



2022 Annual Conference
June 26 – 29, 2022

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**Lessons Learned
from the
Courtroom:
Employment
Litigation
Challenges and
Opportunities**

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LESSONS LEARNED: EMPLOYMENT LITIGATION CHALLENGES & OPPORTUNITIES IN TODAY'S COURTROOM

June 26-29, 2022

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I. Checklist and Talking Points for Jury Trials in Employment Cases

This document highlights key issues and concerns to be addressed when faced with pending employment litigation or when trying to avoid such litigation.

II. Unmuting the Jury: Lessons Learned and Trends to Note in Employment Litigation

Dr. Jill Huntley Taylor, of Taylor Trial Consulting, addresses the latest issues and possible points of contention in connection with trying employment litigation, and offers insights into both current and future “jury-think.”

III. Chart – Leading Causes of Loss

Pamela Peltzman, Esq. of United Educators provides a breakdown of the types and frequency of employment litigation claims over the past five (5) years.

IV. Chart – Trend for Educators’ Legal Liability Claims under \$2,000,000.

Pamela Peltzman, Esq. of United Educators provides a breakdown of the 3-year moving average trend for Educators’ legal liability claims by both claim count and average monies paid.

LESSONS LEARNED: EMPLOYMENT LITIGATION CHALLENGES & OPPORTUNITIES IN TODAY'S COURTROOM¹

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A. No Good Deed ... or when being nice does more harm than good.

- Performance reviews, if offered, serve an important function, assuming they are completed appropriately:
 - they provide a basis for employers to reward and support excellent performers;
 - they put employees on notice of areas for improvement, when they still have time to make corrections; and
 - they can provide reasonable justification for promotion, demotion, or to maintain the status quo.

But, used incorrectly, they become Plaintiff's Exhibit 1 in a subsequent wrongful termination case:

In Sloat v. Hewlett-Packard Enter. Co., 18 F.4th 204 (6th Cir. 2021), Hewlett-Packard hired Sloat in 2011 to develop training programs for its salespeople. Sloat was 54 years old at the time. "For the next five years his performance reviews were notably positive: his managers found that his work 'exceeded expectations' in 2011, 2012, and 2015, and 'significantly exceeded expectations' in 2013 and 2014. In each of those years, Sloat also received a 30% performance bonus." In 2016, Sloat was transferred to a new group headed up by Hagler. The first time Sloat met Hagler, Hagler presented a PowerPoint that showed no responsibilities for Hagler. One month later, 'Hagler told [Sloat] that he would not receive a raise the coming year and that Sloat's annual performance bonus would be only 8%. Hagler explained that he rewarded his 'top performers' and 'everyone else got what was left.' Sloat responded that he had been 'an outstanding performer for the year before;' Hagler said, 'Not for me.'" Hagler subsequently called Sloat "young man," told him, "You've got old skills," and repeatedly asked him when he was planning to retire. When Sloat later complained to Human Resources that Hagler was discriminating against him because of his age, Sloat was directed to speak with Hagler about his concerns. Hagler was furious and screamed at Sloat that he had done nothing wrong. Hagler then reassigned Sloat's remaining duties elsewhere and, in his mid-year performance review, rated Sloat as "Stalled" – the second-worst rating at H-P.

- Retaining a problematic employee because you want to ... [bridge them to retirement, allow them to resign, continue their health insurance, etc.] often creates more headaches and potentially greater liability for an employer.

¹ Dr. Jill Huntley Taylor of Taylor Trial Consulting also contributed to this outline.

- For example, in the Schofield v. Trustees of the Univ. of Pa. (E.D. Pa. 1996-1997) case, the university opted to not fire the sexual harasser because his wife was dying, even though their investigation found he had sexually harassed the plaintiff almost daily in the four years she worked for him. That decision was not well-received by the jury. Interestingly, the jury was also unhappy that the University did not fire the plaintiff when it learned in discovery about her criminal background and past employment history (*see below*). Those same jurors later expressed approval when, under vigorous cross-examination questioning the legitimacy of the HR Director’s assertion that the University was being humane by not firing plaintiff for her fraud, the HR Director responded, “You know what? You are right. I am firing her right now. Effective immediately!”
- Perception matters. While a supervisor may consider their actions to be helpful or even a “good deed,” the affected employee can have a very different mindset.
 - In Redlin v. v. Grosse Pointe Pub. Sch. Sys., 921 F3d 599 (6th Cir. 2019), the plaintiff was hired as an Assistant Principal at Grosse Pointe South High School (“GPSHS”) in September of 2012. After the plaintiff provided an advanced warning to a co-worker about a supervisor’s pending review, she was told that such actions were inappropriate and would result in discipline. Plaintiff’s issue was not with this conclusion but with the fact that the other assistant principal, who is male and who committed a virtually identical transgression, did not receive the same discipline.

The defense presented evidence that the plaintiff, “who was already interviewing for administrative positions in other districts, told [the Deputy Superintendent] Dean that she was ‘in the process of leaving. Wanting to get another job outside of the district.’ Dean said in response, ‘I don’t want to jam you up, so I will hold this [discipline] in abeyance.’ Dean also filed a placeholder ‘effective’ evaluation with the State of Michigan pending the outcome of plaintiff’s job search. This allowed plaintiff to conduct her job search without any discipline or a substandard rating in her file.” *Id.*

The plaintiff testified, however, “that Dean told her that she would be disciplined ‘[u]nless [she] g[ot] another position by the end of the year,’ and that she understood this as a threat, namely that Dean was saying, ‘I’ll help you out [by keeping the discipline in abeyance], as long as you leave [the district] by the end of the year.’”

After the Sixth Circuit reversed the district’s court grant of summary judgment for the defense, the parties settled confidentially.

B. #MeToo has moved the bar in harassment and gender discrimination cases.

- #MeToo led to changes in juror attitudes and insights about sexual harassment in the workplace.

- The act of “grooming” someone has become part of the established lexicon for employment cases.
- Juries are more willing to forgive plaintiffs who wait to complain about misconduct.
- Sexist labels should be avoided. Terms that once were viewed favorably are now considered hostile, not funny, and even malevolent. *E.g.*, referring to an adult female as a “girl;” making gender assumptions with the use of pronouns in the absence of any clear directive; using the term “snowflake” when discussing a younger person; using the term “Karen” for a middle-aged woman seen as angry, entitled and/or narrow-minded.
- The #MeToo Movement has become increasingly relevant as part of the jury selection process. In *State v. Barron*, 183 N.E.2d 470 (Ct. App. Ohio 2022), the court, while upholding criminal convictions for trafficking and promoting prostitution, made the following comment in response to defendant’s claim that a juror was implicitly biased in favor of the defendant’s guilt: “Additionally, one of the juror’s other responses indicated a potential strategic reason defense counsel may have wanted the juror to remain. Specifically, the juror’s comment in response to a question about the ‘#MeToo movement’ revealed a level of skepticism about the movement and questioned whether an accuser might have something to gain by going public. Thus, Barron’s trial counsel’s decision to keep the juror could have been within the ambit of trial strategy.” *Id.* at 487-88.

C. Evolving sensibilities toward race and national origin discrimination cases.

- #BLM led to changes in juror attitudes and insights about race discrimination.
 - Prosecutor questions and comments about #BLM have led to Batson challenges in response to peremptory strikes against Black prospective jurors. In *People v. Silas*, 68 Cal. App. 5th 1057 (Sept. 17, 2021), the appellate court found the Batson challenge for one of three jurors should have been sustained so it reversed the judgments and remanded for a new trial: “Here, the record contains a number of circumstances that give rise to an inference of discriminatory purpose. To begin with, the way the prosecutor questioned Prospective Juror No. 275 about Black Lives Matter was not neutral and suggested an antipathy toward the movement. As amici curiae detail at length, and the Attorney General agrees, the prosecutor’s questions about Black Lives Matter rested on misperceptions or biases. The movement is ‘based on the premise that Black lives have worth and therefore must be protected and allowed to thrive.’ It has ‘engaged in and supported acts of protest and civil disobedience’ as a means to bring attention to threats to Black lives, particularly police brutality. Property destruction, jury nullification, and other illegal behavior are not ‘tactic[s] embraced by the broader movement.’ Rather, ‘[t]he nonviolent direct action and civil disobedience tactics employed by Black

Lives Matter reflect centuries-old traditions of Black civil rights protest,’ which have likewise been ‘falsely portray[ed]’ as ‘lawless.’” *Id.* at 1096-97.

- Phrases like “systemic racism,” “implicit bias,” and “racial reckoning” have been invoked by jurors as they work to determine potential liability.
- Inappropriate or offensive questioning, under the guise of “being curious” or “wanting to understand” someone is no longer tolerated. And, a term that is considered derogatory subjectively by a plaintiff will be accepted as such by jurors.
 - In Emamian v. Rockefeller Univ., 971 F.3d 380 (2nd Cir. 2020), the plaintiff was an “Iranian-born neuroscientist who wears a traditional Iranian headscarf, immigrated to the United States in 1998 to pursue career opportunities as a research scientist. Emamian testified at trial that she began to feel singled out and mistreated due to her race, national origin, gender, and religion almost immediately upon joining the lab. According to Emamian, soon after she joined the lab, [Dr.] Greengard made her feel uncomfortable by asking her numerous questions about her headscarf with a ‘sarcastic’ and ‘negative attitude, despite her attempts to change the subject. Emamian said the conversation went on for approximately twenty minutes and made her feel ‘kind of desperate, very, very uncomfortable,’ though she did not feel he was discriminating against her at the time. Greengard testified that he had been told by his secretary, who was also Iranian, that wearing a headscarf is a sign of submission to men among Iranian women and that it was rare for an educated Iranian woman to wear one.”

“Emamian testified that, unlike other employees, she did not receive an office or a computer; she was ridiculed and humiliated in front of others in the lab, including by being aggressively questioned and belittled during a lab presentation in May 2005; and she received little support from Greengard with regard to research, writing, or obtaining another position. Emamian further testified that she felt excluded from life in the lab. One specific incident described to the jury involved an email sent to the entire lab by another researcher, Dr. Marc Flajolet. The email had the subject line ‘to the ‘cart drivers’ (and camel drivers . . . and horse drivers too . . .)’ and included a photo of a camel as an attachment, alongside numerous other photos. Emamian testified that the email was sent shortly after Flajolet saw her pushing a cart through the lab and mocked her, and that she felt humiliated by the email because she understood ‘camel driver’ to be a widely recognized racial slur against Middle Easterners commonly used in France, where Flajolet was from . . . When asked at his deposition whether he did anything about the email, Greengard did not specifically remember receiving the email but, upon reviewing it, stated that it ‘had nothing objectionable in it.’” *Id.*

D. Fundamentals are important, and getting back to basics is essential.

- Background Checks should be an essential part of the hiring process, and should be re-examined/raised as situations warrant.

