Getting Inside the Mind of the Factfinder: 
Creating Compelling Themes in Employment Litigation

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Persuasive trial techniques and compelling themes has always been important but with the recent landmark case law handed down by the United States Supreme Court and lower courts, these techniques and themes have added significance. Recent decisions have held a plaintiff does not have to prove egregious conduct beyond intentional discrimination in order to recover punitive damages, Kolstad v. American Dental Association, 119 S.Ct. 2118 (1999); and clarified issues under sexual harassment in Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) and Burlington Industries v. Ellereth, 118 S.Ct. 2257 (1998); as well as holdings under Title VII, Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264 (10th Cir. 1998) and the Americans with Disabilities Act, Wallin v. Minnesota Department of Corrections, 153 F.3d 681 (85th Cir. 1998). Given recent decisions, more cases may survive summary judgment. Additionally, there exists and increased likelihood of punitive damages if intentional discrimination is proven. These factors make compelling themes very important in employment litigation.

It is important for the employment lawyer to develop a case theme early in the preparation process. The better developed the theme, the better your opportunity to incorporate it into the various components of your preparation. A theme is crucial to properly and effectively present your client's case at trial. Once developed, this theme should be carefully incorporated into all pretrial issues presented to the judge, into voir dire, into the opening statement, into the testimony of witnesses, and in determining what
evidence and exhibits to introduce to the factfinder and, finally, into the closing argument.

**A. A Good Theme Tells Why Your Client Should Prevail.**

A good theme tells the factfinder why your client should prevail. This theme should preview an interesting and informative story you could describe to your family at the dinner table. If you cannot keep your family’s attention, you likely will not be able to keep a juror’s attention either.

An important element of the theme is the case statement which is the hook that catches the attention of the listener and contains the most compelling, emotional, factual and legal elements of your case. One cannot underestimate the influence television has had on jurors. The short and direct phrases that boast a product’s benefits (“Just Do It”) are what jurors expect you to deliver as a theme. A catchy and easily remembered theme presented during voir dire, opening and closing can be a highly effective tool.

For example, you represent the plaintiff in a wrongful termination action. Knowing jurors’ propensity to dislike big corporations, you play on that bias with the tried (or is it tired) and true theme of “a heartless Goliath”. In fact, you may have won cases when using that theme. Ironically, you may have prevailed in spite of that theme and it may have contributed to the fact that you lost other cases.

Or from a different perspective, on the eve of a bench trial, you are finalizing your opening statement preparation for the defendant corporation in a sexual harassment case. You decide to appeal to the judge’s high sense of personal responsibility by characterizing the plaintiff as a “whiner” in a case of “crying wolf.” Despite evidence to support that characterization, the plaintiff ultimately prevails.

Are both of these approaches all wrong? No. Are they entirely correct? No. What was right in both instances was the attempt to create a theme for the case. A case without a theme is like a novel without a plot. Without the theme, you might eventually figure out what is going on in the story but it takes a great deal more effort and leaves many of the events open to wide and disparate interpretations on the part of different
receivers. Effective themes at trial provide the filter through which the factfinder views your case.

It is also important and correct to create a theme for the judge in the bench trial or for an arbitrator. Many attorneys mistakenly believe their arguments need neither as much creativity nor a central theme when the case is tried to the court or an independent factfinder. In fact, research finds that judges are much more like jurors when processing the evidence than they are different.¹ On an anecdotal note, many judges have commented post-trial that they appreciated, even looked forward to hearing from the trial attorney who made the effort to present the evidence via a story interwoven with themes. Given that “similarity truism”, the authors challenge the reader to think of judges, arbiters, mediators, and juries when reading about the “factfinder” and persuasion in this article.

So what was wrong with the themes chosen for both scenarios? Read on to learn what extensive jury, judicial, and arbitration research before trial has taught us about themes and their effective use.

B. The Strongest Theme Illuminates Your Proactive Case.

Highly successful trial attorneys have long contended that the strongest case is one which focuses its themes and witness testimony around its own proactive evidence rather than placing a great deal of emphasis on the weaknesses of the opposition’s case. While such a truism makes common enough sense, it is astonishing how equally common it is for litigators to focus first and foremost on the other side’s sins. In fact, the two scenarios discussed earlier in this article both commit that very transgression.

1. Playing Fair vs. Poor Sportsmanship

The ultimate question then becomes: What does it matter if your theme aims the gun at the other side? The answer ranges from “some” to “a great deal.” Over the course of interviews with hundreds of jurors and judges, one very simple proposition

repeatedly surfaces. Factfinders in trials want counsel to play fair and to observe social niceties. Jurors are especially sensitive to the trial attorney who blasts the other side while portraying her own client as a saint. Jurors frequently see it as “poor sportsmanship” or as “not very nice” to argue first that the other side is evil rather than to focus primarily on the good acts of the party he represents.

