# Trial Strategies in the Courtroom for Discrimination, Harassment, and Retaliation Cases

**A Lexis Practice Advisor® Practice Note by Rachel Ziolkowski Ullrich, FordHarrison LLP**

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This practice note provides guidance on employer-side courtroom strategies for discrimination, harassment, and retaliation trials.

Specifically, this practice note covers the following topics:

- Voir Dire Best Practices and Jury Selection Strategies
- Opening Statements
- Cross-Examination of the Employee
- Cross-Examination of Other Witnesses
- Cross-Examination of the Employee's Experts
- Common Objections to Plaintiffs' Attorneys' Questions and Proffered Evidence
- Motions for Judgment as a Matter of Law (Formerly Motions for Directed Verdict)
- Essential Evidence to Introduce in Discrimination, Harassment, and Retaliation Trials
- Direct Examination of Supervisors and Other Witnesses
- Charge Conferences and Jury Charges
- Closing Arguments
- Posttrial Motions

For information on employment litigation issues related to discrimination, harassment, and retaliation, see Employment Litigation—Discrimination, Harassment, and Retaliation practice note page. For a practice note discussing the key stages of defending single-plaintiff employment discrimination cases, see Employment Discrimination Litigation: Defending Single-Plaintiff Cases. For employment litigation forms for discrimination, harassment, and retaliation cases, see Employment Litigation—Discrimination, Harassment, and Retaliation forms page.

**[>] Video:** For a three-minute video on how to access employment litigation practical guidance in Lexis Practice Advisor (LPA) – Labor & Employment (L&E), see Employment Litigation Resources on LPA L&E. For a transcript of the training video, see Employment Litigation Resources on Lexis Practice Advisor Labor & Employment: How-to Video.

For more information on state laws concerning discrimination, harassment, and retaliation, see Discrimination, Harassment, and Retaliation State Practice Notes Chart.

## Voir Dire Best Practices and Jury Selection Strategies

Depending on your jurisdiction, voir dire may be your first opportunity to tell your story to the jury. If so, take advantage of that opportunity and spend time educating the venire about your case, especially the reason for the adverse employment action.

Further, while voir dire is an excellent opportunity to introduce your future jury to your good facts, be sure to spend time discussing some of your less favorable facts. In an employment law case, you may be dealing with allegations of racial epithets, homosexual slurs, or sexual comments that would make some people blush or cringe. Do not shy away from using those terms (the exact terms, no shortcuts

or nicknames) during voir dire. If you do not use the precise words used, you will never know which jurors feel so uncomfortable with those words that they would never find in favor of the employer—even if you prove that the alleged discriminator/harasser never said them or that the employer fired the person the moment the words came out of his or her mouth.

Unfortunately, in an effort to make trials more efficient, many courts take the lead in conducting voir dire based on a list of questions each side has submitted. While this "judge led" voir dire procedure might possibly make the jury selection process a bit faster, you may have to waste one of your precious strikes on a member of the venire simply because they did not answer any questions asked by the court. Nothing is scarier than having a juror on your panel that you know virtually nothing about. Luckily, you will likely be given some opportunity to ask follow-up questions with the jurors who did raise their hands to specific questions. Do not shy away from that opportunity and take your time to get the answers you need.

## Sample Employment Law Voir Dire Questions

Here are a few examples of some essential employment law voir dire questions:

- Have you or any close family member ever been employed with the defendant? If so, what was your experience?
- Have you ever been involuntarily terminated from a job? Or (in constructive discharge cases) have you ever felt compelled to resign from a job because of the working conditions?
- Are you or have you recently been in a position where you supervise people?
- Have you ever had a complaint filed against you by one of your co-workers? Have you ever made a complaint at work? How did you feel the company handled it?
- Have you ever felt discriminated against/harassed/retaliated against in the workplace? Or, more generally, have you ever felt that a supervisor/co-worker treated you differently because of your race/sex/national origin/etc.?
- Have you or any close family member made any complaints to human resources about a co-worker or supervisor? How did you feel your company handled your complaint?
- Have you ever filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) or any state equivalent? Why? What was the result?
- Have you ever made a request for a disability or religious accommodation in the workplace? How did you feel your employer handled it?
- Have you ever had to make a request for medical leave? How did you feel your employer handled it?
- Have you ever been a caretaker for a family member and those responsibilities caused you to take time off of work? How do you feel your employer handled your request?
- Are you a member of a labor union or do you work in a unionized setting?
- Have you ever felt like you were discriminated against/harassed/retaliated against in the workplace and decided not to make a complaint? Why did you make that decision? (As a result of the #metoo movement, it is important to ask this question in every employment law case. If #metoo has taught us anything, it is that a vast majority of discrimination and harassment claims go unreported and the last person you want on your jury as an employment defense attorney is someone who cannot separate their prior bad workplace experience from the facts of your case.)