- Educational and Employment Background Checks should include criminal background checks and searches for prior litigation, including Bankruptcy filings.
- Consider incorporating irrevocable authorizations in connection with Employment applications (staff and faculty) to allow retrieval of past employment and educational records at any time.
- Persons conducting complaint investigations should check past employment and educational backgrounds.
- Pursue aggressive background checks in Trial discovery.
 - In Schofield v. Trustees of the Univ. of Pa. (E.D. Pa. 1996-1997), post-litigation investigations of the plaintiff revealed she had been fired by two prior employers for theft, she pled guilty to embezzlement, and she lied on her employment application. Plaintiff’s motion *in limine* to exclude her criminal and employment backgrounds was unsuccessful. At trial, the jury found the defendant liable for permitting a sexually and racially hostile environment, but did not find *quid pro quo* harassment or retaliation. The jury awarded her \$40,000 in pain and suffering but declined to award front and back pay, past and future medical expenses, or punitive damages. The total amount awarded “represented approximately 2% of the total damages sought.” 919 F. Supp. 821, 825 (E.D. Pa. 1996).
- Consistency is essential. Once a policy or precedent is established, do not deviate unless willing and able to articulate, under oath, why this “one time” is different from everything else.
- Employment reviews matter, and being kind for the sake of being kind helps no one.
- If you are encouraging an employee to move on, do not sabotage their efforts to do so. Often, in the absence of a source of income, a former employee will decide their only recourse is to file a claim.
 - In Emamian v. Rockefeller Univ., 971 F.3d 380 (2nd Cir. 2020), a race, national origin, gender and religion discrimination case in which the jury found for the plaintiff, the plaintiff’s evidence including the following: plaintiff’s supervisor, Dr. “Greengard informed Emamian that she should make every effort to find a new position as soon as possible, and that he would be willing to write her a recommendation only for a small teaching school, as opposed to a research institution.” *Id.*
- In the absence of an explanation for a termination, an employee is more likely to default to a nefarious or improper purpose behind the decision.

- Thus, in the case of McCarthy v. New York City Tech. College, 1997 U.S. Dist. LEXIS 13174 (S.D. N.Y. Sept. 3, 1997), plaintiff sued for age discrimination when no other reason was presented to him for his termination. And, his evidence at trial revealed that he was hired at the age of 50 as Director of Security. For 11 years, he was supervised by Frank Smith, the College’s director of operations. In each of those 11 years, Smith rated Plaintiff as “Excellent” or “Very Good” in each category. In 1991, Plaintiff began reporting to the newly appointed VP of Administration, Dr. Richardson, who did not complete an evaluation for plaintiff in 1992. Instead, the College soon notified Plaintiff that he would not be recommended for reappointment. No reason for the decision was stated. Plaintiff appealed, which was denied. Plaintiff requested an explanation and was told that the terms of his CBA did not obligate the College to provide a reason. At the time of his termination, Plaintiff was over 62 years old².

E. Questions of Damages and Mitigation.

- Consider offers of judgment at the beginning of Litigation, and again when faced with an unreasonably high settlement demand, an unappealing Plaintiff, or a Plaintiff who fails to mitigate damages.
- Consider retaining a jury consultant to help frame the defense’s presentation and/or to help mitigate a substantial award of damages.

F. Current jury insights.

- Jurors can and do find AGAINST defendants as opposed to finding FOR a plaintiff.
 - A rich plaintiff can still be awarded money by the jury.
 - An unlikable plaintiff becomes less relevant (and problematic) when faced with an unlikable defendant.
 - Jurors want to decide for themselves if a plaintiff is unlikable. In other words, a defense that focuses on the bad character of the plaintiff, in an effort to thwart attention from potential bad acts of the defendant, may backfire.
- Jurors expect and look for transparency. They want to see clear policies, notice provided to employees before adverse actions are taken, and decision-making that does not involve subterfuge or back-room machinations.
- The image of a Juror as an Activist is increasing. Plaintiffs’ counsel are calling on this activism as they present their cases and arguments to the jury.

² For a discussion of the final resolution of his case, please see the last bullet point on page 7.

- Freedom and equality have taken on added weight and meaning; they both provide strong narratives – ones that can be used by both sides. Jurors will use this freedom - equality dichotomy as a proxy for other attitudes.
- Jurors do not always “get things right.” Motions for directed verdict and judgment notwithstanding the verdict are important tools that, in the right case, can be wielded with great success.
 - In Latimore v. President & Bd. of Governors of Univ. of NC, 669 F. Supp. 1345 (W.D. N.C. 1987), the district court granted a directed verdict for the defense at the close of plaintiff’s age discrimination case. Here, the plaintiff was a tenure-track professor who was initially appointed at the age of 45, and later was denied tenure on the basis of annual reviews that included Satisfactory Teaching, both Above & Below Satisfactory Professional Activities, and Below Satisfactory Service. At trial, plaintiff presented an exhibit showing that between 1980 and 1985 (4) candidates below the age of 40 received tenure while three (3) candidates, including Latimore, who were over 40 were denied tenure. [Two of the three denied tenure were initially appointed after age 40, including the plaintiff.]

Through five different exhibits, plaintiff chose to compare himself to Dr. Jane Levy, an archeologist who was under 40 and did receive tenure. The Court reviewed those same exhibits and determined the following: In “five of the categories of professional development, Levy equaled or exceeded Plaintiff in books published, articles published, professional papers presented, research grants, and editing work by others. In three of the categories, Plaintiff exceeded Levy, i.e., books under contract, Plaintiff was 1, Levy was 0. In articles accepted, Plaintiff was 2, Levy 0. In professional sessions organized, Plaintiff was 3, Levy 1.” *Id.* at 1349. On cross-examination, Plaintiff testified that he had used his CV and Levy’s to make these comparisons. He also testified that, in doing so, “he had not given Levy credit for any of the following: (1) Six book reviews which appeared in journals. (2) Eight archeological expeditions. (3) Chairperson, archeological council. (4) Levy’s work in progress.” *Id.* And, while between 1980 and 1985, Levy served on 11 committees and Plaintiff 17 committees, no additional information was provided on the committees themselves. Interestingly, plaintiff also testified on cross-examination that he had “no reason to believe that any member of the review committee voted against tenure for him because of his age.” Instead, he testified that personal malice by one of the named defendants (Rent) was the reason he was denied tenure.

- See McCarthy v. New York City Tech. College, 1997 U.S. Dist. LEXIS 13174 (S.D. N.Y. Sept. 3, 1997) (directing final verdict for the defendant after the evidence at trial established that Plaintiff’s replacement, who was 64 at the time of hiring, was two years older than the plaintiff).

UNMUTING THE JURY: LESSONS LEARNED AND TRENDS TO NOTE IN EMPLOYMENT LITIGATION

June 26-29, 2022

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“You’re on mute.”

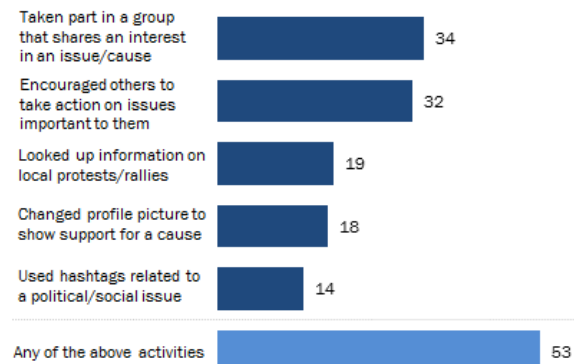
The world of work has changed through the pandemic, political divisions, social justice movements, and generational shifts. The jury, too, has been changing and evolving during this time. This article attempts to unmute the jury and offer insights into these changes as well as advice on handling them to avoid or best position an employment case for trial.

Jury Insight: Call to Activism is Real and Growing

Even before the pandemic, more and more people found their voices and began using those voices to express their views on social media. Pew researchers reported on this increased civic engagement finding that in a one-month period, over one-third of social media users used these platforms to express support for causes or to find and encourage activities in support of causes.ⁱ Pew found these trends particularly strong among younger people, noting that, “There have also been double-digit increases among younger users when it comes to getting involved with political or social issues and having a venue to express their opinions.”ⁱⁱ

Roughly half of Americans have been civically active on social media in the past year

% of U.S. adults who say they have done the following activities on social media in the past year



Note: Respondents who gave other responses or did not give an answer are not shown.
Source: Survey of U.S. adults conducted May 29-June 11, 2018.
“Activism in the Social Media Age”

PEW RESEARCH CENTER

These trends were no doubt exacerbated by social distancing and isolation, forcing people to increase their screen time.ⁱⁱⁱ As we hunkered down at home, many of us sat with screens

including social media sites such as Twitter, Facebook, and Instagram. We connected to the world beyond our neighborhoods, and we engaged on various issues swirling in the broader world demanding action, change, and to have our voices heard.

While increased activism and engagement are admirable, there are also implications for trials and jury selection. It arguably means there are more jurors open to the call of “reptilian” plaintiff lawyers who encourage jurors to view themselves as advocates. On pages 158-159 of the “Reptile” book,^{iv} the authors explain ways to call upon jurors to feel they are the “chosen” ones from voir dire through closing arguments. Here is a summary excerpt of a recommendation they make for closing:

“But whoever’s in charge of right and wrong in this world made the right choice. Because I’ve watched all of you through this trial. How closely you paid attention. How you’ve been taking notes. Your concern day after day about a total stranger. That’s not the kind of thing people do all the time. Something put you here for a reason”

It also means that how prospective jurors feel about a variety of hot topic issues may be knowable either via social media accounts or simply by asking the jurors about their views.

Jury Advice: Examine the Type and Level of Juror Activism in Jury Selection

Because young people are particularly engaged, young prospective jurors should be on the radar in jury selection because this engagement and activism makes them potential leaders. In years past, younger jurors were not considered leaders on juries, but age no longer reflects the level of opinions and engagement (or leadership) of a juror. More and more, young jurors are landing the role of foreperson and having an influence on the outcomes of cases.

The overall heightened level of activism also provides an important insight for jury selection more generally. Leadership is always a worthy consideration in jury selection. Leaders with concerning attitudes are higher priority strikes (or targets for cause) than jurors less likely to lead. Leaders who hold supportive views of your client and case are obviously helpful to protect. Likewise, you should identify leaders who are opposed to your position to strike. Identifying leaders of concern must be a priority.

