

'She Should Have Punched Him Out'

Research Shows Sexual Harassment Jurors Don't React the Way Lawyers Might Expect

Reprinted with permission from Lawyers Weekly USA, the national newspaper for small law firms.

By Jeremy Rose, Ph.D.

The plaintiff, a 39-year-old single mother of two, had been fending off advances from her supervisor for more than a year before she complained to management * and even then she downplayed the incidents, which included kissing, fondling and undressing her.

It was not until she was interviewed by the HR Director - 17 months after the incident * that the whole story came out.

The plaintiff's lawyer, a seasoned sexual harassment attorney, was concerned about her delay in reporting, which can be fatal for the plaintiff's case. During a trial simulation conducted by the National Jury Project, he noted that she had been sexually abused by her father when she was seven, and that this experience heightened her fear that reporting the abuse would produce negative consequences. When she finally told her mother about her father's abuse, her mother left her * so in her mind, the result of reporting sexual misconduct was the loss of her father.

Thirty years later, a similar situation was being played out, and it's no wonder she was afraid to report, he argued.

It seemed like a sound approach.

But the female mock jurors were merciless. One woman was appalled that she even accepted the position, in which she helped provide psychological training to EMTs and firefighters. "If she came with all that baggage from her child abuse * which I don't see has anything to do with this * she had no business being on that team. She should never have been there."

When male jurors argued early traumas can affect your whole life, another female juror responded, "But that's not the company's fault." A third was suspicious: "It's almost like she subconsciously puts herself in these situations so she can be faced with that again."

What the attorney learned from the mock jury was that appeals to sympathy or understanding for the weak can backfire badly, and that the assumption that women are more sympathetic jurors in sexual harassment cases is just plain false.

Instead, the attorney concluded that the only way to use the plaintiff's vulnerability was by emphasizing the theme that the harasser deliberately preyed on the weak and vulnerable, could spot them from a distance, and knew that they were less likely to report him.

Trial simulations and post-trial interviews by the National Jury Project, one of the nation's oldest consulting firms, reveal what questions jurors are most concerned about in sexual harassment cases, and what issues drive their verdicts. The company has consulted in more than 5,000 cases since 1975.

This experience has demonstrated that even experienced lawyers often operate on faulty assumptions in sexual harassment cases. Among the most common mistakes are making pleas for sympathy (illustrated above), failing to tell a complete story, failing to emphasize the company's response to the harassment allegations, and failing to explore

crucial juror attitudes in voir dire.

Tell a Complete Story

Research conducted by the National Jury Project shows that jurors fill in gaps in any story * and in sexual harassment cases they have a tendency to fill in those gaps in ways that hurt the plaintiff. There is a common psychological defense mechanism that makes jurors think "It wouldn't have happened to me," and since it did happen to the plaintiff, then she must have done something wrong at some point along the way.

This leads jurors to look for ways in which the problem could have been prevented or resolved more easily, and they will use their imagination to picture better outcomes if only the plaintiff had been smarter. A compelling story of how the situation began, progressed, and reached the level that warranted a suit can override that defense mechanism, and allow the jurors to recognize that the victim is not to blame.

There are four key time periods in the story that plaintiffs' lawyers need to tell as clearly and completely as possible:

The harassment.

Sexual harassment is not news to anyone. Jurors are not surprised to learn that a man sexually harassed a woman on the job, nor are they surprised to learn how outrageous his conduct was, or how upsetting it was to the victim.

As a result, lawyers should certainly note, but need not belabor, the bad things the accused harasser did.

Plaintiffs' attorneys who dwell on the harasser's bad behavior, walking through each incident in detail, are not making as much progress as they might think. In fact, doing so merely encourages jurors to examine the victim's behavior closely and to evaluate whether she may have welcomed it, and how smart her choices were in response to the harassment.

The more important story to tell, then, is why she behaved as she did. If the lawyer doesn't answer that question, jurors are likely to question the validity of the plaintiff's claim.

For example, when presented with a woman who worked in candy sales who was subject to offensive remarks from her supervisor, the mock jurors did not question the supervisor's oafishness but did debate if the saleswoman responded adequately, as this exchange between two women jurors illustrates:

Juror 1: I worked with a guy who was just rude and crude; I had to share an office with him. It was just like, if I hate it, go back to my desk. He was a guy who spent five years on a boat, and didn't know how to talk without throwing out swear words and sexual innuendo.

