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Discovering the law of gravity

IN THIS CORNER | By Alan L. Rupe

JULY 1982. TOPEKA, KANSAS. Jury selection in an employment-discrimination case. The 103 degrees outside was cool compared to the heat I felt from these potential jurors. The temperatures in the jury box reached the flash point when I made a remark that was perfectly simple and legal.

My client, the “Mega Corporation,” had fired a poorly performing employee with long-standing attendance and attitude problems. The employee then sued my client for discrimination. During jury selection, I explained the basic legal principle of “employment at will,” that an employer has the right to fire any employee at any time for any reason, or even “no reason.” To the court, the lawyers and my client, it was a simple statement of law. But a middle-aged woman in the front row raised her hand and asked, “You mean the Mega Corporation fires people for no reason?” The panel’s temperature began to rise. These people knew about American justice from cop and lawyer television shows: the Miranda warning, the right to an attorney and due process. And a feeling of disapproval spread through the jury box toward my client and me like prairie fire on dry buffalo grass. I had just discovered the natural flow of people’s beliefs in the courtroom; I had just discovered gravity.

Law school professors and knowledgeable labor lawyers had taught me that “at-will employment” is the law. And while the judge, the lawyers and my corporate client knew that the implied covenant of good faith and fair dealing meant nothing in an at-will employment context, it meant plenty to this Topeka jury panel. To them, some things were as certain as gravity: employees should



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be warned by their bosses about bad behavior; everyone deserves a second or third chance; and it is not fair for a company to fire an employee without cause. Trying to convince this panel otherwise was like trying to prove that Isaac Newton was wrong.

“Have you ever tried to quit a job and your employer told you that you had to stay?” I asked the woman.

“Well, no,” she replied.

“Have you ever given your boss a letter of resignation and she told you that she would not accept it and to get back to work?”

“No, and she had better not,” blustered the juror. A new gravitational pull was discovered.

“What applies to you as an employee also applies to your employer,” I explained. “Employees can quit a job anytime for any reason, whether that reason is more money, better hours or less work. And employers have that same right. At-will employment works both ways.” And suddenly, the jury got

AT WILL? SO WHAT? ▲ Jurors are skeptical of what seems perfectly obvious to employers and their attorneys.

it. The gravitational pull was reversed.

After trying employment cases for 32 years, I have become an expert on gravity. Two other examples illustrate the force of a jury’s gravity:

The notion of refusing to tell an employee the reason for termination is “anti-gravity.” Because of possible liability issues, legal treatises and lawyers often advise employers to decline to give an employee a reason for being fired, or to provide only a general reason. A jury’s gravity, on the other hand, is that the employee should be terminated only after the specific reasons for the job action have been explained and the employee has been given an opportunity to correct the problem. A jury’s gravity is that “no firing should be a surprise.” There is probably no case harder for a trial lawyer to defend than a “no reason given” termination employment case. To win one of these cases is to defy gravity.

In a sexual-harassment lawsuit, a jury’s gravitational pull is always *away* from knowledge and power. Take the following example. A longtime male

ALAN L. RUPE is a trial lawyer, certified by the National Board of Trial Advocacy. He is based in the Wichita, Kansas, office of Husch & Eppenger, LLC (www.husch.com) and practices regularly in federal and state courts across the country. He is chair of Husch’s Labor and Employment Section and vice chair of the General Business Litigation Practice Group.

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supervisor who golfs frequently with the company's CEO is accused of making crude, suggestive comments to a young, attractive female employee. The woman reports the conduct to the company's human resources director. The CEO investigates the complaint and personally interviews the woman. The supervisor keeps working. The female employee is moved to another department. She quits and files a charge of discrimination within a few weeks.

The jurors' gravity in this case? Employees who complain are punished; the company did not conduct a fair investigation; and the company will always believe the boss's buddy. The jury will be offended by the more knowledgeable, more powerful company and its behavior. That gravity will cost the company in the courtroom. While the defense attorney may strive mightily to prove otherwise, gravity is going to bring that employer down to earth, hard.

Human resources executives and lawyers must work carefully and cooperatively to make the company's practices mesh with accepted legal principles and "gravity." Workplace tools such as progressive discipline, a code of conduct, job descriptions and specific policies that ensure fairness and consistency generally follow accepted legal principles and jury gravity as well.

Telling a jury that the company followed its own policies and procedure may simply not be enough, however. Showing a jury that the employer took care in designing its policies and procedures, followed those procedures closely and was fair and consistent in dealing with employee issues is essential. One of the best ways to ensure that the flow of gravity favors an employer is to design policies governing probationary periods, progressive discipline and the circumstances under which employees will be terminated. A "code of conduct"

that sets out the company's expectations of behavior may also be seen by jurors as a good-faith effort to do more than simply what is required by the law and to ensure that employees have a decent place to work.

Meshing the gravity of people's beliefs with the oftentimes anti-gravity of the law is absolutely necessary in today's workplace, where jurors frequently second-guess day-to-day employment decisions. A well-written policy handbook, "codes of conduct," job descriptions, performance-improvement plans and regular employee evaluations all help employers deal with employees today and juries tomorrow. An employer's best defense in the courtroom is one that follows the law but also acknowledges a jury's gravity. **wjfm**

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