

UPSCALE ACCUSATIONS COUNSELING EXERCISE

Upscale Exhibits' Attorney's Instructions and Information

You are the attorney advising Upscale Exhibits in an employment discrimination suit. Based upon your initial interview a year ago with the client, JB Clark, one of Upscale Exhibits' principal partners, subsequent meetings, and some discovery, you know the following information obtained in the initial interview (please also see attached "Notes from your initial interview with JB.")

Upscale Exhibits is a small business set up 12 years ago by JB Clark and his college friend. Upscale Exhibits specializes in designing historical and artistic displays and exhibits found in museums, trade shows and large building lobbies. While developing their business plan, JB and his partner realized that they would need a competent and highly organized administrator/office manager to get the business off the ground. On JB's wife's recommendation, they met and hired Pat Broderick who proved to be a perfect addition to the team.

With Pat onboard, the team of three spent many evenings meeting to create and execute a sound strategy for Upscale Exhibits. The first six years were marked by exceptional growth. At its peak, Upscale Exhibits had 22 employees (not including the partners). Then, four-and-a-half years ago, the economy started to decline. Orders plummeted and two employees left for personal reasons, sparing the need to let anyone go at the time.

Faced with continued revenue downturn, JB and his partner hired a small business consultant to reassess the business. The consultant recommended "professionalizing and formalizing positions and information flow." She reviewed all of the employees and recommended that "terrifically talented Jen Johnson" become part of a small management team. Jen was then 32 years old and had been with the company for two years. This recommendation was implemented while Pat was out on medical leave recovering from arthroscopic heart surgery.

Shortly after Pat's return to work the next month, JB took her out to lunch and explained the changes in office structure. While clearly unhappy, Pat said she did not have the energy to make a fuss. After that, JB never saw evidence of Pat's former energy level.

Pressured by the business decline, JB and his partner decided that an office staff position would have to be eliminated. Jen was asked to evaluate each employee's strengths and weaknesses, and the aspects of the business they supported. Jen concluded that Pat, then 55 years old, was the most expendable. The partners decided to terminate Pat without consulting an attorney. Once the decision was made, JB met with Pat to explain to her that the business was in dire financial straits and could not continue to pay her salary. He said that her duties would be distributed among other staff.

JB expressed regret at the circumstances and thanked Pat for her many years of loyal service. JB also offered Pat a three-month severance package including health benefits, in exchange for her signing a release of claims form. Pat declined. The termination occurred approximately two years ago and several months after Pat returned from medical leave.

Additional Information Obtained Through Discovery and Subsequent Meetings

Pat's Deposition

In her deposition, Pat testified that she was shocked by the request to sign a release in return for the severance and that it prompted her to question JB's motives. This triggered her filing an EEOC claim. Pat became convinced that her earlier, partial promotion to sales had been part of a long-term plan to get rid of her. "It all finally fell into place for me," said Pat. She believes that she was given the sales position to keep her "grateful and quiet" while Jen, "that snake," was being promoted to run the company. "They were out to get me but I was too trusting to realize it at the time!"

Pat testified that Jen was very high-strung and a patronizing individual who was difficult to tolerate. She said that Jen repeatedly made comments indicating that she viewed Pat as a "dinosaur." In fact, Pat reported that Jen e-mailed her pdf'ed clippings of cartoon dinosaurs. In her deposition Jen admitted to sending the e-mails but said that these were "just forwarded jokes" and that she did not mean anything by them. Pat was not amused.

Pat was obviously angry in her deposition and pointed out that she was replaced by a younger person. When asked to whom her duties were assigned, Pat said that her office managerial duties went to Jen, the 32-year-old, and the accounts were distributed to at least one younger person. Pat testified that a 40-year-old sales person took over one of Pat's accounts. "They did not want to keep me around because I am older," said Pat.

Pat testified that the partners were making frivolous expenditures while "supposedly in dire financial straits." She said that they invested \$80,000 in "some fancy computer toy" when the business was declining. Pat was also very upset about the raises allegedly given to everyone upon her termination (according to her friends on the staff).

You also learned in discovery that Pat now has a half-time job where she makes \$15,000 per year with no benefits.