One leadership consideration is how strongly the person holds their opinions, and a jurors’ level of activism and engagement is an important indicator for jury selection. In voir dire and in social media searches, consider how active prospective jurors are in social justice movements. Are they participating? Organizing? To what extent are they expressing those opinions, and how committed are they to the cause? Exploring a juror’s beliefs has always been a primary objective in jury selection. Social justice and political and protest movements are fertile ground for voir dire and created a more engaged and activist jury pool whose views and levels of engagement are worthy of consideration. These jurors also may be particularly ripe for plaintiff lawyers’ Reptilian arguments about safety, rule following and general efforts to call jurors to action in their cases. Both the content and level of engagement in activism offer great insights into prospective jurors in the jury selection process.

Another activism consideration is the type of activism. Depending on the issues in the case, different types of activism may suggest a more plaintiff or defense-orientation toward the case. In a Title IX case, for example, and depending on the specific allegations, you may want to know whether the juror has used the #MeToo hashtag or has otherwise spoken out about high profile cases of sexual misconduct or cases that include allegations that sexual misconduct allegations were mishandled.

Here are four suggestions for getting a sense of a prospective juror's activism and leadership on relevant issues in the case:

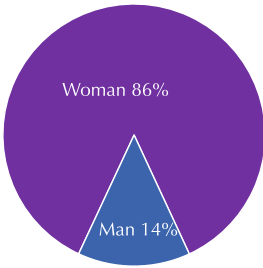
1. Examine the juror's social media footprint on case-relevant issues and other hot button topics. More and more people took to social media over topics ranging from politics, mask-wearing, and social justice movements such as Black Lives Matter.
2. Has the prospective juror ended a friendship or stopped communicating with family over differences of opinion? Knowing this, when possible, ask the juror about the nature of the relationship and the underlying difference of opinion. The nature of the dispute, as well as the fact of the juror's steadfast opinions, suggest the juror will not be easily persuaded by his/her fellow jurors.
3. How strongly does the juror hold views that are problematic for you and your client in the case? Note that in today's climate, jurors are more willing to honestly share their opinions, including opinions that were once considered offensive or politically incorrect.
4. While it is routine to perform social media and web searches (i.e., "Googling") to explore a prospective juror's social media footprint, it is more important than ever in light of the growing level of activism on social media.

Jury Insight: Jurors are Tuned in to Race and Gender Issues

Our collective psyche is shaped by key events in the world. Both the #MeToo and #BLM movements led to changes in juror attitudes and sensibilities about sexual harassment and racial discrimination in the workplace.

As shown on the following data chart, most mock jurors give the benefit of the doubt to a woman accusing a man of sexual harassment. Anecdotally, while this pattern has always existed, it has grown stronger following the #MeToo movement.

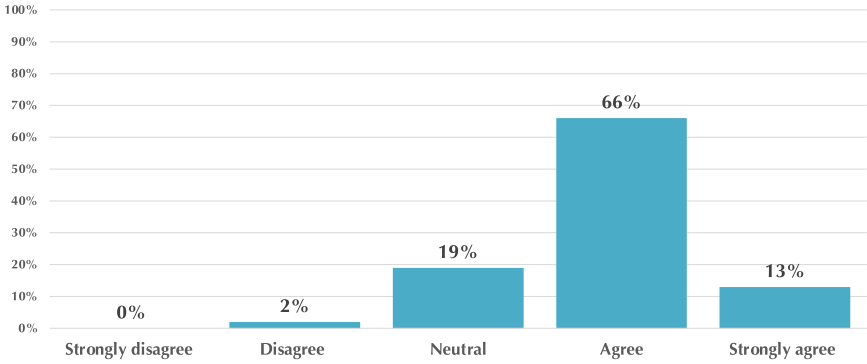
In a dispute between a woman claiming sexual harassment and a man she works with, who would you tend to believe?



SH3
N=145

Another hardening attitude we have observed is mock jurors’ willingness to forgive plaintiffs for not complaining out of fear of retaliation or retribution. Again, we have always seen that pattern generally, but the #MeToo movement broadened this view amongst mock jurors. Jurors are less likely to critique plaintiffs for failing to complain or waiting to complain. Jurors are more forgiving and understanding of this pattern of behavior.

Employees often do not report sexual harassment by a supervisor for fear of retaliation.

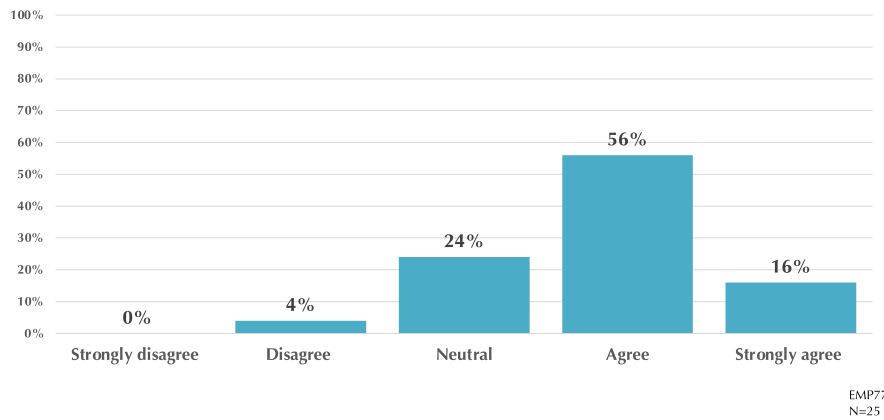


SH11
N=47

In mock trials, we have seen jurors becoming educated on sexual harassment and sexual assault via the high-powered men who were taken down with allegations related to very old conduct. Jurors began using phrases such as “grooming,” and offered greater forgiveness to plaintiffs who waited to complain about misconduct. Jurors now expect more from defendants in terms of processes in place to handle such allegations.

Handling of complaints is a critical component of many employment cases and investigations often take center stage. When it comes to investigations, one expectation (unrealistic as it may be) is that investigations should be conducted by outside investigators. Jurors tend to expect this for any investigation into alleged misconduct.

Outside investigators should be hired to handle investigations of employee complaints.



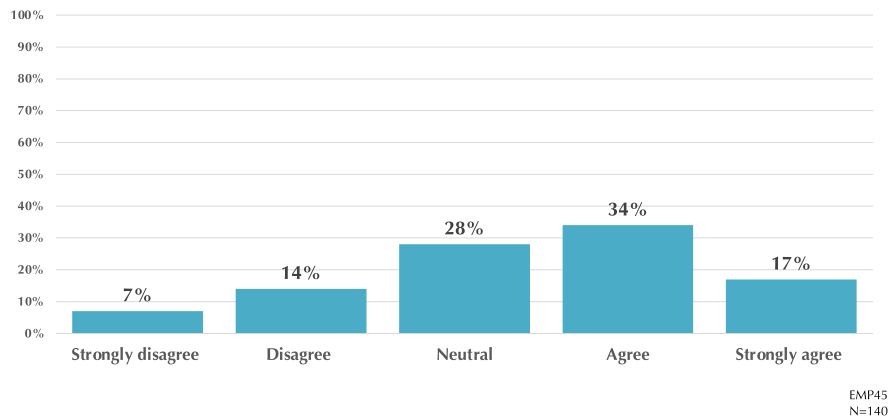
As with the #MeToo movement, in the past few years, we have seen a similar trend from the #BLM movement. In addition to the word “pandemic,” the term “systemic racism” was one of the 2020 Oxford Dictionary words of the year.^v We began to hear jurors refer to “implicit bias” and systemic racism in their mock jury deliberations. These issues were on the jurors’ minds and now on their tongues as they talked through their decisions on cases that touched on race or had race allegations at their core. To the extent racial issues had been hidden or ignored, they were now on the collective conscious and radar.

During these COVID-times, race, equity, and racial disparities took center stage in many ways. Social justice movements, such as Black Lives Matter, grew. In polling conducted a few weeks after the George Floyd murder, Pew found that two-thirds of Americans expressed support for the Black Lives Matter movement. People were engaged on the issue of race.^{vi}

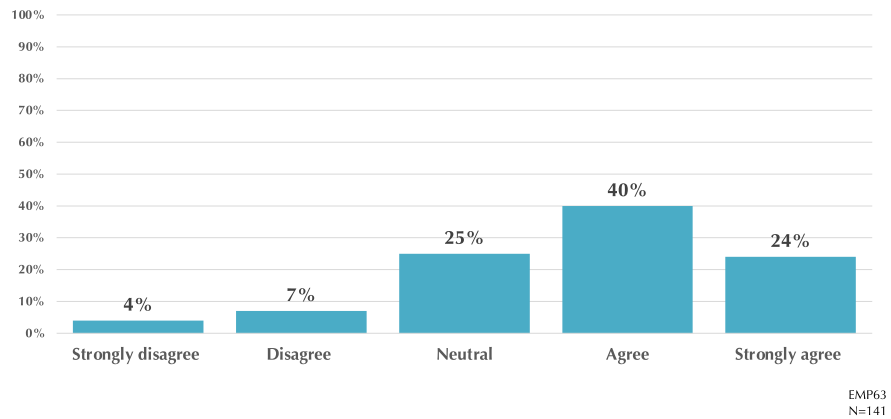
These views are intertwined with politics and for some jurors and in some venues, the social justice lens presents an additional hurdle to employers accused of race discrimination. The bar for finding against an employer in a race discrimination case is likely lowered in more liberal venues for whom these issues resonate. Rather than needing evidence of explicit and overt discrimination, such as racial epithets, or a hanging noose, jurors may be open to more subtle forms of racism, perhaps some actions that are not even within the conscious awareness of the decision maker.

To understand jurors’ views of race in the workplace, we have been asking mock jurors about their views of race and diversity in the workplace. As shown on the following data charts, the majority of mock jurors believe that race discrimination is common in the workplace, and an even greater number report valuing diversity in the workplace.

Race discrimination is common in the workplace today.