Sadly, factfinders do not always expect counsel to observe those niceties. Jurors seem more cynical about the legal profession today than ever. The same appears to be true for corporations, especially big ones. Counsel can use this cynicism to her advantage by showing class both in the courtroom and in her choice of themes. Additionally, the element of surprise in this unexpected approach will prove more persuasive.

2. Alternative Arguments Should Be Carefully Considered

Additionally, while alternative arguments may be appropriate for a judge or arbitrator, jurors do not like to hear “it did not happen, but even if it did, my client is not liable” because this is often viewed as speaking out of both sides of your mouth. An age old problem for defense attorneys deals with arguing damages. This should be done with great care. One approach that has met with success is to state you do not believe damages are an issue, but since plaintiffs spend so much time on this topic, some brief comments are appropriate.

3. Rework Your Negative Themes

Consider a possible rewrite of the themes suggested in the two earlier scenarios. If plaintiff’s counsel focuses more on the good quality of his client’s work product in the wrongful termination case, the factfinder may be more incensed by the defendant’s unfair treatment of its employee. An improvement on the theme might be “a strong person, a

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3 In the same survey, 81.3% of adults surveyed responded that executives of big companies “usually” try to cover up wrongdoings.
stronger work ethic.” Likewise, the defendant corporation that underscores its follow through on well-written anti-harassment policies in the workplace might impress the factfinder more with its novel approach to an age-old problem. A better theme could be “a good policy at work.”

4. Mock Trials May Help Develop Themes

When the strongest elements of your case elude you or when you are uncertain how opposing counsel’s strong points might play, consider conducting mock trial research. Such research is intended to illuminate the strengths and weaknesses of both parties’ cases. Frequently, the mock jurors’, mock judges’, or mock arbitrators’ narrative remarks provide “quotables” or “mantras” for the case that become your strongest theme.

C. Factfinders Are More Persuaded by their Own Conclusions Than by Counsel’s.

There is such a thing as making too overt a conclusion for the factfinder. Persuasion theory tells us that the conclusions a person draws on his own (or has been guided to draw on his own) are more compelling than conclusions drawn for him. Additionally, factfinders may feel that their intelligence is insulted by too obvious an argument. Reexamine the first theme suggested in this article, “a heartless goliath.” By focusing instead on “a strong person, a stronger work ethic” you are making a point by insinuation that the company was way off the mark in terminating the plaintiff. By demonstrating your client’s strengths, you will inspire the factfinder to look more deeply for a motive on the part of the company to fire him. Having found one on her own, the factfinder will be more likely to internalize that conclusion.

1. Utilize Undisputed Facts

Marshaling the undisputed facts – those facts agreed to by both sides, or not contested – helps the factfinder come to his own conclusion. Focus on facts that will be

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undisputed aids in developing the case themes. For example, in sexual harassment cases, company knowledge and action in response to that knowledge are important defense themes. If an undisputed fact is that the company immediately started its investigation upon learning of the claim ("prompt action, responsible follow-through") then a case theme should incorporate this concept. Likewise, other undisputed facts should be used and emphasized in your theme.

2. **Turn the Hostile Witnesses, or the Bystander to Your Advantage**

The factfinder will also be better able to reach her own conclusion by an emphasis on testimony from disinterested bystanders or hostile witnesses. Such witnesses are ones even the opposing party will often have to concede are unbiased. This type of witness can be hard to find, but often witnesses can be led to support a position by establishing that there were no prior problems between the witness and the interested party, that the employee thought this particular person was fair and unbiased, or that they had a good working relationship. Former employees should also be interviewed because they are often a good source of "patterns" for one side or the other. Human nature and pretrial research bear out the fact that judges and juries look at prior patterns of performance and treatment as a context for judging credibility.

Developing case themes around favorable testimony from hostile witnesses is very effective in a case. While the hostile witness may disagree with your position on some facts, there is often common ground that you can use with this witness to prove other parts of your case. It is important to get what you can from the hostile witness and have his testimony support some part of your theme.

D. **Employment Litigation Themes Should Resonate with the Factfinder’s Prior Workplace Experience.**

1. **Use Prior Experience to Your Advantage**

In patent litigation, jurors rely on their prior experiences with having ideas stolen by friends or neighbors. In medical malpractice cases, judges operate from a framework of having been "Monday morning quarterbacked" themselves. In employment litigation,
juries are comprised not of six to twelve jurors but rather of a combination of six to twelve employees and "family managers." Jury research finds that jurors can spend upwards of 25% to 40% of deliberations talking about their own personal experiences. In comparison to other types of litigation, jurors have life experiences more relevant to employment cases than any other. As a result, they become their own experts in the jury room and can easily be expected to compare their own workplace experiences with that of the litigants.

