

"Americans clearly believe in equal opportunity even as they reject programs that mandate equal outcomes." So writes pollster [Frank Luntz](#) in his book, *Words That Work: It's Not What You Say, It's What People Hear*. The observation is a remarkably valuable insight for anyone preparing an employment discrimination lawsuit trial.

Whether representing the employee or the employer, the challenge that Luntz's insight presents during an employment discrimination trial is to remain focused on the right side of the Luntz equation. Employment discrimination disputes almost always concern both halves of the opportunity-outcome equation. An employee denied an equal employment opportunity will persuade a jury to the employee's point of view. An employee seeking compensation because the employee did not get an equal employment result will likely fail to persuade a jury.

In other words, employees should be proving that an employer's wrong was in the decision making process not the outcome. Conversely, employers should be arguing that the employee wants a mandated outcome. This is part of what makes proving a discrimination case so hard for an employee. The distinction between decision and outcome is subtle. The issue is why a decision was made not what the decision was.

When an employee contacted me about a potential case, I used to ask the very poor question: "Tell me why the decision to terminate your employment was based on your (sex, age, disability, etc...)." The answer I got was almost always the same. The employee told me how unfair the outcome was. "I produced more than Mary, but they kept her and let me go." Or, "my boss said I turned in my paperwork late, but it was on time." Or, "I had more seniority but they kept Joe." The answers were almost always outcome focused.

Most employees were unable to articulate that a different decision making process was applied to a similarly situated employee of a different protected characteristic like sex or age. The employee did not recognize that I was asking about the employer's motivation for the decision and not the decision itself. What I have learned is that the employee's lawyer must get to the process part of the story and highlight it at trial despite the client's initial inability to tell that story. Now, I ask this way: "I am going to assume that what happened to you was unfair. Tell me what that unfairness has to do with your ..."

Further blurring the process-outcome distinction is the inevitable and necessary story the jury

must hear about the damages suffered from the discriminatory decision. Because the employee must prove not only that the employer violated the employee's rights but also the extent to which that violation harmed the employee, the harmful outcome of the unlawful process must also play a prominent role in the employee's employment discrimination case. But the employee's advocate must keep reminding the jury about the distinction and connection between the wrong committed and the harm suffered.

For the employer's lawyer, the task may be easier but no less important. Unlike employees who have difficulty articulating what was discriminatory about the decision making process, most employers quickly focus on defending themselves by explaining their process. The common responses I have heard from my employer clients is "we gave the employee so many opportunities." Or, "the employee's conduct left us with no choice." Or, "we hated to let the employee go, but after looking at all our options, we had to eliminate that position." Notice that all of these responses are focused on the process leading to the outcome.

But as long as the story is being told about the process, the employee's trial story is being told. Yet every seasoned trial lawyer knows that the more the trial is focused on the story your client wants told, the better. Furthermore, the longer the story goes on about the process, the more likely an employer is to have flaws in its execution of that process. At trial, this is often the employer's most serious danger zone.

While an employer must show how fair the decision making process was, the employer's lawyer should keep the case focused on the employee's conduct rather than the employer's. More particularly, the employer's case should be focused on showing that the employee is expecting a mandated equal outcome, i.e., the same job security, or same raise, or same promotion as other, differently, qualified employees. Certainly the defense is strongest when the other employees are better qualified, but juries are likely to give an employer deference in deciding what "better qualified" means if the focus is kept on the employee's desire for a mandated equal outcome.

Both the process and outcome of an employment decision will be part of the story told at an employment discrimination trial. How each side of that story is emphasized is likely to make the difference between winning and losing.