JB Clark's Deposition

In a follow-up phone conversation, you asked JB about the \$80,000 computer expenditure and increased salaries. JB said that the computer system and custom software are state-of-the art technology that the company desperately needed to be

competitive. Upscale Exhibits needed to appeal to a wider range of high-end customers with more sophisticated demands. The computer and software allowed Upscale Exhibits to create professional marketing materials and advanced display graphics in-house. Pat did not know that JB and his partner made personal loans to the company to cover it.

The increases in salary were very minor, totaling \$10,000. However the company still needed savings from Pat's termination (\$50,000 salary and \$15,000 in benefits). The minor raises were intended to keep everyone motivated in the face of extra work.

JB testified that Pat's job duties were distributed among several different people. Most of the office management duties went to 32-year-old Jen because she was adapt at the computer, and understood the business including its vendor and billing relationships.

Some of Pat's former duties were delegated to Pat's 40-year-old former assistant. It is true, JB said, that the accounts that Pat handled were handed over to younger folks as well but it was not pre-meditated. In fact, the accounts were initially handled by whoever picked up the client call and were eventually assigned to the best sales people, who were 39 and 40 years old at the time, because the accounts needed extra care.

Liability under the Facts

Summary Judgment

After your initial interview with JB you told him that Upscale Exhibits' defense looked very strong. You thought that the case would be knocked out on summary judgment. This was a reduction in force. You didn't know then of any evidence, direct or circumstantial, establishing a prima facie case. Under the age discrimination Reduction-in-Force (RIF) standard, Pat would have to establish four elements or "prongs" for a prima facie case.¹ (The first three are not at issue.) Under the fourth prong, Pat would have to present evidence "tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." When you first met with JB, you had learned of no evidence supporting this claim. Thus, success on summary judgment looked promising.

Unfortunately, as often happens, the picture looks different after discovery. JB's recall abilities improved under fire from opposing counsel, and Pat's and Jen's depositions yielded more information about the events leading up to and following Pat's termination. This no longer is a clear-cut case for summary judgment or defense verdict at trial. In fact, you believe that the chances of losing a summary judgment motion are 75%.

¹ Please see the attached document entitled "RIF and SJ Legal Standards" for an outline of the relevant legal framework.

The main new fact that undermines your optimism about the success of a summary judgment for Upscale Exhibits is Jen's posture towards Pat prior to termination. Jen's comments and e-mails to Pat provide Pat with material that might suffice to establish the fourth prong of the Reduction-in-Force (RIF) age discrimination prima facie case. Whatever might happen at trial, Pat claims that Jen's behavior was discriminatory and your client claims that it was not, presenting a dispute of a material fact for purposes of a summary judgment motion. Further, viewed in a light most favorable to Pat, this story does not bode well for your client.

Trial

The odds at trial, while better than on summary judgment, still carry great risk for your client. You would strongly argue on behalf of your client that Pat was fired due to a necessity to reduce force. Pat will try to challenge this argument by pointing to evidence of younger employees, Jen's dinosaur e-mails, and the partners' expenditures. She will argue that she was singled out for termination. JB can present evidence that his reasons for terminating Pat were nondiscriminatory by pointing to Upscale Exhibits' depressed finances at the time. Although you believe your client simply made a difficult business decision, without any discriminatory intent, a sympathetic jury might see it Pat's way. Specifically, you are concerned about Jen's recommendation to lay Pat off and how Jen would come across to the jury given her age and the dinosaur e-mails. You believe that the chances of a plaintiff's verdict are 50/50.

Your Anticipated Discussions with JB

Summary Judgment and Reduction-in-Force Argument

You need to explain to JB the meaning of summary judgment and the potential risks and rewards involved.² JB should understand that while this initially seemed like a slam-dunk, the recent revelations in discovery have altered the playing field to his disadvantage. While you will certainly make strong argument for Upscale Exhibits, you will urge him to consider settling the case. You should also take JB through a brief explanation of what Pat would have to prove under the Reduction-in-Force standard. It is important for JB to recognize that if summary judgment is denied (as you predict), the plaintiff's settlement demand is likely to go up!