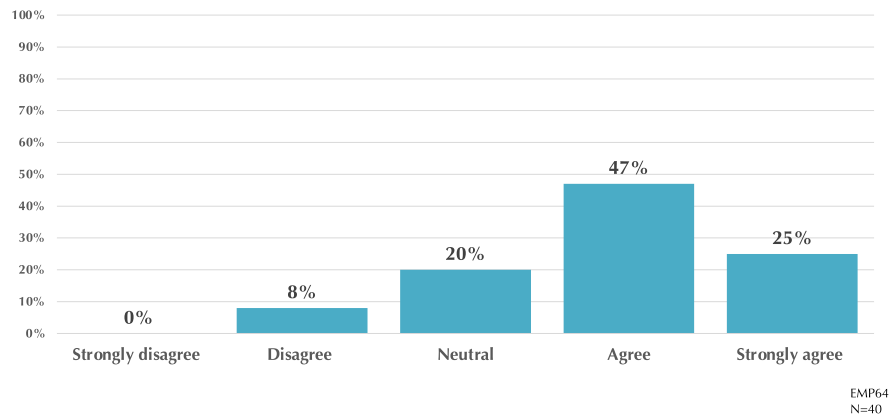


Creating a more diverse workforce is an important goal for companies.



Jurors stop short, however, of diversity efforts that take race into consideration. As the following data chart indicates, most jurors do not want race to be a consideration in hiring decisions.

Employers should not consider race in hiring decisions



Jury Advice: Get Comfortable with Uncomfortable Topics

Developing the case narrative in cases of harassment or discrimination requires a clear understanding of the prevailing views in the venue. But even before trial, these cases bring important jury considerations. Here are a few key issues:

1. The image of the school/relationship of the school to the community
2. The sincere commitment to gender and race equity including policies, procedures, outreach, and resources available to the school community
3. Investigations that are neutral, thorough, and transparent

When attorneys conduct voir dire, it is important to be facile and comfortable asking jurors about issues of race. Exploring jurors' race-based attitudes and expectations as well as their employment experiences is key in race-based cases. Moreover, even in cases where race is not an express cause of action, be mindful of the fact that race may still be an underlying issue in the case.

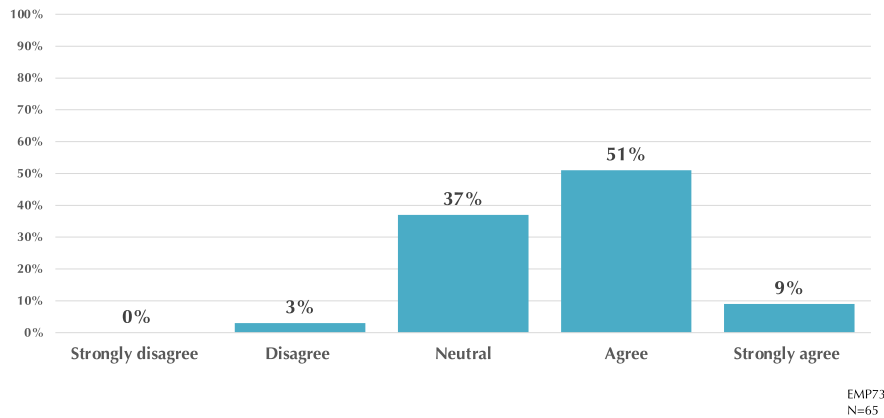
Jury Insight: Jurors Equate Transparency with Fairness

The amount of information and faux information that we see and have at our fingertips is astounding. We want information and we want it now. That is true in the employment context as well. More and more states are enacting pay transparency laws^{vii} and the public (and jurors) are coming to expect this level of transparency from employers when it comes not only to pay, but also promotion and termination decisions.

Fairness is at the heart of the analysis for jurors in employment litigation; that has not changed. Jurors have also had an expectation of the type of progressive discipline they expect in

their own jobs, such as you would see in a government or union position. But increasingly, jurors want more than the insight and feedback of progressive discipline; they now expect greater overall transparency from the employer as a show of fairness.

Employers should give employees progressive discipline when they do something wrong.



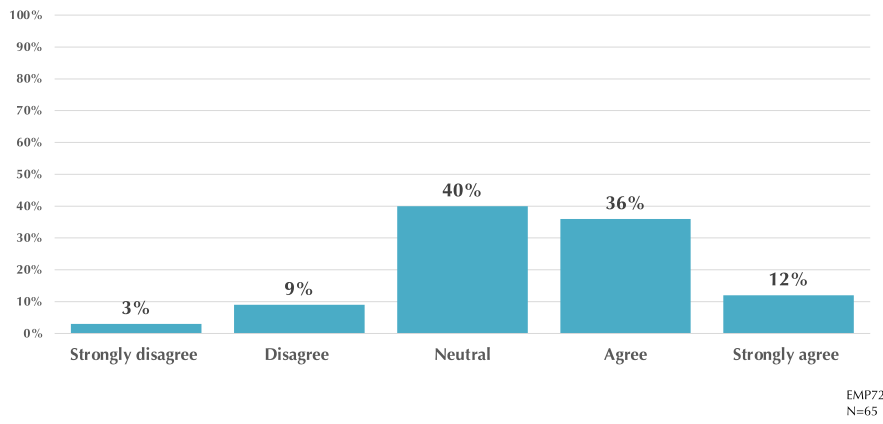
Jury Advice: Create Greater Objectivity and Transparency

When an employer conducts an investigation, jurors expect them to keep all those involved informed throughout the process. If there are issues with an employee’s conduct, the employer should let them know, let them know what it means, and most importantly, let them know how to improve.

When it comes to pay equity and promotions, jurors expect employers to clearly lay out how such decisions are made. Most jurors are also employees. They want to know what it takes to advance or gain a promotion, and they want these decisions to be fair and objective. In the minds of many, if some information is not disclosed, the organization must have something to hide.

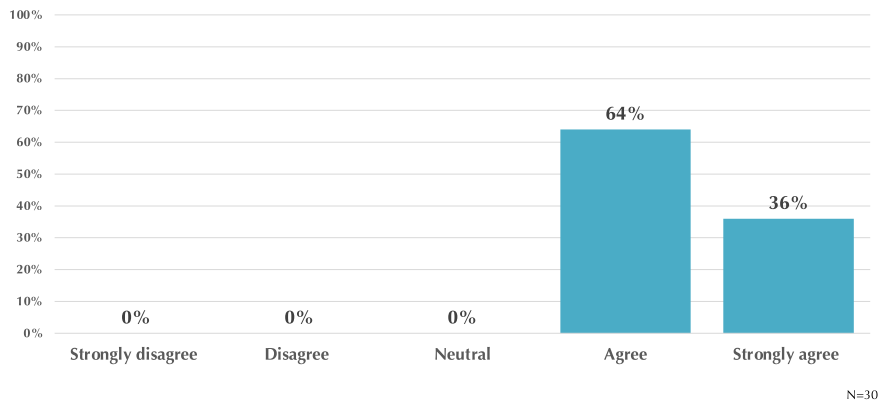
It behooves employers to give honest feedback in performance evaluations. Jurors tend to believe these are good indicators of an employee’s performance and although “meeting expectations” may not be “great” from an internal review process, most jurors do not perceive it as a failure or terminable level of work.

Employee performance reviews are a good indication of how an employee is performing in the workplace.



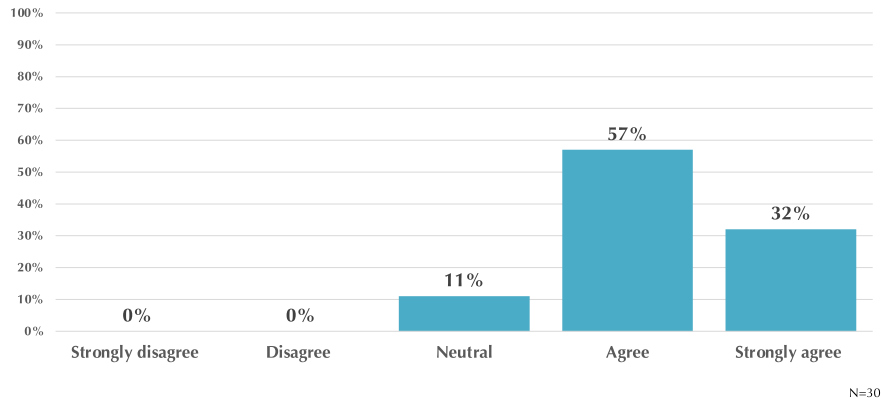
Review criteria for tenure and promotions have an inherent subjectivity and present additional challenges. For example, the following data charts come from a recent mock jury in a tenure denial case. The data reflect some of the juror attitudes and expectations regarding tenure. As the following chart indicates, jurors want tenure criteria to be “very clear.”

Universities should make the criteria for achieving tenure very clear.



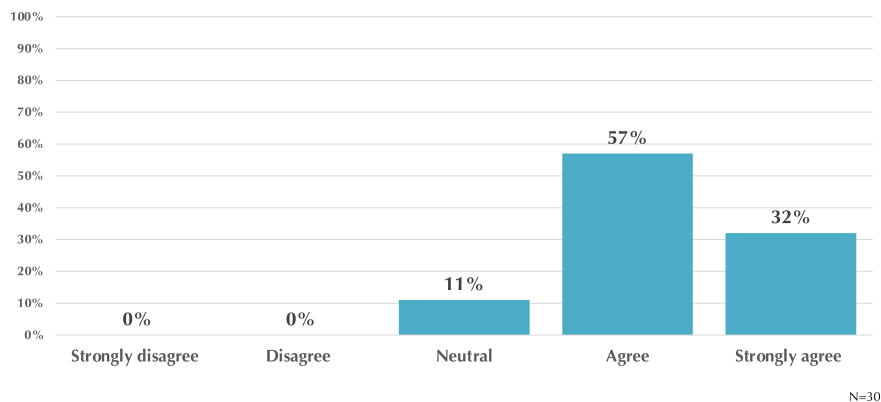
To the extent you can show the guidelines, criteria, and process for tenure to the jury and demonstrate that a plaintiff knew and understood these criteria, this can go a long way toward empowering the plaintiff and demonstrating the transparency and fairness in the process. But beyond having these criteria, jurors want to see that they are followed. For instance, in this example tenure denial case, the school was a “teaching” university, and the professor was denied tenure largely based on her research record. To jurors, this can be perceived as an unfair inconsistency.

It would be unfair for a university to deny a professor tenure based on that Professor's research publications if the university's stated top priority is teaching.



To the extent a professor was not living up to the criteria, jurors expected that the University would know this and would offer feedback, advice, and guidance to the professor to get them on track or at least give them an opportunity to improve prior to the tenure decision. If there were no such “warnings,” jurors tend to view the denial of tenure as “unfair.”

It would be unfair to deny a professor tenure if that professor's annual evaluations all suggested she was doing what was needed to obtain tenure.



