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Employment Law

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Tips for Trying an Employment Case in Federal Court

Over the past 24 years, I have had the privilege of trying employment discrimination and harassment lawsuits in federal courts in the United States District Courts for the Northern, Central, and Southern Districts of Illinois. An overwhelming number of those cases have been tried before a jury. Hopefully, the following tips will help you obtain the best result for your clients.

Depose All Witnesses Who May Hurt You at Trial

Many attorneys prefer not to depose every single potential witness identified by the plaintiff. If the plaintiff is married, always depose the plaintiff's spouse so you can get a sense of whether the spouse is supportive of the plaintiff and whether the spouse will be sympathetic. Occasionally, a spouse will give testimony which is contradictory to the plaintiff. After once choosing not to depose a spouse in a wrongful termination case, at trial, it turned out that the plaintiff's wife was close in age, appearance, family circumstances and residence to a member of the jury. This juror cried with the spouse during her testimony and ended up being the jury foreperson. Lesson learned.

Begin with Jury Instructions

Before developing a theme and organization of your case, begin working on your proposed jury instructions and verdict form. Do not put this off. The proper jury instructions can be critical to whether you win or lose at trial. Start with the pattern instructions and then move on to researching any prior employment law cases that have been tried before your judge to get a sense of the judge's willingness to permit non-pattern instructions.

Next, find more recent employment cases that have gone to trial with a defense verdict and one or more of the same claims as in your case. Once located, log onto the electronic dockets and pull up the jury instructions that were given in the cases. If a case involves a unique claim, the research may need to be expanded outside of the jurisdiction. Also consider whether there are any appellate court decisions with pro-employer language in the ruling.

There currently are no pattern instructions for procedural due process cases. For a good place to start, look at the instructions from *Stallings v. Johnston City, et.al,* Case No. 13-422-DRH (S.D. Ill. June 21, 2016) at Doc. 123

Using the 4.15 Special Verdict form in an American with Disabilities Act case is not recommended. The form requires jurors to unanimously agree on six separate issues: whether the plaintiff was disabled, was the plaintiff qualified, did the plaintiff request an accommodation, was the defendant aware of the plaintiff's disability, did the defendant fail to provide the plaintiff with a reasonable accommodation, and would accommodating the plaintiff have posed an undue hardship for the defendant. *See* Fed. Civ. Jury Instr. 7th Cir. 4.15 (2010).

The problem with this verdict form is that the jurors may unanimously agree that the plaintiff has not met her burden of proof but disagree on the reason why. Some jurors may believe that the plaintiff did not request an accommodation,

while others may find that accommodating the plaintiff would have posed an undue hardship. Using this verdict form may prevent a jury from deciding in your client's favor when the jurors' rationale for their decision varies.

Select the Best Jury for Your Case

As you develop themes for trial, consider what type of person would make the best jury based on the facts and circumstances of your case. Take time to develop *voir dire* questions that will best uncover positive and negative juror experiences that could color their view of your case. Most federal court judges do not allow attorneys to ask questions during *voir dire.* The following questions are helpful in finding your best jurors:

- Have you ever managed or supervised and/or hired or fired other employees?
- Have you ever taken part in an investigation of any employee for misconduct?
- Have you ever been responsible for human resources in the course of your employment?
- Have you ever been terminated from a job and if so, under what circumstances? Do you believe the termination was improper?
- Do you or a close family member belong to a union? Have you or your family members ever filed a union grievance?
- Have you or someone close to you ever felt that you were treated unfairly by an employer?
- Have you, a family member or close friend ever filed a Charge of Discrimination with the Illinois Department of Human Rights or the Equal Employment Opportunity Commission? Who was the Charged filed against, what was the basis of the Charge, and what was the outcome? Were you satisfied with the handling and result of the Charge?

As you go through jury selection, keep in mind that you will never get all of the jurors you want. Divide prospective jurors into leaders and followers. Aim to keep as many pro-management leader jurors as possible. Do not waste strikes on potential plaintiff-minded jurors who are clearly followers. The followers are the least likely to be engaged during the trial, will not take notes, and may even doze off during witness testimony. It is very unlikely that such a juror will be able to make any convincing argument to the rest of the group to vote his or her way.

Tell a Compelling Story During Opening

The opening statement is your opportunity to explain the defense's theory of the case to the jury. Since jurors have not heard the facts yet, their attention will be at its peak. Tell a story with a memorable theme and evidence that is certain to come in during the trial. Many judges allow attorneys to use exhibits during opening statements if there are no objections to the document. Take advantage that opportunity to go through key documents during opening and tell the entire story in the way that benefits your client.

Use your opening statement to explain why the expected evidence will show that plaintiff's story is not credible. Since the plaintiff is typically the first witness in an employment case, alerting the jury to issues with plaintiff's testimony will hopefully cause the jury to view such testimony with skepticism from the outset. Many attorneys tell the jury how the facts will be unfolding throughout the trial and that by the end a clear picture will emerge. If possible, paint that picture right at the beginning with documents.

