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Anti-Corporate Bias in Employment Cases

In evaluating the character and behavior of large corporations, the American public employs two primary filters : their experience as a consumer and their experience as an employee. For many potential jurors, this second employment filter is likely to be the most salient touchstone. Given the amount of time devoted to an individual's work life, it is predictable that jurors who work with or for a big company will form opinions about other large companies through the prism of their own experience on the clock. For that reason, anti-corporate bias plays a particularly important role in employment cases.

This brief research note will first consider the overall impact of anti-corporate bias and then consider the ways that this bias can be addressed both before and during employment litigation.

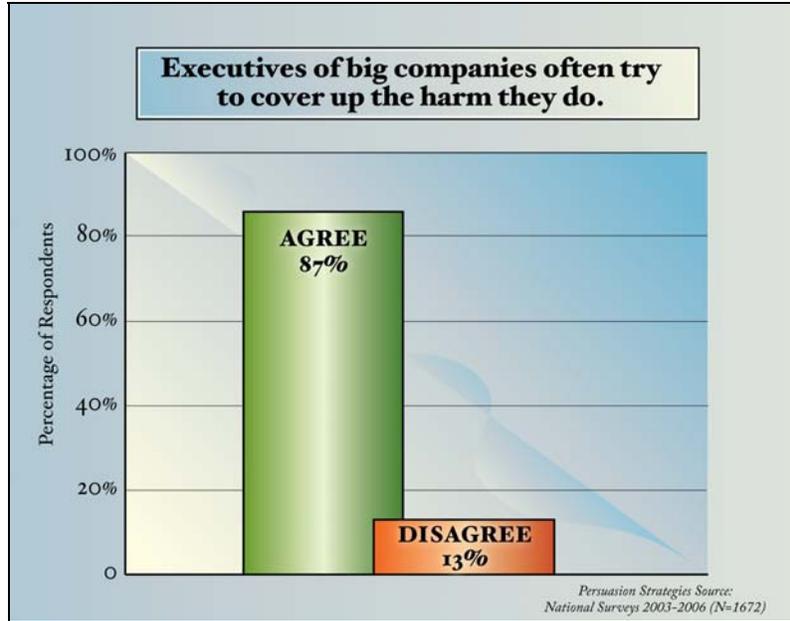
Recognize that Anti-Corporate Bias Limits Trust in Large Employers

Anti-corporate bias significantly impacts employment cases. Four years of Persuasion Strategies survey research reveals 87% of the jury eligible population believes big company executives often try to cover up the harm they do. National statistics become personalized for jurors when contextualized by the fact that the employees change jobs frequently, particularly in the 18 to 34 year-old age bracket. A presumption that an employer is acting out of dishonesty or self-interest has become a common starting point for many jurors, and willingness to grant an employer the benefit of the doubt become a thing of the past.

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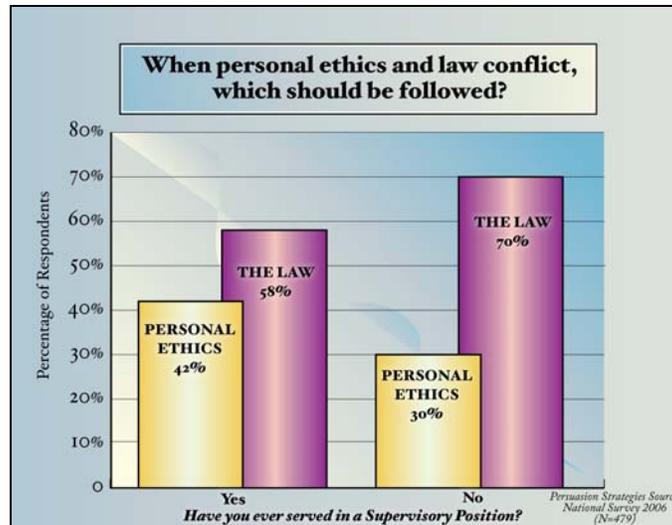
Phone [303] 295-8181 Fax [303] 295-8182 www.persuasionstrategies.com

555 17th Street, Suite 3200, Denver, Colorado 80202 Mailing Address P.O.Box 8749 Denver, CO 80201-8749

