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### **Factors Driving Verdicts in Employment Cases**

Lawsuits filed by employees against their employers have the potential for large punitive damage awards because the nature of the employment relationship creates an expectation that employers will do the right thing; when they don't, and they fail to take responsibility for their wrongful acts, a jury's desire to punish can be strong.

The employment relationship is predicated on mutual rights and obligations. Employers depend on productive and efficient employees. Employees depend on an employer to provide reasonable remuneration and fair working conditions.

The National Jury Project has conducted mock trials in employment cases with thousands of mock jurors over the years, and several fundamental principles have emerged about how jurors analyze issues in employment disputes. Jurors view the employment relationship as an implied contract between the employer and the employee, where the employer has a responsibility to treat the employee fairly. In exchange, the employee is seen as having an obligation to perform her duties to the best of her ability and to follow the workplace rules. The employee's duty is to contribute education, experience, skills, time and labor to produce something of value for the employer. In exchange, jurors expect the employer to pay the employee and treat the employee fairly.

Employment disputes are unique because almost every juror is an expert. Every juror has his own experience in the workforce (or is close to someone who does) and, as a result, has opinions about what constitutes fair treatment.

In jury deliberations, the primary question jurors attempt to answer is: Did each party fulfill its part of the bargain? First, the jurors examine the employee's conduct, asking themselves whether the employee worked hard, pulled her own weight and made a valuable contribution to the employer. Defendant employers can reduce awards by arguing that the employee was insubordinate, unwilling to be a team player, resistant to change, more concerned with her own advancement than the company's bottom line, or that she failed to follow the company's policy for making complaints.

In assessing the employer's conduct, on the other hand, jurors are most concerned with what standards were violated. They want to know the rules and regulations that govern the employment relationship. Are there federal or state laws that mandate certain treatment? For instance, is the employer subject to OSHA regulations regarding air quality? Did the employer have a contract with the employee that set out the terms and conditions of the job? Did the employer provide an employee handbook that stated company policy regarding sexual harassment?

Central to the decision making process regarding whether the employer followed the rules and ultimately was fair in its treatment of the plaintiff employee is a juror's own job history, including level of authority in the workplace, length of time on the job, size of the employer, culture of the workplace and his employer's policies and standards. For example, jurors who have worked in a job for a longer period of time are likely to have higher expectations of an employer, while jurors who have been downsized or switched jobs frequently may expect less from an employer and think the plaintiff has unreasonable expectations and should find a new job and move on with her life. A juror who works for a company with a strict sexual harassment policy that is scrupulously followed will hold the defendant company to a high standard in deciding if the defendant employer followed its own policies. A manager who goes by the book will not identify with a defendant manager who violated the rules by failing to promote Hispanic employees.

In determining liability, jurors weigh factors that go to fairness. Not surprisingly, the more unfair the employer's conduct the greater the potential for a substantial punitive damage award. Punitive damages are motivated by jurors' desire to punish the defendant. Jurors consider three factors in determining whether to award punitive damages: the reprehensibility of the employer's conduct, the severity of the harm to the plaintiff and the net worth of the employer.

The single biggest factor driving an award of punitive damages is the degree of outrage the jury feels at the employer's conduct. The more reprehensible the employer's conduct the greater the punitive damages award. Jurors may be outraged at the employer that allowed the offensive behavior to have occurred in the first place, as well as its lack of a swift and reasonable response to the wrongful conduct once discovered. Jurors look to whether the employer followed its own policies about conducting investigations and disciplining employees. An employer who does not respond in a timely manner to a complaint of discriminatory conduct, conducts a sloppy investigation, and fails to adequately discipline the wrongdoer is at risk for higher punitive damages.

Jurors may be angrier at how an employer handles an issue with an employee than at the underlying conduct. For example, an employer who fires an employee with bipolar disorder while he is on bereavement leave is seen as not only insensitive but motivated by an improper reason. This poor timing can be interpreted as an opportunistic move to oust a difficult employee. Employers score points and decrease the possibility of punitive damages when they can demonstrate they gave the employee notice and a chance to correct the problem, say through progressive discipline.

The second factor jurors consider in deciding whether to award punitive damages is the degree to which the employee suffered harm. An African American manager who has been wrongfully terminated and blackballed from his industry is perceived as suffering a greater harm than an employee who was fired but eventually found a comparable job. Jurors also consider the potential harm. Did the employer's conduct put other employees at risk? An employer who ignored complaints about an employee with a drug problem who eventually assaulted another employee may also be responsible in the jury's eyes for the potential for harm to other employees.

The third factor is the wealth of the company. Not surprisingly, higher awards are assessed against wealthier employers. Jurors reason that the award has to be large enough to hurt the company.

In addition, jurors may be more willing to punish companies with a greater net worth because they have the resources to do it the right way. They can invest time and money in training managers, and establishing a process for filing and investigating complaints, and disciplining bad behavior.

The bottom line is that jurors expect employers to do the right thing. If an employer follows its own rules for responding to complaints of harassment or discrimination and accepts responsibility for the wrongful conduct and does not try to conceal it, jurors will be less motivated to punish the defendant employer with a large award of punitive damages.

Interestingly, empirical research shows that the amount of punitive damages suggested by the plaintiff's attorney also influences the jury's award. Typically, the higher the amount requested, the higher the amount awarded. Jurors use the plaintiff's figure as a starting point for their discussion about what amount is appropriate. They then adjust the plaintiff's figure up or down depending on the important considerations.