Perceptions Of Discrimination And Harassment In A #MeToo World:

Implications for Litigating Employment Cases

The DOAR Research Center
Perceptions Of Discrimination And Harassment In A #MeToo World:

Implications for Litigating Employment Cases

The DOAR Research Center

Ellen Brickman, Ph.D.
Chad Lackey, Ph.D.
Introduction
Introduction

From the lead-up to the 2016 presidential election to the present day, questions of social inequality – between men and women, between Whites and non-Whites, between those born in the U.S. and those who were not – have dominated and polarized our national discourse in virtually unprecedented ways. We have seen it in the passionate debate over the current administration’s immigration policies, and in the groundswell of attention to sexual harassment that manifested itself in the #MeToo movement.

In this heated context, the nation has followed watershed legal events: the challenges to Trump’s immigration ban, the Masterpiece CakeShop case, and the allegations of sexual harassment against some of the icons of our time. We at DOAR wondered, though: What about the non-watershed legal events? What about the kinds of cases that our clients have been trying for years, and continue to take to court on a daily basis? Do attorneys need to be thinking about the political climate in their day-to-day work?

In considering where and how this climate might come into play, employment litigation immediately came to mind. Jurors’ beliefs about social inequality, intergroup differences and disparate treatment are likely to play a role in their evaluations of claims of discrimination and harassment. To understand that role better, DOAR undertook a survey of registered voters in the New York and Los Angeles metropolitan areas, two popular venues for employment litigation. This article describes our findings and considers their strategic implications.
The Survey
The Survey

One thousand registered voters from the New York and Los Angeles metropolitan area were surveyed in the Spring of 2018. The sample was obtained through a survey panel house. Participants completed the survey online, with an average completion time of 7 minutes.

The survey included questions about basic demographics, personal experience with harassment and/or discrimination, and attitudes about immigration policies and the #MeToo movement. The central measures of the survey were a series of questions asking for respondents’ beliefs about harassment and discrimination based on race, national origin, gender and age. For each of these types, respondents were asked: (1) How common it is (on a 5-point scale from Very Uncommon to Very Common); and (2) what percent of those who experience this report it. Thus, we asked them to provide a “prevalence” estimate and a “reporting” estimate.

The survey sample included 500 respondents from the New York metropolitan area and 500 from the Los Angeles metropolitan area.\(^1\) Half the sample was male and half female. Respondents ranged in age from 18 to 86 with a mean age of 47 (SD=17.18) and a median age of 44. Seventy percent of the sample identified as White, 12% as Asian, 9% as Black and 9% as “Mixed” or “Other.” In a separate question, 18% of the sample reported they were of Hispanic origin. The vast majority (89%) of respondents had been born in the United States.

Eleven percent of the sample had a high school diploma or less; 27% had some college or a technical or associate’s degree; 32% had a bachelor’s degree and 30% had done post-graduate work.

\(^1\) The NY area included the five counties of New York City as well as Nassau, Rockland, Suffolk and Westchester Counties. The LA area included Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara and Ventura Counties.
Key Findings

Discrimination and Harassment Were Personally Relevant To Respondents

_Voir dire_ in employment cases often includes questions about personal experiences with discrimination and/or harassment, but concerns remain about the quality of the information you elicit. Are jurors always willing to be forthcoming? If the Court is doing the questioning, are the questions phrased to include the broadest range of experiences, and to induce jurors to be self-disclosing?

Recent studies suggest that if jurors do self-disclose discrimination and harassment, they will have a lot to say. A Pew study of over 6,000 adults conducted in February-March 2018, just a month before the present study, found that 59% of women had experienced unwanted sexual advances or sexual harassment, and 69% of these women reported experiencing this at their workplaces – a figure that translates to about 42% of all women surveyed. A study by the US Equal Employment and Opportunity Commission (EEOC) concluded that “anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace.” The lower end of the range reflects a random sample of women responding to a question about “sexual harassment” without the term being defined in the question; the higher end reflects a convenience sample responding to questions about specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion.