Jurors tend to focus on the professor’s “teaching” in these decisions because they believe teaching is the most important role of professors, and it is also the role most understandable to jurors. Explaining the other criteria and offering insight into how these criteria are applied is important in such cases. Again, demonstrating that the professor knew and understood 1) the criteria, 2) the process and 3) how they were doing goes a long way to demonstrating fairness and to empowering the plaintiff in the process.

Jury Insight: Jurors can find AGAINST defendants

There are unlikeable plaintiffs. They may be greedy, unkind, or bad actors. They may have criminal histories or drug histories. It may seem that these qualities or characteristics will advantage the defense as jurors will not find such plaintiffs deserving. In reality, jurors can find plaintiffs largely “irrelevant” if they are angry enough at the defendant.

Jurors also do not like hearing a defendant (big guy) attacking the plaintiff (little guy). Jurors may come to the defense of the little guy, and worse, get angry at the defendant for picking this unfair fight.

Jury Advice: Facts Not Attacks

It does not feel good to be sued. No company or individual, no named defendant, or fact witness enjoys litigation. Many feel scared, more feel angry. Anger seems like an invitation to attack the source. Even when the plaintiff is truly reprehensible, resist. Focus the case on facts, not attacks.

Jurors may not like the attack and instead get angry at the defendant. If they are given the true facts of the case in a factual way, jurors will get angry on their own. Jurors like to find their own anger and tend to resist being urged or told that they should be angry at a plaintiff. In fact, jurors may even come to the defense of a plaintiff if they find them sympathetic in any way.

Building the story of the case through empowering facts can be the other side of the attack coin. Jurors are going to be less motivated to “take care” of an empowered plaintiff who had information, choices, experience, and resources.

ⁱ Auxier, B., Activism on social media varies by race and ethnicity, age, political party, Pew Research Center (July 13, 2020).

ⁱⁱ Id.

ⁱⁱⁱ Anderson, M, Toor, S, Rainie, L, and Smith, A., Activism in the Social Media Age, Pew Research Center (July 11, 2018).

^{iv} Ball, D. and Keenan, D. Reptile: The 2009 Manual of the Plaintiff’s Revolution (2009).

^v Oxner, R. Oxford’s defining words of 2020: ‘Blursday,’ ‘systemic racism,’ and yes, ‘pandemic,’ NPR Arts and Culture (November 23, 2020).

^{vi} Parker, K., Menasce Horowitz, J., & Anderson, M. Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement, Pew Research Center (June 12, 2020).

^{vii} <https://www.jdsupra.com/legalnews/states-expand-pay-transparency-9224845/>



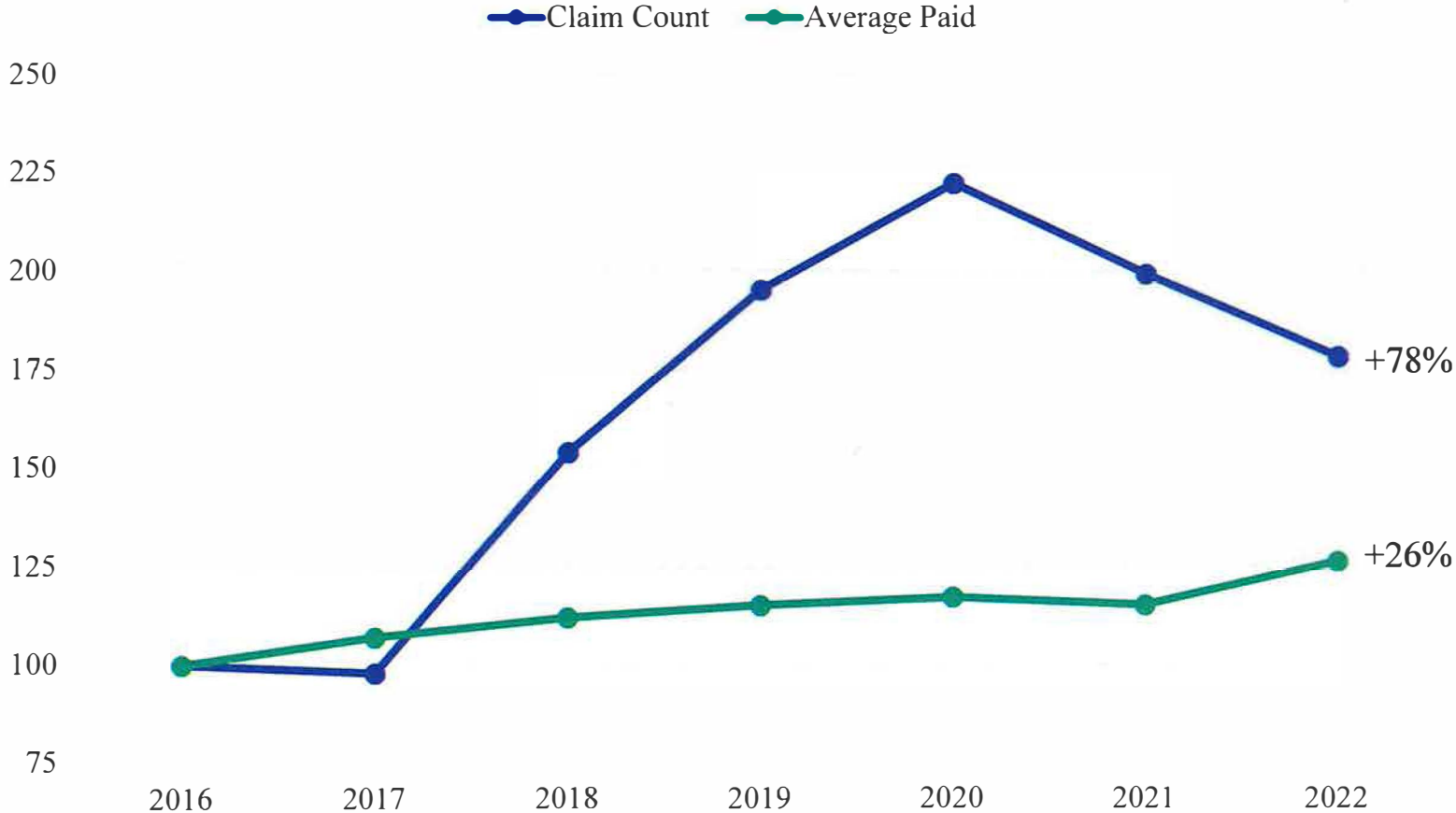
Leading Causes of Loss

Cause of Loss	Portion of Claims	Severity Increase over 5 years* (2016 vs 2022 YTD)
Discrimination – All Types	60%	+21%
Breach of Contract	10%	+49%
Wrongful Termination	5%	+53%

*Using ELL claims < \$2M by Closed Year



3yr Moving Average Trend for Educators Legal Liability Claims < \$2M by Closed Year (Percent of 2016 Value)



Note:

This presentation contains videos that are not playable from a PDF file. If you would like to view the presentation with all of its videos, you may access and download the full presentation by clicking [here](#).



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Lessons Learned from the Courtroom: Employment Litigation Challenges and Opportunities *(Unmuting the Jury)*



Pam Peltzman, Esquire, United Educators
Stephanie Karn, Esquire, KVCF
Jill Huntley Taylor, Ph.D., Taylor Trial Consulting

Moderator: Neil Hamburg, Esquire, Hamburg Law Group



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Trends

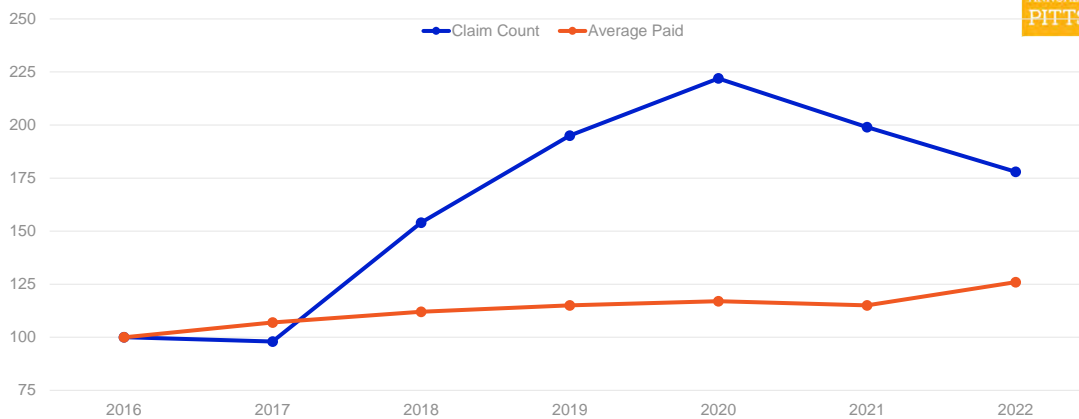
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Three-Year Moving Average Trend for ELL Claims < \$2 Million By Closed Year (Percent of 2016 Value)

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Source: United Educators

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Leading Causes of Loss

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Cause of Loss	Portion of Claims	Severity Increase Over Five Years* (2016 vs. 2022 YTD)
Discrimination — all types	60%	+21%
Breach of contract	10%	+49%
Wrongful termination	5%	+53%

*Using ELL claims < \$2 million by closed year



Source:  United Educators

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Unmute



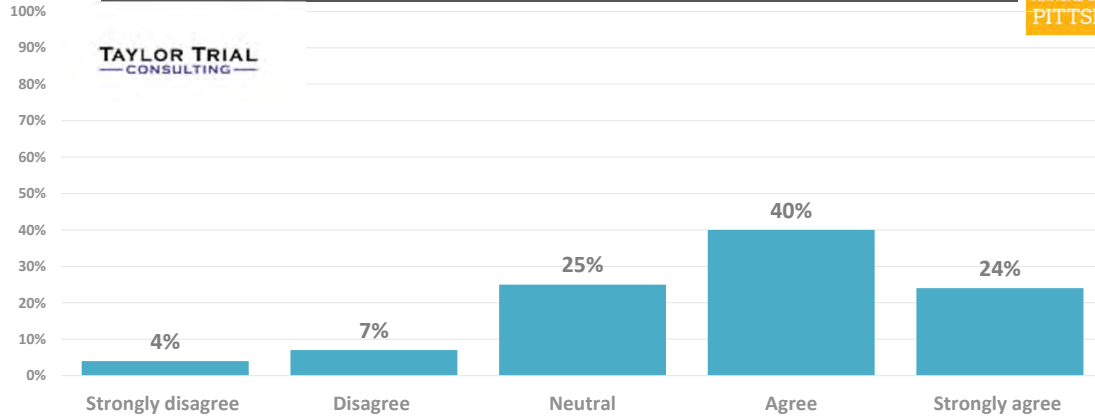
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Creating a more diverse workforce is an important goal for companies.

