

## **PLEASE JUST GIVE ME A TRIAL BY AMBUSH**

Yesterday, I finished trying an age discrimination case to a jury in Decatur County Circuit Court where Judge Creed McGinley presides.

For a long time, the parties believed the case would settle. But as the trial date approached, circumstances changed such that settlement was no longer possible.

Three days before trial, we exchanged names and documents for the first time, in the form of witness lists and exhibits.

No depositions had been taken.

No summary judgment was ever filed.

No electronic discovery issues were even considered.

Just a trial.

Thirteen witnesses testified. We admitted twenty or so exhibits. Two ladders were used to demonstrate certain facts.

After the plaintiff's proof, the defendant moved for directed verdict. It went something like this:

Defense Counsel: "Your honor, I have a Rule 50 motion to make."

The Court: "Okay. Denied. Call your first witness."

Defense Counsel: "We call Mr. Smith."

The jury charge was simple, mostly adopted from the Tennessee Pattern Instructions. Gone were complicated *McDonnell Douglas* burden-shifting instructions and the common joke (sometimes from the bench): "Don't worry. The jury won't understand all these instructions because lawyers and judges can't understand them either." Instead, the Court gave the jury simple, tight instructions, and it did so at the beginning of the trial, not the end. They understood what to look for.

Jury deliberations began toward the end of day two. There were no slips of paper from the jury to the judge expressing confusion about the charge. There had been no quarrels among the lawyers whether discrimination was to be "a factor," or "the sole factor," or "a substantial factor," or "a determining factor," or "a motivating factor," or "a but-for factor," or a "mixed motive factor," or a "factor other than age," or what, in the

world, do any of these terms possibly mean and who is actually the winner under these various standards?

The jury came back. It found against my client. No age discrimination. I'd like to believe it was a close decision, but I do not know that for sure.

Would I have won the trial with the benefit of depositions? Electronic discovery? Some type of early mandatory disclosures? No.

Would I have done a better job of handling witnesses? Probably not. With every witness being fresh, the lawyers had to *listen*. Really listen. Testimony was not overly rehearsed. And no gotcha-impeachment stuff, like whether the variance of trial testimony from deposition testimony owed to a purposeful mind versus a frail memory.

Would the company have obtained a summary judgment if it had taken depositions and mounted various legal arguments? No.

Would the parties have saved money if the normal discovery and motion rules had been used? Hardly.

We will not appeal. Why would we? My client received a full and fair jury trial. The case was decided on its merits. It did not cost my law firm, my client, or the company a small fortune.

I hugged my client before leaving the Decatur County courthouse. I felt disappointed with the result, but proud of the system.

The point is this: The cost of our normal legal rules is a price too steep for most Tennesseans. Often, we cannot enforce our laws because it is too expensive to follow our rules.

Today, motions for summary judgment -- intended to weed out frivolous cases and conserve on the cost of litigation -- are filed in *every* discrimination case. Most depositions are taken not because they are needed to better understand a case; they are taken to mount and respond to summary judgment. And electronic discovery requirements can overwhelm, regardless of the actual merits or size of the case.

Many employment discrimination cases do settle, particularly if it's done early. But something is fundamentally *unsettling* where the basis for the settlement is the monetary price of the alternative: Our own judicial system. It makes companies feel "extorted" by the judicial system. And employees feel cheapened because their discrimination complaints are processed by system costs.

I've practiced fifteen years now. I had grown accustomed to, if not wary of, some of the rules and their costs to individual claimants in Tennessee. If my recent experience was a "trial by ambush," or one resembling "the days of old," can you please just give me some more of that?

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