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# What Matters to Jurors in Labor And Employment Matters

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The content of this article is based on professional observations from mock jury research and actual jury trials. It is intended to complement, not replace, professional legal advice.

## It Pays to Pay Attention to Employees

How hard do you think it is for a plaintiff to create a strong impression on a jury?

Not hard – just see Exhibit 1, page 2.

## The Employee Lawsuit “Kit”

Employees suing for sexual harassment, discrimination, wrongful discharge or termination can impress on a jury that their case has merit when certain elements are present. In work environments where management is careless, a lack of awareness of such elements can mean a lawsuit waiting to happen. It behooves employers and litigators to know what makes up the employee lawsuit “kit,” and to identify employer vulnerabilities before it is too late. As a trial consultant who has consulted on numerous such lawsuits, I am struck by how common, yet preventable, the issues are that work against employers.

## These issues include an employee who:

- Performed well when first employed
- Has been recognized for good performance (e.g., with an award, commendation, increased responsibilities or staff, promotions, raises, longevity, etc.)
- Knows dissatisfied co-workers (present and former) who might testify, especially ones with nothing to lose or something to gain, and who would be likely to disparage the employer
- Communicates well and can maintain composure
- Has no serious problems or complaints against them in their HR file
- Has proof that they complained to HR and received a slow – or no – response
- Has proof of repeated attempts to resolve a complaint, with unsatisfactory HR response
- Is likeable
- Can show that their employer failed to communicate with them

### EXECUTIVE SUMMARY

- Jurors bring their entire lives and collective work experience into the deliberation room. Most jurors are (or have been) working people, are not managers, and very few are “the boss,” which means they tend to think like employees and have an employee’s perspective of the case.
- Employees can impress on a jury that their case has merit when certain elements are present. In work environments where management is careless, a lack of awareness of such elements can mean a lawsuit waiting to happen.
- Potential defendants in labor and employment matters should keep jurors’ perspectives in mind and at heart in order to practice “preventive law” and avoid foreseeable pitfalls.
- The behavior of a company’s management and HR professionals, and the way their personalities come across at trial, must reassure jurors on the issues that matter to employees. While managing these issues during trial is better late than never, it is better still to manage them in advance to prevent litigation.

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than employer

- Is not systematic in following up on complaints or problems, which may make jurors believe the organization and its management are unprofessional and uncaring
- Generally fails to keep good records and document problems – jurors may believe a company has no rules and does whatever it wants with its employees

Do you come up short in any of these areas? If so, it would serve you well to familiarize yourself with the threats you face and ways to avoid them.

## **Taking workers for granted *matters* to jurors**

*Who are jurors?*

Most jurors are (or have been) working people. That means they tend to think like employees. Most jurors are not managers. Those who are managers can be wild cards. They may be less tolerant of frivolous claims by non-producing employees and may appreciate management's efforts to solve problems. However, they might instead judge managers on trial harshly (thinking, "I would never do that!"). The management-level juror can pose a special threat to the defendant by scrutinizing its HR policy, its enforcement of that policy, and its workplace atmosphere more critically than other jurors. Their manager's sensibility can have a great impact on the rest of the jury if they are viewed as the "expert" in the jury room. They are not easily swayed, are comfortable in leadership positions and in speaking to groups, and are experienced at creating consensus among individuals who disagree. Through pretrial jury research in a specific case, counsel can determine which way this type of juror is inclined to react.

Few jurors, however, are "the boss," so the majority will view a case from the employee's perspective. They judge defendants in employment matters as they would judge their own employer, manager, HR contact, or "boss." Hence, a jury of one's "peers" likely means peers of the plaintiff, not the defendant, in labor and employment matters.

## **Jurors' common beliefs about work *matter***

What jurors think about employers in general can hurt employers in litigation.

- "Corporate America abuses power."