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Jurors: In their own words.....Ready for Real Race Talk

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Actions to Help Prevent Race Discrimination



Fix policies and procedures that perpetuate systemic discrimination.

Improve recruitment, hiring, and promotion practices.

Create a culture of respect through education and training.



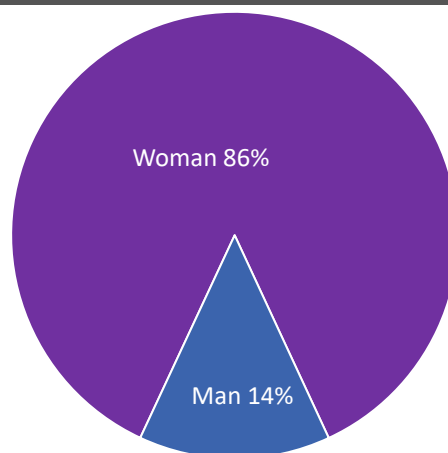
Source: United Educators

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In a dispute between a woman claiming sexual harassment and a man she works with, who would you tend to believe?



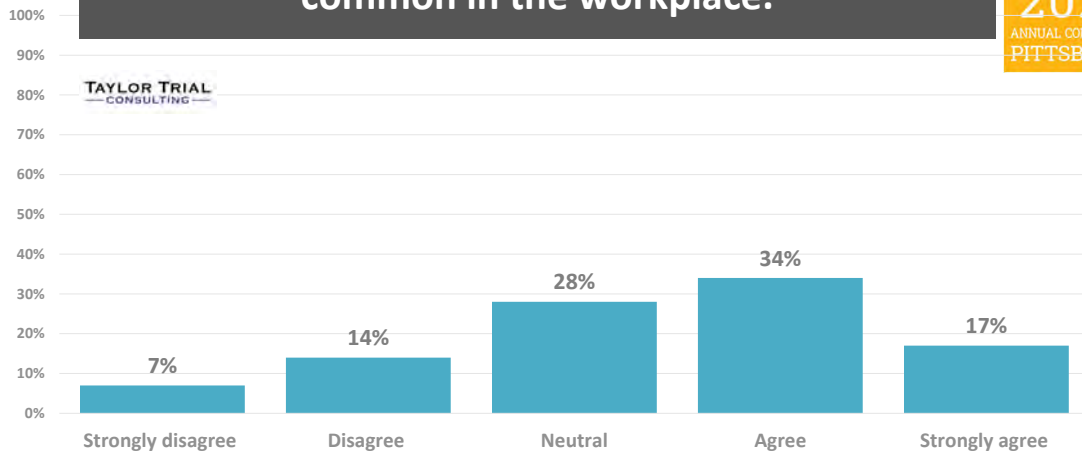
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Race discrimination is common in the workplace.

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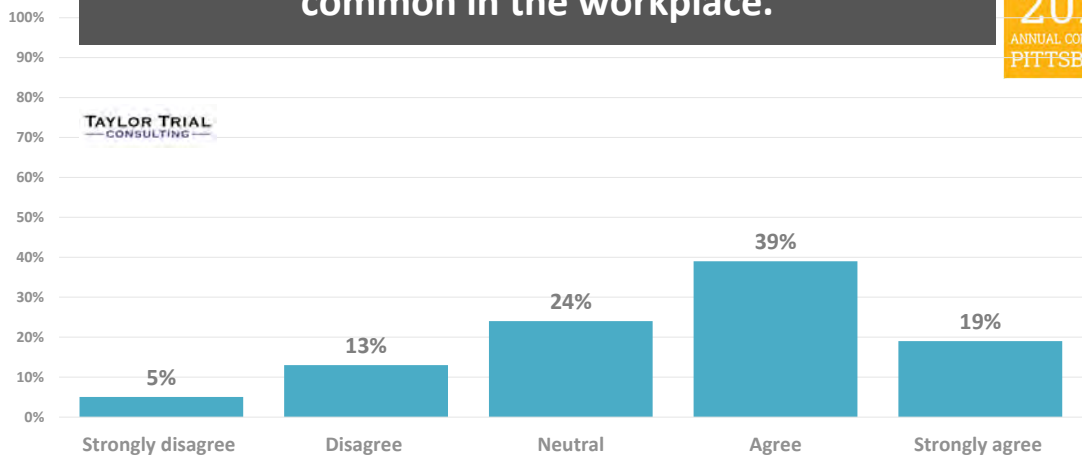
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Gender discrimination is common in the workplace.

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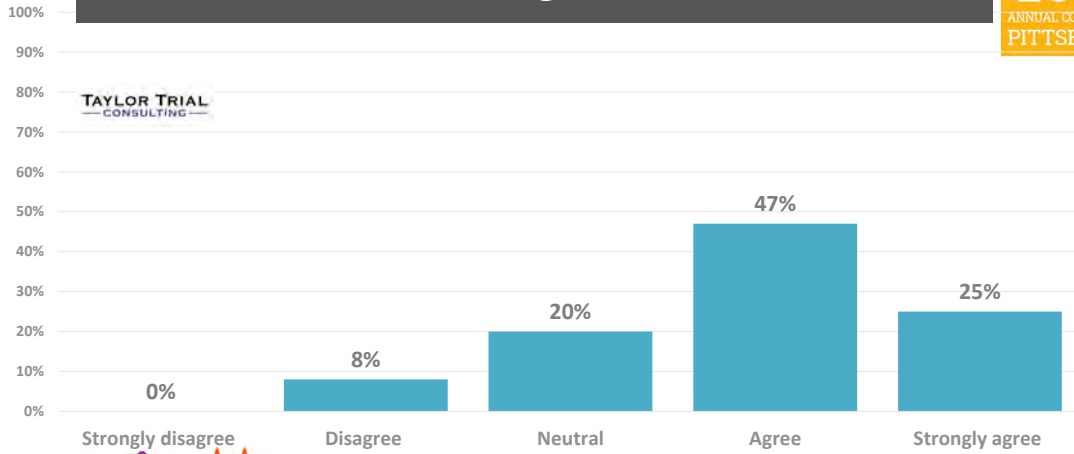
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Employers should not consider race in hiring decisions.

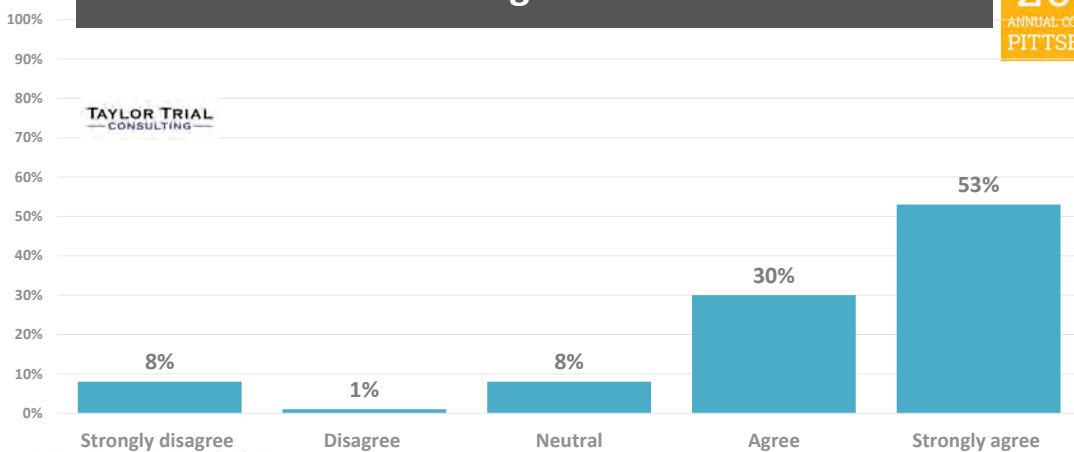
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Companies should hire the most qualified candidates regardless of race.

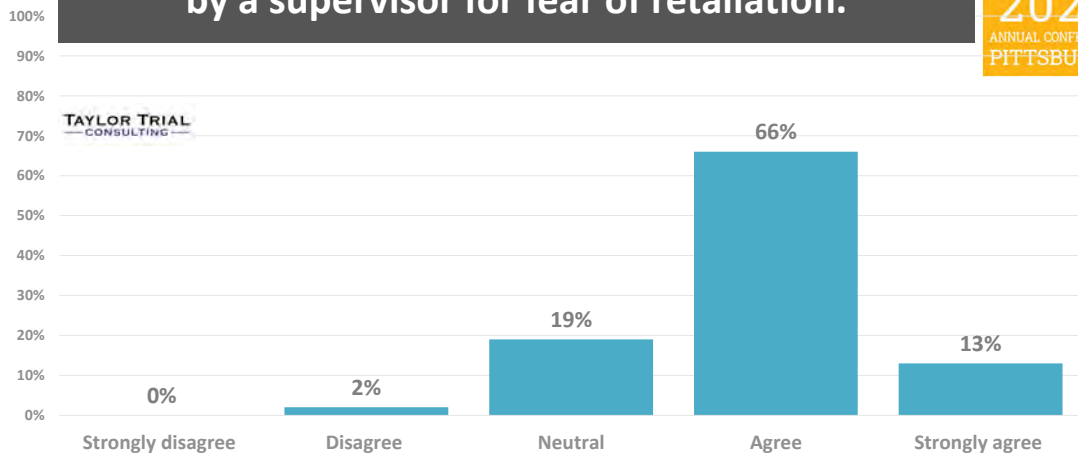
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Employees often do not report sexual harassment by a supervisor for fear of retaliation.