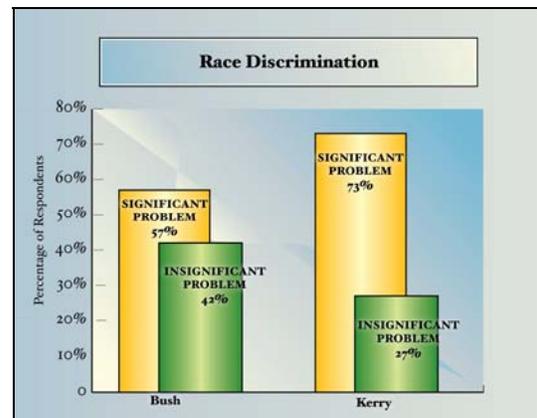
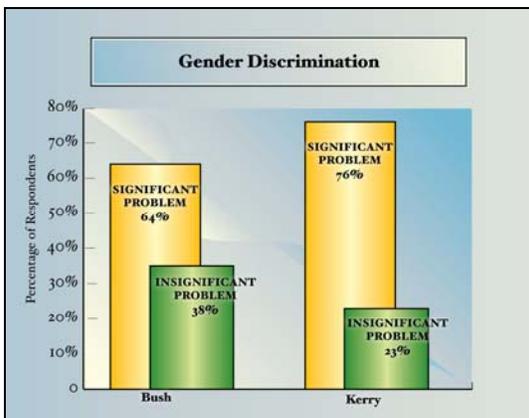


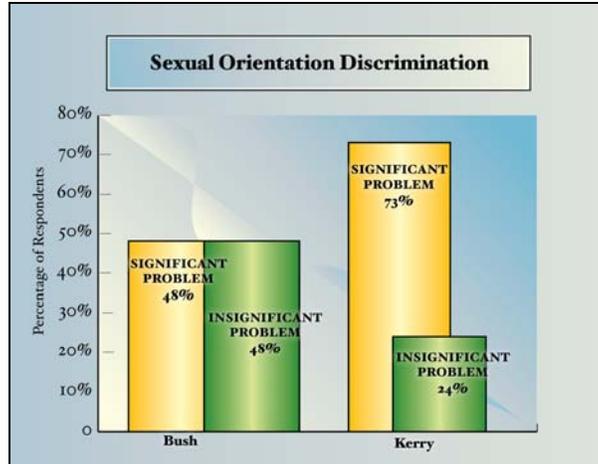
Jurors' individual experience will impact their interpretation of employment litigation issues and the degree of bias that they bring to the evaluation of those issues. Jurors with positive employment experience with large corporations are likely to apply that experience in developing expectations for a corporate party in litigation. Similarly, jurors with negative employment experiences with large corporations will often use that experience to reinforce a negative view of large companies, or conversely, to place greater responsibility on those who deal with large companies to expect the worst and to protect themselves accordingly. Reactions differ, of course, because they are strongly tied to the quality of an individual employee's experience. However, employers must consider the strong potential influence of anti-corporate bias both as a key to avoiding litigation when possible *and* to effectively handling unavoidable litigation.

Looking across individual differences, however, several specific trends can be observed in the way potential jurors' experience bears upon their view of large corporations in employment litigation. Specifically, jurors with experience working in large corporations (500 or more employees) *or* with supervisory experience are significantly more likely to believe that in evaluating company conduct, "whether a company acted ethically" should be given greater weight than "whether a company acted legally." Jurors with supervisory experience are also significantly more likely to follow personal ethics when it conflicts with the law.



Beyond employment experiences, those who voted Republican in 2004 are significantly *less* likely to view race, gender and sexual discrimination as serious problems. Those who voted Democrat in 2004 are significantly less likely to identify with business executives. These are just a few examples of the ways jurors' individual experiences impact their perspective of corporations and corporate behavior.





