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## Getting the jury fired up about your client getting fired

### DEVELOPING AND PRESENTING TRIAL THEMES IN EMPLOYMENT CASES

The loss of a job can be one of the most devastating events in a person's life. The average person spends more than half of their awake life working to support themselves and their family. Being able to provide for yourself and those who rely on you is of utmost importance, and losing that under unjust circumstances not only creates grave financial consequences, but also severe emotional consequences. A job is a major pillar of personal identity and when that is taken away unjustly, there is also a loss of identity, confidence and purpose.

As a plaintiff's employment attorney, your goal is to cleanly demonstrate to a jury that the employer chose to illegally fire your client, and the devastation that resulted demands justice. Doing so comes with unique challenges not present in other types of consumer cases because the workplace is full of complex relationships, motivations, and events. Unlike personal-injury or products-liability cases that typically involve a single event or incident, employment cases involve numerous events and issues. In light of the complexities of employment cases, trial themes are key to helping the jury remain focused on what is important to the employee's case.

A trial theme is a unifying idea that frames your client's case in a simple, powerful way for the jury. A trial theme becomes the keystone of your case presentation. Your theme should be presented starting at voir dire and repeated through closing argument. The goal is for the jury to view the entire dispute from a simple perspective most favorable to finding for your client. The importance of a theme applies no matter the type of case – from sexual harassment to whistleblowing.

#### **A trial theme must fit all aspects of your case**

An effective theme is both memorable, and also fits the law, facts, and people involved in the trial. A trial theme helps to declutter the case. In

employment cases, a common defense tactic is to raise numerous issues to distract and confuse. A trial theme helps the jury stay focused on what matters, and more easily reject the noise from the defense. The theme should address and preempt the defendant's theme, and provide the jury to a path to focus its attention on the defendant's illegal conduct. The trial theme brings it all together for the jury and is crucial to the plaintiff's success. But be careful – be sure to avoid a theme that the defense can flip.

#### **Approach to developing a trial theme**

Developing your trial theme should start early in the case and develop further as the facts do. An approach that can help do this starts with creating a timeline of significant events. The timeline should include events that are both factually and legally important to the story. From that timeline, create a short argumentative statement of the case. The statement of the case should be similar to an elevator pitch.

Next, list out the facts and ways to humanize the plaintiff. Identify the strongest ways jurors are going to relate to the plaintiff and trust her. Most jurors have had a job. This is both a blessing and a curse. They will therefore be able to empathize with the plaintiff in some ways. Equally challenging is that jurors will come with their own work experiences that will shade their perspectives and opinions. Even the most thorough voir dire may not expose what those are, so that is always something to consider.

Listing the motivations of the parties is the next step in vetting trial themes. Human motivation and dynamics are very prevalent in employment litigation because conduct in the workforce is ripe with many motivations. Incorporating the competing motivations of the parties into your trial theme will help the jury get behind why the defendant illegally fired the plaintiff. Identify why the plaintiff is bringing this case, what is the justice or

right being vindicated, what is the motivation of the defendant for doing what it did to the plaintiff, and any other relevant motive. This part of the exercise does require you to put on both your plaintiff and defense counsel hat. List out what the defendant will claim is their motivation for getting rid of the plaintiff so this can be considered in determining your best theme.

The final part of the exercise is synthesizing how the law fits into the facts, people, and motivations. Incorporate what you've identified into the elements of the law. This will allow you to see where your strengths and weaknesses are both factually and legally. Once you've gone through this exercise, use what you've identified to come up with themes that weave or are consistent with it all.

Keep in mind that, when formulating trial themes, it is important to try the case you have, not the kitchen sink. While at the pleading stage it may make sense to plead numerous theories of recovery for wrongful termination, when preparing for trial you may want to trim your causes of action down to the most persuasive. Deciding whether to do that should be done in connection with finalizing your trial themes based on how the facts came out in discovery. Weaker claims can dilute the stronger claims.

For example, in a case of race discrimination and retaliation for complaining of race discrimination, after discovery you may discover that you do not have many strong facts to prove race discrimination, but do for retaliation. If so, seriously consider only proceeding on the retaliation cause of action at trial. The main reason is that the jury does not have to find that race discrimination actually occurred to find that retaliation for complaining of discrimination occurred. All you have to prove at trial is that the employee reasonably believed that race discrimination was occurring when she lodged the complaint.

Similarly, in a Labor Code section 1102.5 whistleblower retaliation case, all

that is required is that the employee had reasonable cause to believe that the conduct complained about violated the law.

### **All the players should be consistent with the trial theme**

Choosing a trial theme must take into consideration all the different players in the case. This includes you as the advocate, defense counsel, the plaintiff, the defendant, witnesses, and the theme the defense is likely to use.

