

Juror Perceptions and Trial Strategy in Employment Cases



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Despite all of the efforts to reduce the number of lawsuits against corporations, the number of employment related lawsuits and the size of jury verdicts continues to rise. Everyday the news is filled with stories of companies experiencing layoffs and reductions in force that spawn new lawsuits. Some of these lawsuits are brought by former executives who believe that they were short changed by their employers during their disengagement. Other lawsuits are brought by men and women who allege that they were victims of discrimination or sexual harassment in either traditional or non-traditional ways.

The Gap Between Juror and Company Perceptions

The danger for employers in most employment cases is the wide gap in perceptions between company executives and jurors. An example is a recent trial in which the plaintiff was an attractive woman in a company department which traditionally employed only men. According to the evidence at the trial, some of the men in the department made a habit of teasing the plaintiff about parts of her anatomy and making suggestive remarks about possible sex acts.

At trial, the company chose to defend itself by stating that the woman knew in advance of her employment that the department contained only men and that sometimes men have a “locker room” mentality. The company also tried to suggest that the comments of the other people in the department were not serious.

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The jury in the case was not impressed with the company's defense, however. The jury believed that the company had the responsibility for instructing the men to be more respectful and to supervise the situation more closely. The jury believed that the company had the responsibility of making the workplace more friendly to new workers who might have different sensibilities.

Another case is typical of the new strain of lawsuits brought by former executives against their employers for breach of employment obligations. This particular case also contained allegations against five former executives for breach of trade secrets and breach of other obligations to their former employer. The executives and the employer were engaged in developing high level data processing software.

The employer was the first to file suit. In an effort to stem an outflow of its executives to competitors, the company's board of directors made a decision to support the filing of lawsuits to intimidate its remaining executives into giving close consideration before leaving and using knowledge gained on the job for the benefit of company competitors. There was some evidence that one of the former executives had actually recruited the other four after leaving the company.

The five executives who were sued by the former employer, then counter-sued for money they believed were owed by the former employer and for interference with their new employment relationship. They believed that they had not disclosed any trade secrets of the former employer and that they had fulfilled all of their obligations to that company.

The case settled during jury deliberations. However, the parties asked the judge to allow the jurors to assemble and allow the attorneys and clients to ask the jurors about their perceptions in the case. Once the jurors

were allowed to speak, they revealed many of the perceptions that other jurors across the country have expressed in such cases.

The jurors believed that the company had acted unfairly to the former employees. They perceived the company as being greedy and trying to deprive the defendants of freedom in working where and for whom they chose. They felt that the company misused its power in suing the former employees. This feeling was reinforced by the evidence which showed that the former employees had taken nothing with them that belonged to the company when they left.

Juror Perceptions in Employment Cases

Jurors tend to disregard factual evidence in employment cases more often than perhaps any other kind of case. Because their life experiences in the workplace are so powerful and influential in their decision making, they spend a great deal of time during jury deliberations discussing these experiences and how they relate to the case. Very little time, if any, is spent discussing the legal issues in the case.

Jurors are very interested in the character and motivations of the company and the people involved in the case. Post trial interviews of jurors indicate that they typically have strong reactions to the parties and how they behaved. Most of their attitudes are reflective of their own self concepts and most of their decisions are expressions of choices they make that reinforce their self images.

Jurors perceive their work life as an extended family environment. People in the workplace represent other family relationships with which they are familiar. The head of the company or its senior management play the role of father. Most workers perceive of themselves as children in this extended family. They might perceive of other

workers as brothers, sisters, aunts, or uncles.

In this kind of extended family environment, violations of others' rights are deeply felt. If a father (i.e. senior executives) discriminates or harasses a child (i.e. a worker) in the family, an unforgivable abuse has taken place. Conversely, when a father takes action to protect a child in the family, he has fulfilled his obligations and expectations of how a father should behave.

Most jurors have had both positive and negative experiences in their careers. The positive experiences were joyful, but the negative experiences may have been especially painful. For some jurors, a particular fact scenario might remind them of a particularly painful experience and they will transfer some of their residual anger or other bad feelings from the previous experience to the case in which they have been called as a juror. Regardless of their prior experiences, most jurors feel like they have a stake in the outcome of an employment case.

Because jurors' attitudes about specific issues in the case and their life experiences are so powerful in their decision making process, it is important to discuss these issues in jury selection. Allowing jurors to sit in a case without knowing about their attitudes and life experiences in the workplace is risky. Because some of these issues and many of the life experiences of jurors are sensitive, it is also helpful to utilize a simple written juror questionnaire which addresses the issues in the case. Such a questionnaire affords privacy for each juror and encourages honest and thoughtful answers that are often not possible in oral voir dire.

