many.

While obstacles, like language barriers, exist for immigrant women in bringing and proving their cases, individuals who do not speak English deserve and are guaranteed protection under the law. This chapter will consider issues that arise when a claimant does not speak English. The information here addresses finding a competent interpreter, analyzing cultural considerations, raising objections to bad interpretation, and helping prepare clients to work with an interpreter.

When Should You Start Working With An Interpreter?

From the moment an advocate begins working on a sexual harassment case for a non-English speaker, he or she should work with a qualified interpreter. Some claimants rely on family members to interpret when they do not have anyone else available to help with the language barriers. This practice is neither appropriate nor advisable. While having a claimant show up with a family member to interpret may appear an easy solution to your interpretation problems, it is not. Survivors of sexual harassment or assault often feel shame, embarrassment, and isolation. They may not want their family to know what has happened to them and subjecting a child or other family member to play the role of interpreter could be traumatic for both the survivor and the family member. If you are in contact with a potential claimant, try to convey to the individual that your understanding of what happened to her is vital and that steps will be taken to find an interpreter as quickly as possible to help bridge the communication gap. The individual should know that her experience is important and that you want to understand details fully in order to provide her with the best assistance.

TIP: If a non-English speaker calls the EEOC directly to file a charge of discrimination, they should tell the EEOC employee, whether they speak to someone at the national call center or their local EEOC office, that they are in need of an interpreter to help them file their charge and otherwise communicate with the agency.

The importance of finding an accurate and appropriate interpreter for a sexual harassment survivor cannot be understated. Every detail matters in proving a sexual harassment case. Misinterpretation could lead to additional trauma for the victim when her situation is not correctly communicated. If the interpreter is not paying attention or is reacting inappropriately to the claimant's statements, the advocate has just compounded, not solved, a problem.

Are Individuals Entitled To An Interpreter In Federal Court?

In order to ensure that all individuals have equal access to fair federal court proceedings, a federal law requires that limited English proficient (LEP) individuals will be provided with interpreters.⁵ In addition, federal law created a process for ensuring that these interpreters are qualified and that this information is made available to those needing interpretation.⁶

⁵ See 28 U.S.C. § 1827 (2008).

⁶ *Id.*

The Court Interpreters Act created a process for federal courts “to facilitate the use of a certified and otherwise qualified interpreter in judicial proceedings instituted by the United States.”⁷ According to the statute, this means that “certified or otherwise qualified interpreters”⁸ should be available in “all proceedings whether criminal or civil, including pretrial and grand jury proceedings (as well as proceedings upon petition for a writ of habeas corpus initiated in the name of the United States by a relator) conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court.”⁹

While this statute requires that interpreters be made available in “any court which is created by an Act of Congress and is invested with any jurisdiction of a district court established by Chapter 5 of this title [28 U.S.C. 81, et. seq.]”¹⁰ this federal statute has additionally paved the way for lower courts to take measures to facilitate the use of interpreters, as well using the guidelines set out by this federal statute.¹¹ President Bill Clinton also mandated that federal agencies, like the U.S. Equal Opportunity Commission (EEOC), implement a plan to “ensure that eligible LEP persons can meaningfully access the agency’s programs and activities.”¹² In complying with this Executive Order, the EEOC issued a plan to help non-English speakers assert their rights under the federal anti-discrimination laws.¹³ In accordance with this plan, the

EEOC has taken steps to hire bi-lingual staff, including investigators, to provide educational information about the agency and Title VII in several languages, and to conduct outreach to limited English proficient individuals about their rights.¹⁴ This means that a non-English speaker should be able to file a charge of discrimination and have access to someone to interpret for them during the investigation of their complaint.

When an individual is being represented by an attorney, the charging party’s attorney should ask the EEOC if the office has interpreter services available for the client.

TIP: It is a good idea to notify the EEOC that your client is not proficient in English. A good practice is to notify the agency of this fact in the cover letter that accompanies the charge of discrimination. The attorney, or the charging party’s representative, should inform the EEOC that your client needs an investigator assigned to the case who speaks your client’s native language. In the alternative, you should advise them that your client will require an interpreter for EEOC administrative proceedings, such as interviews by the investigator or during an EEOC mediation.

