
Jury Selection Issues in Employment Cases

Lara M. Giese, Psy.D. and Leslie Ellis, Ph.D.

In a wrongful termination case in Los Angeles, jurors awarded the plaintiff a whopping \$3.43 million verdict. In post-trial interviews, jurors were found, not surprisingly, to dislike the defense – a major corporation in Los Angeles – and its corporate witnesses. What made a crucial difference in this four-week, two-day deliberation case was the precise, scientific way in which the jury was selected.

With the help of a trial consultant, questionnaires were devised to find jurors who had interests, experiences, and backgrounds in common with the plaintiff. Working from a deselection model, counsel utilized a 1-5 scale to rank the potential adversity of possible jurors.

While it is always a challenge to pick a fair and impartial jury in an employment litigation, this case highlights

the importance of jury selection in these cases. Because it couples scientific research with intuitive reasoning, jury selection is both an art and a science.

Employment “Experts”

When trying an employment case, it is crucial to learn the work histories of potential jurors. Unlike jurors in other kinds of cases, jurors in employment cases usually carry a load of emotional baggage regarding their personal work experience. Because most jurors either have been employed or have employed someone, most view themselves as experts in these cases. They consider their personal experience as equivalent to “legal facts” in their consideration of the issues. This can be dangerous to either side.

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TRIAL GRAPHIX.

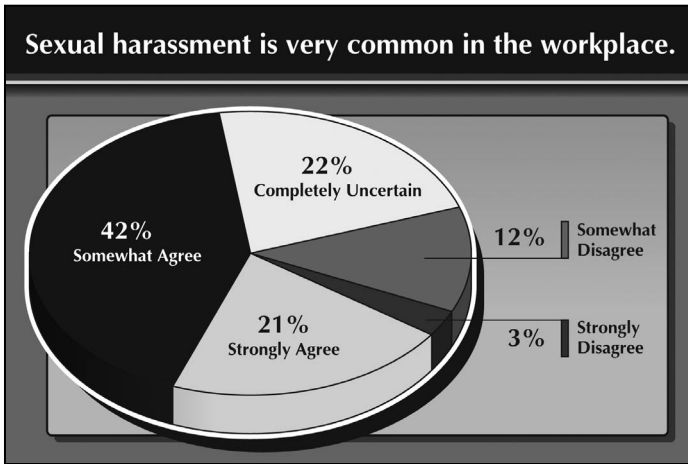


Figure 1

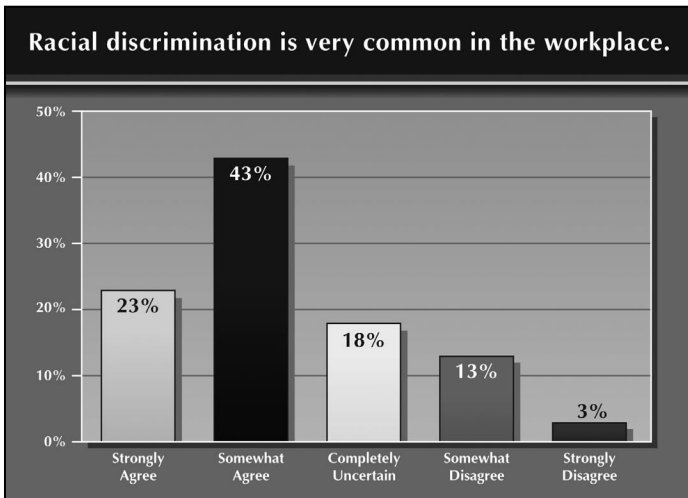


Figure 2

The results of a false sense of expertise was quite evident in a recent Los Angeles focus group.

One mock juror persuaded the other 11 that “an employment law” stated that an employer could not terminate an employee without three written warnings. Although no such law exists, the juror was able to convince the others; those who were on the fence regarding their verdict decision decided to go with the plaintiff, whom they believed was wrongfully terminated.

The day-to-day circumstances under which potential jurors have worked can be as important as their long-term history. Contrary to some expectations, many jurors who work or who have worked in employment circumstances similar to the plaintiff’s could be less likely to sympathize with the plaintiff.

Jurors frequently engage in a psychological defense mechanism called Defensive Attribution. To help them believe that something could never happen to them, they may determine that in a specific situation such as the case at hand, nothing bad happened to someone else (the plaintiff). They do not want to believe that the plain-

tiff’s circumstances were negative enough to find liability, because these jurors do not want to admit that their own employment circumstances are equally bad. These jurors may think, “My situation is not (or can’t be) that bad; therefore the plaintiff’s situation can’t be that bad.” They may be loathe to find for the plaintiff, because the meaning of that decision would hit a little too close to home.