## Ask Case-Specific Questions

You should, of course, always ask case-specific questions. In employment law cases, you may be delving into some sensitive issues that some jurors may be hesitant to discuss. For example, in sexual harassment cases, you may have to ask questions about their feelings or experiences with domestic violence or sexual assault or workplace "horseplay." In race discrimination cases, you may have to discover the jurors' feelings about civil rights, white privilege, the use of the N-word, or the KKK. In disability discrimination cases, you may have to ask about jurors' health issues. Be sensitive to the jurors' needs for privacy (you will likely be asking the more personal questions at the bench), but be as thorough as you can be with your questioning.

## Consider Carefully Jurors' Professions

As an employment defense litigator, try to keep jurors whose professions require strict adherence to rules. For example, accountants, engineers, scientists, and lawyers generally have an innate understanding that if you break the rules, there are consequences. As "actions have consequences" is often an underlying theme to most employment discrimination cases, jurors with that innate understanding can be valuable. Likewise, certain professions foster the belief in second chances, including teachers, social workers, counselors, and nonprofit workers. Jurors in these professions are more likely to ignore the "business judgment" rule (i.e., good faith business decisions will not be second guessed) and find for the plaintiff if they believe the employment decision was harsher than the one that they would have made themselves.

You should also look for business owners and people who have worked in management roles as they often understand

the challenges of supervising employees and may have had to terminate or discipline employees under their supervision. You should exclude, however, anyone who has worked in any type of quasi-supervisory role as a unionized employee, such as a shop steward, or anyone who works in union leadership. While unionized employees could be perceived as rule followers because their workplace rules are specifically set out in their collective bargaining agreement, the stereotypical "union mentality" is very suspicious of companies in general. Such views might place an additional (and unnecessary) burden on your case.

Of course, there are exceptions to every rule. At the end of the day, trust your gut. If there is something about a juror that is telling you to strike them, strike them. You will only regret the strikes you do not make.

### Be Mindful of Your Actions – The Jury Is Watching

A final note on juries: jurors see everything you are doing, no matter how small. Jurors will notice if you are disorganized. Jurors will notice how you treat your co-counsel (or opposing counsel). They will see how you treat your staff. They will see you rolling your eyes at opposing counsel (or the plaintiff) or cursing the court's ruling under your breath. They will see you bite your nails or twirl your hair. Act accordingly.

## Opening Statements

We are taught in law school that every trial should have a theme. Yet, attorneys often struggle to find themes when they are first preparing an employment case for trial. In the days and weeks leading to trial, whiteboards will be filled with different possible themes and variations thereof. Many of those themes get erased or modified after meeting with trial witnesses or rereading plaintiffs' depositions. As you are organizing how you are going to present your case and start figuring out the story you want the jury to hear, you may find yourself coming back to one theme more than others. That is usually the theme to go with at trial.

Do not overthink your theme. It should be short, simple, and most importantly, relevant to your case. Do not introduce a theme just for the sake of having a theme. It is better to have no theme at all than to have a theme that does not fit your case.

Sometimes your theme could be as simple as "actions have consequences" or "three strikes and you are out." You may be inspired by the trial exhibits or deposition testimony in the case. You may find your theme in the employer's mission statement contained in the employee handbook to the extent it summarizes the reasons why the plaintiff was terminated.

Although most jurors take their jobs very seriously and do listen to and look at the evidence throughout trial, it is often said that most jurors make up their minds about a case during opening statements. Accordingly, a well-crafted opening statement will allow the jury to focus on what you want them to hear from the very beginning of trial.

You should tell your story succinctly. Tell the jury what the most important evidence will show, but do not get too bogged down in the details. Remember, if you tell the jury they are going to see a document or hear certain evidence, make sure they hear or see that evidence.

When telling your story in an employment law case, you should always keep in mind the "F-word": "Fair." For example:

- A jury wants to believe that the employer had policies in place, that the employee knew about the policies, that the plaintiff violated those policies, and that the punishment fit the crime.
- A jury wants to believe that the employer took the employee's complaints seriously and at least investigated the complaint.
- A jury wants to believe that the employer made some attempt to engage in the interactive process and presented reasonable alternatives to the employee.

