

FEAR *of* FIRING

How the threat of litigation is making companies skittish about axing problem workers

BY MICHAEL OREY
Illustrations by Owen Smith

WOULD YOU HAVE DARED FIRE Hemant K. Mody?

In February, 2003, the longtime engineer had returned to work at a General Electric Co. facility in Plainville, Conn., after a two-month medical leave. He was a very unhappy man. For much of the prior year, he and his superiors had been sparring over his performance and promotion prospects. According to court documents, Mody's bosses claimed he spoke disparagingly of his co-workers, refused an assignment as being beneath him, and was abruptly taking days off and coming to work late.

But Mody was also 49, Indian born, and even after returning from leave continued to suffer a major disability: chronic kidney failure that required him to receive daily dialysis. The run-ins resumed with his managers, whom he had accused flat out of discriminating against him because of his race and age. It doesn't take an advanced

degree in human resources to recognize that the situation was a ticking time bomb. But Mody's bosses were fed up. They axed him in April, 2003.

The bomb exploded last July. Following a six-day trial, a federal court jury in Bridgeport, Conn., found GE's termination of Mody to be improper and awarded him \$11.1 million, including \$10 million in punitive damages. But the award wasn't for discrimination. The judge found those claims so weak that Mody wasn't allowed to present them. Instead, jurors concluded that Mody had been fired in retaliation for complaining about bias. GE is seeking to have the award overturned, and a spokesman said, "We feel strongly there is no basis for this claim." Through his attorney, Mody declined to discuss the case with *BusinessWeek*.

If this can happen to GE, a company famed for its rigorous performance reviews, with an HR operation that is studied worldwide, it can happen anywhere. It has never been easier for U.S. workers to go to court and



allege that they've been sacked unfairly. Over the past 40 years federal, state, and local lawmakers have steadily expanded the categories of workers who enjoy special legal protection—a sprawling group that now includes women, minorities, gays, whistleblowers, the disabled, people over 40, employees who have filed workers' compensation claims, and workers who have been called away for jury duty or military service, among others. Factor in white men who believe that they are bias victims—so-called reverse-discrimination lawsuits—and “it’s difficult to find someone who doesn’t have some capacity to claim protected status,” observes Lisa H. Cassilly, an employment defense attorney at Alston & Bird in Atlanta.

THese workers wield a potent weapon: They can force companies to prove in court that there was a legitimate business reason for their termination. And once a case is in court, it’s expensive. A company can easily spend \$100,000 to get a meritless lawsuit tossed out before trial. And if a case goes to a jury, the fees skyrocket to \$300,000, and often much higher. The result: Many companies today are gripped by a fear of firing. Terrified of lawsuits, they let unproductive employees linger, lay off covered workers while retaining less valuable ones, and pay severance to screwups and even crooks in exchange for promises that they won’t sue. “I’ve seen us make decisions [about terminations] that in the absence of this litigious risk environment, you’d have a different result,” acknowledges Johnny C. Taylor, Jr., head of HR at IAC/InterActiveCorp, the conglomerate that runs businesses such as Match.com and Ticketmaster.

MANAGERS OFTEN FAIL TO BUILD A CASE FOR FIRING BY SHYING AWAY FROM REGULAR AND CANDID EVALUATIONS

The fear of firing is particularly acute in the HR and legal departments. They don’t directly suffer when an underperformer lingers in the corporate hierarchy, but they may endure unpleasant indirect consequences if that person files a lawsuit. Says Dick Grote, an Addison (Tex.) talent management consultant: “They don’t get their bonuses based on the number of lawsuits they win. They get their bonuses based on the number of lawsuits they don’t get involved in.”

This set of divergent incentives puts line managers in a tough position. When they finally decide to get rid of the underperforming slob who plays PC solitaire all day in her cubicle, it can be surprisingly tough to do. And that, in turn, affects productive workers. “Few things demotivate an organization faster than tolerating and retaining low performers,” says Grant Freeland, a regional leader in Boston Consulting Group’s organization practice.

But it’s often the supervisors themselves who bear much of the blame when HR says someone can’t be shown the door. That’s because most fail to give the kind of regular and candid evaluations that will allow a company to prove poor performance if a fired employee hauls them into court. Honest, if

it would be more exposed in a lawsuit by the woman.

Another of Cassilly's clients, a manufacturer, acquired a new facility and quickly identified one worker as having "a variety of performance problems." But the woman, an African American, had nothing in her personnel file indicating prior trouble, which made firing her a risky bet. So the company put her on a six-month "performance improvement program" to document her deficiencies—and to find out if she could mend her ways. She couldn't, and, Cassilly notes, her client "had to suffer through her poor performance during the whole period."

Early this year, Cassilly got a call from the client. They had just discovered that the woman, an office administrator, had stolen thousands of dollars from the company, and they promptly dismissed her. "It was almost a case where the company was delighted to find out they were the victim of theft," Cassilly says, as opposed to having to defend far more subjective performance evaluations.

Even in the face of theft, Revolution Partners, a small investment banking advisory firm in Boston, balked before showing one of its employees the door. The woman had used her company credit card for a personal shopping spree and plane ticket, but Revolution retained an employment attorney, got the woman to sign a form waiving her right to sue for wrongful dismissal, and after she was fired took no legal action to recover the amounts improperly charged. "We're a little firm, and the last thing I need is to spend a lot of time on a lawsuit, whether it's warranted or not," says Peter Falvey, one of Revolution's co-founders.