It is important to choose a trial theme that, as an advocate, you are comfortable presenting. A theme that makes you feel cheesy or artificial is exactly how you will come off and be ineffective. Similarly, who defense counsel is should also be taken into consideration. While some trial themes may work well when you have an aggressive defense attorney, they don't work as well if she is understated and soft spoken in trial. The only way to actually know who defense counsel is during trial is to see her in action, so if you have the opportunity, seize it.

The theme must also take into consideration all aspects of your client. This includes how the plaintiff presents, their physical appearance, education, work history, economic position, attitude and personal life. A trial theme focused on a vulnerable plaintiff being taken advantage of by a company works well if the employee is an unsophisticated, minimum-wage-earning individual in need of the jury's compassion. That may not work as well if the plaintiff is a highly compensated, sophisticated employee at the company.

Equally important to consider is who the defendant employer is. A theme that works with a big box company may not work for a small mom and pop shop. What industry the employer is in also factors into this. The defendant's attitude toward your client's case should also be considered. An employer who has taken the position the employee had it coming, compared to an employer who takes the position it was a business decision, can impact your trial theme significantly. An employer who did provide accommodations for a significant amount of time does not fit well with a theme that focuses on an employer being above the law. Sometimes a phrase taken from a

defense deposition can be a strong theme. Other times, a pattern of their conduct can really resonate in a theme.

### **Sometimes the time-tested themes are just fine**

Certain cases are challenging to come up with unique themes. In those cases, don't be afraid to use one of the many time-tested themes that have been successful in many courtrooms. While you may think it has been overdone, the jurors are not likely to feel that way as they have spent far less time in a courtroom than you. There are also certain benefits to using a time-tested theme.

Many time-tested themes are founded in familiar concepts to jurors, and jurors are likely to be comfortable with them. Some common themes include "the Company thinks it's above the law" and "Profits over people."

### **Examples of plaintiff's employment trial themes**

#### *The retaliation theme*

While the general rule is a legal theory should not be a trial theme, retaliation in a plaintiff's employment case is the exception to the rule. If your case has the facts to support a retaliation theme, this a strong, clean trial theme. There are two common retaliation scenarios that come up in wrongful termination cases – the employee who is fired for complaining to the company about something she believes to be illegal, and the employee who is fired for exercising her rights to accommodations or protected leave.

#### *How dare you complain about me*

It is a well-known fact that no one likes being complained about. There is also an inherent stereotype that an employee who complains will be viewed as a whiner, troublemaker, or headache that no one wants to deal with or have at their company. With these two truisms in a case where an employee complained of discrimination or suspected illegal conduct and was terminated shortly after, it is a clean sell that the complaint motivated the firing. In this scenario, the jury is less likely to get caught up trying to figure out if the protected conduct actually motivated the termination, or

whether the conduct complained of was actually illegal.

#### *Retaliation for exercising certain rights*

The other common retaliation theme is an employee who is fired because she exercised her rights to disability accommodations or took protected leave. It is undeniable that when an employee needs to take protected leave or needs an accommodation, this causes logistical challenges to the company's operation in some form. Finding a temporary employee to fill in takes time, temps can be less skilled and more expensive, and getting the temp up to speed quickly requires other employees' time. Co-workers are typically asked to take on more responsibility without additional pay, and in cases where the need for leave is unexpected or sporadic, co-workers are forced to cover for the employee on leave. Similarly, when an employee needs modifications to their duties, co-workers are often required to pick up tasks so the accommodation can be made. These kinds of facts make it easy for a jury to understand the motivations of the company and connect the adverse employment action to the employee's need for leave or accommodation.

#### *Good employees don't turn bad overnight*

If you have a case where the employer claimed the employee's performance declined after lodging a complaint or taking protected leave, this trial theme can be very strong. This theme does require that the plaintiff employee establish a positive performance record or lack of notice of performance issues prior to the protected conduct at issue.

For example, if the employee had nothing but positive performance reviews prior to needing a disability-related accommodation, but then the employee's performance dramatically declines, followed by termination. You can effectively argue that the decisionmaker was motivated to paper the file or justify performance reasons for the illegal termination. Juries feel compelled to give the employee justice when they believe the supervisor engaged in this conduct.

Make sure to try to eliminate alternative sources of bad performance: divorce, health issues, substance abuse, personal problems or other significant

changes in the plaintiff's life. Presentation through visuals also helps to expedite the process of demonstrating the significant good performance the employee had before compared to after the protected conduct. Don't bore the jury going through too many records.