It is essential in your opening statement that you give the jury a reason to believe that your client tried to be fair with the employee. A jury can forgive a lot of things if they believe the employer tried to be fair, even if the jury feels the outcome was not necessarily the one they would have chosen.

You should give the jury assignments. Challenge them to look at the evidence you want them to look at and focus them in on the key evidence favorable to your case:

- "Read Ms. Smith's emails to her supervisor."
- "Study Mr. Jones' complaint to HR and try to find any mention of the word 'religion.'"
- "Listen to Mr. Wilson's testimony and see how often he tried to give the plaintiff an opportunity to succeed."

Your assignments will cause the jury to pay attention to certain testimony during trial because you have told them it is important.

### PowerPoints and Graphics

Should you use PowerPoints and graphics during opening? Trials are stressful enough for most litigators without having to worry about whether technology will work properly. Moreover, consider that as a defense attorney who often represents large companies, you might want to be as low tech as possible, particularly if the other side is represented

by a small firm or solo practitioner. "David vs. Goliath" is a common plaintiff's side theme in employment law cases. High tech gadgets and presentations often feed into that narrative. But if you feel you must use a PowerPoint, be sure it only supplements your opening. It should not be your opening.

## Cross-Examination of the Employee

Every plaintiff's cross-examination is different, depending on the facts of the case and the personality of your plaintiff-employee. Many times, you are walking on a tightrope between being tough on the witness and looking like you are attacking the alleged victim. You should do your best to be as respectful as you can—which may be difficult given the plaintiff's reaction to your questions. However, as mentioned above, the jury sees everything, and you would rather have the jury focused on the plaintiff being rude, argumentative, or, at times, unhinged (particularly if those are some of the reasons they were fired), than you being disrespectful to the witness. Do not let them get under your skin.

Your goal in cross-examining a plaintiff-employee is often to poke holes in the story they are now telling. You should emphasize changes in their story over time, particularly if you have a good investigation record. Most jurors understand that employers can only act on information they knew or should have known at the time. They do not expect employers to be mind readers.

If the employee never mentioned a key fact in any of their complaints or in any of their statements (including their charge of discrimination), you must question the witness about that.

For example:

> Q. Now, you went to the EEOC on April 12, 2017, correct?
>
> Q. And that was one week after your termination of employment?
>
> Q. And you signed this charge under oath, under penalty of perjury?
>
> Q. And you had the opportunity to write anything you thought was important for the EEOC to know about what happened to you at XYZ company?
>
> Q. And you filed this charge before you filed this lawsuit where you are seeking money damages?
>
> Q. And while you mention in this charge some comments your supervisor made, you did not say anything about him touching your breast, did you?

You should spend time in your cross-examination focusing on the F-word (i.e., fair). If you can show the jury through the plaintiff's own testimony that the employer tried to be fair, even if it made a few mistakes, you have taken an important step towards a defense verdict. If appropriate, you should focus the jury on the fact that the plaintiff-employee knew the rules (because of the company's policies or prior discipline or discussions) but failed to follow them. Further, if you can, show the jury that your witnesses listened to the plaintiff's complaints and were not only polite but took at least some action (even if, in hindsight, they could have done more or something different), then get that testimony from the plaintiff on cross-examination.

Do not forget to address the plaintiff's duty to mitigate damages. It is the defendant's burden to establish this affirmative defense. Explore with the plaintiff all the ways they could have looked for a job but did not. Juries do not like the idea of someone sitting around waiting to collect a paycheck from a lawsuit.

For practical guidance on plaintiff's duty to mitigate damages in employment discrimination cases, see Mitigating Damages in Employment Discrimination Cases.

## Cross-Examination of Other Witnesses

There are several categories of witnesses you will likely have to examine during plaintiff's case-in-chief.

### Witnesses of the Alleged Events

These witnesses can make or break your case so tread lightly but not too lightly. You should focus on any inconsistencies with their stories which have developed over time. Did they write any statement nearer to the time of the incident which tells a different story? Is this witness the best friend of the plaintiff? Does this witness have an axe to grind with the company because they were terminated? The more motive you can give a jury for this witness's unfavorable testimony the better.