2. **Understand Jury Research Findings**

When building themes for your employment case, consider the following findings from prior jury research and post-trial interviews:

- Jurors see employment cases as ultimately about power.
- Jurors demand proof that the plaintiff was treated consistently with other employees.
- Jurors will scrutinize a company’s policy manual as a yardstick for the company’s performance in the case of the specific plaintiff.
- Jurors use minimum governmental standards regarding harassment and discrimination as a checklist for a company’s behavior.
- Jurors rely *far* more heavily on written reports than on verbal testimony.
- Absent other “quirks” with the plaintiff, jurors tend to applaud the plaintiff whistleblower for having the courage to speak up.
- Jurors want to know that an employer did everything possible to keep the “at risk” employee in the “corporate family” before reaching the last resort of termination.
- Jurors tend to believe that a corporation’s loyalty to profits supersedes loyalty to employees (and where such is not the case, jurors are duly impressed with the employer.)
- Jurors hold the plaintiff responsible for having done a thorough job of reporting complaints through the proper company channels before resorting to litigation.
• Jurors are typically unforgiving of a plaintiff who is complaining of discrimination when it can be shown that s/he also participated in that practice at one time.

• Jurors will determine for themselves if the company’s procedures were illustrative, flexible, and achievable by comparing them to procedures they would have written on their own.

• Jurors expect two completely different speeds for termination (slow) and harassment investigations (swift).

• In constructive discharge cases, jurors are not typically swayed by a defense argument that the plaintiff exercised free will in quitting.

Now, what do you do with these findings? Use them to your advantage in creating a proactive, positive theme on your client’s behalf. You know that factfinders typically see an employment case as one about power. Make the case that your plaintiff client used her own power and her own ability to make the best of a bad situation. Argue that the defendant corporation used its power to create fair working conditions for all of its employees. If documents are a strength for your case, use that fact in your theme. Consider the phrase, “a well-documented policy” or “a highly credentialed employee” as a central theme. Again, the well-framed theme is one that considers the factfinders’ predispositions and that uses those predispositions to tell a positive story.

E. Themes That Focus on Values and Motives Are Most Potent.

1. Use a Factfinder’s Sense of Right and Wrong

Without fail, jurors are frequently prone to view a case through a filter of values. Were the plaintiff’s actions moral? Was the defendant corporation fair in its dealings with its employees? Anecdotal review of jurors over the years bears out the fact that certain subgroups are even more likely to ask these questions and to make values comments when assessing the parties’ actions.\(^5\) As a result, it makes good sense to

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\(^5\) Based on Dr. Karen Lisko’s jury research with several hundred jurors over the past twelve years
design a theme that incorporates values terms, such as: “fair dealings in a fair setting” or “moral actions in an immoral environment”.

Juries and factfinders identify with their own sense of right and wrong and these themes are appealing and easy to understand. Any experienced trial lawyer recognizes jurors come from all sorts of backgrounds. However, common themes such as teamwork, dedication, honesty and hard work appeal to most jurors in employment cases. These themes are appealing and easy to remember.

2. **Make the Motive Come to Life**

   A first cousin of values is the concept of motive in the case. While criminal cases readily lend themselves to a discussion of motives, many overlook the fact that factfinders consciously or subconsciously consider motive in civil actions as well. For example, it is readily apparent that corporations are universally charged with a profit motive in acting as they do. Plaintiffs in employment actions typically do well to advance a profit motive on the part of the defendant company, especially when the defendant provides no compelling rebuttal to that charge.

   However, businesses need not automatically suffer from that identity. A powerful persuasion technique rests with turning one’s weakness into one’s strength. As the big company, welcome the profit motive. Argue through your theme that the company’s profit motive kept it honest (values incorporation) because dishonesty could hurt the company’s bottom line. Perhaps the company’s profit motive means that it has a policy of doing everything possible to rehabilitate its “at risk” employees because firing and hiring is so much more expensive. By dealing in the factfinder’s realm of expectations about a party’s motive, your argument and theme will be more palatable and, therefore, more persuasive.

F. **Themes Are More Effective When Interwoven Throughout the Trial.**

1. **The Theme Should Umbrella the Entire Case**

   Counsel often expend a great deal of time and money establishing the “perfect” theme only to underuse it at trial. True, the natural home of your theme is at the
beginning of opening statement. However, consider the fact that an effective theme should serve as an umbrella for your entire case. It should be the main setting for your characters’ actions. It should drive your witness order. It should prevail into closing argument as a key way of tying all of the evidence together. Learning theory also teaches us that a person may need to hear something upwards of seven times before incorporating it into her own perceptions. Repetition of your theme will ensure its resonance with the factfinder and will draw a line of continuity throughout your case.