#### ***The sham investigation***

When you have the facts, a sham investigation is a powerful theme. Jurors naturally conclude from a sham investigation that the employer was trying to provide a cover for its unlawful actions. A sham investigation occurs when the persons conducting the investigation fabricate, ignore, or misrepresent evidence, or the investigation is circumscribed so that it leads to the desired outcome, for instance, by deliberately failing to interview certain witnesses. Another variation of the sham investigation theme is when the employer turns the investigation into an investigation of the plaintiff who lodged the complaint. This is a favored tactic of unethical investigators and can infuriate a jury.

#### ***The cover-up***

A corollary to the sham investigation is the cover-up theme; the employer knew what was going on but did nothing to address or prevent it. This theme really builds in the imbalance of power between the employee and the company. The company had the power and ability to prevent injury to the employee but failed to do anything. Baked into this theme is the basic duty an employer owes an employee – particularly a long-term employee.

Examine the corporate policies about how issues should be handled, and examine what the company actually did in failing to follow their own policies. Employer policies often say lots of self-serving things. Capitalize on that and turn its own policies on the employer. Point out that decisionmakers are ultimately protecting the company and trying to pay lip service to the policy, but still engage in an illegal action while trying to sugarcoat it.

#### ***The company that thinks it is above the law***

This can be a very effective theme applicable in many situations – the company does not think it has to follow the same laws that every other employer in California is required to follow. The

core of this theme is unfairness, which resonates with jurors. It is very effective when the employer has engaged in unethical or shady conduct. It's also a call to action to punish the employer.

#### ***Loyalty and long-term employment***

This can be a strong theme for a long-term employee who stayed loyal to the company, helped the company grow and become successful, and then when she is older or needs an accommodation, the employer rids itself of the burden the employee has become without regard for the many contributions the employee has made over the years. After years of faithful service, the employer kicked the employee when she was at her most vulnerable.

Look out for an employer using a layoff to get rid of the older or disabled employees. Remind the jury of all the employee's accomplishments and contributions to the success of the employer. This theme is especially powerful from a damages perspective because if the employee is close to retirement or not as employable because of a disability, it is easy to argue that the employee may never work again, and certainly won't find a job paying as well as this one did. Profits over people.

#### ***The law protects even imperfect employees***

Every potential performance issue an employee had during their employment – whether real or perceived – suddenly becomes a huge issue at trial. Employers will try to elicit all kinds of testimony on these claimed performance issues to make the plaintiff look bad in the eyes of the jury and to distract from the plaintiff's case. Plaintiff's counsel will, of course, point out the lack of any documentation or discipline arising from these issues, and that they only became a big deal at trial. But the way to undermine this common defense tactic is with a theme – the law protects even imperfect employees. In fact, imperfect employees are the ones who most need the protection of the law. Any points the defense may have scored are neutralized and the defense often ceases even mentioning the alleged performance issues in the face of this theme.

#### ***Broken promises***

Policies or contractual commitments are promises an employer makes to its

employee. They are typically in writing and can be paraded in front of the jury. These policies or contractual commitments lend themselves very well to a broken promises theme. Hang the corporate employer by its own commitments. This can be especially effective with harassment, discrimination, and retaliation policies. Focus on accountability, which is particularly effective and resonates with conservative jurors.

#### **Test out your themes**

Once you've come up with your strongest trial themes, it is crucial to focus group them to an audience. A jury focus group is incredibly beneficial. Be sure to test themes against all the evidence and arguments the defense will present. That's really the only way to know if the theme will hold up. Even casually focus grouping to friends and family is a good way to refine the case theme. Conservative or hard-to-convince friends or family are particularly useful for testing themes.

#### **Using visuals to highlight themes**

Enlargements of key documents, summary charts, timelines and even images can all bring to life the plaintiff's theme. As you develop themes for your case, think about how to graphically represent the theme. The lack of any performance issues before the employee made a protected complaint, compared to the numerous write ups that followed immediately after can be presented very powerfully by a graphic. Just the simple image of a person pushing a rock uphill can underscore for the jury how hard the employer made it for the employee who just wanted to do their job.

#### **Concluding thoughts**

A well-thought-out theme will help the jury view the entire dispute from a simple perspective most favorable to finding for your client, and counter the defense evidence and argument. But don't be afraid to pivot with your trial theme when necessary. Sometimes during trial, based on the way the evidence comes in, your strongest theme has to change.

While that is not ideal, rulings during trial and the evidence admitted is not always within your control. In closing, don't be afraid to change your theme to capitalize on the most compelling themes that came out during trial. As plaintiff's lawyers, we must be nimble and willing to go where the evidence takes us to put our clients in the best position to achieve justice for them. And never forget that as plaintiff's employment attorneys, we command the moral high ground for social justice. That should inform all of our themes.

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