### Spouses and Family Members

These witnesses are often presented in the hopes of increasing plaintiff's compensatory damages. They can be tricky witnesses to cross-examine because of the emotional aspect of their testimony and their strong desire to assist their loved one win their case (and all of those damages). These witnesses, however, are unlikely to have any personal knowledge regarding any alleged discriminatory conduct so you should focus on that rather than getting into any arguments with them about how distressed their loved

one may (or may not) be. Make the point that they have no personal knowledge of what happened at the office and then get them off the stand as quickly as possible.

### The "Me Toos"

These witnesses are offered in an attempt to show that the company has a history or pattern of discriminatory/harassing/retaliation against its employees. You should focus your questioning on every way their issues differ from the plaintiff's. These types of witnesses and evidence should be addressed prior to trial in your motion in limine, particularly if the relationship between their complaints to your facts is tenuous at best. However, to the extent this testimony is allowed into evidence, you must inform the jury that plaintiff is attempting to compare apples and oranges. Did they have different supervisors? Is the alleged discriminator/harasser different? Did they work at different locations? Were they terminated for different reasons? In addition, if the witness never made a complaint about the issues to which he or she is testifying, bring that out in cross-examination. Most jurors will understand that employers can only act on something they knew or should have known about.

## Cross-Examination of the Employee's Experts

We are seeing fewer expert witnesses in employment law cases. The statutory damages that are available in most employment cases simply do not justify the cost of an expert unless the employee is highly compensated.

Keep in mind that you can calculate damages in most employment law cases with a calculator. Once you calculate plaintiff's back pay with that calculator, the rest of the damages flow from the statute.

The most common expert in an employment law case is the economic expert, put on usually to justify front pay damages. Their testimony is often very technical and boring. You do not need to spend a lot of time with these witnesses. Focus on what their numbers do not take into consideration—usually plaintiff's ability and/or failure to mitigate.

## Common Objections to Plaintiffs' Attorneys' Questions and Proffered Evidence

- **Hearsay, hearsay, hearsay.** Before every trial, review the hearsay rules—they are supremely important in employment cases. Plaintiffs often want to prove their cases by what they heard about other people or what other people told them. Keep your ears open for this testimony and object accordingly.
- **"Me too" evidence (not to be confused with #metoo).** Plaintiffs also often want to prove their cases by introducing facts about other lawsuits or claims brought against the company for other alleged discriminatory conduct. In the context of single-act employment discrimination claims, federal courts have recognized the so-called "me too" or "other acts" evidence of "behavior toward or comments directed at other employees in the protected group is one type of circumstantial evidence that can support an inference of discrimination." Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008); see also Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1287 (11th Cir. 2008).

  However, while the U.S. Supreme Court has held that testimony by nonparty employees about discrimination can be relevant in a single-act discrimination case and that any per se exclusion of such evidence would constitute an abuse of discretion, the admissibility of such evidence must be determined on a case-by-case basis. Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379, 380–81 (2009). The analysis is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." Sprint/United Management Co., 552 U.S. at 388. These factors include "temporal and geographical proximity, whether the various decision-makers knew of the other decisions, whether the employees were similarly situated in relevant aspects, or the nature of each employee's allegations of retaliation." Griffin v. Finkbeiner, 689 F.3d 584, 598–99 (6th Cir. 2012).

  In determining whether to exclude me too evidence, courts have also considered "whether it's the same place, the same time, the same decision makers, or whether it's such that the people who are making the decisions reasonably should have known about the hostile environment." Bennett v. Nucor Corp., 656 F.3d 802, 810 (8th Cir. 2011); see also Elion v. Jackson, 544 F. Supp. 2d 1, 8 (D.C. Cir. 2008) (considering "whether such past discriminatory behavior by the employer is close in time to the events at issue in the case, whether the same decision-makers were involved, whether the witness and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated.").

  You will want to do your best to exclude or, if unsuccessful, distinguish and/or otherwise minimize the importance of other discriminatory conduct.

