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IN PRACTICE

EMPLOYMENT LAW

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Keeping the Lid on Jury Verdicts

How to reduce the risk of runaway juries in employment cases

Million dollar jury verdicts in employment cases in New Jersey have caused many sleepless nights for employment attorneys. A study by the U.S. Department of Justice in 2001 showed that the median employment discrimination verdict was $606,000, and is still on the rise. Thomas H. Cohen, J.D., Ph.D., *Punitive Damage Awards in Large Counties, 2001* (March 2001).

What can attorneys do to reduce the risk of a runaway jury verdict?

First, try personalizing the corporate defendant. Remember the old Andre Agassi commercial, "Image is everything"? Well, it is. You don't want your corporate client portrayed as a cold institution. The best way to dispel that image is to make sure you always have a corporate representative in court with you and, preferably, the same person throughout at least most of the trial. Having no one there conveys an image to the jury that the corporation doesn't care about the outcome. If permitted, be sure to introduce that person to the jury at the outset of the trial. The representative should also understand that juries are very observant. Therefore, how he dresses is important. The jury will also be watching the representative's reactions to testimony and the way he interacts with defense counsel, even outside the courtroom.

Also, make sure to utilize mock juries and effective voir dire. Jurors are the most important people involved with your case. They are the variable that can be the difference between a positive verdict for your client and impending bankruptcy. You can know your case inside and out, but the jurors ultimately hold all the cards. Fortunately, troublesome jurors can be excluded from the panel before they ever hear your case; or problem jurors can be persuaded by your presentation if you can get into their heads at the outset of the trial.

It is almost never too late to empanel a mock jury. Often laymen will give good insight concerning what a jury of their peers will consider important. A mock jury can provide valuable feedback as to style or effective techniques, as well as help you understand what portions of your case are most important in their decision making. A mock jury also can give you a better idea about the value a jury might place on plaintiff's case. This may be the difference between convincing your client to increase its settlement offer and deciding to proceed with trial. If nothing else, a dry run on the witness stand may enable your corporate client to loosen his starched collar and become more likeable.

Mock juries can also help you decide what you want your jury to look like. This, in turn, should help you craft your voir dire questions. A mock jury might surprise you concerning who would make good, or bad, jurors in your particular type of case. For example, older jurors who have worked their whole lives often are tougher on plaintiffs in age discrimination cases than younger people. Be careful, however, of how your client is perceived during jury selection. A corporation that excludes most older jurors may be planting a seed in the jurors' minds that it truly does discriminate on the basis of age.

Take advantage of voir dire (French for "to speak the truth"). Too many times attorneys fail to use this valuable process to eliminate jurors who can lead to a runaway jury. Spend time crafting appropriate voir dire questions for inclusion in your pretrial exchange. The voir dire process is the appropriate vehicle for testing prospective jurors' potential prejudice. Ask whether they believe corporations are entitled to the same protections as individuals. In high profile cases, explore the impact of any publicity. Also be aware that the *Batson* rule applies in civil cases. Therefore, you cannot use peremptory challenges to exclude a particular class of individuals unless you can come forward with evidence that the action was justifiable on the basis of situation-specific bias.

Be sure to file in limine motions. If your client is denied summary judgment, you can still file motions in limine seven days prior to trial as part of a pretrial exchange. These motions not only can streamline the case but, even if unsuccessful, can plant the seed in the court's mind regarding weaknesses in plaintiff's case.

For example, has plaintiff failed to mitigate damages? While it is a rare

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occurrence to be able to show that plaintiff didn't make reasonable efforts to mitigate, it is not unheard of. Our firm was successful on such an application in a race discrimination case where the plaintiff, who was working as a temp, was offered the identical job as a direct employee with full benefits. She turned down the job because she "no longer trusted corporate America."

A potentially bigger ticket item is emotional distress. Consider whether you can knock out these damages against the corporate defendant because it had a written antiharassment policy that was consistently enforced and supported by those at the top of the organization. Likewise, can you avoid punitive damages either because there was nether actual participation by upper management nor willful indifference? Even if these applications are denied pretrial, you may be laying the groundwork for a directed verdict.

