Inside the Mind of a Juror: The Psychology of an Employment Lawsuit

Mention the words “employment lawsuit” and CEOs respond with terror. Some of the reasons for this fear – the exorbitant legal costs, a tarnished public image, and the inevitable work disruption – are both realistic and valid. Others, perhaps, are not. In particular, the common perception among senior executives that jurors in employment litigation are either a) from a different planet; b) temporarily insane during the trial, or c) a saboteur on the payroll of their biggest competitor, is inaccurate.

In reality, jurors are people just like you and me. They’ve worked for companies, they’ve managed employees, and they’ve generally been around the block. Understanding how jurors think during employment litigation can not only help employers prevent an unfavorable verdict should a CEO’s worst fears be realized, they can provide valuable insight into how your employees view what’s happening at work right now. In this article, I’ll share nine lessons I’ve learned serving as an consultant and expert witness during employment litigation – and how they can perhaps help human resource professionals promote a productive and lawsuit-free work environment.

Lesson #1: Strike before the iron is hot. Jurors expect employers to take action to prevent problems. In fact, in a recent juror poll, researchers found that jurors place less significance on how a company responds to sexual harassment complaints, and more emphasis on the policies and procedures designed to prevent harassment from occurring. (Gallipeau, Dan R., Jurors' Views of Sexual Harassment in 2001, New York Employment Law Practice, May 29, 2001). Waiting for a complaint and then handling it accordingly may not always be enough. Companies must actively look for ways to improve and revamp their harassment policies. Otherwise, employers may find themselves opposite an angry juror whose main question will not be “how could this happen,” but rather, “how much should it cost.”

Lesson #2: Do the right thing – promptly, consistently, thoroughly and fairly. Jurors also give great weight to the promptness of company investigations and company responsiveness to employee complaints. In a juror’s mind, one prior accusation, even if it was years ago, puts the company on notice that there may be a harassment problem. If this problem is not corrected immediately and another complaint surfaces, jurors point to this as an indication of the company’s “tendencies.”

Also, employers must be aware that even a casual mention of a concern by an employee to an immediate supervisor or low-level human resources person, even off-site, is considered notice for many jurors. Thus, it is critical for employers to promptly investigate all claims of harassment, no matter how trivial in substance the complaints may initially appear to be.

Lesson #3: Don’t look for skeletons in the plaintiff’s closet. How many times have I heard a plaintiff talk at length about the interrogation she received once she complained about offensive behavior? “Why do you think he picked you?” Why didn’t you speak up sooner?” “Didn’t the two of you used to date?” Complaining employees are slow to
forgive a manager – no matter how well intentioned – who steers the conversation to the behavior of the victim rather than the deeds of the offender. So are juries.

Jurors generally don’t like defenses that focus on the negative attributes of a plaintiff's job performance or conduct to justify a company’s decision to fire, demote, or otherwise take adverse action against the plaintiff. This often comes up in the case of a chronically tardy or permanently obnoxious employee who is never disciplined for these behaviors until s/he is terminated or complains about a manager’s behavior. In a harassment or discrimination lawsuits, jurors are focused on fixing a perceived problem with the company, not evaluating whether a plaintiff has skeletons in her closet. The "bad plaintiff" defense should never be the sole focus of a company's defense strategy, just as the “bad employee” conversation should never come up during an offensive behavior complaint.

Lesson #4: Make the punishment fit the crime – NO EXCEPTIONS. If an internal investigation indicates that harassment took place, jurors take a close look at whether the company's discipline of the harasser fits the misconduct. Jurors, like employees, generally hold a supervisor to a higher standard than a coworker. For example, 94% of polled jurors felt that a company should terminate a supervisor who physically touches an employee in a sexual manner. Most polled jurors (83% percent) said they believed that executives who sexually harass subordinates do not get disciplined severely enough by their employers.

In my experience, most jurors do not like disciplinary actions that are influenced by money. In fact, if a juror believes a harasser received less discipline because of his or her importance to the company's bottom line (i.e., the harasser is a key deal maker for the company), the juror to apply this same motivation in the deliberation room – by awarding the plaintiff more monetary damages!

