Three Keys to an Effective Employment Litigation Strategy

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According to one study, in a dispute between an employee and an employer, 57% of jurors would tend to favor the employee.[i] The same study found that if the defendant is a "big organization," the number jumps to 88%. At first glance, this may raise concern for defendants, but other studies have revealed equally strong opportunities for defendants. For example, one study found that 65% of jurors believe "people often claim discrimination when they don't get what they want."[ii] Another jury study conducted by us found that 86% of jury-eligible respondents agreed that "too many people use lawsuits to try to get money they do not deserve." The opportunities and vulnerabilities for each side in employment cases often seem to function as "two ships passing in the night." They each fail to directly refute the other, yet somehow, each can exert profound influence on the case.

The goal of this article is to identify three key opportunities for plaintiffs and defendants in employment cases and discuss how to practically take advantage of each. There are certainly a broad range of factors that can influence any individual outcome, but in our experience, these are the three most common turning points in employment cases.

Despite the fact that the plaintiff's and defendant's opportunities in employment cases may seem like "two ships passing in the night," they actually create mutually-exclusive frameworks for how jurors make sense of the central issues in the case. This is because it boils down to jurors' focus in the case. Focus in deliberations is zero-sum. If jurors are talking about one thing, they are not talking about something else. Furthermore, jurors' focus tends to become more critical over time. If jurors focus on and talk about a corporate defendant for hours in deliberations, it is not four hours of praise, but rather four hours of critique. Consequently, each side should want jurors to talk primarily about the other side during deliberations. However, temptations exist on both sides. Plaintiffs often want to make the case about how the plaintiff has been victimized (i.e. from the perspective of the plaintiff) and defendants often want to talk about how great of an organization they are. These approaches place the focus on the client rather than the opposing party. This temptation should be avoided.

A unique feature of employment cases is that every juror has had some sort of employment experience over their lifetime. Those experiences and the attitudes that are formed from them provide template narratives for jurors to adopt and focus on over the course of trial and deliberations. In other words, there are common workplace experiences among all jurors that serve as powerful narrative filters for the evidence and testimony at trial. Once a juror has adopted this filter, it is extremely hard for the other side to shake him or her of it since confirmation bias kicks in.

Consequently, the first key to effectively litigating an employment case is controlling the focus. The plaintiff should make the case about the employer and the defense should make the case about the employee. For the plaintiff, the case needs to be presented as a referendum on the way the defendant runs its business and manages its employees. The plaintiff should tap into the common workplace experience (and cultural narrative) of the boss that is simply out to get someone and look for anecdotes that reinforce this common experience. The goal is to get jurors angry or frustrated about how the defendant operates its business. Large damage awards are the product of anger and frustration, not sympathy.

For the defense, the case should be about the plaintiff's work ethic, choices, and lack of accountability. Every juror has had the experience of the difficult or annoying co-worker who was nearly impossible to work with and created an unenjoyable work environment. The key for the defense is to tap into this common experience by developing relevant anecdotes that show a pattern of poor choices or conduct by the plaintiff. The defense wants jurors to immediately think of the difficult co-worker when they hear the evidence in the case. The goal is to activate jurors' strong sense of personal responsibility and the tort-reformer tendencies that tend to come with an unlikeable plaintiff. This does not, however, require an aggressive "attack" on the plaintiff over the course of the trial. This can often be accomplished through a "just the facts" approach that strings together anecdotes to create a pattern of poor behavior.

The second key to effectively litigating an employment case is credible and reasonable testimony by the party's representative. In some respects, many employment cases boil down to an "eyeball test" where jurors look at the witness and decide whether or not he or she seems like the type of person that would engage in the alleged behavior. For example, testimony by a plaintiff that is disorganized, sloppy, unreasonable, and/or overly defensive may reinforce the focus on the plaintiff and lead jurors to conclude that these traits are indicative of the difficult or annoying co-worker they all have worked with. Alternatively, testimony by a company representative that is rude, arrogant, and/or unreasonable may reinforce the common "bad boss" narrative.

When it occurs, this kind of failed testimony is often the product of two things. First, the witness had inaccurate views of what his or her role was as a witness. Attorneys have spent much of their lives in depositions, so they know exactly what the witness's role is, but the witness rarely understands his or her role even when he or she indicates otherwise. Instead, witnesses often take on unnecessary burdens that only create opportunities for their credibility to take a hit. Second, the witness was not given the opportunity to practice his or her testimony in advance. Attorneys never truly know how their witnesses will perform until they actually perform a mock cross-examination that throws out all of the standard attorney tricks. Attorneys can talk all day long to a witness about how to testify, but they never actually know whether or not the witness has internalized these rules and lessons until they see the witness perform. So why wait until the actual deposition? Take the time and practice in advance. It allows the

witness to fail in a safe place and it allows the attorney to provide the kind of guidance needed to help the witness overcome common hurdles and shine in his or her testimony.

The final key is jury selection. As discussed throughout this article, jurors' personal experiences and beliefs significantly influence how they perceive key issues in the case. In our experience with dozens of mock trials on employment cases across the country, jurors spend anywhere from a third to a half of their deliberation time talking about their own personal experiences that relate to the issues in the case. These personal experiences and beliefs fill evidentiary gaps and help resolve issues where it is unclear which side is right.

Consequently, attorneys need to be on the look-out for the kinds of workplace experiences and attitudes that make a juror more likely to support the other side. This type of data collection far outweighs the value of any attempts to use voir dire as a first shot at persuading the jurors. If venire members have these experiences or attitudes, an attempt to persuade otherwise in voir dire is going to have little effect. These people simply need to go, whether it is through the development of a successful cause challenge or the use of a peremptory strike. There are a variety of theories about how best to approach voir dire. The single most effective strategy is spending the time to ask questions that make venire members comfortable disclosing information about their personal experiences and attitudes, identifying those that will make a juror more resistant to the client's case theory, and removing them from the jury.

There are a lot of ways to try an employment case, but if the strategy fails to address these three keys, there is a high likelihood of failure. Conversely, these three issues provide any party a solid foundation on which they can get jurors engaged in a process of motivated rationality in which jurors focus on and embrace the evidence and testimony that favors what they want to believe about the case and ignore, discount, or reject the evidence and testimony that goes against what they want to believe.

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[i] Gerber, Steven. Jurors' Per-Conceived Attitudes: How They Impact Employment Litigation. (Accessed 12/9/15). http://www.thefederation.org/documents/P%20-GERBER.pdf

[ii] Raedeke, Art. Juror Attitudes in Employment Litigation. (Accessed 12/9/15). http://juries.com/9701art.html