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Jurors: In their own words...Fear of Retaliation

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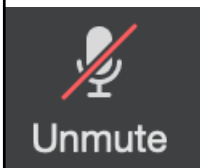
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Jurors: In their own words.....Retaliation is Real, Bad Employees Included

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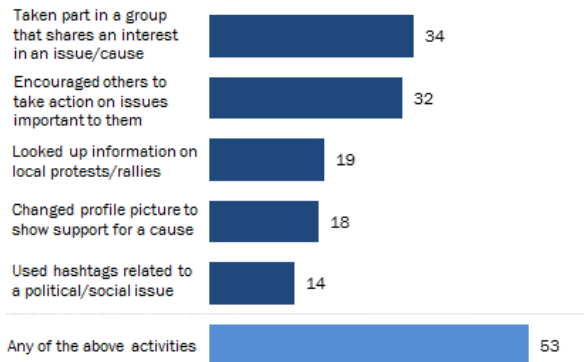
Increasing Levels of Activism



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Roughly half of Americans have been civically active on social media in the past year

% of U.S. adults who say they have done the following activities on social media in the past year



Note: Respondents who gave other responses or did not give an answer are not shown.
Source: Survey of U.S. adults conducted May 29-June 11, 2018.
"Activism in the Social Media Age"

PEW RESEARCH CENTER



These Activist-Jurors are Ripe for Reptiles:

Tell jurors that they were "chosen"

Against all odds, reminding them of all the people called to jury duty, rhetorically asking who knows why it worked out that way...something put you here for a reason, etc. (p.159)



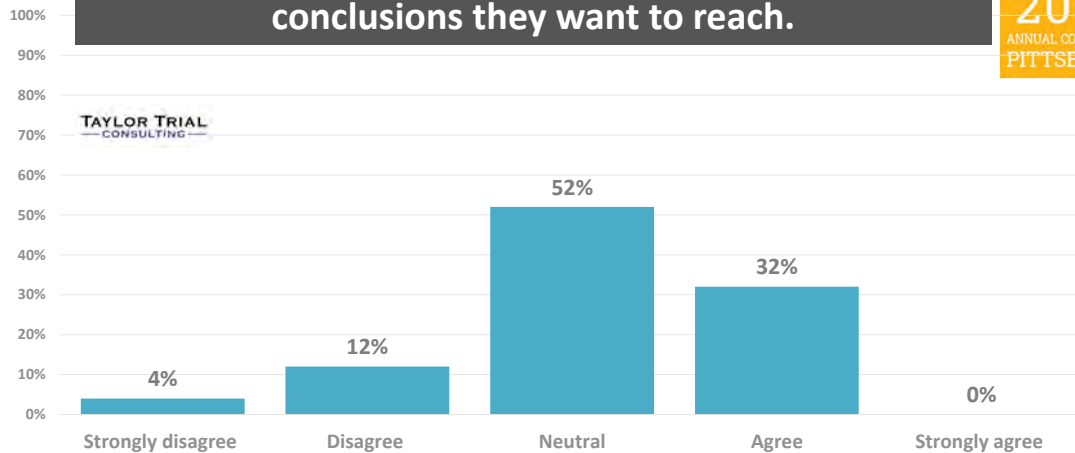


Growing Expectations for Transparency



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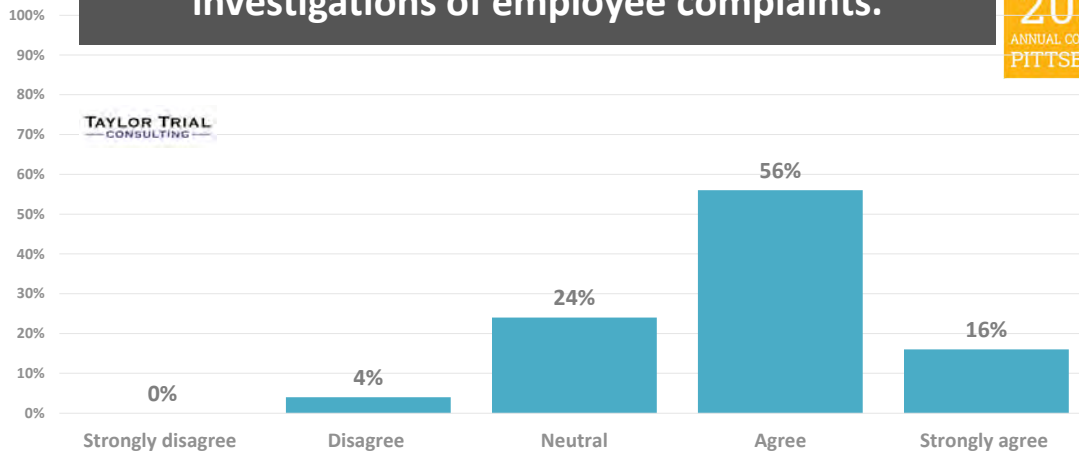
When companies conduct investigations into discrimination complaints, they often reach the conclusions they want to reach.



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Outside investigators should be hired to handle investigations of employee complaints.

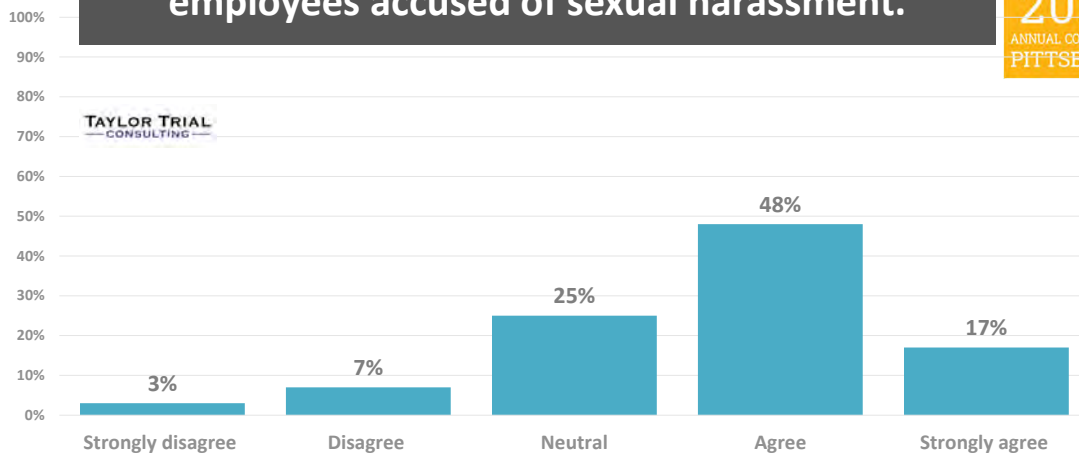
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In general, employees too often protect powerful employees accused of sexual harassment.

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Progressive Discipline: No Good Deed Goes Unpunished



- Excellent
- Very Good
- Good
- Average
- Poor

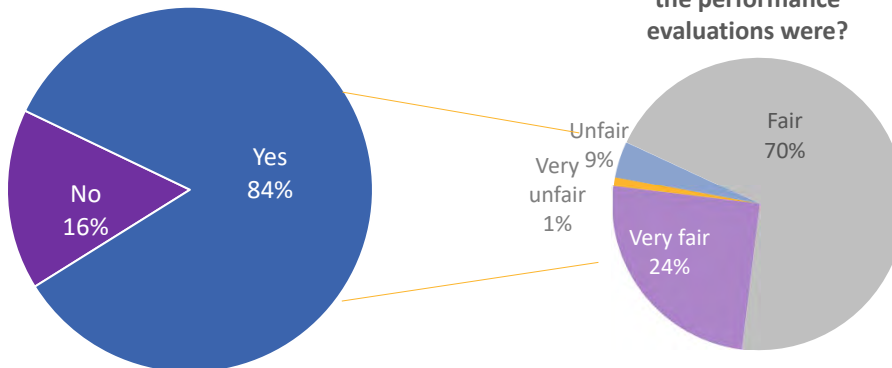


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Have you ever had performance evaluations at work?

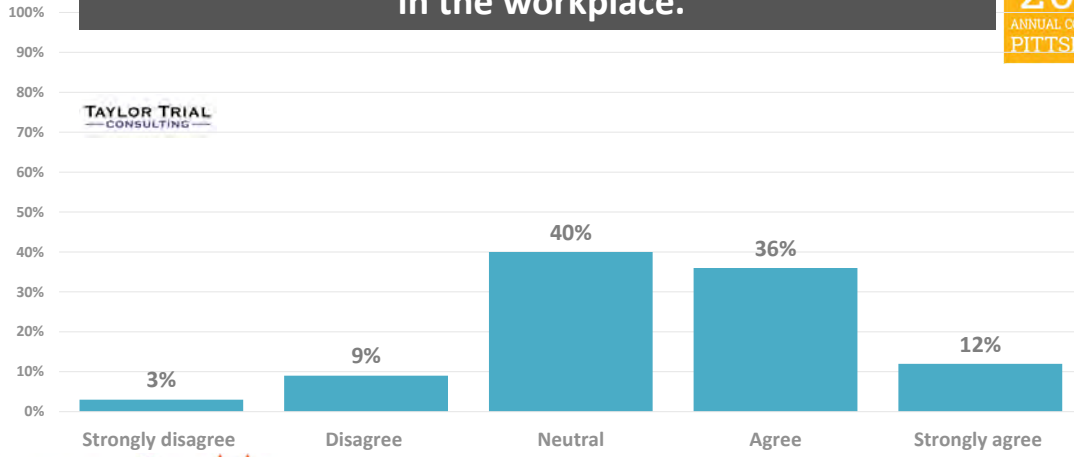


If yes, how fair did you typically think the performance evaluations were?



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Employee performance reviews are a good indication of how an employee is performing in the workplace.

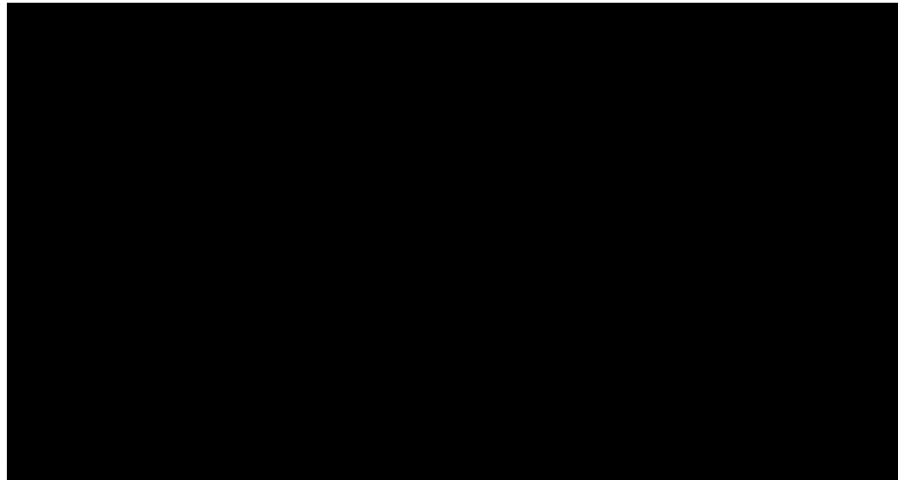


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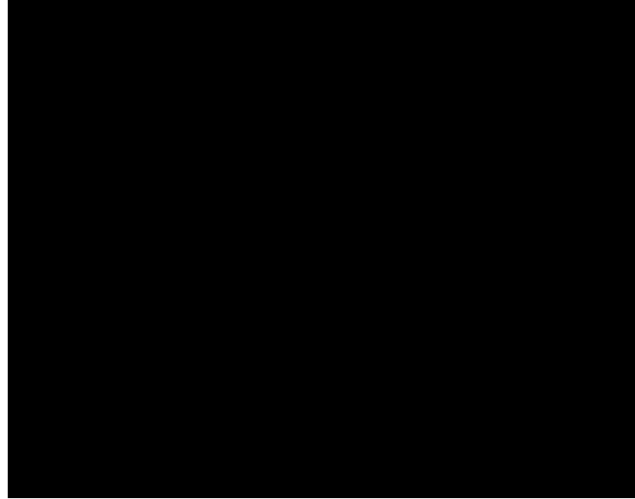
Jurors: In their own words...Another chance, no good deed