Draft a Careful Cross Examination of the Plaintiff

If the budget permits, videotaping the plaintiff's deposition is recommended. There is usually a noticeable disparity between a plaintiff's demeanor during a deposition versus at trial. Ideally, the plaintiff will describe a key event calmly and dispassionately in the deposition which will contrast greatly with the plaintiff's emotional state at trial when discussing the same incident. The best video clip will be a lengthy answer by the plaintiff so the jury can hopefully recognize that she is "acting" on the witness stand and is normally not as emotional as she appears.

Keep in mind that most plaintiffs' attorneys prepare their clients to virtually memorize their depositions prior to trial. Additionally, witnesses tend to have their guards down more often in a deposition than at trial. It is much easier to elicit a flippant answer, arrogant gesture, or combative response during a deposition, which when caught on video and played back during trial can be very effective. No matter how well coached a plaintiff is, during trial there will invariably be embellished testimony. If the embellished testimony sounds implausible or is a stark contrast from the plaintiff's testimony during the deposition or in response to written discovery, be prepared to highlight the change in testimony during cross examination.

Since most jurors are non-management employees, there is a natural tendency for jurors to sympathize with the plaintiff, who as noted above is almost always the first witness on the stand. The goal should be to convince the majority of jurors by the end of your cross-examination that the plaintiff should not win. This is especially crucial when one or more of your supervisors is unlikeable, not a good manager, or disciplined the plaintiff harshly for what may appear to be a minor rule violation.

A thorough plaintiff cross-examination can last a full trial day or longer, depending on the facts. Do not skimp or cut corners. Develop a list of open-ended questions that were not asked during the deposition and that you do not necessarily care how the plaintiff answers. Many plaintiffs will squirm and be uncomfortable with the questions because they are not expecting them and are unsure how to answer. Others will exaggerate and damage their credibility.

Search out Unbiased Witnesses

The most powerful witnesses for the defense are those persons who will support the defendant's case but are not employed by the defendant. Seek out former employees who can verify the plaintiff's poor performance or misconduct. Is there an employee of an outside vendor who has relevant information that will support the testimony of your management employees?

If there are customers or clients who brought complaints about the plaintiff, get over any reluctance to drag that person into your client's messy or embarrassing situation. Take advantage of these disinterested individuals' credibility with the jury as someone who does not stand to gain by either side winning or losing.

Use as Many Exhibits as Possible and Learn How to Properly Use the ELMO

Defense attorneys regularly counsel management clients to document, document, document. Clients who follow such instructions make defense attorneys jobs much easier. Many jurors have commented after a trial on how much they were influenced by the employer's documentation. Documentation helps bolster defense witnesses' testimony and keeps the

jury engaged during trial. Have all exhibits ready to go and cross-referenced with direct and cross-examinations. Avoid being the disorganized attorney fumbling around searching for documents while a witness is on the stand.

Even though jurors will be given all of the exhibits to take back to the jury room during deliberations, do not expect that the jurors will actually go through those exhibits. The time to highlight exhibits is while a witness is on the stand. Place the exhibit on the ELMO and use the screen to the left to highlight important testimony. Never place your finger on the document itself to point out anything. Jurors trying to read the document will be irritated with your finger in the way. The same is true with underlining on the screen because it invariably covers up the writing below.

If a document is especially damaging to the plaintiff, leave it on the ELMO even after moving on to a different topic. Once the document is taken off the ELMO, immediately clear off any markings on the screen. Do not leave markings on a blank screen and again risk irritating the judge and jurors. Better yet, if you are computer savvy, upload all of the exhibits onto your laptop and display the exhibits directly from your own computer.

Use the Jury Instructions to Your Advantage During Closing Argument

It is very important to go over the issues instructions and verdict forms during closing argument to ensure the jury understands the law and exactly what they are being asked to decide. Place the instructions on the ELMO as you highlight such instructions as:

> You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.
>
> In deciding [the plaintiff's] claims of discrimination and retaliation, you should not concern yourselves with whether defendants' actions in terminating [the plaintiff] were wise, reasonable, or fair. Rather, your concern is only whether [the plaintiff] has proved that defendants terminated her because of her [protected class] or in retaliation for complaining of [protected class]-based harassment or discrimination.

Fed. Civ. Jury Instrs. 7th Cir. 1.01, 3.07 (2010).

If a plaintiff is likeable or it appears that the discipline or termination was overly harsh, address that with the jury and remind them of their oath to follow the law, even if they disagree. Again, use the exhibits to tell the story and add emphasis. Exhibits help keep the jury focused during your closing and will provide structure and substance to your arguments.

Juror-Submitted Questions and Ending the Trial

Many federal court judges allow jurors to ask written questions of witnesses once the attorneys have finished their questioning. Do not be overly concerned by what may seem like pro-plaintiff or off-the-wall questions on irrelevant or ancillary issues. During my last three trials, jurors posed questions that caused the defense team great concern even though ultimately, the jurors from all three trials indicated that that majority of the jury voted for a defense verdict immediately upon beginning deliberations.

If you have any control whatsoever on the pace of the trial, the best strategy is for closing arguments to wrap up close to lunch on a Friday. Given the choice between holding firm for the plaintiff and coming back to deliberate on Monday or agreeing to a defense verdict and getting home at a reasonable time on a Friday, a follower juror almost always picks Friday happy hour. If all goes in your favor, you and your clients can enjoy a post-verdict celebration as well.

About the Author

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