Trial Risks – Potential Damages and Costs

You believe JB. However, Pat has some convincing facts that a sympathetic jury could embrace, ruling against your client. Although Pat will not be able to get compensatory

² *Id.*

damages because they are not available under the federal statute³, the potential damages could nonetheless run high and have severe impact on Upscale Exhibits.

- **Backpay (required by statute): \$105,000 -- \$150,000.** Backpay would equal Pat's lost income plus cost of benefits from the day of the verdict back to the day of termination, less income from employment since then. Assuming a verdict a year from now (although it would probably be longer), this would amount to \$195,000 (3 years of salary of \$50,000 and benefits at \$15,000 per year). Assuming that Pat works at her current half-time job for another year and earns a total of \$45,000, the mitigated damages for backpay would be **\$150,000**. You would argue a higher mitigation amount pointing to Pat's employability as an indication that she could have worked full-time earning \$30,000 annually. This would increase the mitigation amount to \$90,000 and equal damages of **\$105,000**.
- **Attorney's fees (Pat's): \$60,000.** All of Pat's fees through trial will be about \$60,000 (about equal to JB's fees which were \$30,000 to date and would be approx. \$30,000 for a full trial). This does not count.
- **Front pay: ranges of \$245,000 -- \$350,000 (7 years) or \$70,000 -- \$100,000 (2 years).** A jury can award damages until the time that it is reasonably believed the plaintiff will work. Generally the age is 65. Assuming a verdict in one year when Pat is 58 years old, these damages would amount to \$455,000 (\$65,000 x 7 years). The jury might discount this number by \$105,000, the amount that Pat will be expected to earn from her part-time job, leaving **\$350,000** in projected front pay. Again, you can argue about Pat's ability to work full time, increasing the mitigation amount to \$210,000. Front pay would be then **\$245,000**. These figures reflect the worst case scenario of a 7 year front pay award. However, it is reasonable to expect a two year award which would equal damages of \$70,000 (with full-time pay mitigation) or \$100,000 with part-time pay mitigation.
- **Reinstatement.** The court could order reinstatement plus Pat's lost income. This would obviously take front pay out of the equation, but not backpay.
- **Liquidated damages: \$210,000 -- \$300,000.** If the jury finds age discrimination and also feels that Upscale Exhibits' conduct was *willful*, liquidated damages could be awarded in the amount of double the backpay or **\$210,000-\$300,000** (the mitigated amount times two). Liquidated damages are unlikely in your view.

³ Pat's state claim is barred because she failed to file the claim within 180 days of her termination. Under state law, provided she proved liability, she would have been entitled to compensatory damages in addition to the remedies available under Federal law. In addition, punitive damages under state law are not limited, as under Federal law.

- **Punitive damages -- \$420,000 -- \$600,000.** Although very unlikely due to the extreme standard that must be proven (*malicious conduct*), you will mention these to JB for a complete picture. Under Federal statute punitive damages cannot exceed the doubling of liquidated damages which would total **\$420,000-\$600,000**. The worst case scenario based on the damages numbers is astronomical at \$1.4 million. Even taking out the punitive and liquidated damages, Upscale Exhibits could still be faced with a liability of approximately \$300,000 to \$500,000 if Pat won. If you do not settle the case now, the summary judgment motion will be briefed, filed, and argued within three months. A ruling on summary judgment can be anticipated six to nine months later. If the summary judgment motion fails, trial would take place approximately eighteen months from now.

Settlement Overtures After the last deposition, opposing counsel confirmed that Pat was adamant about going to trial. Pat is convinced that she was set up for termination and feels betrayed by JB and his partner.

Nevertheless, both attorneys agreed that the potential costs and risks involved in proceeding with litigation suggest settlement. Pat's attorney did not have specific instructions from Pat to discuss settlement but he threw out a ballpark of \$150,000 to \$200,000 as a reasonable settlement range that he would discuss with his client. You said that you have yet to discuss numbers with your client and whether or not he is even open to this option. Based on your experience with this attorney, you believe he should be able to get his client to \$125,000 and you think perhaps to \$100,000 or close to that.