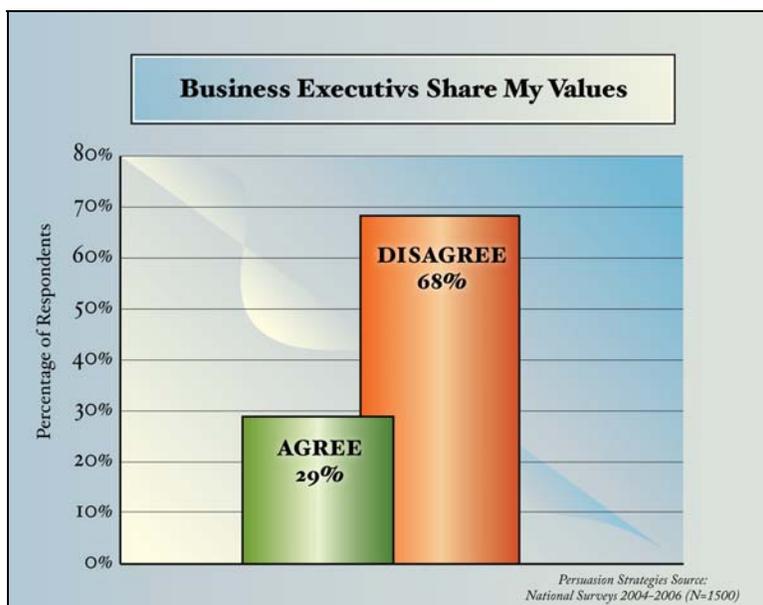
While jurors' employment experience can lead to a diminished view of corporate responsibility, jurors' political alignment can lead to a much greater perception of the prevalence of employment discrimination. The combination of an anti-corporate attitude with the perception that discrimination is ever-present can prime a pro-plaintiff juror in many employment suits. While these results alone should encourage employment litigants to give very careful attention to an analysis of their specific venue, there are also important implications from our research for reducing the effects of this bias before and during litigation. .

Practice Positive Behavior to Preempt Bias *Before* Litigation

Clearly, today's corporate climate of perceived scandal and misconduct has caused jurors to be more skeptical of defendant companies' motives and more critical of corporate decisions. Companies that could once benefit from the positive reputation that came from being a large employer and a successful enterprise, now are more likely to be in the position of needing to prove their responsibility through good works. As a result, it is more important than ever to communicate effectively with potential jurors *prior to* becoming involved in litigation – both as a way to preempt public resentment and minimize potential litigation risk. Our research confirms that companies can gain an advantage by differentiating their own image from more general anti-corporate attitudes. This can be done by focusing on your own internal and external communications.

A first step to taking some control over your own public image is to recognize the degree to which average Americans are alienated from corporate culture. Our survey research reveals

that more than two-thirds of the population does *not* believe that business executives share their values.



This means that the task of communicating externally requires *overturning* some ingrained assumptions and conveying that the company and its executives are cut from different cloth. We continue to recommend making your key executives accessible to the public by taking advantage of the opportunity to explain that the company's conduct is not only legal, but moral and ethical as well. Defendant companies can gain an advantage by having potential jurors hear a positive message from company executives before litigation hits, portraying the large employer as, in effect, "a different kind of company."

Finally, we continue to recommend that companies communicate internally as if their image depends on it – because it does. Jurors perceive documents as stronger evidence than witness testimony and we continue to see "smoking gun" emails and memoranda playing a major role in employment litigation. Educate your employees on effective internal communication and nurture an organizational climate where employees are not only comfortable but mindful of communicating key organizational values in writing, and particularly in email. This will serve you well down the road, when employment jurors expect a good company to have a clear paper trail, and value that record when they see it.

Maximize Your Effectiveness *In* Litigation

Our research confirms that despite a climate of anti-corporate bias, there are also ways companies can gain an advantage *in* litigation. Facing a jury panel of independent experts on employment law by virtue of jurors' personal employment experiences, jury selection is often more critical in employment cases than in other types of litigation. Scrutinizing individual jurors and unearthing juror bias in voir dire is an important first step in effectively handling anti-corporate bias in employment litigation. In most cases, the answer is not found in juror demographics (gender, age, education, etc.). Carefully profiling and deselecting high-risk jurors requires clearly articulated, case-specific criteria to identify those with attitudes and experiences most likely to work against you (see Appendix: High Risk Juror Profile).