- "No good deed goes unpunished."
- "They say if you want to get something done, ask a busy person. That's why hard workers get taken advantage of."
- "Companies often side with abusive managers and close ranks rather than protect their employees."
- "Working stiffs can't get a fair shake."
- "It's better to keep your mouth shut and not make waves. Otherwise, you'll get labeled as a troublemaker."
- "Whistleblowers always pay the price."
- "Companies discriminate, but it's hard to prove."
- "Most corporations cannot be trusted."
- "Companies are loyal to profits, not people."
- "It's still a man's world."
- "Women still only make 80 cents on the dollar."

## **Jurors' personal work experiences *matter***

Few people love their jobs unconditionally. Worse, whether it is true or not, many jurors believe they have been discriminated against in the workplace at one time or another. Many working women can readily cite a personal encounter that they construed as sexual harassment. Thus, most jurors "understand" what wrongful termination, harassment, discrimination, and retaliation are (as jurors define it, based on their own experiences). Their definitions (and verdicts) may include such sentiments as these:

***If companies are unaware or careless, they can behave in ways that lead to a lawsuit or that come into question during a lawsuit.***

- "I don't like that manager – he reminds me of my boss."
- "My company doesn't appreciate me."
- "I'm overworked and underpaid"
- "Companies never look out for the little guy like me."
- "It's who you know."
- "My company always pleads poverty as an excuse"

- not to give me more money or hire help for me.”
- “If I won the lottery, I would never work again.”
- “Maybe legally that company didn’t break the law, but ethically they did.”
- “Maybe technically, the defense didn’t discriminate, but I didn’t like them/they didn’t do the right thing, and that’s a good enough reason for me to find against them.”
- “Even if the company didn’t do anything wrong, that plaintiff deserves something; someone has to pay for it. The company can afford it.”
- “If you need the job, you can’t afford to complain.”
- “You can take this job and shove it.”

Such sentiments represent the mindset of many jurors. Because such jurors are predisposed to be receptive to plaintiffs’ claims, they make matters more difficult for defendants. The plaintiff’s claims may remind jurors of their own experiences. What a great opportunity that provides to the frustrated juror to send a message to “the boss” – through a plaintiff verdict.

## **Facts that lead jurors to trust or suspect on employer matter**

Anything that smacks of precariousness, inconsistency or pretext matters to jurors. General factors that jurors consider in judging employment matters include:

- Credibility of HR and management witnesses: Does the witness seem approachable to jurors? Are they someone who would be responsive and who would enforce employees’ rights?
- Employee performance history – it is difficult to argue against good performance reviews. Timing is everything: When did the employee’s performance decline? Why are you bashing them in a lawsuit instead of during their employment?
- Did the company have an appropriate policy in place?
- Was the policy objective?
- Was the policy enforced?
- Was it easy or difficult for employees to benefit from the policy, get advice, lodge complaints, and interface with management?
- What is the general atmosphere at the company?

- How did the company follow up? How and how fast did the company respond?
- What happened to the employee? What happened to the alleged abuser/harasser/discriminator? Are they still employed? Were they punished or rewarded?

Factors that jurors scrutinize to decide whether an employer has been fair or not in cases involving hiring, firing, and claims of discrimination include:

- The diligence used in following the prescribed steps in the HR policy
- The neutrality of the people judging who stays or goes
- The ease with which someone can understand and apply the rating system used by the employer in making decisions
- The checks and balances in place to prevent over-subjectivity by those making decisions

Factors that jurors scrutinize to decide whether an employer has been fair in responding to sexual harassment claims include:

- Credibility of the alleged victim(s) and their behavior – is there a double standard between the way the plaintiff behaved and his/her claims against how others behaved?
- How “social” were the people involved? What was their marital status? How senior were they? Defendants with spouses or other significant primary relationships may be seen as less likely to risk serious relationships.
- Employees earning good money, who have job security, or who are near retirement are often perceived as having no motivation to risk losing them by a false claim.
- Likewise, defendants with a lot to lose (for the same reasons as above) may be viewed as less likely to risk engaging in the behavior claimed against them.

***If presented successfully, jurors can come to understand that the employer had no better choice in a difficult situation.***

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## What makes jurors judge an employee harshly?

