Themes and stories in employment cases

Our clients are a part of the larger and continuing saga of good and evil; right and wrong

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"The Law, wherein, as in a magic mirror, we see reflected not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle."

– Oliver Wendell Holmes, Jr.
(to the Suffolk Bar Association, 1885)

Everyone loves a good story. Despite the formality of the courtroom, judges and juries are no exception. As lawyers, we often forget that the stock in trade of our profession are the stories of living human beings: their conflicts, the struggles, and the triumphs and tragedies of their lives. As advocates, our work flows directly from the stories of their lives – the inevitable joys and sorrows, the injuries, wrongs and disputes of life – and our all too human effort to make laws intended to resolve those disputes. As is the case in all other areas of law practice, this is no less true in the practice of employment law.

A paradigm

To set the stage here, it is helpful to view the employment relationship as a set of reciprocal duties and responsibilities. Someone is hired to do a job for another, to perform all essential duties and responsibilities of the position competently and in good faith. He or she is expected to perform at a satisfactory level, to the best of his or her ability. In return, the employer compensates the employee fairly and promptly for all work performed. Each player, both employer and employee, expects the other to deal fairly, honestly and in good faith.

One logical (if not common sense) extension of this view is the sense that an employer should fire an employee only for good cause, for a fair and honest reason, governed by standards of "good faith and fair dealing." For plaintiff employees who survive the inevitable defense motion for summary judgment, the issue for the jury becomes whether the company has treated the employee fairly, in good faith and with some measure of due process.

This view is somewhat inconsistent with the presumption of "at-will" employment. Absent a contractual right *not* to be terminated without good cause, employment is deemed at will, terminable at the will of either party. However, an implied contract not to discharge without good cause (including the covenant of good cause and fair dealing) limits at-will employment. Implied contracts are based on longevity and other factors. (*Foley v. Interactive Data Corp.* (1988) 47 C.3d 654; *Guz v. Bechtel Nat'l, Inc*. (2000) 24 Cal.4th 316, 335-336.) Other clear exceptions to the "at-will" doctrine (and regardless of longevity) include discrimination, harassment and retaliation.

I always present my clients as hard-working and loyal employees, performing at the highest levels and standing up for the principle that their co-employees do the same. They have met their side of the employment bargain. For whatever reason, however, the employer has failed to carry out its side of the bargain in an employment relationship held to standards of fairness, of good faith and fair dealing.

Tormentors and victims

Having practiced employment law for over 15 years, mostly in the plaintiff's employment bar, I've had a substantial opportunity to interface with working people at all levels the employment spectrum. For many of these people, who have lost their jobs and livelihoods through terminations, their stories are those of careers ruined, of reputations tarnished, of great distress and anxiety. Often the sole source of support for themselves and their families and their livelihoods have come to an abrupt end. They see themselves as wronged, cheated and victimized by discrimination through harassment or retaliation in the workplace. They are upset, often angry people, who are left with a deep sense of humiliation and injustice – anxiety for having been punished for who or what

they are. They see themselves – often justly – as the victims of oppression and violation in the workplace.

Discrimination in the workplace is today clearly prohibited on many bases under laws both state and federal. In California, these protections include the Fair Employment and Housing Act (FEHA), Government Code section 12900 et. seq. protecting against unlawful discrimination, retaliation and harassment in the terms and conditions of employment. California Labor Code sections 6310 and 1102.5 (California's Whistleblower Act) and other statutes further protect employees against retaliation for reporting safety issues or opposing unlawful activities at their workplace.

Most of us view discrimination in general as wrong, as a deprivation of our basic right to earn our living or livelihoods free from discrimination in a hostile and abusive work environment. To the extent that employers, their individual managers and supervisors act in ways *violating* those rights and those expectations in the workplace, working people are justly offended. They sue, they bring lawsuits, and they seek juries to redress those wrongs suffered as victims of discrimination, harassment or retaliation – all arising often out of the same fact pattern. They seek remedies to be made whole again for their losses and distress they have sustained. And, of course, they seek compensation in the courts to bring fair closure to this most unfair and distressing chapter in their lives.

The facts and events leading up to a job termination suggest specific themes in the litigation of employment cases. Large corporate employers often disregard the law in the pursuit of profits and corporate efficiency. Often overlooked, and sometimes intentionally disregarded, are the rights and protections of their employees. Corporate managers often thumb their noses at laws designed to protect working people. These include those with disabilities, those who speak up with concerns about safety, and those who stand up and speak up about violations of the law they perceive in the workplace. It is critical for us as advocates to present these cases to the judge and the jury in a compelling manner, with a clear and compelling theme in a story that puts the employer, *not* the employee, on trial.

The working people I represent are those who at some point assert their rights to the fair treatment to which they and their fellow employees are entitled under law. They are often those who "stand up and speak out" against violations of the law, against dangers and other wrongs they perceive in the workplace. They sometimes refuse to just "go along," to be involved with and acquiesce in wrongdoing and violations of the law in the workplace. But they pay a price for their courage. In standing up and speaking out about the wrongs they perceive in the workplace, they very often place their livelihoods and careers at risk – along with their very reputations and the financial security provided from their employment.

My clients are, by and large, honest and conscientious, people, working people. Their claims of discrimination or wrongful discharge are most often recognized in the law, as violations of public policy. Their stories are compelling – often larger than life – and connect with universal values of fairness and good faith in the workplace. It is always a challenge for me to present these people, with their stories of injustice, in a compelling way and with a compelling theme to the court.