2. **Bring Life to the Jury Instructions**

One way to develop effective themes that is often overlooked is to carefully examine the jury instructions you hope to present at the end of the case. Often, most of the instructions are known from the very beginning of a lawsuit. Incorporating the language from the instructions into all phases of your case can help the jury answer the verdict form in your favor. Using these instructions, *i.e.*, “age was not a factor,” throughout helps the jury when they see this language in the jury room and they remember your theme.

3. **Get Witnesses to Speak Your Theme**

Use of your theme throughout the trial helps drive home your case. The more witnesses who support your theme, the better for your case and the stronger your arguments. In developing your case, see how many witnesses you can get to support your themes. Not all witnesses will agree with each of them, but often, even hostile witnesses will agree with many parts. By using themes that may be repeated throughout the testimony, you are making certain the factfinder will consider your point during their deliberations.

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4. "Visualize" Your Theme

Most attorneys recognize that visual information is often more persuasive in proving your case than is verbal information. Demonstrate evidence in developing your themes is critical to a winning case. Although employment cases often involve things that one cannot see like biases, prejudices, personnel decisions and emotional distress, there are still visual aids that should be considered in developing your trial themes.

Employment lawyers know that timing of events is important. For example, if the employee complains of harassment soon after receiving a negative job evaluation, timelines depicting these facts are good demonstrative exhibits to support the themes. Timelines can incorporate your themes and be used throughout the case. An effective timeline may be used in opening with undisputed facts, be supplemented during trial with facts presented by witnesses, and then be used in closing by the attorney with argument. Of course, there are many variations of this that may also be used depending on your particular case, but effective use of a timeline will support your theme.

Other visual aids to stress your theme can include schematics of the work area, blowups of disciplinary letters, company policies or key documents, diagrams, calendars and diary entries just to name a few. Incorporate these visual aids to help the factfinder and be sure to use these demonstratives in your closing.  

G. Conclusion

It goes without saying (even though we have taken several pages to say it) that themes are critically important to a persuasive case. Let your factfinder drive your theme and use it at every possible turn throughout trial.

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7 A 1993 study by the National Law Journal and Lexus found that, of 2,000 jurors surveyed, 43% admitted to having begun to make up their minds about the case by the time of closing argument. Fully 20% more said that closing arguments facilitated that process for them.
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Expertise

Mr. Husband is a partner of Holland & Hart and practices labor law and litigation and is listed under labor and employment among The Best Lawyers in America. Mr. Husband has served as the Chair of the firm’s Labor Practice Group. He has experience in litigation and administrative proceedings before the Equal Employment Opportunity Commission, the Colorado Civil Rights Commission, the Colorado Division of Labor and Employment, the National Labor Relations Board and in the courts of 18 states. His other activities have involved representation issues; class action lawsuits; sexual harassment, race, national origin, sex, handicap and age discrimination; arbitrations; equal pay act matters; contract and tort litigation arising form the employer-employee relationship, including wrongful discharge and termination at will; contract negotiations; strikes; Railway Labor Act; Fair Labor Standards Act; OSHA; MSHA; and preventive labor relations.

Over the course of his employment related career, Mr. Husband has been involved in many hundreds of cases and has been lead trial counsel in over 200 adversarial proceedings, trials, major arbitrations or administrative actions that have been tried to conclusion.

Before joining Holland & Hart, Mr. Husband completed a clerkship with the Honorable Robert H. McWilliams, U.S. Tenth Circuit Court of Appeals.

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Mr. Husband speaks frequently at seminars on fair employment and labor relations, and has provided training to over 30,000 professionals on a wide range of labor and employment-related topics. He is listed among Who’s Who in America, Who’s Who In Business, Who’s Who In the World.

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Expertise

Dr. Lisko has practical experience in hundreds of cases in the areas of civil plaintiff, civil defense, and criminal defense ranging from simple to complex litigation. She provides expertise in courtroom persuasion, strategic jury selection, case theme development, effective public speaking, persuasive opening statements/closing arguments, and assists with witness preparation for deposition, arbitration, and trial. She has trained many attorneys, individually and in groups.

Dr. Lisko utilizes her training to conduct the firm’s focus group and mock trial research for arbitration, bench and jury trials. She relies on her experience with hundreds of mock juries and focus groups to develop case strategy recommendations based on the research findings.

Dr. Lisko has provided expert witness testimony on jury bias, jury decision making, and community attitude survey research for change of venue.

Dr. Lisko holds a doctorate in legal communication, one of the only specialized degrees of its kind.

Professional Organizations

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