Selecting An Interpreter

Selecting an interpreter for the client is important to the success of her case. Whether the interpreter is being used in-house to interpret for the client or witnesses or for court-related proceedings, the interpreter’s ability to communicate the client’s words and emotions and the interpreter’s ability to communicate with the client and you are key criteria in selecting an interpreter. Federal court rules and local court rules may also play a part in selecting an interpreter.

7 28 U.S.C. § 1827(a) (2008).

8 *Id.*

9 28 U.S.C. § 1827(j) (2008)

10 *Id.*

11 Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (2002).

12 Exec. Order No. 13166, 65 Fed. Reg. 50121 (August 16, 2000).

13 U.S. Equal Employment Opportunity Commission. “Plan of the Equal Employment Opportunity Commission For Improving Access to Services For Persons With Limited English Proficiency.” EEOC Comp. Man. (BNA) N: 3121 [Binder 3]; available at www.eeoc.gov/abouteeoc/plan/lep/lep.html

14 *Id.* at N:3121-N:3145.

Federal Court Guidelines in Selecting an Interpreter¹⁵

Interpreters used in federal courts must fall within one of three categories:

- Certified Interpreter
- Professionally Qualified Interpreter
- Language Skilled Interpreter

Certified Interpreter: Interpreters used to interpret Spanish, Haitian-Creole or Navajo in a federal court must pass a written and oral certification exam administered by the Administrative Office of the U.S. Courts.¹⁶ Interpreters used in federal courts for other languages must be approved by the local federal court. The court will determine that the interpreter is either a “professionally qualified” or “language skilled” interpreter.¹⁷

Professionally Qualified Interpreter: A professionally qualified interpreter can be used in federal court for languages other than Spanish, Haitian-Creole or Navajo.¹⁸ In order for an interpreter to be deemed “professionally qualified” by a federal court, the interpreter must show that he/she has certain qualifications.¹⁹ These qualifications can be found online on the Federal Court Interpreter Program’s Information Sheet.²⁰

Language Skilled Interpreter: A language skilled interpreter can be used in federal court for languages other than Spanish, Haitian-Creole or Navajo.²¹ If a federal court determines that an interpreter is unable to meet the benchmarks necessary to be a “professionally qualified interpreter,” she may be able to interpret if she demonstrates to the federal court that he/she can “effectively interpret” in the two languages and is therefore a “language skilled” interpreter.²²

All federal court interpreters, regardless of their level of certification, become officers of the court for the duration of their assignment and must abide by the Standards for Performance and Professional Responsibility for Contract Court Interpreters, which can be found at www.uscourts.gov/interpretprog/Standards_for_Performance.pdf.

For more information on the Federal Court Interpreter Program go to www.uscourts.gov/interpretprog/interp_prog.html.

¹⁵ Admin. Office of the U.S. Cts. Fed. Ct. Interpreter Program, Federal Court Interpreter Information Sheet., Last visited November 3, 2008 available at World Wide Web: www.uscourts.gov/interpretprog/interp_prog.html

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

State Guidelines In Selecting An Interpreter

Each state differs in its approach to using interpreters in its state court system. It is best to check with your state court to determine any policies, procedures, “best practice guidelines,” or code of ethics established for using interpreters in that state.