In a large-scale 2016 Gallup poll, 20% of Black respondents reported being treated unfairly at work because of their race. An AARP study in 2012 revealed that 26% of older workers reported experiencing age discrimination, and 56% of older workers looking for a job reported the same.

The present study is consistent with these findings: Discrimination and harassment were personal issues for the majority of respondents. Thirty-seven percent had personally experienced such harassment and an additional 20% had not but reported that someone close to them had. Gender discrimination/harassment was the most common type cited, with 47% of the sample indicating they or someone close had experienced it – not surprising in our largely White and relatively young sample.

All Forms Of Discrimination and Harassment Are Not Created Equal – Or Perceived As Equally Common

While some people gave higher estimates of prevalence across the board than did others (more on this below), the respondents as a whole did not perceive all forms of discrimination or harassment as equally common. On average, people believed age discrimination was more common than other forms of discrimination. It was followed by race, gender, and then national origin. This finding stands in interesting contrast to respondents’ reports of their own experiences and those of people close to them: On those questions, age-based discrimination was the type least often cited.

When we asked about harassment, though, a different picture emerged. Here, gender-based harassment was seen as the most prevalent form, followed by race, age and finally, national origin. This is, in fact, consistent with respondents’ self-reported experiences, where gender-based discrimination and harassment was the most commonly reported form. It is also consistent with – and perhaps driven by - media attention to sexual harassment in the Spring of 2018, a time when Harvey Weinstein and Bill Cosby dominated the news (in fact, the survey was undertaken right around the time Cosby was standing trial for the second time). The data may reflect how strongly jurors’ beliefs about social issues are shaped by current events.

---

4 https://news.gallup.com/poll/194750/nearly-half-blacks-treated-unfairly-last-days.aspx
5 https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2013/Staying-Ahead-of-the-Curve-Age-Discrimination.pdf
Demographic And Other Factors Affected Beliefs About The Prevalence Of Discrimination And Harassment

There were clear demographic and job-related factors that made some individuals assume greater prevalence of discrimination and harassment than others:

- Women offered higher prevalence estimates of gender- and race-based discrimination, and of gender-, race- and age-based harassment than did men.

- Non-Whites offered higher prevalence estimates of both discrimination and harassment based on race and national origin than did Whites.

- The older people were, the more common they thought age-based discrimination was.

- The younger people were, the more common they thought all forms of harassment were.

- Union members perceived harassment based on age, race and national origin as more common than non-union members, though the groups did not differ in estimates of gender harassment or any form of discrimination.

Respondents Believed Discrimination And Harassment Are Underreported

One component of the current national debate relates to the extent to which discrimination and harassment are under-reported (or perhaps, in the eyes of some, over-reported). The #MeToo movement has brought to the fore decades of women’s unreported experiences with sexual harassment in particular, leading some to speculate that the cases that are reported represent merely the tip of the iceberg. In that context, that belief that discrimination/harassment is underreported is a kind of bellwether for sensitivity to these behaviors – a sensitivity that we speculate might favor a plaintiff in a discrimination or harassment case.

On average, respondents believed that fewer than half of those who experience discrimination or harassment in the workplace report it to their employers. The highest estimated reporting rates were associated with gender discrimination (48%) and harassment (49%) but rates for other forms of discrimination and harassment were not far behind, ranging from 39% for national origin-based discrimination to 47% for race-based harassment.

Retaliation Is On People’s Minds When They Think About Discrimination And Harassment

Retaliation claims are a frequent and important aspect of discrimination and harassment cases. Several measures in our survey suggest that jurors are quite attuned to the possibility that a company will retaliate against those who report such unfair treatment. When asked how likely it was that a company would do so, only 18% thought it was unlikely or very unlikely, whereas 48% thought it was either likely or very likely (34% chose a midpoint option).

This attunement may be heightened for jurors who have personal or vicarious experience with discrimination.
and/or harassment. Of the 573 respondents who had experienced discrimination or harassment or were close to someone who had, 321 (56%) indicated the incident(s) had been reported at the workplace. A follow-up question elicited the information that 62% of the reporters experienced retaliation because of their reports. And, for those who did not report, fear of retaliation was the most commonly cited reason for that decision. The experiences of those who did report suggest that this fear was justified.