The Importance of Juror Perceptions of Fairness

A great deal of published and private jury research deals with juror perceptions of fairness in the workplace. Jurors believe that employers should be

fair in the decision making process and that a decision reached about an employee should be fair as well. Because jurors have often been affected themselves by a lack of fairness at times in their lives, they react strongly to situations where they believe an employer has acted unfairly either in the decision making process or in a decision that was reached.

For example, let's imagine a situation where an employee was terminated after complaining about customer billing problems and then files suit alleging retaliation. The jury will certainly ask why the employee was terminated. If the employer has documented evidence that the employee had misbehaved to the point of causing a hardship on other employees or causing damage to the company, most juries will expect the employer to have confronted the employee with complaints and to have tried to work out the problems prior to termination. They believe that such a course of action is fair. If the employee continued to misbehave, most jurors would support termination.

On the other hand, if there was no documented history of poor work performance on the part of the employee and the employee was terminated directly after complaining, most juries will believe that there was the possibility of retaliation. There are two important principles in jury decision making at play in this situation. The first is that jurors attribute one's behavior to the consistencies in their previous behavior. The second is that a causal relationship is generally present when 2 events take place together chronologically.

Juror Mistrust of Corporations

Juror mistrust of corporations and corporate executives is widely documented. An overwhelming majority of jurors believe that corporations should be held to a higher standard than

individuals because corporations have more resources and more power. They also believe that many corporate executives will lie just to protect their jobs. Jurors tend to sympathize more with employees than employers.

In defending a company in trial, jurors will usually want to know immediately where the company stands on the issues in the case. This generally means that a company should have written policies and a history of enforcing them. They expect the company to know about every complaint that a worker has had and that some action was taken by the company in response. Conversely, jurors believe that the lack of clearly stated policies or lack of enforcement are indications that a company does not really care.

Irrational Company Behavior

One of the biggest mistakes that companies make in defending themselves in employment cases is letting emotion and personalities interfere with rational decision making. Oftentimes, a great deal of emotion arises when employees or former employees are involved in a lawsuit against the company. However, juries will not understand why company executives are angry or indignant about having their behavior called into question. Often in trial, anger and indignation cause witnesses or company representatives to appear to be callous or even arrogant. These characteristics are often precursors to large damage awards against a company.

Jurors are innocent and simply want help in understanding what happened. They need someone to help them feel that their time in the courtroom is valuable and meaningful. However, they become especially angry when they feel like parties in the case are using the lawsuit to punish each other.

How Can a Company Defend Itself?

In spite of the daunting list of negative perceptions that many jurors have of companies and employers from their past experience, trial teams and corporate counsel who recognize the dangers can take action to avoid the pitfalls. By accepting likely juror perceptions and aligning with them, the defense of a case becomes easier and the chances of success are greatly increased.

The most persuasive defenses are those which comport with jurors attitudes, life experiences, expectations, and concerns. For example, jurors will expect a company to show compassion and sensitivity to all workers, including plaintiffs. They will not often agree with a plaintiff who has himself or herself been unfair.

In most cases, there are many ways to tell the company's side of the story. A story which comes alive with themes that transcend the facts of the case is more meaningful for jurors and, therefore, more persuasive.

The Role of Trial Consultants & Jury Research

Many years of research and experience have taught us that judges, jurors, and arbitrators cannot be persuaded to believe things that run against their fundamental beliefs. Conversely, they can generally be persuaded to accept themes and courtroom arguments that coincide with their fundamental beliefs. The basic principle behind jury research is that we can develop our most powerful case presentations once we know the attitudes, life experiences, values, and beliefs of likely jurors and how they will process the case to make a decision.

The field of jury research itself is only about 30 years old. However, the study and methods contained in scientific psychology are thousands of years old. It has taken a few years for

us to know exactly how to apply all of the vast resources offered by scientific psychology to make trial advocacy more powerful. As a result of the development of this field of science, most full-service trial consulting firms now offer a complete range of services to a trial team and corporate client designed to better understand how fact finders will process the issues in a particular case and how to develop the most persuasive case using reliable information. Some of these services involve focus groups, surveys, mock trial studies, mock arbitration studies, mock bench hearing studies, and mock mediations – all designed to help better understand the audience in the case.

The most frequent reason for hiring a trial consultant is to obtain an experienced and objective outside source for information to use in making important strategic decisions in a case. Trial consultants who are trained in psychology or another science offer a tremendous advantage to trial teams and corporations in helping them to find creative ways to win their cases. Trial consultants who are trained in law and psychology offer a special advantage in translating important information into useful recommendations for the trial team and for corporate counsel.

Most trial consultants these days offer a variety of services including hourly consultations, decision maker research projects, witness training, jury selection assistance, and trial advocacy support during trial. The skill and effectiveness of a particular trial consultant will be based primarily upon their experienced and their academic training. One of the best ways to determine which trial consultant is right for a particular case is to ask for references.

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About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [***Courtroom Psychology and Trial Advocacy***](#), published by American Lawyer Media.

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