Personal Experiences

Jurors have what they believe to be “experiential information.” Their past experiences guide their opinions. Furthermore, most pattern jury instructions direct jurors to rely on their experience and common sense when evaluating the evidence and witnesses. Jurors frequently apply their personal experiences to the case. These experiences may influence them – even prior to the presentation of any evidence – to find one side of the story more plausible than the other.

For example, in retaliation cases it is common for a plaintiff to claim that he or she was fired after a particular incident because the employer had been looking for a nondiscriminatory excuse to get rid of the employee. The employer, of course, claims the incident was proper grounds for termination. When deciding if a particular incident is justification for termination, jurors frequently rely on their own experiences with “blow-ups” at work.

In one such case, a fairly senior employee was particularly unpleasant to his immediate supervisor and was terminated. Because they would expect to be terminated if they behaved similarly, jurors who are laborers and those who hold hourly wage jobs are more likely to feel that the employer would be justified in terminating the employee. Jurors who hold salaried, white-collar jobs, on the other hand – and those accustomed to the human resources department mediating between employees and management – are more likely to feel that the employer should take more steps to rectify the situation before terminating an employee.

Perhaps the most important employment experience for attorneys to seek out in potential jurors is whether they feel they have ever been discriminated against at work or in other arenas. Jurors who feel as though they have been discriminated against, and that the discrimination prevented them from accomplishing their goals, are more likely to favor a plaintiff position. On the other hand, jurors who report that they have been discriminated against, but the discrimination did not prevent them from accomplishing their goals, are less likely to favor the plaintiff. These individuals are likely to believe that because they succeeded without suing anyone, the plaintiff could have as well.

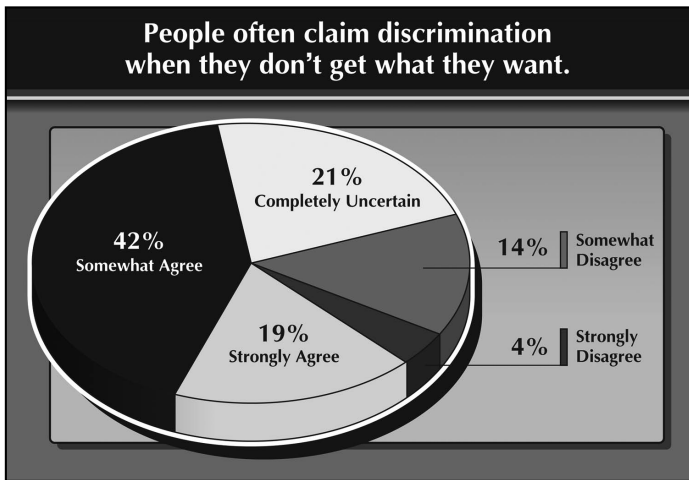


Figure 3

Although the law strictly forbids it, most jurors initially tend to place the burden of proof on the defendant (the employer) and side with the plaintiff (the employee) in employment cases. With the recent high-profile collapse of companies such as Enron, WorldCom, Arthur Andersen and others, people feel vulnerable in the workplace and believe that employees' rights are no longer protected. Jurors tend to have a slight bias toward the belief that discrimination and harassment do occur on some level, and they or someone they know has probably been harassed or discriminated against in the past. Data gathered from over 1,700 surrogate jurors in venues across the country indicate that 63 percent agree that sexual harassment is very common in the workplace (see Figure 1). 66 percent agree that racial discrimination is very common in the workplace (see Figures 1 and 2).

Conversely, many jurors believe that people are too quick to file claims; these jurors label many cases as frivolous. Of the surrogate jurors surveyed, 61 percent agreed that people often claim discrimination when they don't get what they want. This fact can be used to bolster a defense case, if you can prove that the case is more about the plaintiff's greed than about wrongdoing on the part of the corporation (see Figure 3).

It is important to ask questions in voir dire that address both sides of the coin. For example, if an attorney asked, "How many of you feel that discrimination is common in the workplace?" over half would answer affirmatively. Unfortunately, attorneys never have sufficient peremptory strikes to eliminate half the venire. It is critical to ask the follow-up question, "How many of you believe that sometimes people file a discrimination lawsuit when they don't get what they want at work?" The potential jurors who respond affirmatively to the first question and negatively to the second question are the jurors most likely to be adverse to a defense position.