Why did you/they decide not to report it?

<table>
<thead>
<tr>
<th>Fear Of Professional Retaliation</th>
<th>Did Not Think It Would Help</th>
<th>Fear Of Social Retaliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>42%</td>
<td>27%</td>
<td>9%</td>
</tr>
</tbody>
</table>

Did Not Think They Would Be Believed 9%
Fear Of Being Blamed 7%
Other 7%

“If It Happened To Me, It Probably Happened To You:” The Availability Heuristic At Work

In ways large and small, our life experiences shape the way we make sense of – and make assumptions about – the world around us. Using a mental shortcut known as the “availability heuristic,” we make judgments based on the information that comes to our minds most quickly. Typically these are events or situations that are related to the issue at hand, and because they are first to mind, we judge them to be more frequent or likely than they may actually be. Thus, if we have had an experience ourselves, we will probably overestimate the likelihood that others have had it too.

Consistent with this psychological phenomenon, the results of this study suggest that those who have some personal experience with discrimination and/or harassment are more likely to believe that it happens to others as well. Those who reported having such experiences themselves had the highest prevalence estimates for all forms of discrimination and harassment. This group was followed by those who had not experienced it themselves but reported that someone close to them had. The lowest prevalence estimates came from those without either personal or vicarious experience.

Political Affiliation, the #MeToo Movement, Immigration Attitudes And Perceptions Of Discrimination And Harassment Are All Related

In this era of heightened attention to questions of unequal treatment based on sex, skin color and other demographics, beliefs about key political issues are an inevitable part of the equation when we think about discrimination and harassment case. This survey included questions about political affiliation, support (or non-support) for tightening immigration controls, and the #MeToo movement.

The Role Of Attitudes About Immigration

Sixty percent of the survey respondents indicated they “support current efforts to tighten immigration to the U.S.” while 40% did not. Not surprisingly, this measure was strongly related to political affiliation: 81% of Republicans answered this question affirmatively, compared to only 46% of Democrats and 67% of Independents.

Beliefs about immigration control were also strongly associated with perceptions of discrimination and harassment. Those who supported tightening immigration had lower prevalence estimates for discrimination based on race, national origin and gender than did those not supporting immigration control. The former group also estimated higher reporting rates for all forms of both discrimination and harassment, perhaps suggesting less sensitivity to employees’ concerns about reporting such experiences.

Putting #MeToo Into The Mix

Respondents were generally familiar with the #MeToo movement: On a 5-point scale from Not At All Familiar (1) to Extremely Familiar (5), 58% of the sample responded with either a 4 or a 5. We also saw broad support for the movement. Close to 60% agreed or strongly agreed with the statement that “The #MeToo movement has brought long needed attention to the problem of sexual assault and harassment.” Similarly, 65% agreed or strongly agreed
that “With the rise of the #MeToo movement and the celebrities who have been publicly called out, people are finally being held accountable for improper behavior.”

Forty-six percent of the sample identified themselves as Democrats, 27% as Republicans, and 22% as Independents (with the remaining 5% reporting some other, or no, political affiliation). We saw highly significant differences among these three groups with respect to feelings about #MeToo, and also perceived prevalence of all forms of harassment and discrimination.

Democrats reported greater familiarity with the #MeToo movement than Republicans, with Independents scoring midway between the two. Democrats also agreed more strongly than Republicans with two statements supporting the #MeToo movement:

- The #MeToo movement has brought long needed attention to the problem of sexual assault and harassment.
- With the rise of the #MeToo movement and the celebrities who have been publicly called out, people are finally being held accountable for improper behavior.

Conversely, Republicans agreed more strongly than Democrats with two statements about negative effects of the movement:

- The #MeToo movement has gone too far in labeling normal interactions as sexual harassment.
- The #MeToo movement has become a witch hunt and innocent men have been caught up in it and wrongly punished.