Juror 2: But did you ever speak up, tell him it was offensive?

Juror 1: Yeah.

Juror 2: Did he change?

Juror 1: He toned it down.

Juror 2: [The plaintiff] never made that request. I take issue that she never said to this man she was offended.

Juror 1: Some women don't know how to do that.

Juror 2: She's in sales; she has to know how to do that.

In short, the jurors have a tendency to ask "Why didn't she just _____?" A complete story needs to have answers to those questions.

Some jurors will assume that the victim should have responded to the harasser with zero tolerance if not outright hostility, and that if she did not, it must have been welcome conduct. It can be helpful to emphasize that most women, when first faced with offensive conduct, will hope it goes away on its own or think they can handle the situation without outside help. A male juror in a case of a woman who tried to handle the harasser's advances on her own had a simple solution for her: "Personally I think she should have punched him out! [If anyone questions that], you say, 'This is why I punched him out.' Period."

Reporting.

In many sexual harassment suits, the biggest problem for the plaintiff is that she delayed in reporting the situation to the company. One of the most common questions jurors ask is, "Why didn't she go to HR?" It is especially problematic in situations where a supervisor or human resources representative catches wind that something may be wrong and asks the plaintiff to describe the situation, but she fails to report all the incidents.

The reality of the situation may be that the victim, who is traumatized already, is anxious about how the company will respond to her allegations, and that anxiety leads her to act cautiously and tell the story piecemeal to see what kind of response it will get. This is the victim's way to judge whether it's safe to tell the whole story.

If jurors understand that dynamic, it can make the difference between blaming her for failing to do her part and blaming the company for failing to respond appropriately. In a case where the victim did not reveal all of the harassment incidents until after she was fired, one mock juror instinctively understood the dynamics of the situation: "She's trying to keep her job, mentioning the least offensive things first to see how they'd respond. When she had nothing left to lose, they took her job away, then she had the courage to speak up."

There is another kind of "reporting" that jurors also find significant.

In terms of corroborating what happened, how it affected the victim, and what she tried to do about the situation, the most important witness can be the victim's best friend, husband, boyfriend, or other confidant. These witnesses can be seen by the jurors as a way of bypassing the "he said/she said" nature of many harassment cases.

If the best friend or husband can verify that this was an extremely difficult situation for the victim before any kind of complaint was filed, jurors will be less likely to suspect that she was exaggerating or that the complaint was some kind of manipulative strategy to gain position in the company.

On the other hand, if the victim never tells her confidants about the harassment, or if those confidants never notice any changes in the victim's mood or behavior, it can deflate the assertion that this was a life-changing trauma for the victim. In one sexual harassment suit against a college for a professor who allegedly groped many of his students, research jurors were bothered by the fact that one of the plaintiffs kept a detailed diary that outlined many of her sexual encounters and musings but never mentioned the professor's assault.

Leaving/staying with the company.

A victim's decision whether to leave the company can present a double-bind for plaintiffs. On one hand, if the victim leaves the job right after the harassment begins, jurors tend to think the harm done doesn't merit a lawsuit or significant damages. On

the other hand, if the victim sticks with the job, or waits for months or years before leaving, jurors assume either the harassment wasn't that bad or she failed to fulfill her responsibility to take care of herself.

In a trial simulation involving female miners who were exposed to extreme harassment by male co-workers, one question the jurors discussed at length is why the women stayed on the job for so many years.

Jurors made comments such as, "How much abuse are you going to take?" and "The women should have some personal responsibility for choosing to stay." One concluded that staying on the job made their descriptions of the harassment implausible: "The reason they stayed is, it wasn't as bad as it was made out to be."

Research by the National Jury Project revealed that the key to overcoming this hurdle was to make clear why these women stayed: They loved their job, they had few employment alternatives that would pay enough to support their families, and they felt that they had a right to stay rather than being forced out of the job.

Some jurors need to be persuaded that leaving a job is a significant loss, one that the plaintiff should not be forced to endure.

Suing.