Guidelines to using interpreters with indigenous language-speaking low-wage workers:²³

1. When selecting an interpreter for an indigenous language, ask your client/witness from which hometown or region he/she originates and ask the interpreter if he/she understands the language spoken in this hometown or region.
2. Remember that many indigenous language-speaking people may have faced ridicule about their language or other discrimination in their community in the United States. People from Mexico or Guatemala that speak an indigenous language as their first language may be reluctant to admit that they do not understand Spanish, so you may have a compound problem if the indigenous speaker is trying to navigate in Spanish. Give clients time to reveal their native language so that you can seek an appropriate interpreter.
3. Budget extra time and money when working with indigenous language-speaking clients and interpreters. It may be necessary to do “relay interpretation,” as some indigenous language-speaking interpreters will only be able to interpret from the indigenous language into Spanish. A different interpreter may be needed to interpret the Spanish interpretation into English.
4. If the conversation to be interpreted will involve any legal or technical words (i.e. charge, Title VII, etc.) develop a vocabulary list that includes the terms AND their definitions in Spanish. Give the vocabulary list to the interpreter prior to the event for which he/she will be interpreting so that the interpreter has time to think about how to interpret the words.
5. Be patient when using indigenous language interpreters. Remember that many English and Spanish words do not have a direct translation into an indigenous language. For example, many indigenous languages do not have a direct translation for “sexual harassment.”
6. Indigenous language interpreting is extremely difficult to do over the phone. If possible, use an in-person interpreter.
7. For reasons of cultural modesty, use an interpreter of the same gender as the client/witness.

For more information on working with people with limited English proficiency, go to the U.S. government’s Limited English Proficiency (LEP) webpage www.lep.gov,

²³ Special thanks to Julie Samples of the Oregon Law Center’s Indigenous Project for her help creating this list.

click on “Recipients of Federal Funds” (in red) then on “Executive Order 13166 LEP Resource Document Tips and Tools from the Field.”

For a Language Services Resource Guide for Health Care Providers, contact the National Health Law Program or The National Council on Interpreting in Health Care.

Preparing A Witness To Work With An Interpreter

Preparation of a non-English speaking witness to work with an interpreter is extremely important. Many individuals are not used to working with an interpreter. It does not feel comfortable or natural to them. Therefore, witnesses can benefit from the opportunity to prepare in advance of the formal proceeding where their testimony will be taken and an interpreter used.

Reasons it is important to work with an interpreter:

1. Even though practicing with an interpreter can be time-consuming, it is well worth the investment. Using the same interpreter for preparation will help your client feel at ease because they will have had the experience of using an interpreter. In addition, it will give the interpreter an opportunity to get used to your client’s speech patterns, word choices and speech-flow.

Just as a New Yorker might have to concentrate more when listening to an Alabama accent, a Spaniard may have to concentrate more when listening to a Caribbean accent. Accent variation and idiosyncratic speech abound. While interpreters, who are often educated speakers, may use standardized Spanish, Russian, French, etc., defendants or witnesses may hail from anywhere, and a witness may have less formal education and be harder to follow than someone who has had a formal education. Interpreters have to “tune in” to many different accents or speaking styles, and any amount of lead time is helpful to the ear.²⁴

2. The witness needs to understand that it is important for him/her to look at the attorney asking the questions and not to look at the interpreter.²⁵ Bear in mind that body language varies from culture to culture. In some cultures it is considered polite to answer questions with the eyes downcast, so a witness may have to be coached beforehand, to look up when answering the questions. A careful attorney will also elicit testimony from the witness on this subject as well, so jurors are not offended.
3. It is also important to convey that the witness should not engage in “side conversations” with the interpreter. The interpreter is not participating in the proceedings to become friends with the witness. It is the interpreter’s

²⁴ Interpreter’s Office, (S.D.N.Y.). “For Attorneys: Examining Witnesses Through An Interpreter,” 3. Last visited November 3, 2008 available at World Wide Web: http://sdnyinterpreters.org/index/php?page=examining_witnesses.html

²⁵ Some attorneys, mistakenly, tell witnesses to look at the jurors. Such advice is misguided. Such a tactic can appear in court as manipulative, at best, and very odd, at worst. Witnesses should be told to respond to the person who asks the question.

job to repeat word-for-word what the witness is saying. Therefore, the witness must know that anything he/she says to the interpreter will be interpreted and that there is no room for chatting or socializing.²⁶