We also continue to find that jurors' *and* judges' evaluation of responsibility centers around two key factors – the parties' perceived power and the parties' respective choices, including how those choices were exercised. Thus, enhancing the plaintiff's perceived power and available choices while also demonstrating how your company used its power and choices responsibly is an effective way to diffuse or even channel anti-corporate bias in the courtroom. For example, consistency is pivotal in defense employment cases. Jurors seek to learn if the defendant company treated the plaintiff consistently over time and how other similarly situated employees were treated. Companies can effectively show jurors they used their power appropriately by *choosing* to implement policies and demand consistent supervisory behavior. By showing jurors the pattern of choices leading to their consistently ethical behavior, defendant companies emphasize consistent and fair use of power and choices in situations where inconsistent often equates to illegal. By showing that the company's policies and practices exceed jurors' (possibly low) expectations, employment defendants can enhance their own credibility and foist the greater burden on the plaintiff to defend their own use of power and exercise of choices.

Personal responsibility remains a strong theme in employment litigation. Jurors are willing to scrutinize plaintiffs, including their use of power and choices, and will look for evidence that the plaintiff did everything possible to mitigate any damage. However, defendant companies should use an understanding of jurors' scrutiny wisely. The perception the defense is trashing the plaintiff can result in a backlash effect, with jurors sympathizing with the plaintiff.

Jurors are particularly skeptical when they perceive corporate defendants as turning their back on an employee the company previously endorsed via promotions or the assignment of an upper-level position. Thus, defendant companies are often best served by first offering jurors their own affirmative story demonstrating their responsible behavior before even subtly attacking the plaintiff. This approach effectively arms defense-oriented jurors with the persuasive power to influence plaintiff-jurors in deliberations – a critical piece of jury persuasion in employment cases, where defense jurors often emerge as jury leaders due to their employment in higher status occupations and leadership experience.

Ultimately, large employers in the current anti-corporate climate face several challenges, but also enjoy several strategic advantages. In that context, the best formula for success involves first, acknowledging the full extent of doubt in corporate motives that inheres in many jurors; second, seizing every opportunity to communicate responsibility inside and outside of the company walls; and third, framing the dispute in terms of the responsible exercise of *both* the company's and the individual's power and choices.

APPENDIX

HIGH RISK JUROR PROFILE: EMPLOYMENT

The characteristics listed below delineate the attributes of jurors who are likely to prove generally risky for the defense in the average employment case. The topic areas appear in order of importance. Within each topic area, attitudes far outweigh life experiences and demographic characteristics in identifying plaintiff-oriented jurors. While no single characteristic may warrant a strike, a pattern of numerous risky characteristics within a given person indicates an especially dangerous juror for the defense.

I. ANTI-MANAGEMENT

Jurors who view the issues in this case through a lens of boss/subordinate relations and identify primarily with the subordinates are especially dangerous in this case.

- Sees relationship between subordinates and management as “us” versus “them”
- Believes management will break a policy when it suits their purpose
- Believes a company’s management is likely to be relatively uncaring
- Believes supervisors routinely abuse their authority
- Believes managers are likely to hold a grudge
- Believes managers are prone to being unethical
- Would tend to distrust a management witness over a co-worker witness
- Has never held a management position
- Has publicly questioned management practices
- Staunch labor union member/supporter
- Transitional or unstable employee
- Worker’s compensation claimant
- Welfare recipient

II. TERMINATION/EMPLOYMENT SECURITY SENSITIVE

Jurors who identify with those who face employment risks and insecurities are likely to identify with the employee and harbor heightened skepticism toward employers.

- Believes that they have been unfairly terminated or suspended from a job
- Believes that they have been singled out for unfair treatment at work
- Philosophically opposed to “at will” employment
- Believes employment is a *right* not a *privilege* after a period of years (tenure-oriented)
- Believes that only the most extreme circumstances justify a termination
- Believes that employees need to be offered a second, third, or fourth chance
- Believes they have been (or someone close to them has been) the object of a “witch hunt” or retaliation

- Has felt, or knows someone who has felt discriminated against in the workplace for race, age, gender, nationality, or religious reasons
- Has received poor evaluations in the past that she/he deemed to be unfair
- Has had job changes to his/her disliking
- Has been forced to move from higher status position to lower status position
- Belongs to/supports a consumer advocacy group
- Comes across as low in personal responsibility (e.g., identifies external factors as the cause of past problems)

III. WORKPLACE RESPECT/SATISFACTION SENSITIVE

Has heightened sensitivity regarding the respect and the satisfaction they receive (or don't receive) in the workplace.