Finally, many jurors are suspicious of any plaintiff's motives for suing. The attorney who overstates the emotional distress or requests unreasonable damages can provoke a "get over it" response from the jurors. One juror's views of an entire case boiled down to: "It was just a matter of she thought, 'Well, maybe I can get something out of the company on the harassment deal.'" Note that his comment reveals an acceptance of the claim that she was harassed, but a rejection of damages based on her motives.

Focus on the Company

While jurors are sure to scrutinize the plaintiff's behavior closely and hold her to a high standard of behavior, they will do the same for the corporate defendant. They assume employers have a high level of awareness of sexual harassment issues, and consequently they expect a swift response.

What the harasser did to the victim is only the starting point of the story. The most important story is how the company responded to the situation. During the trial, the bulk of the time should be focused on the company, not on the plaintiff or the harasser. If the focus remains on the plaintiff, unless her behavior was exemplary throughout the entire history of events, she will suffer under the scrutiny.

Plaintiffs' lawyers should emphasize that the only time a sexual harassment incident comes to trial is when the company fails to correct the problem. If the company does a prompt and thorough investigation, and disciplines the harasser and/or removes the plaintiff from harm, it doesn't get to trial.

Just as there are pivotal points in the plaintiff's story, there are specific areas of company conduct that will most likely determine the outcome of the case:
Investigation.

When a company is presented with allegations of sexual harassment, jurors expect a swift and thorough investigation. They will focus on questions such as when the investigation began, who conducted the investigation (human resources or a less appropriate person in the company), who that investigator spoke to or did not bother speaking to, whether they tried to locate others who had been harassed by the same person, and at what point the investigation was considered complete.

Most jurors are appalled if the company appears to be dragging its feet or giving only

a cursory glance into the allegations. Sure, the conduct may be interpreted as welcome or the allegations may be fabricated, but if the company doesn't investigate it will never know.

The most damning thing of all, from the jurors' point of view, is if the company failed to follow its own policies regarding the investigation and response to sexual harassment. And the company that has no policy or system in place for dealing with sexual harassment doesn't fare any better. Given the prevalence of harassment in the workplace, there is no excuse in most jurors' eyes for the company being caught off guard. An indignant juror, arguing for high damages, said: "If you've got policies, enforce them. If you don't have policies, go get some."

Retaliation.

In many cases, the victim who files a complaint is demoted or terminated soon afterward, and even when there is not a separate retaliation claim this action on the part of the company can have a significant impact on how jurors view the case.

The employer can always come up with a reason why the plaintiff was demoted or fired, and there is usually some valid aspect to that reason (including the fact that her job performance may have dropped after the harassment), so the central issue is pretext. Plaintiffs' lawyers should emphasize that since no employee is perfect, the issue is not whether the company can come up with a technical justification for terminating the plaintiff, the issue is whether that termination was fair.

To answer that question, jurors want to hear about how other employees in the company were treated. A policewoman who had been harassed was fired for allegedly being incompetent, and one juror said: "With this case, I would like to know more than anything else how she compared to her peers, because that'll tell me how good or how incompetent she really is."

Even if the defense establishes that the company followed its policies in regard to termination procedures, this may not be enough to satisfy the jurors if those policies have not been enforced for other employees. One mock juror was suspicious of a defendant company's claim that it fired a woman who complained of sexual harassment because she signed her supervisor's signature on some forms. The plaintiff had shown that this was a common practice in the company. "So, if five people should have been let go for forgery, why aren't the other four let go? It's just certainly coincidental that she filed a sexual harassment suit."

Even in cases where the company claims it was only downsizing when it terminated the plaintiff, the jurors will look carefully at whether the plaintiff was the right candidate to be downsized, or whether less qualified employees were retained instead.

One factor that can bolster a defendant's case is if the plaintiff was a complainer in the past. The same jurors who hold it against her that she didn't report harassment promptly to human resources will also find it significant that she once filed a complaint about workplace conditions or couldn't get along with a fellow employee. The more skeptical jurors will take any evidence of her being a "problem employee" and run with it.

The wording of jury instructions and special verdict forms can be critical. What we have found in trial simulations covering all kinds of employment cases * from sexual harassment to race discrimination to whistle blowing * is that one short word can make all the difference. In research, jurors often engage in lengthy discussions about the difference between "a determining factor" and "the determining factor." If there is any question about any aspect of the employee's conduct, jurors are reluctant to conclude that retaliation for reporting is the only reason she was fired.