As described earlier, jurors are mostly working people. Most have a reasonably good work ethic and must behave and perform well to keep their jobs. However, they may have encountered co-workers or acquaintances that take advantage of them, loopholes in their company's policies, or lax supervision. Many people know someone who has someone else punch in or out for them, who puffs up overtime reports, or who simply does not earn their keep. People on the short end of these sticks are not likely to view undeserving plaintiffs sympathetically. The types of plaintiffs whose claims jurors tend to reject may include:

- Plaintiffs with problematic emotional histories, work histories, or difficulty working with others
- Plaintiffs who believe that they are "special," so the rules don't apply to them
- Plaintiffs who have received special consideration from their employers and who expect such treatment as a matter of course
- Plaintiffs who believe they are better than peer employees
- Plaintiffs who were given multiple chances but ignored them (if these chances can be demonstrated and documented)
- Plaintiffs with obvious agendas that are not the company's problem or fault (e.g., plaintiff is lazy, greedy, using a lawsuit as an early retirement strategy, etc.)
- Plaintiffs who employ theatrics and melodramatic testimony
- Plaintiffs who wait a long time to leave a job they claim was intolerable
- Plaintiffs who claim discrimination or harassment in circumstances that point to other, more personal sources for their discontent or motivation for revenge (e.g., changes in staff structure which are not to their liking, changes in the company's offering of products, or territories which change their commissions, bonuses, workload, etc.)

## Preventive law – avoid pitfalls that antagonize jurors

Potential defendants in labor and employment matters – companies, their executives, managers and HR

personnel – should keep jurors' perspectives in mind and at heart in order to practice "preventive law" and avoid foreseeable pitfalls. It is prudent, cost-effective, and simply good business to do so.

Despite common juror biases against employers, many litigants feed right into jurors' negative attitudes about work. These attitudes are based on jurors' experiences with authority, corporate culture, fairness, and personal autonomy. Many jurors believe they have been discriminated against in the workplace (or are in some other way disgruntled about their employment), so they are highly receptive to claims against employers.

If companies are unaware or careless, they can behave in ways that lead to a lawsuit or that come into question during a lawsuit. These actions or inactions reinforce the inequities – real or perceived – that jurors are sensitized to in their own work history and are then critical of when judging defendants in work-related litigation.

The behavior of a company's management and HR professionals, and the way their personalities come across in trial, must reassure jurors on the issues that matter to employees. While managing these issues during trial is better late than never, it is better still to manage them in advance to prevent litigation. That way, if a case does make it to trial, the juror will more readily imagine a positive answer if they ask: "Would I like being treated the way you treated the plaintiff? Would I be able to rely on you if something was wrong? Would I get performance reviews? Would you judge me fairly on my performance reviews? Would I get a fair shake for a promotion or if the company changed hands or was reorganized? Would I be comfortable telling you if I had a problem? Could I rely on you to take care of it? Could I talk to you and trust you? Would you remember me? Would you bother to accurately remember important things about me (like agreements the company made with me, my concerns, requests, promises made to me, my salary, raises, commissions, bonuses and complaints)? Would you keep good and fair records of my work and important discussions? Would I want to work for you?"

## What jurors look for in labor and employment matters *matters*

Without sufficient answers to the above questions, jurors are more likely to conclude that the employment decisions at issue in a lawsuit were not objective or were unfair, and thus were discriminatory. If jurors cannot apply the company's rules (or "yardstick") themselves, they are more likely to conclude that the employee could not do so either, and that a company's decisions and actions

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were suspect. The more objective and carefully considered a management decision or action is, the better.

## **Word choices *matter* to jurors**

One way in which corporate defendants (and the lawyers who defend them) reinforce jurors' negative perceptions about employers is through insensitivity to the nuances their words convey, both in documenting interactions with employees and when they present a case. Word choice is critical. The language of business is often aggressive; though it might be appropriate in the boardroom, using "business speak" in the courtroom sends the wrong message. For example, saying "We executed the RIF" is harsher and colder than saying "We implemented the RIF," and can inadvertently invite anger from jurors by sending the message that we "axed" an employee. Most jurors translate "laid off" to simply "fired."

Likewise, a jury may become alienated and distrustful if the defendant fails to explain both the reasoning behind the policies it implemented and its commitment to its employees throughout the process. A successful explanation, however, can make all the difference.

