Comments on Lawyer Smith's Expert Report in Jones et al v. Agency

Smith's report exhibits major flaws:

- She utterly misstates the nature of the covenant as created by the Alaska Supreme Court, offering a covenant not seen in any court ruling.
- She criticizes my report for things that do not appear in my report. Some are mere straw man mischaracterizations; some are bald fabrications.
- She fabricated Alaska court rulings on the implied covenant and fabricated a quote she attributed to a court ruling.
- Long arguments about issues not in dispute: "AGENCY had the authority to revise its policy manual without employee approval", and "employees who quit or are demoted are not entitled to PROGRESSIVE discipline".
- She offers opinions on "commonly accepted norms" in HR department practices, without her ever having served as any employers' HR official, nor ever training as an HR official. She was a full-time litigator from 1978 to 2006, and never served as an HR official before or since 2006.
- Her CV lies about her expert witness record.

She offers no criticism of the first 750 words of my report (my plain-English summary of employer duties under the covenant), nor the last 3,000 words. Those parts stand unrefuted.

In Part 3 she explains that she will offer expertise about "how HR is done in the real world, rather than in litigation." Impossible for her. She litigated full time for 28 years and never worked for even a week in an employer's HR department. She has no experience or training in HR department functions. I worked for 40 years in the real world of HRM: as an employer HR official for 33 years and as Professor of HRM for the other 7 years.

In Part 4.1 she includes me in her criticism about Plaintiff claims regarding "just cause termination" and "progressive discipline". My report offers no such opinions. Neither the phrase "progressive discipline" nor "just cause" appears in my report. As you requested, I offered expert opinions about some, but not all, of Plaintiff's claims.

At the bottom of page 3, she states employers who terminate employees in an a RIF "certainly" could not violate the covenant. Since Agency did not conduct a RIF, that's not an issue under dispute in this case. Still, firing an employee and calling it a RIF never eliminates liability under any employment law, union contract, or Alaska's covenant of good faith and fair dealing. Further, she cites no support for her opinion about RIFs – all expert opinions must have a rational basis in law or evidence.

Part 4.2 – a major problem for Smith.

- She claims the Alaska Supreme Court ruled in *Era Aviation* that claims of covenant violation cannot be based on employee speculation, opinion, or assumptions. Yet, employee speculation, employee opinion and employee assumptions appear nowhere in that ruling, nor does any discussion around employee speculation, etc.

- She includes an alleged direct quote about speculation and assumptions from *Era Aviation*: "Such evidence is 'insufficient to prove that the employer acted in bad faith'." She fabricated that quote; it does not appear in *Era Aviation*.
- Next, she asserts that *Holland* held that subjective disagreement with the boss's decisions cannot establish a covenant violation. However, the Holland decision does not address subjective disagreement, or any similar term.

She simply fabricated Part 4.2, and then lectures the court about keeping this fabricated guidance in mind while evaluating Plaintiff's claims.

Part 4.3 contains logical inconsistencies disguised as expert opinion. Contrary to Smith, the covenant does – by its specific wording – require more than AGENCY blindly following its own policies, no matter how good or bad. The covenant specifically requires AGENCY to have proper policies, which makes policies subject to court review. The covenant requires that outcomes be those that reasonable people would find fair and even-handed, NOT outcomes that reasonable people would find complied with AGENCY policy, even if those policies and outcomes were unfair or treated like workers unlike.

She argues in Part 4.3.1 against the idea that AGENCY is obliged or mandated to publish guidance to employees about the covenant. My report never asserts that there is such a mandate, or that failure to provide managers guidance about the covenant violates the covenant. Smith does not cite any part of my report where I did so.

On page 5, Smith claims that the covenant is merely a legal theory used in lawsuits, rather than a day-to-day duty of employers. She provides no court ruling (real or fabricated) supporting that opinion, so it must be excluded. No Alaska court ruling about the covenant ruled on whether lawyers used the term properly in filing suit. ALL covenant rulings examined workplace decisions and conduct of employers in their treatment of employees. It is not a covenant of fair dealing with PLAINTIFFS in a lawsuit; it is a covenant about fair dealing with EMPLOYEES in the workplace. The Alaska Supreme court said so repeatedly.