Treatment of the harasser.

Jurors also want to know what the company did about the harasser. Was he fired, demoted, or disciplined? How quickly? The most disturbing scenario for jurors is when the company appears to be trying to protect the harasser, or even keep him happy, because he is a high earner or helps the company's reputation.

In one case, waitresses in a family-owned restaurant were constantly subjected to groping by the owners' son, which the management knew about and tolerated. The jurors were less tolerant.

In another case, the plaintiff was demoted but the harasser (after a long delay) was fired, which led some research jurors to feel more sympathy for him than for the plaintiff. One particularly strident juror said, "If I were a lawyer, I'd take [the harasser's] case. He's got a case! He lost his job, he lost his livelihood for something she's every bit as guilty for. It's not right!"

In another case, jurors objected because the harasser was fired for the wrong reasons. "All he was fired for was using the intercom system and inappropriate actions for management personnel * there wasn't a single word in there about sexual harassment."

Even if remedial action has no legal significance, it affects the jurors' views of the company if they hear about it.

Explore Juror Attitudes in Voir Dire

Although the issues vary from case to case, there are two crucial topics to focus on during voir dire in sexual harassment cases:

Power in the workplace.

Jurors vary widely in their views of the power structure in employment situations. Their views are affected by their own experiences and by core beliefs about how much power one can have over one's surroundings.

Some "empowered" jurors think that if a supervisor makes unwelcome advances on an employee, she can correct the problem simply.

In a trial simulation, the topic of sexual harassment in the military came up, and a woman who had been in the military police explained how prevalent sexual harassment was, and how little there was she could do about it. That prompted another woman to say: "There's no situation that I can see that you can't walk away from. If I had been in the military, I could have walked away from it. I wouldn't have stopped at the sergeant, as the ranks go up, I would have called the President."

Later an African American woman reinforced this view: "The choice is really yours. If I was in the military, and someone approached me like that, I'm AWOL. I don't have to take that; I'm out of there."

Not surprisingly, they both turned out to be strongly defense-oriented jurors.

In contrast, a 72-year-old Republican man who had been a store manager for years, and was an army staff sergeant before that * the kind of person one would expect to be defense-oriented based on his demographic characteristics * expressed an entirely different view of power in the workplace: "I've had employees who I overheard making comments that I thought were inappropriate. Later I talked to them about it, tried to show them how it would make the other person feel. I told them they should leave any sexual comment out of the workplace. The person they address should be given full and equal status and be respected for the work they were doing."

Given this mindset, it was no wonder that he was a strong plaintiff advocate in

deliberations.

These three people illustrate the importance of basing one's peremptory strikes on factors other than simple demographics. Questions about how much power an individual has in uncomfortable situations, such as "What would you do if you or someone close to you were sexually harassed?" can reveal the crucial attitudes if they are permitted.

Experiences with workplace misconduct.

It can also be helpful to explore what personal experiences jurors have had, or have heard about.

The goal is not just to find out who has had a similar experience, but also to uncover jurors' expectations about "what usually happens." How did management respond to the situation? Was the harasser disciplined? What happened to the victim?

Some jurors may have heard of harassment allegations that they knew to be unfounded, or may be familiar with situations where the conduct was welcome, which can sour their view of sexual harassment plaintiffs in general. There may be a tendency to think that women who have experienced unwelcome sexual advances may be automatically sympathetic to the plaintiff, but this is often not true. Research shows that women in jobs where unwelcome conduct is common, such as waitresses or those who work in male-dominated fields such as construction, are often hardened by the experience and expect a woman to know how to handle the situation.

As noted above, many jurors themselves have had sexual harassment training, or are familiar with their company's policy. This is the kind of juror who can be outraged by a company with no policy or training, or a policy that is ignored.

In situations where voir dire is limited, a case-specific supplemental juror questionnaire is ideally suited to sexual harassment cases. These questionnaires allow jurors to maintain a degree of privacy while revealing sensitive information that is obviously relevant to their qualifications to serve on a sex-related case. It is surprising what jurors are willing to write down that they may be hesitant to discuss in open court.