- **Evidence regarding issues which have already been dismissed.** If portions of plaintiff's lawsuit have been

dismissed before trial, you will need to decide if there is any evidence that no longer belongs before the jury. Courts often exclude evidence relating to claims that have been dismissed as irrelevant and inadmissible. See, e.g., Bryce v. Trace, Inc., 2008 U.S. Dist. LEXIS 27310, at *6 (W.D. Okla. Mar. 31, 2008) (explaining that excluding "all references to claims asserted in the Complaint that the Court has resolved by summary judgment . . . is common practice"); Williams v. Hooker, 2008 U.S. Dist. LEXIS 40313, at *8 (E.D. Mo. May 19, 2008) ("Plaintiff may not reference claims that were dismissed by the Court in the Summary Judgment Order."); Howard v. Gray, 907 F. Supp. 2d 128, 130 (D.D.C. 2012) (granting motion in limine to exclude the plaintiff "from introducing evidence regarding [the] now-dismissed claim that he was denied a reasonable accommodation of his disability"); Artunduaga v. Univ. of Chi. Med. Ctr., 2016 U.S. Dist. LEXIS 169460, at *8–11 (N.D. Ill. Dec. 8, 2016) (granting motion in limine to exclude evidence of dismissed claims because such "evidence would only serve the purpose of 'dirtying up' [the defendant] with unrelated bad acts").

- **Supervisor's past or subsequent discipline.** Plaintiff's counsel often try to introduce evidence of the supervisor/decision-maker's other "bad acts." If those prior bad acts or discipline are not related to any claims of discrimination/harassment, retaliation, you should try to keep them out. The mere fact that the supervisor may have violated another company policy at some point does not make that individual more or less likely to commit acts of discrimination, harassment, or retaliation. Such evidence can also be unduly prejudicial under Rule 403 of the Federal Rules of Evidence. Fed. R. Evid. 403.

# Motions for Judgment as a Matter of Law (Formerly Motions for Directed Verdict)

Depending on the testimony and evidence, you may have another shot to obtain dismissal of some or all of plaintiff's claims—following her case-in-chief and prior to the conclusion of the trial—via a motion for judgment as a matter of law. Fed. R. Civ. P. 50. You should be able to prepare this motion by converting your summary judgment papers (assuming you filed such a motion), supplemented by relevant testimony that has been heard/admitted. As an aside, even if the chance of success is low, the cost to prepare is also often low and these motions provide younger associates with an excellent opportunity to get their first trial experience.

# Essential Evidence to Introduce in Discrimination, Harassment, and Retaliation Trials

## Exhibits

While your exhibit list should be comprehensive, there are only a few essential documents that you need to try most employment law cases.

- **Employment policies.** Depending on the type of case you are trying you will need to present the applicable harassment, discrimination, and/or anti-relation policy as well as any acknowledgements showing that the plaintiff signed those policies. The introduction of your client's sexual harassment policy is essential in those types of cases as it will prove part of your *Faragher/Ellerth* affirmative defense (i.e., that the employer exercised reasonable care to prevent and promptly address the harassment and the employee failed to take advantage of the preventative measures). If plaintiff and/or their supervisors received training on these policies, you should also offer those into evidence. You also should admit any policies which the plaintiff violated which led to the adverse employment action(s) at issue. If your client actually followed their progressive discipline policy, introduce that as well. On the flip side, be sure your witnesses are prepared to explain why the progressive discipline policy was not followed.
- **Documentation regarding any relevant discipline.** It is natural to think you should introduce every disciplinary action the plaintiff ever received during their employment to show what a horrible employee the plaintiff was. That would be a mistake. You should only introduce relevant disciplinary actions and, before even doing that, you should ask yourself, "What, if anything, does this disciplinary action add to my story?" This is a particularly important exercise in retaliation cases. If your plaintiff engaged in more serious misconduct years before her complaint and was not fired for that conduct, introducing that evidence could undermine your present case.
- **Termination documents.** These documents are often simple personnel action forms that frequently do not tell the entire story about why the plaintiff was terminated but should nevertheless be introduced.
- **Investigation documents.** A well-written investigation report may be all you need to prove your case. Unfortunately, sometimes they can be the bane of your

existence at trial because they are written by someone who was inexperienced with how to write a proper investigative report. A poorly written investigative report often strays from the facts, comes to conclusions about witnesses, or makes findings you do not necessarily want the jury to reach. At the end of the day, you have to work with what you got. Again, address any issues head on with simple explanations (e.g., the investigator may not have seen a particular document or interviewed a particular witness) and get the jury to focus on the parts of the document which are good for your case.

For practical guidance on workplace investigations, see Documenting Key Events in Workplace Investigations and Workplace Investigations: Step-by-Step Guidance. For a sample workplace investigation report, see Workplace Investigation Report.