Smith's asked a few of her unnamed colleagues about my opinions on the covenant and they allegedly disagreed? So what? She refutes nothing I wrote. She offered no evidence that her colleagues are not as clueless about the covenant as she. Even if 1,000 of her colleagues disagreed with my report, it remains true that employment law is not established by friends' consensus, but by statutes, regulations, and court rulings.

On page six, Smith disagrees with my opinion that untrained managers are likely to botch covenant compliance. Here she trips-up twice. She contradicts her earlier unsupported opinion that AGENCY had no day-to-day duties under the covenant, by insisting that AGENCY met its covenant duties! Also, she offers no factual support for her disagreement with what I wrote. She merely states that A. she BELIEVES that AGENCY didn't violate the covenant, and B. her subjective belief A proves there was no

risk of untrained managers violating the covenant. Sorry, an expert opinion gains no credibility from another opinion, only from evidence.

At the end of page six, she criticizes “Baxter’s claim that AGENCY was obligated to publish guidance”. The word “obligated” does not appear in my report, nor does “mandated” or “required”. She fabricated a claim not appearing in my report and then criticizes it. Either a straw man argument or gross incompetence as an expert witness.

She claims that AGENCY had the benefit of legal counsel when making some of the disputed employment decisions. She offers no evidence that claim is true. Further, even IF true for every employment action at issue, that insulates none of those actions from legal liability. “My lawyer told me to ignore or violate the covenant” is not an effective defense – especially if the lawyer is as clueless about the covenant as Lawyer Smith.

In 4.3.2, Smith claims I criticized the AGENCY HR Manager “because … he could not recite the legal elements of the implied covenant as set forth in legal opinions”. That is false, and she cites no support for it. My criticism of him was that he did not know about any DUTIES imposed on him by the covenant, nor that the covenant was a mandate rather than a suggestion, so he was and remains unfit to assist AGENCY in covenant compliance. I wrote, “It is chilling that, in their depositions, both the CEO and HR Administrator were unable to correctly state their duties under the covenant, and admitted under oath their ignorance of the covenant’s components. If those two officials are ignorant of the covenant’s mandates, and incompetent to review proposed adverse actions by other agency managers, then AGENCY was - and still is - flying dangerously blind, and all its employees are in jeopardy of abuse.” Smith refuted none of my statement about HR Manager’s and CEO’s dangerous ignorance.

Smith then offers the bald conclusory statement that HR Manager “clearly understood the covenant’s intent”. That is a weak assertion from her, since I have shown that SHE does not know the covenant’s intent. Further, her opinion requires support from the evidence – which, sadly refutes her opinion. The bulk of his testimony specifies that he gave no thought to complying with the covenant, because he knew nothing about his covenant duties. Had he remained ignorant to the Alaska Supreme Court’s <u>intent</u> in imposing the covenant, but proven well informed about the <u>duties</u> the covenant mandates, I would have had little criticism of HR Manager.

In 4.4, Smith asserts that I argued that the “periodic amendments of its employment manual violated the covenant.” She does not cite anywhere in my report that I objected to the periodic manual changes, because I did not. Her comment is either a straw man argument or gross incompetence as an expert witness.

On page 5 and 6 of my report I opined that publishing the 2007 manual, which stripped employees of valuable rights promised them in the 2003 manual, was done in an unfair method. Smith offers no refutation of THAT opinion, but wastes thousands of words asserting that:

- AGENCY's manuals allowed it to revise its manuals. Refutes nothing in my report.
- AGENCY manuals stated that employees were at-will. Refutes nothing in my report.
- The 2012 manual does not provide for just cause termination or progressive discipline. Refutes nothing in my report.
- The "good cause" language in the 2003 manual does not apply after 2007. Refutes nothing in my report.
- The 2003 manual allows for RIF's. Refutes nothing in my report.

In Part 4.4.3., Smith asserts that I "argue that AGENCY was obliged to give employees the opportunity to object or to provide the Plaintiffs with monetary compensation before AGENCY could make changes to its employee manuals". She does not cite the language in my report where I offered that argument, because I did not. She fabricated that assertion; it is either a straw man argument or gross incompetence as an expert witness.

In footnote 3, she states that "Baxter also claimed the AGENCY manual used the term "permanent employees, as if to suggest that this was a direct contradiction to at-will employment." I did not merely CLAIM that the 2003 manual repeatedly used the term "permanent employees"; I accurately cited each paragraph containing that phrase, and correctly stated the rights and privileges AGENCY offered permanent employees before 2007. The words "at will" do not appear in that section of my report. Smith again attempts to refute a claim I never made, while denying evidence actually in the record supporting opinions I did offer. She is really not very good at being an expert witness.

