

► Those little white lies employers tell to soften the

blow of firing someone can backfire. One expert's advice: Quit it.

Plain and simple: Liars lose

IN THIS CORNER | By Alan L. Rupe

YOU DON'T HAVE TO BE a federal court judge to figure out that a supervisor's or manager's missteps in handling employee terminations can be costly. Most employers seem to know it. Every employer that has been through an employee lawsuit is painfully aware of it. Take a look at a few recent jury verdicts:

Awarded: \$11.65 million to a Chicago-area maintenance worker who claimed that his employer had violated the Family and Medical Leave Act

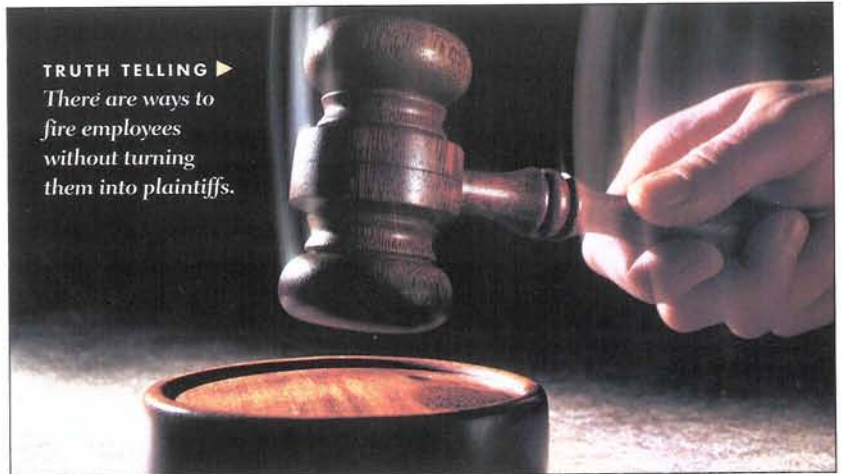
Awarded: \$872,784 in damages and \$650,000 in punitive damages to a factory worker who claimed sexual harassment, constructive discharge and retaliation

Awarded: \$1 million in compensatory damages and \$2 million in punitive damages to a former engineer at a Maine paper company who was accommodated for a disability for four years before he was laid off during a company-wide reorganization

Like the road to hell that is paved with good intentions, the superhighway to a huge jury verdict can often start with a manager's well-intentioned little white lie. Consider the situation of the "jerk" employee. He argues with his coworkers. He gripes about work. He yells at customers. He thins the lining of his supervisor's stomach and causes the company's human resources director to spend countless hours explaining to him why the company operates its business as it does. Everyone is sick to death of the guy.

"We'll fire him," the director of human resources finally says to the com-

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TRUTH TELLING ►
There are ways to fire employees without turning them into plaintiffs.

pany's CEO. "But I don't want a big scene, so I'm going to tell him he is being laid off and that his job is being eliminated. With this economy, he'll understand, and no one will have hurt feelings. A replacement for that position will be easy to find, and we'll be back to work in no time with someone we like."

The human resources director meets with Jerk. Jerk is unhappy that the company is downsizing, of course, but understands that it sometimes happens. Two weeks later, Jerk sees his old job advertised in the want ads. That's his job! If his job was eliminated, why are they trying to hire someone? They lied to him! Was he fired because of his age, his race, his chronic headaches, or because he told the plant manager that he thought the bookkeeper didn't pay him for all his overtime?

Jerk wants answers, and he wants them now. Surely one of those attorneys with the big ads in the phone book could help him get to the bottom of this conspiracy. Now Jerk has a new name: "plaintiff." And the company is on the road to what might be called hell—years of litigation, a trial, big checks to pay attorneys and maybe a jury verdict.

If you are in the habit of telling employees little white lies about their jobs to soften the blow, I have a simple

piece of advice: Quit it. It's a huge mistake. Anyone who has ever served on a jury remembers the part of the trial where the judge reads the rules to the jury. Here is a typical jury instruction used in a discrimination case:

"The plaintiff must prove, either directly or indirectly, that there is evidence of intentional discrimination. Direct evidence would include oral or written statements showing a discriminatory motivation for the defendant's treatment of the plaintiff. Indirect, or circumstantial, evidence would include proof of a set of circumstances that would allow one to reasonably believe that [race/color/national origin/gender/age] was a motivating factor in the defendant's treatment of the plaintiff."

To establish discrimination by indirect ("circumstantial") evidence, the plaintiff must also prove the following by a preponderance of the evidence:

- (1) that he/she was a member of a protected group
- (2) that he/she was satisfactorily performing his/her job
- (3) that he/she was discharged
- (4) that the employer sought a replacement with similar qualifications for the job

If the defendant satisfactorily presents evidence that shows a nondiscriminatory reason for the termination,

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continued

the plaintiff must persuade the jury, by a preponderance of the evidence, that the reason offered by the defendant for the termination is only a pretext or cover-up for what was, in truth, a discriminatory purpose.

I'm a trial lawyer. I have tried employment cases for nearly 30 years, but I can count on one hand the number of "direct evidence" discrimination cases I have encountered in those years. In one of those cases, the employer wrote a memo to the company bookkeeper stating, "As of next Tuesday, there will be no more women on our payroll." That handwritten note was the *only* exhibit in that case. And the matter was settled shortly thereafter, for a substantial amount. Almost always, discrimination cases are circumstantial-evidence cases. And the problem with the well-intentioned little white lie is that it helps a plaintiff prove "pretext."

When an employer has told little

white lies to get out of a sticky situation, the employer's witnesses will have to admit in front of the jury that the proffered reason for the job action was not the real reason. It was a "pretext." The employer's lawyer will find it nearly impossible to get that case dismissed short of a trial. Credibility problems emerge. The employer will be forced to admit that it offered up a pretext to disguise a legitimate non-discriminatory reason. Sound confusing? The jury will think so. And once Jerk's phone-book lawyer gets his hands on an employer that lies, that lawyer, as we say here in Kansas, will really make hay.

At trial, Jerk will cry and talk about his emotional distress. Witnesses (usually other disgruntled former employees) will testify that Jerk was kind, caring and sensitive. The employer cannot point to any other employees who were fired because they were "jerks." The director of human resources will be

cross-examined until the cows come home (Kansas again) about "the lie." The jury will listen to the judge's rules about circumstantial evidence and decide whether the employer had a legitimate non-discriminatory reason for the termination, or if Jerk is right and there was discrimination. Meanwhile, Jerk's attorney will be surfing the Web for the next available delivery date for a new Escalade with mini-bar.

You get the picture. Pretext ("lying") is a problem. But trying to explain the reason for the lie ("I didn't want to have a big scene.") can be a bigger, more confusing problem. The lesson here is simple: Tell it like it is. Document it. Deal consistently and be straightforward with employees. And avoid the courtroom, where liars seldom win. **wfm**

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