4. The witness should listen carefully to what is being asked. If he/she does not understand the question, he/she should ask for clarification. The witness should specify whether he/she does not understand the question or whether they do not understand the terminology being used in the question. For example, sometimes a witness might indicate that they do not understand the question. Despite the fact that the question has been rephrased, the witness still does not understand because a specific word that is being used is confusing.
5. Remind the witness to wait until the entire question has been translated. Sometimes a witness understands some English. At times, the witness might try to answer the question based on what he/she understands. This causes confusion for the attorney, the court reporter and the jury because the witness consequently talks over the interpreter who is still trying to interpret the entire question. Explain to the witness that it is important to wait for the entire question to be interpreted so that they know exactly what is being asked of them and to avoid confusion for the court reporter who is attempting to capture everything that is being said.
6. Tell the witness that they should answer the questions succinctly and in the language that they are most comfortable with. They should not try to answer a question in English if they are not fluent in English.²⁷
7. Explain to the witness that when they have a long response to a question that they should try to break it up into smaller segments so that the interpreter can capture the entire answer. By breaking the answer up into smaller pieces and by pausing, this will ensure that the entire answer is accurately and completely interpreted. If a witness gives a long answer, the interpreter has a difficult time retaining all of the information and the witness runs the risk that their answer will not be accurately conveyed.

THE SOUTHERN DISTRICT OF NEW YORK'S INTERPRETER'S

OFFICE WARNS: Many witnesses forget to pause, and often interpreters cannot retain all detail in long narratives. It is a good idea to practice the rhythm of Question and Answer with the interpreter and the witness ahead of time so everyone can get accustomed to the procedure of waiting for the translation.²⁸

²⁶ Interpreter's office at 3.

²⁷ *Id.* at 4.

²⁸ *Id.*

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8. Explain to the witness what an objection is and how they should react when someone objects. “Instruct the witness that if they hear the word ‘objection,’ they should wait for the judge to rule, and then answer only if the objection is overruled.”²⁹
 9. Explain to them that if the attorney asking the questions pauses or if there is silence after they answer a question that they should not feel compelled to keep talking. The attorney is likely gathering his thoughts based on the answer. Therefore, the witness should not continue expanding upon or clarifying answers. If a question has not been asked or clarification has not been solicited, there is no reason that the witness should continue talking.
 10. The witness should only provide the information based on the questions that have been asked. They should not offer additional information.³⁰
 11. Witnesses who speak an indigenous language may not be able to understand an interpreter who speaks the same language, but who may come from a different hometown or region. For example, in the indigenous Mexican language, Mixteco, or Mixtec, there are at least three different commonly-spoken dialects: “alto” (high), “bajo” (low) and “de la costa” (from the coast). Many people who speak Mixtec from one region cannot understand someone who speaks Mixtec from another region. It is therefore very important to correctly notify the court about your interpretation needs and to make sure the interpreter is understood by your witnesses.
 12. Be aware that some witnesses may initially be reluctant to notify their attorney or representative about problems with an interpreter, especially if the interpreter is an elder person or someone respected in their community. In some cultures it may be considered inappropriate for a younger person to question an elder’s competency. You need to explain to the witness how crucial it is to have an accurate interpreter and to notify you of any comprehension problems. For many Indigenous languages no formal court interpretation certification process exists. Ascertain, before the formal proceeding, that the interpreter is both competent for the job and understandable to the witness. Beginning with the initial interviews with clients and witnesses, you need to ensure that misunderstandings and inaccuracies do not occur.
 13. As the attorney, be sure to judge the “credibility” of the interpreter. You don’t want to be saddled with an interpreter who conveys, by body language or otherwise, that he or she does not believe your witness or client. The interpreter needs to be a neutral communicator, not someone tacitly expressing his or her view about the testimony being given.

²⁹ *Id.*

³⁰ *Id.*

How to Handle Interpreter Problems:

Interpretation is very difficult. It can be tiring and extremely demanding for the interpreter. However, precision in the interpretation is essential. It is important to find out if your local rules provide guidance for how to work with an interpreter and how to properly object to bad interpretations.