- Has felt trapped/powerless in an unsatisfactory job
- Has had negative employment experience leading to serious resentment of the employer (i.e., filed a complaint of any type against an employer)
- Believes that they have not received adequate respect from peers and superiors in the workplace
- Believes that helping employees matters much more than serving clients or the bottom line
- *Frustrated* white collar worker – e.g., a mid-level manager with few opportunities for advancement
- Feels that once a company brings in an employee or colleague, it is *obligated* to do whatever it takes to ensure the employee succeeds
- Believes that leaders and more experienced workers bear a responsibility for the success of those less experienced
- Has complained about conduct in the workplace and feels let down or deceived with regard to employer response
- Feels own ideas have *frequently* been undervalued in a business setting

IV. VALUES-DRIVEN IN THE WORKPLACE

Jurors who view the workplace primarily through a “values filter” may expect that the company should have treated the employee with kid gloves and taken responsibility for rearranging the employees duties and/or work environment to suit that person’s talents or interests. In addition, such jurors are likely to place ‘basic fairness’ over the specific contractual terms and HR process that the employer followed.

- Believes that an employer’s caretaker role of looking out for the interests of their employees should outweigh an employer’s responsibility to ‘the bottom line’
- Believes management needs to show greater loyalty to colleagues and subordinates
- Believes more in the phrase “business should be fair” than in “business is business”

- Believes that an employee's emotional state is one of the most critical factors for management to be concerned with
- Believes that it is a right for employees to control their own working conditions and to set limits on how and when they will work
- Describes self as politically liberal with regard to social issues
- Believes ethics and fairness are more important than contracts or the law in evaluating conduct
- Uses value-laden language: "It is not fair that..." "It is not right that..." "I feel that..."
- Contract/Policy Skeptic: Distrusts contracts, knows someone who has had a bad experience with contracts or company policy
- Describes self as "feeler" versus "thinker"
- Social science major in college
- Social worker
- Older woman with substantial experience in 'nurturing' role

V. ANTI-CORPORATE

Jurors who harbor negative associations with large corporations in general will begin with a presumption that the employer placed profits over people and is willing to deceive in order to save money.

- Believes corporate management is more willing to lie than other individuals
- Believes we need *more* government involvement to prevent corporate misdeeds
- Believes that corporations should be held to a higher level of responsibility than individuals
- Has a negative impression of the defendant company in particular
- Has had or knows someone well who has had a negative experience with the defendant company or a similar company
- Has been or knows someone well who has been personally misled in an employment deal
- Believes that the corporation bears more responsibility than does the employee for ensuring fairness and full disclosure in an agreement
- Believes corporations *always* or *almost always* keep necessary information away from employees

VI. PRESUMPTIVELY PRO-PLAINTIFF

Certain jurors are more oriented toward plaintiffs or those who can position themselves as 'fighting back' against more powerful interests. In the absence of other indicators, typically pro-plaintiff jurors are more likely to side with the employee in this case.

- Believes the fact a lawsuit has made it to court means the case must have some merit
- Little business sophistication
- Middle-aged or older females *outside* the workforce

- Status inconsistent (*combination* of high education level and low status occupation)
- Lesser educated
- Lesser income
- Has been a union member
- Has background in social services/social work
- Has been a plaintiff in a business or employment dispute
- Conspiracy prone
- Majored in social sciences or fine arts
- Has training, education, or experience in the law or the legal system (when combined with pro-plaintiff characteristics)
- Describes self as politically liberal, libertarian, or anti-establishment
- Belongs to/supports a consumers' advocacy group
- Circumstances have forced to move from higher status position to lower status position
- Describes self as feeler not thinker
- Blue collar employee
- Maintenance or service worker
- Has held numerous, short-term jobs over the years (post secondary school)
- Welfare recipient
- Worker's compensation claimant
- Younger
- Certain second generation minorities

VII. DAMAGES AGGRAVATOR

Certain jurors are more liberal in awarding damages than others who might argue for a more conservative approach.

- Believes damages are an important way to get a company's attention
- Believes money damages are an appropriate way to compensate someone for distress or misfortune
- Believes money damages are an effective way to curb poor managerial behavior
- Believes going to court is a good way to handle workplace conflicts
- Believes the fact a lawsuit has made it to court means the case must have some merit
- Blue collar employee
- Prior plaintiff or knows someone well who was a prior plaintiff
- Lesser educated
- Lesser income
- Younger