

Perspectives

Insights From Colleagues of UE

Juror Attitudes in Harassment and Discrimination Suits

By Dan Gallipeau and Steven Gerber

Before deciding whether to take a case to trial, employers—including educational institutions—must consider the attitudes of potential jurors. Employment discrimination claims are among the most difficult to assess and require identification of the preconceptions and natural biases that jurors bring to the courtroom. Unfortunately, in most cases, the college or university employer is essentially guilty until proven innocent. Jurors' experiences lead them to identify with the plaintiff/employee. This personal experience also guides jurors in evaluating the information presented at trial. Dispute Dynamics Inc., which provides trial consulting for litigation, researched the attitudes of thousands of potential jurors in cases involving educational institutions and other entities. This article includes various research questions put to the potential jurors and the findings on their responses. We recommend that institutions look ahead and evaluate jury attitudes early in harassment and discrimination cases—before deciding whether to invest significant time and money in litigation.

Juror Attitudes Toward Employers

In a dispute between an employee and an employer, the average juror tends to believe the:

Employee 59%

Employer 41%

In reviewing an employment case, managers and defense counsel often focus on the plaintiff and his or her negative traits, such as a "slacker" who created extra work for colleagues or a person who overreacted to criticism. But the notion that an employer can win by focusing on the plaintiff's weaknesses is false. In fact, research demonstrates that jurors do not have to like a plaintiff to find in the plaintiff's favor. The overwhelming majority of jurors who vote for the plaintiff are, in fact, finding against the employer rather than for the plaintiff. This dynamic is a key to assessing the risk of going to trial.

About the Authors

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Most companies say they strictly enforce their policies against discrimination or harassment in the workplace, but they really don't.

Agree 75%

Disagree 25%

Jurors will focus on the employer's policies and procedures with a great deal of skepticism. Moreover, having a policy prohibiting discrimination and harassment is not enough. A successful defense must incorporate facts demonstrating how the employer properly addressed the plaintiff's concerns. If the plaintiff made one prior accusation of workplace discrimination or harassment, even years ago, a significant minority of jurors will conclude that the employer had notice of a problem. Even a casual mention to an immediate supervisor or lower level human resources person, outside the workplace, is enough notice to the employer to satisfy many jurors. Finally, despite whatever pleas the victim makes about not wanting anything done, the research demonstrates that the employer still must act. Failure to do so creates the potential for disaster at trial.

Juror Attitudes on Sexual Harassment Cases

Sexual harassment is a common occurrence in the workplace.

Agree 73%

Disagree 27%

Juror attitudes on sexual harassment create a conundrum for employers. On one hand, most jurors believe that sexual harassment in the workplace is common. On the other hand, they believe that most harassment is not reported.

Do women report sexual harassment to their employers if it has occurred?

Yes 22%

No 78%

Many employers incorrectly believe that if a woman did not complain about sexual harassment, it is more likely that her complaint lacks a factual basis. Most jurors, however, do not agree. While federal courts will dismiss a harassment case if the plaintiff failed to use the employer's well-publicized internal complaint process, most jurors will forgive a plaintiff for a long delay in reporting harassment or discrimination. They may ascribe delay to embarrassment at being a victim, fear of job loss, or an attempt to fit in with co-workers. On the flip side, the more serious the allegations, the less receptive most jurors are to a long delay in reporting. Nevertheless, jurors want to see swift punishment if harassment occurred.

Supervisors who sexually harass their subordinates should be fired.

Agree 88%

Disagree 12%

Juror Attitudes on Tenure Disputes

In a dispute between a professor and university, whom would you tend to believe?

Professor 70%

University 30%

Tenure litigation is one of the most expensive, divisive, and time-consuming risks that educational institutions face. Despite the fact that most colleges and universities are nonprofit organizations that engage in significant community service, most jurors come into trial with at best a neutral rather than a favorable attitude toward universities. In addition, more than a third of prospective jurors believe that a university should be more sensitive to employee concerns than corporations and that university personnel should be held to a higher standard than their corporate counterparts.

How well do you understand the term “academic tenure?”

Understand and can explain to others 21%

Understand but can’t explain to others 45%

Do not understand 34%

Trials in tenure denial cases present difficult challenges for universities. These data show that jurors have little understanding of the tenure process, overwhelmingly believe that the most important role of faculty is teaching, and would tend to believe a professor over a university by a 2-to-1 margin. In tenure denial trials, the data illustrate that universities must educate juries about the meaning of tenure, explain the relative weight of research and teaching as promotion criteria, and overcome the natural tendency of jurors to side with a professor over the university. In addition, any institution trying a tenure claim should outline its tenure process in clear, easy-to-understand language that will educate the jury as to how and why it makes tenure decisions.

Above all else, the function of a professor is to teach students.

Agree or Strongly Agree 87%

Disagree or Strongly Disagree 2%

Neither 11%

Risk Management Measures

Despite the challenges illustrated by the jury research, educational institutions can take steps to overcome the biases of jurors and strengthen their cases should employment disputes go to trial. These include appropriate training and intervention practices, as well as care in conducting internal investigations.

Importance of Training and Early Intervention

Institutions should train all employees on harassment and discrimination prevention. As the data demonstrate, jurors believe that harassment is common and that many employer policies are not followed. Offering

evidence of efforts to eradicate harassment through training will show jurors that an institution takes the issue seriously. Some institutions focus on sexual harassment alone, but we recommend that employee training cover harassment and discrimination of any group protected by law or the institution's policies.

Beyond training employees on appropriate and unacceptable workplace behavior, institutions can only help themselves by focusing on early intervention that can prevent problems from mushrooming into litigation. Most employees do not want to sue their employer; they want harassment or discrimination stopped. They turn to plaintiff attorneys when they believe their problems are being ignored or their concerns are not taken seriously. Even with the best defense attorneys and consultants, jury trials are notoriously unpredictable. Institutions that follow best risk management practices resolve employment disputes early and prevent them from escalating into litigation that puts their fate in the hands of a jury.

Importance of Good Investigations

Once an institution learns of potential wrongdoing, it has a legal obligation to investigate even if a complainant asks that nothing be done. Therefore, the institution should carefully avoid promising anyone complete confidentiality. However, it can and should assure complainants that they are protected from retaliation, that the investigation will be discreet, and that the institution will share information only with people who "need to know."

At trial, employers must produce convincing evidence that they conducted a good-faith and thorough investigation of misconduct and took appropriate disciplinary measures. Employers should prepare to respond to the following questions that jurors repeatedly ask about workplace investigations:

- What is the investigator's training and experience?
- How promptly was the investigation conducted?
- Was the plaintiff directly asked if he/she was discriminated against?
- Was the plaintiff kept informed of the investigation's progress?
- Were the investigators' notes destroyed?
- Did the harassment involve physical contact or was it only verbal?
- Did the plaintiff ever say, "Stop"?
- Did the plaintiff participate in or initiate any improper acts?
- Did the plaintiff follow internal policies or union grievance procedures before suing?

Conclusion

Our research persuasively demonstrates that educational institutions are in many ways no different from other employers in the eyes of potential jurors. Most jurors expect convincing evidence that educational employers, like other employers, not only implemented a policy against harassment and discrimination but trained its employees on that policy, promptly investigated alleged violations, and took swift action in response to misconduct. Moreover, jurors do not show a clear understanding of the tenure process or of how a faculty member's various roles apart from teaching are weighed in that process. Any educational employer facing litigation must therefore be prepared to educate the jurors as well.

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