It is a good practice to ensure that the interpreter knows in advance the details of the case. It is important that the attorney ensure that the interpreter will be comfortable discussing sexual harassment and sexual violence. It is also important that the interpreter is familiar with all of the essential words that will be used in the proceedings and that they have time to translate these words in advance.

Sometimes instances arise when the interpreter does not accurately interpret the witness testimony. Therefore, measures must be taken to correct the record and ensure that the testimony is being correctly interpreted. The attorney must understand that the interpreter is not attempting to purposefully interpret incorrectly and that his/her actions are not malicious. For this reason, when the attorney takes issue with the interpretation, it is important to object in a professional and respectful manner.

Tips for Dealing with Faulty Interpretation:³¹

- If you believe a witness's answer is in error, or that the witness was misunderstood by the interpreter, the best solution is to follow up immediately with a rephrased question.
- Even if you are fluent in the interpreted language, refrain from substituting your own notion of how the question or answer should be interpreted. Likewise, do not assume that an error has occurred if you don't hear the word you expect. Often, rigid one-to-one correspondence between words does not exist linguistically. There are many ways to reproduce sentence content from one language to another.
- Use words that are commonly used by and understood by the witness (i.e. colloquial terms).
- Speak clearly and use words that a layperson will easily understand. Avoid using legal terms of art.

TIP: For information about types of error, please refer to the guidelines provided by the U.S. District Court of the Southern District of New York.³²

How to Correct the Record:

If there has been an incorrect interpretation, the attorney should object based on misinterpretation. If the problem persists in a deposition, the attorneys should confer about how to proceed. If this happens in court, the attorney should “request a side

³¹ *Id.* at 4-5.

³² *Id.* at 5.

bar and include the interpreter who will make a correction for the record if one is necessary.”³³ The attorney should check with his/her local rules to ensure that he/she is following the proper procedures for objecting to interpretations and for correcting the record. “If there is disagreement about the correct interpretation of a word or phrase, the judge will instruct the parties on how to proceed.”³⁴

What to do about Very Problematic Misinterpretations and Incompetent Interpreters:

What if an interpreter has misinterpreted a witnesses’ testimony in a way that makes it highly negative or prejudicial to the case? Examples may include interpreting a witness who says, “I did not consent to my foreman’s advances” to “I consented to my foreman’s advances.” Obviously, this is an oversight in that the interpreter likely just didn’t hear the word “not.” In this situation, the attorney could ask follow-up questions to the witness to clarify that this was not what he/she said.

Example of an actual case: In a California sexual harassment trial, an EEOC attorney was appalled when she heard the interpreter interpret the Plaintiff’s use of the word “foreman” as “boyfriend” during her testimony, when the company’s defense was that the Plaintiff and foreman had a romantic relationship. The attorney immediately objected to the misinterpretation and was threatened by the judge that if she continued to object in such a manner she would be held in contempt of court. The jury ended up not believing the misinterpretation as they entered a million-dollar judgment in the Plaintiff’s favor. Although the attorney’s objection was not technically “proper,” given the highly prejudicial nature of the misinterpretation, it was a judgment call she had to make. However, she did risk having to spend the night in jail.

If an interpreter makes repeated errors, especially if the errors are material and prejudicial, or if the interpreter appears early on in the proceedings to not be competent, the attorney may consider moving the court to dismiss the interpreter. Such a decision, however, should not be taken lightly, especially if not done early on, as it is often difficult for witnesses to readjust to a new interpreter (and vice-versa) and such an action would undoubtedly disrupt the proceedings. However, this approach may be the best decision if the testimony is repeatedly being inaccurately interpreted.

When objecting to an interpreter, counsel should go to sidebar and move for dismissal. Counsel will need to explain to the judge the basis for the motion. Counsel’s own understanding of the testimony is not the ideal basis for the motion even if counsel is highly fluent in the witnesses’ language; it is preferable if another person is present in the courtroom who can attest he/she is fluent in English and the language spoken by the witness, and who can verify with the judge that the interpretation has been repeatedly inaccurate.

³³ *Id.*

³⁴ *Id.*