Further, she falsely claimed that, "As used by AGENCY's manual, the term "permanent employee" is used to determine when employees are entitled to certain benefits such as medical insurance." My report correctly specifies the notice, protections, grievance rights, and just cause rights AGENCY offered to permanent employees when disciplined or discharged. She does not – and cannot – refute my statements about the 2003 manual's contents. She does not and cannot refute my statement that government employees given the right to termination only for just cause also have Loudermill rights.

Also on 10, she disagrees with "Baxter's general assertion that the changes AGENCY made to its manuals over the years were 'unfair'." She cites no text in my report offering that "general assertion", since I offered no such opinion. She fabricated that "general assertion"; it is either a straw man argument or gross incompetence as an expert witness.

In footnote 5, she falsely claims that complaint rights employees got in the 2007 manual were better than they had under the 2003 manual. My report does what Smith did not do: I specified the rights employees had <u>before</u> and <u>after</u> the 2007 change. Before was better.

In 4.7, she asserts that I argue that all Plaintiffs were entitled to progressive discipline before AGENCY could take action against them. She offers no support for that claim because she cannot. The phrase "progressive discipline" does not appear in my report.

Her fabrication is either a straw man argument or gross incompetence as an expert witness.

At the top of page 17, Smith lists four bullet points she randomly extracted from Bell's PD as his essential job functions (EJF). Those are not his EJF's. She does not explain when and how AGENCY designated those as Bell's EJF's, as ADA requires of employers. They are not tagged as EJF's in the PD in his personnel file (as a competent HR function would have done). There are court rulings that specify the employer actions that identify which job duties are EJF's; Smith does not show that those she listed (and no others in the PD) met the "Davis checklist".

She correctly states that no employer is ever required to relieve a disabled employee of even one EJF. But every employer subject to ADA is REQUIRED to consider whether there are feasible and reasonably inexpensive ACCOMMODATIONS, which would allow an impaired employee to perform his EJF's. Since that duty is the core of the interactive process, why did she not mention it? Because AGENCY CEO failed to do it.

She falsely claims that reassignment is the ONLY reasonable accommodation an employee is required to consider when an employee cannot perform ELF's without SOME accommodation. The employer is required to consider all feasible accommodations which would allow EJF performance, to determine whether any of those are reasonable, as defined by law. She completely misstates ADA rules, and offers no support for her false opinions.

On page 20, Smith wrote, "Clearly, Day did not want to do the Executive Assistant job as CEO envisioned it …" "Clearly" is not proper in an expert report, and neither is mind-reading. Smith could write "Day testified that she did not want …" and then cite the EVIDENCE supporting that claim.

In the last paragraph of 4.13, she admits that she could think of nothing more CEO could have done to assure that his decisions were fair and equitable. Since she has never been an HR official, and denies that the covenant restricts daily activities, I am not surprised at her admitted incompetence in that matter. As an expert in HR Management, I can think of a variety of simple, low-cost steps CEO could have taken to meet his duties under the covenant while reducing costs and headcount. Offering executives that advice is a usual duty of HR Managers. Smith has never been one.

Lies in her CV

Regarding her CV, she appears to have misstated the cases in which she testified at trial and deposition in the four years preceding now. This issue needs Lexis-Nexis examination by a legal researcher – I have no L-N subscription.

A Google Scholar search indicates that she testified as expert in cases she did not mention:

Bjornson v. Dave Smith Motors, Idaho, July 2008. The judge limited the parts of her expert report she could testify about, and disallowed 75% of her expert fee!

Wooden v. Hammond, WD Washington, May 2013. Extensive discussion of her report, not clear on whether she was allowed to testify.

The published ruling in the June 2007 Heustis case (NOT within the last 4 years, as she claims) was NOT a damage award to Plaintiff, but summary judgement for defendant and dismissal of all Plaintiff claims. She lied about helping Plaintiff win.

My comments support moving for Smith's exclusion as an expert witness. She offers bizarre, unsupported LEGAL opinions; fabrications; and many bald lies about my report. She cannot help the judge and jury understand the HR issues in the case, which is the HR expert witness's sole duty.