Employment Law

Tips from a Discrimination Jury Trial in a Multi-Racial/Multi-Ethnic Big City Courtroom

The conventional wisdom in employment cases is that jury trials should be avoided by corporate defendants if at all possible, especially in large urban areas. This is particularly true where a discrimination claim has been filed by a plaintiff who is a member of a racial minority group and the urban area is downtown Los Angeles where the jury pool is one of the most diverse in the United States. A recipe for a defense disaster? Not necessarily so. In fact, after a two-week trial, the Los Angeles office of K&LNG recently convinced a jury on behalf of our client, a large entertainment conglomerate, that it did not discriminate against the plaintiff. Here are a few tips about trying a case before an urban jury that may be of value to other corporate defendants facing trial.

BACKGROUND FACTS
The case was brought by a gay Filipino plaintiff who alleged that he was terminated from his position as a casting director because he had a strong foreign accent. While our client was not his primary employer (he worked for a production company making a television show for broadcast on our client’s network), we carried the burden of defending the case. Our client asserted that plaintiff had failed to perform satisfactorily and that his accent and national origin were irrelevant to the decision to terminate. No bona fide occupational qualification defense was raised because unaccented speech was not a job qualification.

GUT CHECK
Following the denial of its motion for summary judgment, our client, like many other defendants, faced the prospect of having to settle the case or go to trial. Plaintiff demanded a settlement in the high-six-figure range, making settlement unattractive from an economic standpoint. His case, however, was not frivolous. Not only did he have some evidence that arguably tended to support his claim but he was represented by an attorney with significant trial experience. Moreover, plaintiff knew that he was likely to be able to select jurors from a pool full of people from racial and ethnic minority groups, many of whom had some form of accent.

Thus, our client had to decide whether to settle or risk the possible wrath of a Los Angeles jury if they found it had acted wrongly. It chose the high road and refused to pay unwarranted sums to settle a case where it believed it had done nothing wrong. Our client decided it had to send a message to potential plaintiffs (and their attorneys) that it would not pay big-dollar “nuisance” settlements.

Tip No. 1 Corporate defendants must be willing to draw a line in the sand beyond which they will not be pushed, especially where they believe no wrongdoing occurred. Certain corporate defendants get the reputation of being a “soft touch” when they repeatedly settle claims for “nuisance” value (which, in the Los Angeles area, can range from $20,000 to $100,000) and they find themselves the victims of repetitive lawsuits.

JURY SELECTION
The jury pool was quite diverse in Los Angeles Superior Court. Among the approximately forty-five jurors brought to the courtroom, there were numerous members of racial and ethnic minorities, nearly half were women, at least four were openly gay, and approximately 20 percent of the jurors had some accent. During voir dire, many prospective jurors stated that they either had been accused of discriminating against others or believed they were the victims of discrimination, including age, national origin, race, and gender dis-
The jury panel was very open about discussing the subject of discrimination. They responded candidly to questions like: How did you feel when you were accused of discrimination? How did you defend yourself when you were accused of discrimination? What did you do when you believed you were discriminated against in order to have your accusations addressed by the employer? Do you believe that an employee who is having performance problems will sometimes respond by accusing the supervisor of discrimination? Do you believe that before you accuse somebody of discrimination you should have pretty good evidence to support your claim? Do you think it is wrong to ask a person with an accent to repeat him/herself if you are unable to understand what they are saying?

Tip No. 2 Do not dance around the issues of race/ethnicity/accent in front of the jury on voir dire. Address the issue squarely. Do not stereotype jurors. Every one of the jurors we selected who had an accent voted in favor of our client (the jury was polled following the verdict). Three of the four Hispanics and the only Asian on the jury voted in favor of our client. The jurors we eliminated were those who showed bitterness about their experiences with discrimination. The key was finding jurors who were relatively educated, who had fairly steady employment, and who had been around Los Angeles long enough to know that, for the most part, it is a tolerant city that generally judges people on the merit of their performance and not by their color, ethnicity, accent, or national origin.

CROSS-EXAMINATION OF PLAINTIFF
It is common in discrimination cases to “walk on eggshells” when cross-examining the defendant, seeking to avoid being too aggressive with a person who is already claiming to have been victimized. We decided to politely but firmly “go for the jugular,” pointing out all of his deficiencies and shortcomings. We pointed out his resume puffery, his unsavory prior experience casting transgender models for “fashion shows,” and his filing of tax returns that did not square with his description of his prior lucrative employment. We forced him to tell the jury that he had trouble “admitting mistakes.” We also did not hesitate to bring out relevant testimony bearing on plaintiff’s credibility, even though some of that testimony involved his sexual orientation and several of the jurors were gay men.

Tip No. 3 Comprehensively and thoroughly cross-examine the plaintiff, but be as polite as possible under the circumstances. Jurors understand that it is the responsibility of defense counsel to zealously examine the plaintiff, challenge his/her credibility, and bring out all of the weaknesses in plaintiff’s case. While jurors do not expect defense counsel to be rude or overly aggressive, they understand the need for thorough and sometimes embarrassing cross-examination as a part of the defense. Several jurors indicated post-trial that they expected plaintiff to be subjected to stiff cross-examination.

WITNESS CREDIBILITY/JURY INSTRUCTIONS/SPECIAL VERDICTS
It is said that jurors in discrimination cases often “go with their gut.” Our experience has been different. The jurors specifically stated post-trial that the most important factor influencing their decision was witness credibility. Additionally, the jurors listened carefully to the jury instructions. Plaintiff tried to convince the judge that one of the instructions should provide that discrimination based upon a Filipino accent was sufficient to constitute liability. We countered that defendants had to have the intent to discriminate based upon national origin as a result of the accent. While this was not the pivotal instruction in the end, it nevertheless was something that we were able to argue to the jury in closing argument to counter plaintiff’s persistent theme that, if he was fired because of his accent, defendants were automatically liable. Moreover, conventional wisdom has also been that a more detailed special verdict form favors the defendant because it forces jurors to go through the steps and analysis necessary to reach a reasoned decision. While these practices may apply in some circumstances, we do not believe they are applicable in every discrimination case. We opted for a simple four-question special verdict for each defendant, relying on the “keep it simple stupid” philosophy to avoid confusion and enable the jury to focus on the big picture.

Tip No. 4 Do not assume that jurors are stupid. If you are careful in the jury selection process, the majority of jurors you select will know their responsibilities and will try to follow the judge’s instructions to reach the right result. Most importantly, if defense counsel has reminded them (repeatedly) that plaintiff has the burden of proving that his version of the facts is more likely than not the true facts, jurors will keep this in mind in
weighing the evidence. When we interviewed jurors following this trial, we learned that they had been able to spot all of the strengths and weaknesses of the witnesses and each side’s case. Their number one factor in deciding the case was witness credibility.

CONCLUSION

While jury trials in multi-racial/multi-ethnic big city courtrooms can be nerve-racking and present unique challenges, if a defendant in an employment case resolves to vindicate its position in court, picks a reasonably educated jury, firmly challenges plaintiff’s version of the facts, puts on a legitimate defense through credible witnesses who level with the jury, and sees that the jury is properly instructed, then the likelihood of a successful outcome will increase substantially.

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