- **Interactive process documents.** In disability and religious discrimination claims, interactive process documents are often essential. Employers do not need to provide the exact accommodation an employee desires; they are only required to provide reasonable accommodations. The more you can show your client tried to work with the employee, the better.
- **Failure to mitigate evidence.** You should focus on the plaintiff's work search records. Is the plaintiff only looking once a week? Is he or she only logging the minimum number of jobs required to obtain unemployment benefits? Is he or she looking for positions for which he or she has no experience or for which he or she is not qualified? Look at the applications/resumes produced in discovery. Is there information in them that would give a subsequent employer pause to hire him or her?

  Never forget that it is the defendant's burden to prove failure to mitigate damages. Some courts require defendants to demonstrate not only that the employee failed to exercise reasonable diligence to obtain subsequent employment but also that there were available positions for which the plaintiff failed to apply. See West v. Nabors Drilling USA, Inc., 330 F.3d 379, 393 (5th Cir. 2003). If the plaintiff has made some mitigation efforts, it is important that the defendant produce some evidence of available jobs in the area, which can be done by introducing competitors' job ads for similar positions. For practical guidance on plaintiff's duty to mitigate damages in employment discrimination cases, see Mitigating Damages in Employment Discrimination Cases.

For resources that give you a starting point in preparing and responding to fact discovery requests in various types of employment litigation including discrimination cases, see Employment Litigation Discovery Resource Kit. For an overview of how to draft, serve, respond, and object to written and document discovery in federal court, including interrogatories, document requests, subpoenas, and requests for admission, see Written and Document Discovery Resource Kit (Federal) in Lexis Practice Advisor's Civil Litigation practice area.

### Testimony

- **The fairness factor.** As previously stated, the most important testimony you can elicit are examples of how the employer treated the employee fairly. It may have not been a perfect decision, it may not have been the action the jury would have taken, but if you can show the jury that your client tried to be fair as often as possible (or even when it counted most), you've come a long way to a possible defense verdict.
- **The straw.** When meeting with the decision-maker(s) for the first time, ask, "okay, so what was the straw?" You may get some blank stares, while others will understand the question. This question asks what was "the straw that broke the camel's back" (i.e., what ultimately caused the decision-maker to decide that termination was the best decision). The straw can be an isolated incident, or it can be a series of events, but your decision-maker must be able to articulate the straw on the witness stand and, more importantly, believe that the decision was proper.

## Direct Examination of Supervisors and Other Witnesses

As a practical matter, you will likely spend most of the plaintiff's case-in-chief presenting your own witnesses, so you will need to be prepared accordingly. While technically you can wait to present your witnesses until defendant's case-in-chief, neither the court, nor the jury, will appreciate the likely duplicative testimony and the waste of their time. Further, you might prefer to examine witnesses during plaintiff's case-in-chief because it will give you the opportunity to tell the jury the other side of the story as soon as possible.

Witnesses in employment cases are often worried before trial about having to remember every last detail. While the details are important, in employment matters you are often trying cases years after the events happened. Jurors will understand small lapses in memory regarding the minor details as long as your witnesses remember the big picture. The sequence of events is usually more important than remembering exact dates and, besides, you will often have documents which will allow your witness to provide the exact dates you need. Let your nervous witnesses know these things to help ease their minds.

## Supervisors

The best supervisory witnesses are those that tell the company's story as naturally as possible. They have an easy way of communicating with the jury and do not in any way appear coached. These supervisors are usually good at being supervisors, so they usually are not your alleged discriminator/harasser.

That said, there is nothing natural about testifying before a roomful of strangers about something that happened years ago. That is okay. Your supervisor can appear nervous and uncomfortable as long as they do not appear like a liar (or worse). To combat nervousness, if they have been deposed, ask the witness to review their depositions at least three times prior to trial. The more comfortable they are with their prior testimony, the less nervous they will be in the witness box.

Again, when conducting your direct examination of a supervisor, focus on the fairness factor. Have them testify about all the things they did to help the employee improve their performance. Have them calmly explain why they had to discipline the plaintiff when they did. If they followed a progressive discipline policy, emphasize that.

Do not insult the jury's intelligence by "putting lipstick on a pig." If you have bad or not-so-great facts involving one of your witnesses, address them head on. If one of your decision-makers has a disciplinary issue that gets in to evidence, have them explain what happened, simply, contritely and in their own words. If your witness made a mistake, have them own up to it or explain why the mistake was made with the simplest explanation possible. Remember, the party that has the most explaining to do often loses the employment law case, so it is important that the explanation be simple and logical. Jurors are capable of understanding mistakes, but if they sense a cover-up, you will be fighting an uphill battle.