Good storytelling requires speaking the language of the audience (the jury), setting the stage for what happened, clearly explaining what happened, and reviewing the results – all while making a conscious effort to avoid resistance or rejection by helping each juror think as the decision makers did.

It helps to acknowledge the employees who were affected at each stage and to describe how consideration of these employees affected the defendant's actions (rather than focusing solely on the business aspects of the case and testifying as if the employees' lives did not matter).

Ideally, jurors will be put in the shoes of the employer so they can more readily agree with the choices that were made and understand why, under the same circumstances, they might have made the same decisions.

If it is defending claims regarding reorganizations or RIFs, the defense must paint a picture of the internal and (more importantly) external causes beyond the employer's control (changes in the industry/marketplace, global market changes, trends, the economy, political/other changes, competition, etc.) which required making changes to survive in business. If presented successfully, jurors can come to understand that the employer had no better choice in a difficult situation.

## **Preparation for witnesses who will be**

## **scrutinized at deposition and trial**

*Ways to send helpful messages.*

The last thing the trial team and defendant company want to do at trial is behave in any way that may reinforce jurors' negative attitudes about companies and employers. For example, the defense presentation should be efficient, interesting and focused, without appearing cold and insensitive to details. The company must be portrayed as one that is run by people who are competent and who care about their employees. Any preparation that can reinforce this positive perception (such as ensuring that HR records are in order, accessible and familiar to principal witnesses; and ensuring that CEOs are accessible and knowledgeable about staff, procedures and significant events) is advisable.

## **Graphics used in labor and employment matters *matter***

Graphics create or defeat trends and make experts (in dry fields such as statistics and damages, for example) more user-friendly and memorable. Documents favorable to the defense can be emphasized strategically through visual aids, which further underscores the importance of keeping good documentation.

Strategic demonstrative graphics have enormous impact in labor and employment cases because they paint – or defeat – a picture of a trend quickly, easily and indelibly in jurors' minds. They create more consensus than verbal testimony and are more attention-grabbing than dry, number-heavy charts. Jurors can each refer to the same graphic image to understand a point, rather than track an entire "lecture" from an expert and then refer back to the graphic as a group in deliberations.

Defeating the portrayal of a trend (in pattern and practice claims, for example) requires jurors to understand actions taken by the employer as legitimate and objective. Plaintiff images can be very powerful and emotional. Graphics can achieve this impact almost instantly. Thus, defendants must meet this crucial challenge: Their graphics must have simplicity and visceral jury appeal as well.

## **Generic psychological indicators of plaintiff jurors**

Jury selection is a crucial factor in any trial involving an employment dispute. For any case that does make it to trial, it is important to be aware of the following indicators for potentially adverse jurors:

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- High tolerance for poor job performance; poor work ethic
  - A dependent personality and an external locus of control (tend to blame bad luck or credit good luck on external factors, rather than take personal responsibility)
  - An emotional (rather than analytic) style of processing information
  - Minority group members
  - Have a “chip on their shoulder”
  - Antiestablishment/anti-authority attitudes, work and lifestyle choices
  - Underemployed (better education than position and finances)
  - Female jurors may be more intolerant of the party who has a responsibility to act ethically but fails to do so

## **Pretrial research in labor and employment litigation *matters***

Jurors bring their entire lives and collective work experience into the deliberation room. Their beliefs and attitudes are factors over which we have no control unless we ascertain what they are in advance. Without such knowledge, the defense risks attempting to sell jurors on facts or reasoning that fly in the face of the jurors’ beliefs and experiences, an attempt that may very well have no power of persuasion, or that may even boomerang to harm the defense. By understanding the expectations and the mindset of jurors, one has a much better chance to persuade them.

Because the stories plaintiffs portray often sound familiar (and thus resonate with typical jurors), this article is intended to educate the people who can prevent labor and employment litigation – as well as those who litigate such cases – by illustrating what matters to the people who judge them: The jury. It is not only intended to arm potential defendants, but also aims to increase the quality and integrity of the workplace for its own sake.

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