Jurors are strongly interested in the character and motivations of those involved in a lawsuit. Jurors focus on trial participants' behaviors during trial and form opinions based on these behaviors. Because jurors have life experiences that may in some way be related, they tend to believe they have something personal at stake in the case.

Jurors also seek to put an event into the context of what was happening around the event. For example, if an employee who was terminated claims there was no basis for his or her termination, jurors find it helpful to compare the terminated employee to other employees. For example, how many infractions did the terminated employee commit versus other employees? What kinds of infractions were the employees committing?

Jurors use the concept of "fairness" to assess the behaviors of a corporation. Because jurors may believe they have been treated unfairly at some point in their lives, they have strong responses to certain actions taken by employers. Because jurors strongly believe that employers should be fair in making decisions, jurors are more prone to initially side with employees rather than employers. This is partially because employers are seen as having more resources and power.

Whether jurors believe they have been fairly treated in the past can strongly influence the way they evaluate the fairness of a lawsuit. On one hand, jurors who feel as though they have not been treated fairly in the past can be punitive in their decision-making. Defendants should be wary of those jurors. On the other hand, jurors who have had a tough time of it may have little sympathy for a plaintiff who they feel has no real basis for complaint. Those jurors are more likely to think, "Life is not fair. Get over it."

Many jurors have particular difficulty with the concept of "at will" employment. It violates their sense of fairness and justice. Seventy-five percent of surrogate jurors surveyed about their opinions of employment cases disagreed that employers should be able to fire employees at any time, for any reason (see Figure 4). This is an extreme opinion, and one would expect many to disagree. But this is simply another example of defensive attribution. Jurors think, "I don't want to believe that I could be fired at any moment, therefore it shouldn't happen to someone else."

A key question to ask potential jurors in any employment case is whether they have ever been laid off. Those who have are more likely to be sympathetic to the plaintiff, particularly in a wrongful termination case. In fact, those who have been terminated may be sufficiently bitter or resentful to want to exact revenge by voting to award

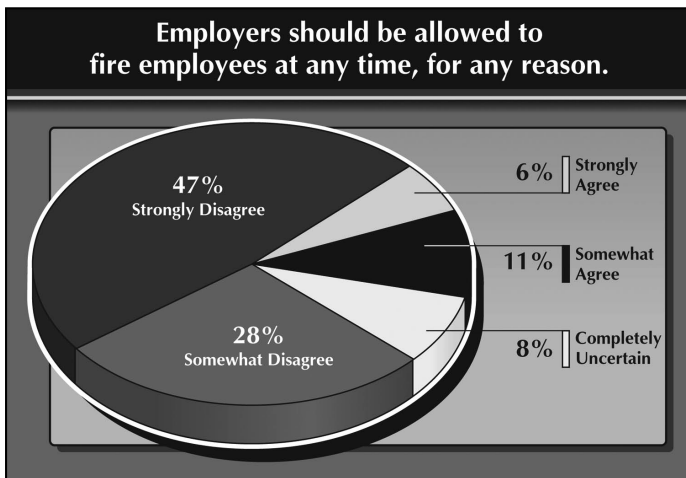


Figure 4

high damages. Even jurors who have chosen to change jobs frequently, and who have never actually been fired or laid off, most often favor the plaintiff as a result of the juror's sense of personal instability in the workforce.

Along the same lines, another important question to ask potential jurors is: How long have you worked for your present employer? The longer a juror has worked for one employer, the more personally stable – and defense-oriented – he or she is likely to be, unless they have worked in the same capacity without advancement for many years. Those who have worked for only one employer and those who have been promoted to a managerial or supervisory position traditionally favor the defense.

The type of work potential jurors do is another concern. Bluecollar workers, postal workers, secretaries, clerical workers and the like (i.e., those who have little decision-making power in their jobs) are usually more plaintiff-oriented in employment cases. Those who are employers or supervisors, or those who work in an “analytical” field such as engineers, computer programmers, bankers, and attorneys, are usually more defense-oriented. Government workers are a mixed bag. Those higher up the ladder (e.g., district attorney, supervisor, etc.) are more apt to favor the defense. Those who are unhappily retired, unemployed, or who are on disability are usually more sympathetic to plaintiffs.

