

# Employment

COMMENTARY

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## Not Your Ordinary Employment Case: How Laymen View Disability Discrimination

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As a trial consultant, when I'm participating in a jury selection for a plaintiff, I do not ask this question: "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 overcome. Defense lawyers should keep it in mind as well because it can help them defend against weak cases with greater confidence.

When working on disability cases, 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 do clients and lawyers. From my experience conducting jury research projects, I have learned three key lessons about disability cases:

- First, because of the perception that accommodations are "special treatment," disability discrimination can be hard to prove.
- Second, not all disabilities are created equal.
- Third, a juror's view of a reasonable accommodation is directly affected by his or her view of the plaintiff.

### Case No. 1: Disability Discrimination Can Be Hard to Prove

A company hired a high-level scientist who was a completely deaf. He could communicate by reading lips but this did not 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 for both employer and employee. Before long, the employer terminated the scientist, ostensibly pursuant to a reduction in force.

The employee had two claims: disability discrimination and breach of contract. From a strategy perspective, his emphasis on discriminatory animus gave defense some easy arguments, such as:

- We're not discriminators — that's why we hired him in the first place;
- We tried to accommodate him. Easier said than done; and

- Give us credit for our efforts. If an employer tries this hard and still gets sued, no one will hire disabled people.

In a mock trial these defense arguments were indeed persuasive to the jurors and, as a consequence, they could not agree on discrimination. The beauty of a focus group or mock trial is that it reveals transcendent case issues, which are powerful enough to unite a diverse group of people, no matter what their attitudes, values and beliefs.

The focus group showed that the contract issue was the transcendent issue. Mock jurors unanimously agreed that the employer should not have promised what it couldn't or wouldn't deliver.

However, another issue came to the forefront, an issue equally transcendent yet unexpected: It turned out that the plaintiff was bulletproof. He was 100 percent credible. Jurors saw a video clip of his testimony, and because his effort to communicate was so great, jurors could not imagine a shred of dishonesty or exaggeration in his testimony.

### **Case No. 2: Not All Disabilities Are Created Equal**

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

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In one case the plaintiff was a successful lawyer who legitimately suffered from mental illness. She had suffered two different breakdowns and each time had returned to work. After her 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 the claim 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 could 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 did not like anything about the plaintiff or her claim. First, they thought she was not a nice person. Second, she looked too good: 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 affect jurors.

With the scientist, there was a profound poignancy in his appearance. Jurors could see in his face and hear in his voice his lifelong struggle. They couldn't help but admire him, and they saw his accommodation 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 testified that her medication made it hard to wake up early. 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 by the defendant's conduct. Jurors had little sympathy for her stated inability to work.

Compare the lawyer's situation to that of the deaf plaintiff. He immediately found another job and relocated across the country. His lawyers worried that his case would be weakened by his quick ability to pick up the pieces. Instead, jurors saw him as a hot commodity, well worth accommodating.

The clincher with the mentally ill plaintiff was that after her termination and after she became permanently disabled, she went on a European vacation. This detail mattered to defense counsel, and it really mattered to the mock jurors, confirming for them that, in their opinion, this plaintiff believed she was above it all.

The 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 offer because she “couldn’t live on that,” she lost her case after a 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 No. 3: Jurors’ Views of Reasonable Accommodations Are Directly Affected By Their View of the Plaintiff**

Craig was a devoted 10-year employee in a radiology office. It was his job to make sure all the machines in the office worked. He was in his 40s and in his peak of health when he had a stroke. He went out on disability, and as he recovered, his treating doctors were adamant that if he immediately went back to full-time work, it would hinder his recovery.

Meanwhile, upon his part-time return to work, Craig was experiencing memory problems. Co-workers would ask him to look into various problems with machines and he would forget. 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 and, as for his part-time schedule, the employer allowed it for a short time before declaring that Craig’s job could not be done in 30 hours; it required 40 hours. It wasn’t long before the office fired him.

The plaintiff’s attorney did a focus group before trial. The goal was to see if jurors could accept the concept that a 40-hour-a-week job could be done in 30 hours.

Mock jurors readily 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 commonsense accommodations (written repair requests) to help him do his job while recovering from his memory loss.

The mock jurors thought Craig was worth a little bending, and they were downright incensed that his employers,

a group of medical doctors, were insensitive to his efforts, especially after Craig had delivered 10 years of solid performance. Not surprisingly, Craig won at his trial as well.

## **Some version of jury research should be undertaken in any case worth taking or defending in front of a jury.**

### **In Sum, Jurors Are Realists**

Most jurors 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.

It is not always clear who’s deserving and who isn’t when you’re close to a case, but it is crystal clear to laypeople. For that reason, some version of jury research (that gives you objective feedback and makes budgetary sense) should be undertaken in any case worth taking or defending in front of a jury.

Many shy away from the bold statement that jury research is a truly a necessity and say, “Sure, in a perfect world ... but it costs too much.” Fast forward 15 years of experience in this field. It’s breathtaking to see how much money is wasted by not doing research. Defendants offer nothing only to get whacked by a jury; plaintiffs give up generous offers only to get nothing; and lawyers spend high fees on technology or experts without first getting a realistic sense if they are likely to win or lose on the facts.

When research projects are reasonably tailored to potential case value, there’s no such thing as “money wasted” because advance knowledge of how laypeople will view a case will give a litigant a leg up every single time.

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