For all of these statements, Independents again had mean scores that fell between those of Democrats and those of Republicans.

Greater support for #MeToo among Democrats was paralleled by a stronger perception in this group that discrimination and harassment were common in American workplaces. For all types of discrimination and all types of harassment, Democrats had the highest prevalence estimates of the three major political groups, followed by Independents and then Republicans. The difference between Democrats and Republicans was particularly striking. For example, on a 5-point scale ranging from Very Uncommon (1) to Very Common (5), Democrats’ mean score for the prevalence of race-based discrimination was 3.61, compared to a mean of 3.06 for Republicans. This difference was highly statistically significant.6

---

6 Statistical significance is a measure of the likelihood of such a difference occurring in the sample by chance, rather than as a reflection of a meaningful difference in the population. This finding was significant at p<.001, indicating less than a 1 in 1000 chance it was a chance finding.
Strategic Implications And Recommendations
Strategic Implications And Recommendations

Here, we consider the implications of the survey findings both for voir dire and for broader trial strategy in cases involving allegations of employment discrimination and harassment.

Implications For Voir Dire

Know that unlike many types of cases, jurors are coming in to employment cases with relevant life experiences. Questioning them about these experiences is especially important.

When defending employers against harassment and discrimination claims, push for inclusion of questions about personal experiences, including experiences of “people close to you.” Vicarious experience matters here, and those with experience – personal or vicarious – are risky for the defense.

When asking about personal experience, phrase your questions broadly: Experience with one form of discrimination affects perceptions of other forms as well. Include questions about experiences with retaliation to help you distinguish between risky and downright dangerous jurors, an important distinction when deciding how to use a limited number of peremptory strikes. And, defense counsel would do well to push for supplemental juror questionnaires to encourage disclosure of sensitive information that jurors may be reluctant to share in open court.

Consider certain broad groups as more likely than others to be plaintiff jurors:

- Women
- Those 45 and older for age discrimination cases; those under 45 for harassment cases
- Non-Whites for cases involving race or national origin
- Union members for harassment cases based on race, age, or national origin

Our findings also argue for the usefulness of political affiliation and political beliefs as proxy variables for employment attitudes. Whenever possible, conduct internet searches of prospective jurors. Political party affiliation can easily be found in online databases and social media users with low privacy settings will often post about involvement in or support for key political causes. A word of caution here: If you are undertaking searches, it is vital that you either educate yourself about the legal constraints of such searching (e.g., what constitutes “communication” with jurors, and how to do “clean” searches) or retain consultants with expertise in this area. It is disconcertingly easy to run afoul of the ethical rules accidentally in researching prospective jurors online.

Implications For Trial Strategy

The findings of this study suggest that for jurors, beliefs about discrimination and harassment line up with broader views about key political issues. Thus, plaintiffs will be well served by nesting an employee’s narrative in the larger story of social inequality – to the extent possible – and defendants will be served by explicit reminders to jurors that it is a personal rather than a national story being litigated in the courtroom. Regular reminders of the individuals and the setting can help defense counsel to keep the focus narrow, while more expansive terminology can help plaintiff counsel remind jurors of the social context in which the case is being tried.

The findings also highlight a specific challenge for defense counsel: that jurors appear ready to believe that companies retaliate against those who report harassment and discrimination. Almost half the sample believed this to be likely. These data suggest that many jurors will bring a presumptive belief in retaliation to their evaluation of a case, psychologically shifting the burden to employers despite legal instructions to the contrary. And,
taken together with data on the experiences of those with personal experience with this issue, one should expect a reasonably high level of juror sympathy for employees who testify that they did not report the discrimination or harassment for fear of retaliation. In this context, aggressive cross-examination on plaintiff’s failure to report can carry some risk – perhaps more so than it did several years ago in a less charged political climate. This risk can be mitigated, though, by setting the proper context for questions on this topic. Frame the questions in the context of the absence of evidence that the alleged discrimination or harassment occurred: Emphasize the lack of corroboration rather than reporting decisions.