Interestingly, one question witnesses often get anxious about is one that should be the easiest in any employment case: "What is the company's discrimination/harassment/retaliation policy?" Witnesses often respond with a nervous, blank look. They know the answer to the question, but they are afraid that their answer of, "it's prohibited" is just too simple to be the correct answer. Now imagine if that blank look occurs in front of a jury. Not only will the jury think the employer does not properly train its supervisors on its policies, but it will think this employee did not know that such conduct was a violation of the policy.

A good plaintiff's counsel is going to do their best to make your decision-maker(s) second-guess themselves. These are the "should've, could've, would've" questions and your witnesses should be prepared for them. If a witness is starting to second-guess themselves during trial prep, provide a pep talk such as:

> Plaintiff is accusing you of being a racist. Are you? [No]
>
> When you issued this disciplinary action did you believe at the time that it was the fair and appropriate thing to do? [Yes]
>
> Did Plaintiff's race play any role whatsoever in your decision? [No]
>
> Then OWN your decision. TAKE RESPONSIBILITY FOR IT. You didn't do anything wrong. Don't question yourself now.

If the decision-maker appears confident in why they made the decision, a jury is more likely to believe that was the true reason for the decision and not a discriminatory one.

## Co-workers

While having the decision-makers testify is important, you should not forget the importance of eliciting testimony from the plaintiff's co-workers. In many juror's minds, supervisors are just the mouthpiece for the company whose loyalties might outweigh the truth. On the other hand, the plaintiff's peers are considered to be more truthful because they are perceived to have nothing to gain from their testimony. A co-worker who supports the company's version of the events is therefore a potentially great witness to have.

## The Alleged Harasser

The alleged sexual harasser will be one of your toughest direct examinations of your career. The plaintiff's counsel will probably spend most of his or her case-in-chief trying to convince the jury that this witness is a pervert and your jury is going to be anxious to see who this person is. Start the examination by having this witness share something personal about themselves as people generally are most comfortable talking about themselves. If you can humanize this witness and make them likeable early on, a jury is less likely to assume "perversion." Have the witness talk about his kids, how he paid his way through college working at McDonald's, how he runs marathons to raise money for cancer, and any other similarly positive background facts.

## Employer's Experts

In most single-plaintiff employment cases today, employers do not go to the expense of hiring an expert witness because the damages available usually do not justify the costs. Damages experts are usually only retained if the plaintiff has hired one and then only if the damage model is considerably high. We see them most often in age discrimination cases

where there will be a calculation of damages through the age of retirement and beyond.

If you do retain a damages expert, you should prepare the expert to testify that a shorter front pay period is warranted based on a consideration of the following relevant factors:

- The plaintiff's work-life expectancy
- The plaintiff's salary and benefits at the time of termination
- The plaintiff's future in the position from which the employer terminated him or her, including anticipated raises or promotions
- The availability of comparable work opportunities
- How long it may take the plaintiff to find a new job through reasonable effort
- The best method to discount the award to net present value

Whittington v. Nordam Group, Inc., 429 F.3d 986, 1000 (10th Cir. 2005); Madden v. Chattanooga City Wide Service Department, 549 F.3d 666 (6th Cir. 2008).

Note that courts frequently limit front pay awards to one or two years on the grounds that front pay is inherently speculative and that a court must balance the plaintiff's right to be made whole against the possibility of an unfair windfall. Courts may also limit front pay awards because of the plaintiff's age or other circumstances, including subsequent intervening events which would have cost the plaintiff his or her job even absent discrimination (e.g., a merger between the employer and another company, a reduction in force, or the termination of the employer's operations).

For information on the role of front pay as an equitable remedy for violations of Title VII of the Civil Rights Act on 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), see Front Pay Awards in Employment Discrimination Cases (Federal).

For an overview of the use of expert witnesses in a federal case, including identifying and retaining experts, disclosing expert witnesses and expert reports, deposing expert witnesses and defending expert depositions, and drafting Daubert motions and motions in limine, see Expert Witness Resource Kit (Federal) in Lexis Practice Advisor's Civil Litigation practice area.

## Charge Conferences and Jury Charges

Most jurisdictions have pattern jury instructions for employment law cases. Unfortunately, many employment lawyers who are not regular trial attorneys assume the judge is going to simply use the pattern instruction and do not bother to preserve possible error by properly and specifically objecting to the charge, submitting alternative language, and obtaining a ruling on the record. Remember, the court of appeals cannot consider your alternate instructions if you never submitted them to the trial court and got a ruling on them on the record.