In sexual harassment cases, study results show that jury-eligible citizens did not make distinctions based on the gender of the plaintiff and the defendant. Due to classic stereotypes in the workforce, however, jurors were more likely to blame a male defendant than a female defendant in these cases.

Empathy also becomes crucial for the jury. The more easily jurors can identify with the plaintiff and “put themselves in the plaintiff's shoes,” the greater the likelihood

they will award higher damages. Conversely, if a female juror cannot identify with a female plaintiff (for example, if the juror feels she would have taken different measures in the same situation), it is less likely that the juror will empathize with the plaintiff.

The way the evidence is framed and the manner in which the plaintiff's story is told influence the degree to which jurors identify with the plaintiff.

Demographics

Demographic factors should not be considered in isolation. They should be reviewed in the context of the attitudes and experiences jurors.

Age is always a key factor in jury selection. As a general rule, older adults are more conservative, whereas younger adults tend to be more liberal in their world view. Obviously, depending on what side of the case you are on, this is vital information.

As mentioned earlier, a juror's occupation is also significant. Each case is unique, of course, but typical plaintiff-oriented jurors include blue-collar workers, those who have filed a worker's compensation claim in the past, liberals, younger adults, minorities, single people, those who rent their home, and those who have less education and lower income.

Conversely, defense-oriented jurors would include those who are white-collar, conservative, Caucasian, homeowners, married, older adults, higher income, more educated, and managers and supervisors.

In cases in which gender is the basis for the claimed discrimination, gender is a critical demographic criterion to consider. Research indicates that women are more likely than men to categorize a broad range of social-sexual behavior as harassing, to find a work environment hostile, and to find attitudes toward women derogatory (e.g., Kovera, McAuliff and Hebert, 1999; Rotundo, Nguyen, and Sackett, 2001). Research also indicates that women are more sensitive than men to the “reasonable woman” standard (Wiener, Hurt, Russell, Mannen, and Gasper, 1997).

Both men and women use themselves as reference points (called “self-referencing”) when evaluating moderately severe or ambiguous cases of sexual harassment (Wiener & Hurt, 2000). Women, however, are more likely to have experience with inappropriate sexual behavior (or to have heard others complain about it) that they can self-reference. Women are thus more likely to find female plaintiffs credible as witnesses and less likely to find female defendants responsible for harassment.

they find corporate executives guilty of wrongdoing; this represents jurors' efforts to halt corporate wrongdoing in our workplaces.

The manner in which the decision-makers testify can be critical in employment cases. In most cases, jurors must decide which story they find more credible – the plaintiff's or the defendant's. The credibility of those who deliver these stories (i.e., witnesses) is critical.

In many employment cases, the witnesses are the story. Whether jurors believe the witnesses becomes paramount. Jurors ask themselves, "Are these people the type who would do what the plaintiff claims they have done? Is the plaintiff the type of person who would behave in the way the defendant claims he or she has behaved?"

One goal of jury selection is to identify potential jurors who will not be open to your case. Identifying jurors who will have a particularly difficult time believing your witness(es) is an important part of this process. Counsel who have a consultant assist with pre-deposition or pre-testimony witness preparation greatly enhance the credibility and communication style with which the witness or witnesses testify.

When considering a corporation as a defendant, jurors respond best when the corporation is "personalized" as much as possible through its witnesses. Jurors want to know with whom they are dealing (the people behind the corporation) and where the corporation stands on the issues discussed in the case. Specifically, jurors need to see written policies with regard to employees and evidence that the policies have been enforced in the past. Jurors want to put the employee and situation at hand into the context of what typically happens at this company. If relevant policies and procedures are not in place, jurors will likely view this as evidence of the company's lack of care or concern about such matters.

Jurors require written evidence to demonstrate that the actions taken were justified and unavoidable. If that documentation is not available, jurors will not believe the employee was "given a chance," and they will likely side with the plaintiff.

Jurors react more positively to a proactive approach than to a reactive one. Rather than focusing on the defensive position and hearing from employees against whom the company did not discriminate, jurors respond best when they hear about measures the company took against discrimination and see examples of how the company cared that discrimination did not take place.

