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Winning Support for the Employer When the Plaintiff Is Backed by a Union

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TRIAL GRAPHIX.

Because the employer is regarded as the heavyweight in EEOC actions, it faces a daunting challenge in a jury trial. Picture the following scenario: On one side, an individual employee with a lone attorney and an EEOC right-to-sue letter. On the other side, a large corporation with wheelbarrows full of documents and a “dream team” of lawyers.

Who will get the benefit of the jury’s doubt? Though this scenario favors the vulnerable individual over the mighty corporation, the perception can be reversed. This difficult task is made easier when the employee is a union member.

Pretrial mock-jury research reveals that jurors who understand unions are an asset to the defense. Such jurors perceive that union members are supported and empowered by a system that provides rights to workers and exerts muscle over employers. Therefore, some commonly overlooked methods for defending a company in employment litigation should be considered when a union governs the workplace.

The Slacker as Plaintiff

Employment litigation involves many “slackers turned plaintiffs”: employees who are tolerated, promoted, and paid but who complain of unfair treatment in the workplace when disciplined, demoted or fired for unacceptable behavior. In following through on their complaints, however, such underachievers tend to exhibit the same lackluster performance they did in their jobs. Since character is constant and produces consistent behavior, this profile is advantageous to the defendant.

Slacker-plaintiffs often ignore rules. This attitude emerges when they perform work, follow procedures, address deadlines and follow up on complaints in a manner that defies their union’s Collective Bargaining Agreement (CBA). In following procedures specified by the CBA, slacker-plaintiffs often do not sweat the details and tend to be inconsistent about the details on which they do fixate. A plaintiff’s handling of alleged grievances often mirrors his or her poor work ethic.

Details of the employee’s work habits lead jurors to question the employee’s credibility and sense of personal responsibility. It is easier to elicit jurors’ skepticism via details related to the plaintiff’s character than through evidence that may seem subjective or inconsistent relating to the plaintiff’s work product. This focus on the plaintiff’s character also shifts jurors’ attention from the defense to the slacker-plaintiff.

How to Turn the Tables: Character, Then Performance

Before attacking an employee’s job performance, introduce the jury to the employee’s questionable character in the form of documented failures to follow CBA procedures. The “CBA Procedures Not Followed” approach can be more fruitful for several reasons:

- The jury scrutinizes the plaintiff rather than the defendant.
- An attack on job performance after the fact is not credible.
- Performance reviews tend to lack documentation, timeliness, appropriate criticism and follow-up, creating the misimpression that the employee performed his or her job better than the employer now claims.

Since key witnesses (HR personnel and middle and upper managers) rarely recall details that help the defense, they seldom satisfy jurors; in addition, such witnesses are scrutinized for imperfect behavior exhibited in their roles—especially by jurors with management, human resources or training experience.

When jurors learn that a union worker has failed to uphold his or her end of a CBA by showing disregard for the CBA-specified time constraints or by failing to communicate appropriately with union staff who are there to protect him, the worker’s case progressively loses credibility as jurors keep score using the checks and balances provided by union membership and the CBA.

As jurors learn about the roles of union representatives and shop stewards and the options and protections available to workers through their union, they become more willing to view a union plaintiff critically. This occurs especially with jurors who come to the case with knowledge of how unions operate.

A platform that reveals the plaintiff’s incompetence or irresponsibility regarding CBA procedures allows jurors to view the plaintiff as powerful (i.e., backed by the union) but lacking credibility. This sets the stage to convert the jury to view the plaintiff as substantially unreliable. Specifically, such a platform:

- Opens the minds of jurors to the plaintiff’s performance insufficiencies
- Permits jurors to view the employment arrangement as a “deal” that affords essential rights and obligations to either side
- Introduces an objective measure by which jurors may judge the plaintiff
- Shifts the focus from the defendant to the plaintiff

- Provides objective evidence likely to bring consensus among jurors (and thus to invite less debate)
- Opens jurors' minds to defense arguments pertaining to neutral reasons for the employer's actions

Steps to Take Before the Jury

An essential goal in employment litigation is to dictate which side jurors ultimately view as in control of the workplace. To achieve this goal, place the plaintiff firmly under the influential and protective shield of his or her union (i.e., as backed by an "army"). This establishes the plaintiff side as Goliath.

