EMPLOYMENT LAW360

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Jury Research Makes The Difference

Thursday, Oct 25, 2007 --- As a trial consultant, when I'm participating in a jury selection for a plaintiff, I do not ask, "Have you ever sought a workplace accommodation for a disability?" Instead I ask, "Have you ever worked with someone who received a workplace accommodation for a disability?"

The last time I asked that question, a very nice woman walked up to the judge's bench to share her experience. She said she worked with a woman who had multiple sclerosis.

We asked her, "How did that situation work out? Did it work out well or not so well?" She exclaimed, "It's been terrible! This woman's disease has progressed to where she's unable to do her job. They won't fire her and I have to do her job for her."

This woman was excused for cause.

This woman's experience isn't all that rare. It reflects the reality that disability cases are different: Jurors don't readily put themselves in the shoes of the disabled plaintiff. Instead, they put themselves in the shoes of the co-workers — ordinary working people who have their own struggles and hardships that don't rise to the level of a disability.

Plaintiffs' lawyers should keep this in mind because it adds an additional burden to your existing burden. Defense lawyers should keep it in mind as well because it can help you defend weak cases with greater confidence.

My experience working on disability cases has taught me that context is everything. Not only do little details add up and make a big difference, but disinterested people – jurors – will always view a case differently than clients and lawyers.

From conducting jury research projects, there are three lessons I've learned about disability cases: because of the perception that accommodations are "special treatment," disability discrimination can be hard to prove; not all disabilities are created equal; and jurors' view of reasonable accommodations is directly impacted by their view of the plaintiff.

* Case Example #1: Disability Discrimination Can Be Hard To Prove *

The employer hired the plaintiff, a completely deaf and high-level scientist. He could communicate by reading lips, but this didn't help him during meetings when many people spoke at once.

He requested oral interpreters as an accommodation and the employer tried to comply with his request, only to learn that it was easier said than done. The employer signed a written document promising interpreters, but the high cost and turnover rate created great frustration.

Before long, the employer terminated the plaintiff pursuant to a reduction in force.

The plaintiff had two claims: disability discrimination and breach of contract.

From a strategy perspective, the plaintiff's emphasis on discriminatory animus gave the defense some easy arguments: "We're not discriminators – that's why we hired him"; "We tried"; and "Give us credit for our efforts — if an employer tries this hard and still gets sued, no one will hire disabled people."

The plaintiff hired me to do a mock trial and we learned that the defense arguments swayed jurors – they couldn't agree on discrimination. The beauty of a focus group or mock trial is that it reveals transcendent case issues. These are the issues powerful enough to unite a diverse group of people, no matter what their attitudes, values and beliefs.

From our focus group we learned that the contract issue was the transcendent issue: mock jurors unanimously agreed that the employer shouldn't have promised what it couldn't or wouldn't deliver.

But we also learned something equally transcendent and unexpected: It turned out that the plaintiff was bulletproof. He was 100% credible. Jurors saw a video clip of his testimony. Because his effort to communicate was so great, jurors could not imagine a shred of dishonesty or exaggeration in his testimony.

* Case Example #2: Not All Disabilities Are Created Equal *

Deafness is obviously different to litigate than is mental illness, not only because of the negative stereotypes that attach to mental illness but because of the intangible things. Jury research projects illustrate how jurors pick up on the subtleties of a plaintiff's attitude and behavior, especially if it's in conflict with the legal claim.

In this particular case, the plaintiff was a successful lawyer who legitimately suffered from mental illness. She had two breakdowns and, each time, she returned to work.

After the second breakdown, she was demoted. As she struggled to deal with what felt like retaliation, she had difficulty getting to the office for 8:30 a.m. staff meetings. She asked for an accommodation for these meetings and was terminated for alleged poor performance.

Her lawyer wasn't necessarily worried about liability; he was worried about

damages. He wondered if jurors would accept that the defendant's discrimination worsened his client's illness and rendered her permanently disabled.

Unfortunately for him, he didn't start worrying until the eve of trial. Also unfortunate was that by this time, his client had already formed the unshakable belief that her case was worth millions.

Luckily, he was smart enough to recognize that a permanent injury would be a tough sell and that a reasonable demand would prompt a reasonable settlement offer. It was his goal to use the mock trial to help his client get more realistic about case value.

The mock trial was a real eye-opener for both.

The mock jurors didn't like anything about the plaintiff or her claim. First, they thought she was not a nice person. Second, she looked too goo: too thin, too beautiful, too stylish. Jurors had hard time getting around it: How hard can life be when you look like a model and have a law degree?