By the time you reach the conference, just about everyone participating in the trial is ready for it to end, but take the time to properly preserve error on the jury charge. While the pattern jury instruction may be easier, it does not necessarily represent the current state of the law. Pattern instructions are often crafted by a committee from both sides of the courtroom. That means that they are often a product of compromise, and compromise does not necessarily reflect an accurate statement of the most recent law.

You should also make sure you have all of the necessary predicate questions in your charge. For example, do you have a question about whether plaintiff was a qualified person with a disability? Do you have a malice question before your punitive damages question?

## Closing Arguments

You have presented all of your evidence. The witnesses have all testified. You have the charge the court intends to read to the jury. Now it is time for the final act—closing arguments.

- Begin and end with your theme. In between, go through the evidence and why it shows your client did not discriminate/retaliate/harass.
- Do not forget the fairness factors and the straw (where appropriate).
- Remind the jurors of the assignments you gave them in opening and how that evidence (or lack thereof) proves your case.
- Question whether to give the jury numbers during closing. If the case has gone well, the easiest thing to do is tell the jury that if they answer "No" to certain questions, no math is necessary or required and everyone can go home. However, when a case is too close to call and plaintiff's counsel has put numbers forward, sometimes you must give the jury alternatives. Focus on the calculation of back pay because, most likely, any other number will flow from the back-pay amount.
- Rest your case and "rest." The matter is out of your hands, for now. Temper your client's expectations, be prepared to discuss options in case the verdict is not favorable, and find some time to de-stress.

# Posttrial Motions

If the jury returns a partial or complete verdict in favor of the plaintiff, you and your client—possibly with input from your client's insurance carrier who may be paying your legal fees—will need to decide whether to file one or more posttrial motions. (Appeals are not addressed here).

## Renewed Motion for Judgment as a Matter of Law

A renewed motion for judgment as a matter of law must be filed no later than 28 days after the entry of judgment under the federal rules and there are no extensions. Fed. R. Civ. P. 50(b). It should be in writing and must set forth the judgment sought and the law and facts that entitled the movant to judgment as a matter of law (JMOL). These are most often made when the evidence presented was legally insufficient to support the jury's verdict. If the court grants you renewed JMOL, it will either render judgment for the movant or grant a new trial. Remember, a court cannot render judgment if you failed to make a prejudgment JMOL.

## Motion for a New Trial

A motion for a new trial also has a 28-day deadline. Fed. R. Civ. P. 59. It moves the court to correct an error by granting a new trial. If you already properly preserved error by timely objecting to it during trial, you do not need to reassert it to preserve that error. However, if you could not have timely objected at trial, then you need to file a motion for a new trial to preserve error on appeal. In employment cases, we often deal with motions for partial new trials when a remittitur is needed because the jury verdict is in excess of the statutory damage caps. Sometimes this reduction can be made without the necessity of a new trial.

For a checklist discussing key issues counsel should consider before making a post-judgment motion, see Post-judgment Motions Checklist (Federal) in Lexis Practice Advisor's Civil Litigation practice area.

For general information on motion practice, see Making and Opposing a Motion (Federal) in Lexis Practice Advisor's Civil Litigation practice area. For a supporting affidavit that may be used in a federal district court case, see Affidavit (Federal) in Lexis Practice Advisor's Civil Litigation practice area. For a notice of motion that can be used to make a motion in federal district court case, see Notice of Motion (Federal) in Lexis Practice Advisor's Civil Litigation practice area.

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Rachel Ziolkowski Ullrich is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

Rachel represents employers in all areas of labor and employment law, including jury trials, arbitrations and a variety of administrative hearings (EEOC, Texas Workforce Commission, Department of Labor and other state and federal agencies).

Rachel also provides training and counseling services to clients in all areas labor and employment law including employee discipline and terminations, medical leave and workplace accommodation issues, wage and hour issues, policy creation and implementation and labor relation issues.

Rachel routinely advises clients on the creation and enforcement of restrictive covenants such as non-disclosure, non-solicitation and non-competition agreements, including obtaining temporary restraining orders and temporary/preliminary injunctions to prevent departing employees or competitors from violating restrictive covenants or using clients' trade secrets. She also defends companies unfairly accused of trade secrets misappropriation and related claims.

Rachel has represented companies in a wide range of industries including retail, hospitality, oil & gas, automobile dealerships, assisted living, printing, insurance, manufacturing, aviation, technology and non-profit.







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