Falvey isn't alone. A number of defense attorneys and HR managers said companies they work for prefer to buy themselves peace of mind over facing the prospect of being sued. "They don't want the publicity or the expense," says Robert J. Nobile, an attorney at Seyfarth Shaw in New York. "Some of them say, 'Hey, we'll swallow our pride and pay 10 grand now rather than 100 grand later.'" That's an approach that makes IAC's Taylor shudder. "If that becomes your norm, then you train the plaintiffs' bar and your departing employees that they should expect something on the way out, no matter how poorly they perform," he says.

MANY OBSERVERS PUT MUCH OF THE blame for fear of firing on HR. "The problem is much more with HR managers being nervous Nellies than it is a problem in actual legal exposure," says consultant Grote. The bigger risk is retaining poor performers, not terminating them, he says, provided the firing is done properly.

Indeed, at most companies HR is essentially a support function that gets called in only when a personnel problem

For Every 10,000 Lawsuits, Few Losses, but High Cost

The maneuvering companies engage in to avoid wrongful-termination lawsuits is out of proportion to the risk of actually losing in court. One big reason: the high cost of litigating claims, even the ones that end up with the company winning.

| Out of 10,000 employment suits | Stage of lawsuit | Cumulative cost for a company to defend a single lawsuit |
|--------------------------------|---|--|
| FILING | | |
| 7,000 | Settle (most settlements are for nuisance value) | \$10,000 |
| SUMMARY JUDGMENT | | |
| 2,400 | Get resolved by summary judgment and other pretrial rulings | \$100,000 |
| START OF TRIAL | | |
| 600 | Go to trial | \$175,000 |
| END OF TRIAL | | |
| 186 | Trials are won by plaintiffs | \$250,000* |
| APPEAL | | |
| 13** | Plaintiff victories survive appeal | \$300,000 |

Sources: Cornell Law School; Hofstra Labor & Employment Law Journal; RW reporting
 *Assumes a five-day trial
 **Out of 22 trial losses typically appealed by companies

has reached the crisis stage. At that point, the best they may be able to do is suggest the kind of risk-avoidance measures that drive managers crazy—such as requiring that an employee's deficiencies actually be documented in writing for an extended period before he or she is fired. This can be avoided, says Amy Rasner, a former HR manager in the fashion industry, if human resources personnel are teamed with line managers, working with them on an ongoing basis to develop and communicate specific, measurable performance objectives to employees.

In interview after interview, attorneys and HR execs say the biggest problem they confront in terminations is the failure of managers to have these kinds of conversations. In a 2005 Hewitt Associates survey of 129 major U.S. corporations, 72% said managers' ability to carry out performance management discussions and decisions effectively was the part of their personnel evaluation process most in need of improvement.

The reasons for this, of course, are varied. Some managers simply see the whole review process as a bureaucratic waste of time. It's also not easy to do. Many supervisors have been promoted into their jobs because they excelled in operations, not because they are skilled as managers. What's more, they've often spent a lot of time working alongside the very people they now oversee, so giving candid feedback to friends and former peers may be awkward. Managers in this position are "the biggest



BECAUSE EVEN LUDICROUS LAWSUITS ARE COSTLY, THE THREAT OF THEM IS AFFECTING WORKFORCE QUALITY

chickens on earth," says Fred Kiel, an executive-development consultant at KRW International Inc. in Minneapolis.

Ironically, when it came to handling personnel issues involving Mody, GE managers appear to have done most things right, offering regular and candid performance appraisals and involving HR and legal personnel at an early stage when matters began to sour. In trial exhibits and testimony, Mody's GE supervisors described him as a talented but prickly worker. Performance reviews and other documents faulted both his people and leadership skills.

But in the trial against GE, Mody's attorney, Scott R. Lucas of Stamford, Conn., laid out the details of what he labeled a campaign of retaliation against his client. Following a July, 2002, memo in which Mody accused the company of discrimination, Lucas told jurors, Mody's boss began complaining that he was absent and tardy too often. In a court filing, Lucas called this "a contrived performance issue," and says Mody was also "falsely criticized for lack of output."

What's more, just six weeks after having given Mody a "very favorable review," his boss gave Mody a "very poor and critical evaluation," according to the filing. Mody was excluded

from various conferences and removed from "meaningful contribution" to projects. At one point, Mody's boss allegedly told him: "There are things I can ask you to do that if I asked you to do them, you would just quit." The last straw for Mody came when he returned from medical leave and was asked to do an assignment that he alleged was low-level and intentionally demeaning.

On July 18, jurors awarded Mody about \$1.1 million in back pay and compensatory damages and—in one of several aspects of the case being challenged by GE—a tidy \$10 million in punitive damages. Even for a company as big as GE, an \$11.1 million verdict is plenty of cause to justify a fear of firing. But Mark S. Dichter, head of the employment practice at Morgan Lewis & Bockius in Philadelphia, thinks that's the wrong lesson to draw from the Mody case and other similar lawsuits. "I can design HR policies that can virtually eliminate your risk of facing employment claims, but you'll have a pretty lousy workforce," says Dichter. "At the end of the day, you have to run your business." ■

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