In most mock jury projects, video clips of key witnesses are presented. A comparison of the mentally ill lawyer plaintiff to the deaf scientist plaintiff shows how these intangibles can impact jurors.

With the deaf scientist, there was a profound poignancy in his appearance. Jurors could see in his face and hear in his voice his life-long struggle. They couldn't help but admire him. And they saw his request as an absolute need: Either he would know what others were saying or he'd work in isolated silence.

With the mentally ill plaintiff, jurors believed her accommodation request was fueled by her difficult personality, not her disability.

She said medication made it hard to wake up. The mock jurors felt that she needed to take her medication earlier or go to bed earlier. In other words, they felt she needed to accommodate herself to the workplace, not the other way around.

With the mentally ill plaintiff, jurors were unwilling to accept the theory that after years of success as a lawyer, she could become permanently disabled.

Compare to the deaf plaintiff: He immediately found another job, relocating across the country. His lawyers worried his case would be weakened by this. Instead, jurors saw a hot commodity, well worth accommodating.

The clincher with the mentally ill plaintiff is that she took a trip to Europe for vacation, after she became totally disabled. The plaintiff's lawyer never told me this information. He wasn't hiding it from me – he just thought it was ridiculous to criticize her for seeking out a little joy in life. I discovered it because I read the plaintiff's deposition.

Not only did it matter to me, it mattered to defense counsel. And it really mattered to the mock jurors. It confirmed for them that this plaintiff believed she was above it all.

This plaintiff was confronted with the reality that she was likely to lose her case, but she could not be reasoned with.

After turning down a $2.5 million dollar offer because she “couldn’t live on that,” she lost her case on trial, where her presence in the courtroom for three weeks begged the inevitable question: If she can sit in a courtroom every day, why can’t she work?

* Case example #3: Jurors’ View Of Reasonable Accommodations Is Directly Impacted By Their View Of The Plaintiff *

Craig was a devoted 10-year employee for a radiology office. It was his job to make sure all the machines in the office worked. He was in his 40s and at the peak of health when he had a stroke.

He went out on disability, and, as he recovered, his treating doctors were adamant that working full time would hinder his recovery.

Meanwhile, upon his part-time return to work, Craig experienced memory problems. Co-workers asked him to look into various problems with machines and he forgot.

He came up with his own solution by asking his co-workers to put their requests in writing. He also asked management if he could work reduced hours until he achieved a greater recovery from his stroke.

His employer’s response was less than positive. Management did nothing to encourage employees to put their repair requests in writing. As for his part-time schedule, the employer allowed it for a short time before declaring that the job could only be done in 40 hours, not 30 hours. It wasn’t long before they terminated him.

The plaintiff’s attorney did a focus group before trial. The goal was to see if jurors could accept that a 40-hour-a-week job could be done in 30 hours. Mock jurors accepted the concept, not because of the realities of time-wasting in the workplace but because of Craig himself.

Here was a person who, through no fault of his own, had a crippling stroke but was highly motivated to get better. He requested common-sense accommodations (written repair requests) to help him do his job while recovering his memory.

The mock jurors thought Craig was worth a little bending. Jurors were downright angry about the fact that Craig’s employers – medical doctors – were insensitive to his efforts, especially after Craig had delivered 10 years

of solid performance.

Not surprisingly, Craig won at trial.

* Conclusion*

In sum, jurors are realists. Most are generally not hostile to employers, nor are they hostile to people bringing claims.

With regard to disability claims, jurors will root for a deserving person, even when the accommodation is difficult. But they will not support an undeserving person – even when the accommodation is simple.

When a case is smack up against your nose, it is not always clear who's deserving and who isn't — but it is crystal clear to lay persons. For that reason, (and please note my professional bias as a trial consultant), I believe that jury research should be a priority in most cases.

I'm not suggesting full-blown multi-day extravaganzas in every case no matter what's at stake but I do mean some version of research that gives you objective feedback and makes budgetary sense in any case worth taking or defending.

I've seen too much money misspent on litigation. I've seen defendants offer nothing only to get whacked by a jury. I've seen plaintiffs give up generous offers, only to get nothing. I've seen lawyers spend money on technology, without first getting a realistic sense if they are likely to win or lose on the facts. But I've never once seen money wasted on jury research. Knowing how lay persons will view your case will give you a leg up every time.

--By Carolyn S. Koch

Carolyn S. Koch is a trial consultant and the principal of Jury Solutions LLC, in Fairfax, Va. An attorney admitted to the Connecticut and D.C. Bars, she conducts jury research projects for both plaintiff and defense lawyers so they can get a clear view of their case well before trial.