Understanding The Role Of Political Climate In Employment Cases: A Look Into The Future

This study marks the beginning of ongoing research into national attitudes about workplace discrimination and harassment. Using these data as a baseline, DOAR will continue exploring this issue in conjunction with related political attitudes. We hope that these snapshot surveys will help to keep attorneys on the cutting edge of the intersection between jurors’ broad beliefs and their case-focused evaluations in employment cases.
About The Authors

Dr. Ellen Brickman is a Director in DOAR’s Jury Consulting practice. She has been working as a trial consultant for over 25 years, and has had a leading role in many high-profile criminal and civil cases including the World Trade Center Insurance Litigation, the defense of politicians Dean Skelos, Sheldon Silver and Senator Robert Menendez, and the FIFA corruption trial in the U.S. She has extensive experience with complex litigation, including white-collar crime, employment cases, securities litigation and intellectual property cases, among others.

As a Director, Dr. Brickman manages teams of consultants and associates conducting pre-trial research and consulting on all aspects of trial strategy. Drawing on her many years of research experience both in and out of the trial consulting industry, she has directed much of DOAR’s pre-trial research. She is particularly skilled at designing research to answer complex strategic questions and helping attorneys interpret the research findings and their implications for trial strategy. She is also closely involved in theme development, jury selection, and witness preparation.

Dr. Brickman holds a B.A. in English and Psychology from Barnard College and a Ph.D. in Social Psychology from Columbia University. Prior to DOAR, she conducted research in social-service settings and then served as Director of Research at Julie Blackman & Associates, a consulting firm that later merged with DOAR. She has also taught courses in Social Psychology and in Research Methodology at NYU, the New School for Social Research, and Fordham University. Dr. Brickman has also served on the faculty of the ABA’s White Collar Crime Institute and NACDL’s Annual White Collar Seminar, and has published articles on trial strategy and juror psychology.

Chad Lackey Ph.D. has worked as a Jury Consultant for the past 15 years and has consulted on over 200 cases involving all types of civil and criminal matters. His background in civil litigation includes, but is not limited to, employment, insurance, complex commercial, intellectual property, securities and personal injury. He has also consulted on criminal cases, for both the prosecution and the defense, involving insider trading, rape, securities fraud, murder, political corruption, terrorism and the death penalty. While his practice has largely been based on the East and West Coasts, he has worked in venues across the country.

Much of Dr. Lackey’s consulting centers on designing and conducting focus group, survey and mock trial research to test the persuasiveness of case themes and arguments on representatives of the venue in question. He then works with trial teams on how to best revise or retool these themes and arguments to maximize their persuasiveness at trial. Dr. Lackey also uses focus group and survey research to identify the personal experiences and attitudes that bias deliberations and decision making in each particular case in order to devise a case-specific jury selection strategy.

Dr. Lackey assists clients in all aspects of jury selection from working with clients to determine how to best negotiate these issues with the court and opposing counsel to drafting and grading supplemental juror questionnaires. He routinely assists clients both in preparing for and conducting voir dire in court and has selected juries in both federal and state courts.

Dr. Lackey also has an extensive graphics consulting background, designing graphic presentations for all types of litigation involving jurors, judges and arbitrators. He has both lectured and authored manuscripts on presentation strategy to civil, criminal and regulatory attorneys and served as an expert on how improperly rendered photographic evidence can bias jurors.
Perceptions Of Discrimination And Harassment In A #MeToo World:

Implications for Litigating Employment Cases

The DOAR Research Center

About DOAR

DOAR is a firm comprised of the world’s leading consulting and testifying experts. DOAR tests, develops and implements litigation strategies in complex business disputes and high-profile criminal cases across the globe, providing research-based advice, strategic communications, and industry and academic experts to advance its clients’ positions and increase their likelihood of success. Over its 30-year history, DOAR has advised on thousands of cases totaling hundreds of billions of dollars of asserted damages, and on many of the highest-profile white-collar criminal cases. DOAR’s experience, commitment to excellence, and tireless dedication to its clients have earned it the trust of the world’s top law firms and corporations.