Very much of this thematic thinking runs contrary to our formal education as lawyers. In law school, we learned from the case books. We extracted the broad propositions of law from casebooks and treatises. We learned the abstract principles to be applied the facts of the particular case. What we missed or never learned, for the most part, were the stories of real and living and human beings. And in the process, we somehow missed the flesh and blood stories behind the cold sweep of logic and legal analysis – the stories and perspectives of living human beings. As budding advocates, we were trained or instructed with blinders to the living pulse of society. We learned abstract principles from individual cases, somehow missing the continuing story of good and evil – of individual human beings and the depth of suffering in injustice.

It is critical, to persuasion and the effective presentation of our cases, to present our clients as living and breathing human beings. This means the ability to convey their stories as part of the continuing human saga of good and evil; of right and wrong. Our clients are among those many whose lives are reflected in Holmes's magic mirror. They are those who have brought their stories, their wrongs and their sufferings to the courts of law. They seek justice to redress those wrongs and balance the scales. As victims of discrimination, of harassment or retaliation in the workplace, they are often among the oppressed and the forgotten. They are the living, feeling, breathing souls who suffered wrong and injury at the hands of their employers.

The morality play

Most of us respond with some conviction to themes of good and evil; of right and wrong. As human and as social creatures, most of us cannot help but see the world in terms of the right and the wrong, of forces of good and evil. This includes the employment relationship. In fact the workplace is itself a microcosm of the larger society and world in which we live and work. For advocates of employee rights, this again means that we need to present our cases with compelling moral force – the loyal and conscientious employee is wronged and damaged at the injustice of the employer.

I have handled a variety of employment discrimination and retaliation cases over the years. Despite the many challenges along the way, I love and have a passion for what I do. I know that behind

every working person, with a just claim in an employment case, is also a wronged and injured human being. It is my job to present these people and their cases as wronged and injured victims, those who seek to right a wrong. Their careers and livelihoods hang in the balance. For all of their courage and conscience in *standing up and speaking out*, they have lost their jobs and livelihoods (and often their reputations) in the process. If I have any hope to be their champion at all, I must also make sure that judges and juries see and hear their stories, the saga of these people as victims who suffered the wrongs they have endured. Yes, they had a right to speak up, to question, to express concerns about ways and practices of their employers, about violations and wrongdoing in the workplace. They had a right to ask questions and, yes, to raise issues of wrongs and dangers in the workplace. Most certainly, their employers cannot punish them for complaining about discrimination and standing up for their civil rights.

Standing up and speaking up

I have represented truck drivers, nurses and medical technicians, airplane pilots and executives among my whistleblowing clients. The issues range from reported instances of discrimination, defects in vehicles, defective heart catheters, corporate fraud and many others. These "whistleblower" clients all possess one characteristic in common: a sense of duty and conscience *to stand up and to speak out*, to report those wrongs and dangers and violations they perceive in the workplace. Like you and me, they are subject to error. For the most part, however, these are also people of extraordinary courage. Out of conscience and sense of right, they are willing to place their livelihoods, their reputations and financial security at stake. They very often perform their job functions at the highest levels – and seek only to make sure that their fellow employees do the same. I find that these remarkable traits of conscience and courage can be found among working people in all occupations and all levels of employment.

Put the employer on trial

Let's not lose the forest for the trees. It is our clients, hardworking people, who are seeking redress for wrongs, for the injustice done to them. We do not need to prove they are angels (as none of us are). And it is not our task to prove they are perfect, for they are not. Nor do we need to prove more than what is legally necessary in their behalf to prevail. In most cases, they have simply done their jobs. They have performed at the highest level that we can reasonably expect of them. In many cases, they have gone beyond the call of duty. Simply put, they were doing their jobs in a loyal, satisfactory and conscientious way. At the very least, we must put the *employer*, not our clients the employees, on trial.

Finally, we must convey the fact that our hardworking and loyal clients were performing their duties and responsibilities to the best of their abilities, in good conscience and in good faith. They had every right (both moral and legal) to question and to report wrongdoing in the workplace. They had a basic and a well-recognized legal right to ask questions, to express their concerns about safety. Our lawmakers have provided for their protection, their right to oppose discrimination, other violations and unfair practices *without* fear of losing their livelihoods. Further, we need to make abundantly clear that their employers had no right to fire them for doing so. To be effective advocates for these people, we must effectively tell their stories, the whole story that gave rise to their prayer for redress in courts of law.

So then let us view and regard and present our clients as part of the story that is theirs – the whole story. Magic mirrors aside, it simply does not require the level of Holmes's genius for the law for us to understand that our clients are a part of the larger and continuing saga of good and evil; right and wrong. When we undertake to represent them and their causes, let's realize in the words of Holmes's, that we are a part of a "majestic theme." We are indeed part of the "magic mirror," of a tapestry larger than life, of the continuing human story of those who have come before us – and will follow after.

Endnotes

[1] I am indebted to trial consultant Mary Jo Koonan of the National Jury Project (West) for this clear and simple paradigm. It is an effective way both to view the employment relationship and to suggest a context in which we can present our clients' causes to the court.

[2] Of great interest in this regard is the growing school of psychodrama, which seeks to elicit, from wronged and injured parties, the inner emotional forces and factors behind their actual and *lived experience* in the case. See Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, Northern Illinois University Law Review, 21 N.Ill.U. L. Rev 1 (2001)

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