If executives or those representing the corporation

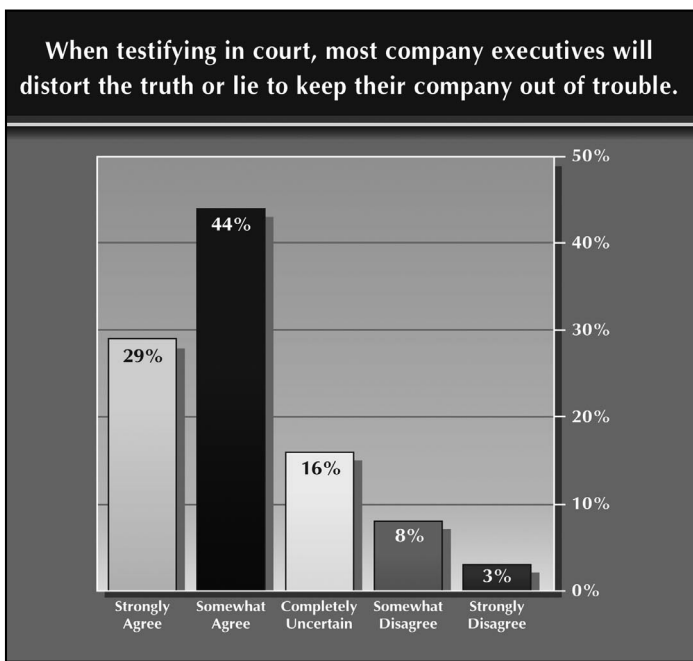


Figure 5

Attitudes and Nonverbal Hints

Aside from work history and demographic information, it is important to focus on the attitudes and nonverbal clues given by potential jurors. Pay attention, not only to what jurors say, but also to how they say it, and more importantly, to how they relate to counsel during the voir dire process. The voir dire process is an important opportunity for attorneys to build rapport with potential jurors.

Nonverbal cues to look for in the voir dire process include content, eye contact, body language, and facial expression. Most importantly, pay attention to any mismatches between what a potential juror says and how he or she behaves. If the juror displays exaggerated behavior or inconsistencies among responses, this often signals deceit and may also tip you off to a stealth juror (someone with a hidden agenda for wanting to get on to the jury).

Witness Concerns

Research indicates that jurors believe corporations should be held to a higher standard of behavior than individuals (Hans, 2000), particularly in dealing with employees. Jurors also tend to believe that executives are willing to lie to protect themselves or their company (see Figure 5), especially in the current corporate climate. Jurors are more skeptical of company executives than they were just a few years ago. Their reactions to executives are not as severely negative as they were 24 months ago; but jurors are much more open to conspiracy claims and accusations of corporate wrongdoing than they were in the past. Jurors are also more punitive now in cases where

demonstrate anger, jurors are likely to interpret this as callousness or arrogance, which will more than likely lead to larger damage awards. To protect itself, a company should present arguments that parallel the experiences, opinions, concerns, etc., of the jurors. If jurors perceive that plaintiffs are unfair in their actions and accusations against the corporation, jurors will not side with them.

Each Case Is Unique

There are many important issues to keep in mind with jury selection and witnesses in an employment case. Keep in mind that each side, not just the plaintiff, will try its best to personalize its clients and to make them more emotionally appealing to jurors. As mentioned earlier, even a large corporation can be (and should be) personalized for the jury by humanizing the corporation and having a company representative attend each day of the trial.

Remember that each case is unique; a jury profile that works in one particular case may not work in another. One cannot simply take the above descriptions and label a potential juror as plaintiff-oriented or defense-oriented. Jury selection involves looking closely at each juror's work history, experiences, and demographics, as well as evaluating his or her voir dire answers, attitudes, demeanor, affect, reactions to the attorneys, and how he or she relates to others. Only when each of these factors is considered will jurors who are truly sympathetic and open to your case be discovered.

Notes:

1. Hans, V. (2000). *Business on trial: The civil jury and corporate responsibility*. Yale University Press.
2. Kovera, M., McAuliff, B., and Hebert, K. (1999). Reasoning about scientific evidence: Effects of juror gender and evidence quality on juror decisions in a hostile work environment case. *Journal of Applied Psychology*, 84, 362-373.
3. Rotundo, M., Nguyen, D., and Sackett, P. (2001). A meta-analytic review of gender differences in perceptions of sexual harassment. *Law and Human Behavior*, 86, 914-922.
4. Wiener, R., Hurt, L., Russell, B., Mannen, K., and Gasper, C. (1997). Perceptions of sexual harassment: The effects of gender, legal standard, and ambivalent sexism. *Law and Human Behavior*, 21, 71-93.
5. Wiener, R. and Hurt, L. (2000). How do people evaluate social sexual behavior at work? A psycholegal model. *Journal of Applied Psychology*, 85, 71-93.