The most obvious in limine motion is to exclude expert testimony, in whole or in part. An expert has several thresholds to meet before his testimony will be permitted. First, plaintiff must show that "scientific, technical or other specialized knowledge" will aid the jury in understanding the facts in issue. Plaintiff's expert may, for example, attempt to proffer an opinion that harassment actually occurred. Although the expert may be a licensed physician, his opinion regarding the occurrence of the asserted tort should be argued to be inadmissible. Whether harassment occurred is a question that should be decided by the jury. Expert testimony that certain conduct satisfies all of the elements of the tort will not enhance the knowledge of the average juror, nor is it an issue for which the jury will need specialized knowledge. There may not be any more damaging testimony than an expert's statement that harassment or some other underlying tortious activity actually occurred.

Disqualifying plaintiff's expert may enable your client to obtain dismissals of certain counts in the complaint. For example, if a plaintiff in a sexual harassment case fails to present expert testimony concerning emotional distress, she will still be able to prosecute her New Jersey Law Against Discrimination claim, but will not be able to prove emotional distress damages for her assault and battery claim. Additionally, if plaintiff does not have an employability or vocational expert, you may be able to exclude the economist's testimony concerning front pay as speculative.

You should also be aware before trial of the types of proof plaintiff intends to offer to establish his claims. For example, plaintiffs often want to call current or former employees to testify about prior acts or complaints of discrimination or to repeat other allegedly harassing comments. Likewise, plaintiff may attempt to offer statistical evidence to establish discrimination. Be prepared with a legal memorandum when you ask the court for a Rule 104 hearing. Each case is unique. Consider the evidence you will need to confront and determine the best method to chip away at the plaintiff's case.

Use damages and emotional distress experts. Older attorneys may remember the largest civil verdict in United States history, the $10.5 billion verdict Pennzoil obtained against Texaco in 1985. The lesson learned? Defendants should consider retaining their own damages expert. The expert can highlight for the jury errors in the plaintiff's expert's report or can utilize more reasonable assumptions when computing damages. Similarly, consider retaining a well-qualified defense psychotherapist to deal with the "wild card" in most employment cases — emotional distress damages.

Another important consideration is whether to file a bifurcation motion. Bifurcation usually means separate trials for liability and damages. To bifurcate liability from damages, a party must show that the case may be "complex and confusing...or that a substantial saving of time would result" if the issues were tried separately. R. 4:38-2. Be aware, however, that some studies have found increased damage awards in cases which were bifurcated, although no significant change in the determination of liability. Dorothy Kagehiro, Ph.D., *The Impact of Bifurcation on Jury Damage Awards*, Trial Graphix (2005). Bifurcation can also involve separating liability of an individual defendant from that of an employer being sued based upon respondeat superior. Staging the trial in this fashion can avoid issue confusion and undue prejudice. For example, testimony concerning the individual defendant's harassment of other employees might be relevant to whether the employer had an effective antiharassment policy, but this testimony might prejudice the individual defendant with regard to whether he harassed plaintiff.

Aside from emotional distress damages, the engineer of a runaway jury in employment cases is punitive damages. Therefore, it is important to constantly remind the court that punitive damages are rare and that the plaintiff has an extremely difficult burden to meet.

Under New Jersey law, to be entitled to punitive damages a plaintiff must prove that defendant's conduct was wantonly reckless or malicious and especially egregious. Furthermore, the plaintiff must demonstrate that "upper management" actually participated in or was willfully indifferent to the alleged wrongful acts. Repeating this underlying "no malice" mantra can be persuasive, as there are numerous cases that address conduct in employment cases not reaching the level necessary to warrant punitive damages.

If your client does lose on punitive damages, be sure to know the caps under the law. The New Jersey Punitive Damages Act limits punitive damage awards to the greater of five times the compensatory award or $350,000. N.J.S.A. 2A:15-5.9 et seq. However, this damages cap is inapplicable in whistleblower cases under CEPA as well as claims under the LAD. On federal claims, the Civil Rights Act of 1991 also has its own caps on compensatory and punitive damages.

Runaway jury verdicts are no longer just fodder for movies and other works of fiction. Even more frightening, the risk of a runaway verdict in an employment case has increased steadily as juries are punishing deep-pocket corporations with more regularity. Hopefully your client has been protected by an arbitration clause, or a jury waiver within an employment agreement or application. If not, there still are important steps you can take to limit your client's exposure at trial. ■