



Account for Social Exclusion in Employment and Whistle-blower Cases

Prepared by:
Dr. Ken Broda-Bahm
Persuasion Strategies - a service of Holland & Hart LLP

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Published on www.lorman.com - October 2018

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Account for Social Exclusion in Employment and Whistle-blower Cases

Written by Dr. Ken Broda-Bahm

There is often something distinctive about the person bringing a case. Whether they are the victim in a discrimination or harassment case, a whistle-blower in an employment case, or a number of other case types, their act of coming forward has marked the individual as outside the social circle of a corporation or group. Whether that exclusion is the cause of the claim (for example, ostracism is an increasingly common form of harassment) or an effect of the claim, that separation is going to be part of the identity of that party or witness. And this outsider status will influence how that person is viewed by jurors. Are they a maverick or a malcontent, or something in between? The answer will add or detract from their credibility.

An interesting new study suggests that the way they are viewed will, in some surprising ways, depend on their similarity to the group that has excluded them. A team of researchers from the University of Basel (Rudert, Sutter, Corrodi & Greifeneder, 2018) published the article in the current issue of the *Journal of Personality and Social Psychology*. When presented with a number of different scenarios, research participants viewed social exclusion

as worse when the person is visibly different from the rest of the group — different not just in the factors that you think might matter in litigation (e.g., race, gender, or age) but different even on superficial factors like hairstyle. When the excluded individual is similar to the rest of the group, the research participants seem to reason that the excluded individual must have brought it on themselves somehow. In this post, I'll share a few thoughts on how this can influence the credibility of the 'odd man out' in litigation.

Similarity and Separation

For persuaders, the strategy of identification is a common one. Some would even say that it is the master strategy: A persuader succeeds by building or drawing attention to common ground. That can mean similarities of situation (*We all live here*), similarities of assent (*We all agree that...*) or similarities of formal style or language. We also tend to adapt new views when we are shown that these views bear a similarity to views we already hold. For that reason, advocates and persuaders are often focused on emphasizing the similarities between themselves and their positions on the one hand, and their audience and that audience's prior beliefs on the other hand.

That, at least, is how the idea of similarity typically works, and trial lawyers will try to build as much similarity as possible for themselves, their clients, and their witnesses. The factor of social exclusion, however, seems to change that dynamic. In that case, a focus on similarities between the complainant or whistle-blower and the group at large can rebound back upon that individual,

causing an audience to implicitly reason, “If you’re so similar to the others, and you were still excluded from the group, then it must have been something *you* did.” In contrast, salient dissimilarities invite the belief that exclusion was a result of differences, and that is unfair.

When to Build Similarity

This research suggests that one strategy in answering the claims of someone who is claiming to be a victim of the group is to argue the they are really a *member* of the group by building on similarities including common experience, knowledge, and language. If someone who is claiming to be a victim of harassment, for example, also participated and laughed at some of the same jokes as the rest of the group, that can psychologically undercut their claim. If they share a great deal of common ground with those they’re now accusing, jurors may see inconsistency and wonder why they are singling themselves out.

When to Build Difference

If you are representing this discrimination or harassment victim or whistle-blower, on the other hand, then you want to highlight differences. And what the research points out is that it is not just the differences you would think of: the factors that make them part of a cognizable group based on gender, age, race, religion, etcetera. Instead, focusing on *any* difference seems to work. As long as you aren’t creating an alternate cause for the disparate treatment, it helps to be able to show that, in other ways, this person was really not a member of the group. That focus will help

jurors reach the conclusion that the social exclusion was caused by the group and not by the individual.

For questions regarding this update, please contact: Dr. Ken Broda-Bahm
Persuasion Strategies 555 17th Street Suite 3200 Denver, CO 80202
Holland & Hart, 1800 Broadway, Suite 300, Boulder, CO 80302
Email: KBrodabahm@persuasionstrategies.com
Phone: 303.295.8294

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