Advance this strategy by educating jurors on the following points:

- Union membership—Explain to jurors the significance of union membership. Show proof of the plaintiff's membership. Present points of contact between the employee and the union, such as membership dues, service charge authorization forms, etc.
- This will illustrate that by choosing to join the union, the plaintiff agreed to be bound by its rules and procedures.
- The role of union representatives—Sympathy for plaintiff employees declines when jurors learn that unionized employees are provided with a sophisticated team to fight their workplace battles. To shift the jury's perceived focus of strength, specify the relevant members of the union team, what they do, the power they wield and how they—not the employer alone—set the rules.
- Voting—Inform jurors of the issues about which union members vote. Clarify the fact that union workers gain control over the workplace through union votes and subsequent agreements between the union and the employer.
- Collective Bargaining Agreements—Educate jurors as to what it takes to negotiate and pass a CBA and who is involved in the negotiations. Detail the sophistication of the parties involved, and explain what a CBA governs. This will make it clear to the jury that the plaintiff is supported on the job by an organization that enjoys power equal to or greater than that of the employer. Point out to the jury that in exchange for the benefits of such power, the employee is obligated to follow the union's policies and guidelines.

- Consequences—Through unions, workers and employers agree to work together in clearly defined ways. The consequences of any failure to follow these rules are spelled out in advance.

To enable jurors to understand this controlled work environment, teach them case-relevant rules of engagement.

Most of what can happen in a union workplace already has been addressed in an objective, mutually agreed on and predetermined manner, rather than subjectively by an individual "on the spot." Spell out how case-relevant issues are governed by both the CBA and company policy (e.g., specific discipline for specific misconduct, warning requirements, criteria for suspensions and discharges, etc.) This approach facilitates the judgment of each party against a union-sanctioned checklist. Who upheld their end of the deal? Often, it is the employee who comes up short...or at least, shorter than the employer.

- Grievances—With a basic understanding of unions, jurors become less receptive to the complaints of a worker who fails to follow union procedures when a problem arises. Walk jurors through the "if-then" paradigm prescribed by the CBA for solving

Generation X: A Challenge to the Union Mentality?

Recent research by Industrial/Organization psychologists (I/Os) reveals that Gen-Xers (those born between 1961 and 1981) view the workplace differently than the preceding generation. They are more likely to switch jobs, but not because they are noncommittal. Their work experience often involves entry level jobs at which their needs were ignored, so they may be skeptical of the motives of employers. Still, while they may remain at a job for only a brief period, their dedication to it while there is often high.

An implication worthy of study is whether Gen-X jurors value merit over seniority. Such a position would challenge the union mentality of some plaintiffs and jurors, particularly older individuals who assume that seniority trumps merit.

For unionized employees with seniority who claim mistreatment when denied positions or promotions for which they are not at all qualified, let alone the best qualified, younger employees may pose a special threat. As Gen-Xers begin to fill the jury pool, it will be important to learn their views of unionized workers in employment litigation.

workplace problems. Detailing this paradigm is a persuasive way to overcome employees' claims of unfair treatment or that the employer disregarded their complaints.

- Timing—An easy way for jurors to judge the validity of a claim is to compare the dates of alleged wrongful acts with the date of the plaintiff's first action against the defendant. Details of timing appeal to jurors because such details make sense and are easy to consider. The longer the delay, the less credible the claim. Hence, it is essential in a winning argument to show the plaintiff's initial failure to act, and to emphasize all remedies accessible to the employee—but not pursued—at the time of the alleged problem(s).

This "delay yardstick" can be applied repeatedly to the plaintiff's new or ongoing complaints. The better jurors appreciate how and when the plaintiff could have acted—but did not—the less they will believe a problem ever existed.

Finally, considering the insolvencies, layoffs, scandals and disintegration of faith in the post-Sept. 11 economy, many are grateful simply to have a job. Does this social and economic environment make jurors more suspicious of employers? Perhaps, but jurors may also be less receptive to lawsuits brought by unionized employees who benefit from job security in uncertain times.

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