Lesson #6: Jurors have a hard time trusting you. Jurors know bad things still happen at work and that it’s not always easy to speak up when they do. Seventy-two percent of polled jurors believe that sexual harassment at work may be less blatant, but it still happens. Both male and female jurors (75%) say they believe a woman who said she was sexually harassed at work. And, for employers who use as a defense the fact that an employee does not report the harassment until they file an action, the poll brings sobering news: Only 22% of the survey's respondents thought that it looked suspicious when a woman waited several months to report sexual harassment.

Jurors are, for the most part, willing to ascribe many reasons for a delay in complaining about offensive behavior, including the cultural background of the plaintiff and the need for her to "be one of the guys." Jurors are also willing to consider that a female might not want to disclose to a male supervisor that she was harassed, especially if the alleged harasser was in a senior position. From a practical standpoint, employers need to broaden their focus from legally defensible policies and procedures to a practical focus on building a respectful work culture, providing multiple channels of reporting, and teaching their managers sound interpersonal skills.
Lesson #7. Meet your employees’ expectations. A 1996 survey by Dispute Dynamics survey found that 74 percent of the potential jurors surveyed felt that employers act more unethically now than they did 20 years ago. Seventy-four percent also thought that, before terminating an employee, the employer must warn the employee, make sure the employee understands the rule or policy that has been violated and give the employee a chance to correct the problem. Jurors have certain expectations about how employees – particularly long-term ones – should be treated by their employers. Regardless of the technical merits of a case, an employer who violates these expectations may wind up on the wrong side of a jury verdict.

Of course, it’s these same interpersonal violations that often precipitate a lawsuit to begin with. Employees, for example, expect due process for performance problems, don’t like surprises (such as unanticipated layoffs), and are angered by unethical or misbehaving managers. Employers who take steps to train their managers in the interpersonal skills needed to be effective managers are likely to have less lawsuits – and to win the ones they do.

Lesson #8. Manage Your People’s Stress Level: A systematic survey/interview of 269 actual civil jurors from 36 trials [See Mott, Hans, and Simpson (2000), Law and Human Behavior, 24(4), pp. 401-419] has demonstrated that many jurors feel ill equipped to make damage judgments and consider this phase the most difficult part of their service. On top of this, the damages phase comes at a time when jurors have the least amount of energy to apply to the task at hand. Thus, jurors are tired and frustrated, but they need to find a way to come to a decision.

Under these circumstances, it is no wonder jurors use simple decision strategies to come to a final damage decision. Simple cues, such as the damage numbers the plaintiff (or defense) mention, can be powerful predictors of the final award. Likewise, levels of emotional arousal created by the case can play a greater role in the size of the verdict. Thus, the ability to get the jury angry or keep them calm about case issues can have a powerful effect on how the jury conducts its damage analysis. Isn’t the same true of managers? Managers who are overworked or under trained are most likely to make errors in judgment when handling offensive behavior complaints.

Lesson #9. Jurors feel protective of the underdog. Most people have a very normal inclination to see themselves as better than average, a tendency psychologists refer to as “self-serving bias.” It may seem counterintuitive, but this tendency very often leads jurors to be more receptive to the plaintiff’s case. Because jurors see the injured plaintiffs as less competent than themselves (and certainly less competent than a corporation), they are more likely to believe they need protection. This makes claims that the plaintiff has been taken advantage of by some larger entity are highly credible.

In the courtroom setting, the self-serving bias manifests itself when jurors seek to excuse problems in the plaintiff’s case or the plaintiff’s conduct by citing the relative incompetence of that plaintiff in comparison to themselves. It is important to note that
jurers are not simply saying the plaintiff is not as powerful or competent as a corporation. They are saying the plaintiff lacks the skill and ability of the juror. The jurors credit themselves as not having the same weaknesses (or at least not to the same extent of the plaintiff), and therefore, find it easier to understand how the plaintiff became a victim of the defendant’s conduct. The self-serving bias create problems for defendants because it means jurors may require the defense not to simply show it behaved reasonably, but that the defendant behaved in a manner sufficient to protect the more "simple-minded" plaintiff. In effect, jurors are taking a paternalistic approach to the plaintiff and the class of people the plaintiff represents.

British author G. K. Chesterton once said, “Our civilization has decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. . . . When it wishes anything done which is really serious, it collects twelve ordinary men standing round.” While there may be the occasional runaway jury, most members of a jury think a lot like your managers and employers. By understanding the psychology they use in the courtroom, perhaps we can improve the morale of the workplace.