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Jurors: In their own words...Performance reviews

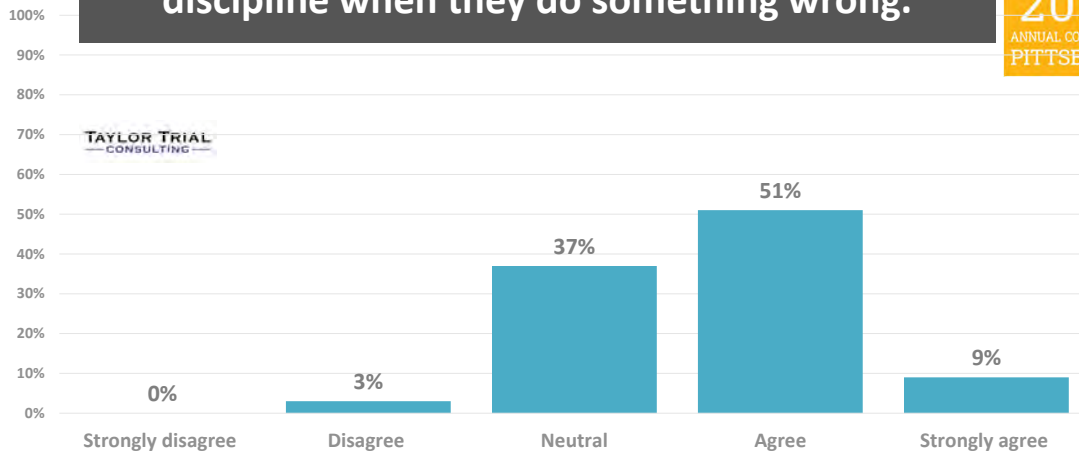
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Employers should give employees progressive discipline when they do something wrong.

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Jurors: In their own words..... Progressive discipline

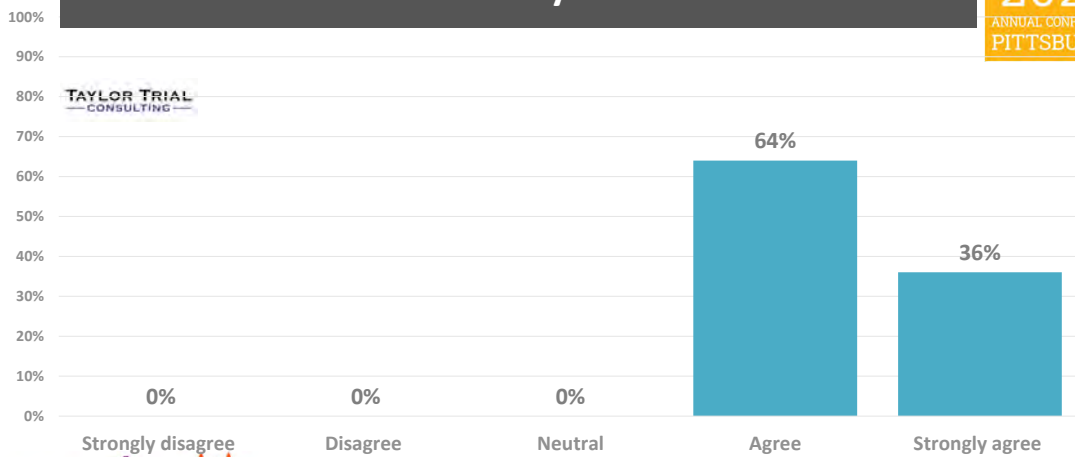
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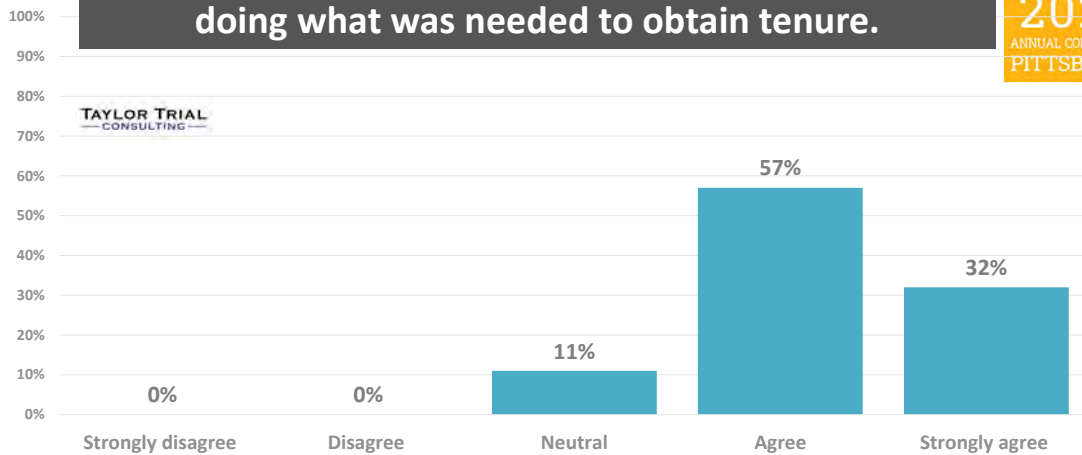
Universities should make the criteria for achieving tenure very clear.

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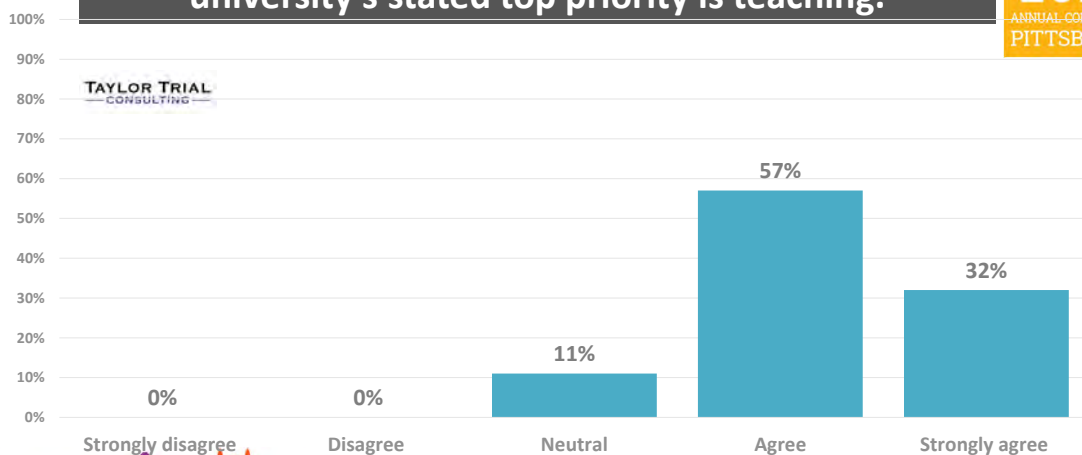
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It would be unfair to deny a professor tenure if that professor's annual evaluations all suggested she was doing what was needed to obtain tenure.



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It would be unfair to deny a professor tenure based on that professor's research publications in the university's stated top priority is teaching.



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Background Checks



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Background Check Fundamentals



- A 2019 benchmark report by [HireRight](#) found that background checks uncovered significant discrepancies and misrepresentations by candidates, primarily with respect to criminal convictions, but also with motor vehicle records, employment histories, and educational credentials.
- About 71% of organizations reported that background checks uncovered issues they wouldn't have known about otherwise. The report found that conducting background checks is a key risk mitigation strategy, as it improves the quality of hires and reduces organizational risk.
- Background checks of candidates, employees, and certain non-employee groups is a crucial risk mitigation practice for educational institutions.



Source: United Educators

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Background Check Fundamentals



- Institutions must select the appropriate screenings, ensuring that the chosen checks comply with local and federal law and don't discriminate against applicants or employees.
- Background investigations may include checks or verification of the following records:

- State and federal criminal record databases
- Name/alias
- Social Security number trace
- Residence history
- Current and prior employment
- Professional licensure
- Education
- State and federal sexual registries
- Child and elder abuse registries
- Reference checks
- Motor vehicle history
- Credit history
- Psychological and physical examinations
- Drug and alcohol testing
- Social media accounts and online presence

Source: United Educators



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- State and federal criminal record databases
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- Credit history
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- Drug and alcohol testing
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Source: United Educators



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Important Considerations Before Conducting Background Checks



- Check timing.
- Consult with legal counsel to ensure compliance with laws applicable to your institution.
- Obtain proper authorization.
- Keep background information secure.
- Use a third-party provider.



Source: United Educators

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Lessons Learned From Wrongful Termination Claims in Discrimination Cases



- Act promptly.
- Emphasize fairness.
- Carefully consider all dismissals.
- Review contract details.
- Take special care with group separations.
- Separate employees with compassion.



Source: United Educators

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Recommendations Checklist



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Checklist: Assessing Your Employee Performance Evaluation System



Do you periodically assess your institution's employee performance evaluation system?

If not, consider doing so regularly (every three to five years).



Source: United Educators

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Checklist: Assessing Your Employee Performance Evaluation System



A good place to begin evaluating your employee performance system is by considering the following:

- Does your institution mandate performance evaluations for all employees?
- Does the institution use its performance evaluation system for:
 - Termination decisions?
 - Employee discipline?
 - Determining layoff candidates?
 - Promotions?
 - Salary adjustments?
 - Bonus eligibility?
 - Employee professional development?



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Checklist: Assessing Your Employee Performance Evaluation System



A good place to begin evaluating your employee performance system is by considering the following:

- Do your employee handbooks and policies describe the performance evaluation system and explain how it is used?
- Is your performance evaluation system centralized, with oversight by Human Resources (HR)?



Source: United Educators

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