You would strongly urge JB to give you authority to settle at \$100,000 if that could be negotiated. It would be great if he would authorize as much as \$125,000. You anticipate that JB is going to be very difficult to convince. Some time ago when you raised it as a possibility, JB said that his original severance package offer to Pat of \$15,000 (3 month salary and benefits) was met with a kick in the teeth with the law suit. "I'll be darned if I reward that."

He remembers that when you first took the case, you said that success on summary judgment was a strong possibility and, in the alternative, that you often settle these kinds of cases for 3 to 6 months salary TOPS!

You have asked JB to come to your office to discuss the case and its possible settlement.

Instructions for Attorneys (all students) in the Counseling Skills Exercise

Due to time limitations, you should assume that you are familiar with Upscale Exhibits and JB's circumstances from previous meetings.

JB has already entered your office for this scheduled meeting, **and you have already**

exchanged pleasantries about the weather, parking, sports, etc. You have already offered JB water or coffee. You have *not* learned anything about the business' performance since your last meeting. Transition to the matter at hand.

Conduct an abbreviated but skillful counseling session. You should anticipate that it will be important to:

- Communicate clearly (explain any legal jargon) concerning the case's procedural status and the legal challenges presented by a summary judgment motion.
- Seek to understand the client's current and foreseeable future interests and discuss the impact of settlement or trial.
- Deal with psychological barriers to wise decision-making in face of uncertainty
- Work effectively with JB's strong emotions. Please note that this is the order in which these topics were covered in the course. They will not necessarily occur in this order in the exercise. **You should *not* attempt to present a decision tree** because you do not have sufficient time (though you may talk about risk and uncertainty in some fashion).

Reduction-in-Force and Summary Judgment Legal Standards

Age Discrimination Case *** Please see *Skelton v. Sara Lee Corporation*, 2007 U.S. App. LEXIS 23521 (6th Cir,2007) for legal analysis.

I. Age Discrimination in a **Reduction-of-Force (RIF) Situation**

a. Age Discrimination - shifting burdens of proof (McDonnell Douglas Test)

- i. Prima facie case made out by plaintiff (see I(b) below).
- ii. Burden shifts to defendant employer to establish that the reason was non-discriminatory .
- iii. If successful, burden shifts to plaintiff employee to prove pretext by showing that the employer's reason (preponderance of the evidence):
 1. has no basis in fact;
 2. did not actually motivate the employer's challenged conduct;
OR
 3. was insufficient to motivate the employer's challenged conduct.
- b. To establish prima facie case in an age discrimination matter where RIF took place the employee must:
 - i. establish that he was a member of the protected class (i.e. age 40 or over);
 - ii. establish that he was qualified to perform the job;
 - iii. establish that he was subject to an adverse employment action; and
 - iv. present additional direct, circumstantial, or statistical evidence "tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." (NOTE: this factor, absent a RIF situation, requires proving "replacement.")

II. Summary Judgment

- a. **May be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Fed. R. Civ. P. 56(c)*.**
- b. **Must view all evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party.**
- c. **“The critical inquiry . . . is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”**

Upscale Accusations

Notes from Upscale Exhibits' Attorney's Initial Interview with JB

Twelve years ago, JB and his partner founded Upscale Exhibits, a small business that specializes in designing historical and artistic displays and exhibits found in museums, trade shows and large building lobbies. They had been college friends, and had drifted into similar businesses before starting Upscale Exhibits. JB had worked primarily in store fixtures and layout. His partner was a graphic and interior designer. JB had always been the main salesman and business mind. His partner is the "artiste."

While developing Upscale Exhibits' initial business plan, they recognized the need for an administrator/office manager to obtain office supplies, choose computer systems, set up relationships with vendors, and organize the books and schedules. They felt that the person should have prior experience managing an office to deal more effectively with demanding clientele especially in handling billing accounts.

JB's spouse suggested a friend, Pat Broderick, "the most organized person the world has ever known." Formerly the office manager for an architecture firm, Pat had recently taken some time off to rehab a house and restore antiques. JB's spouse thought Pat would be ready for a real job. Pat's experience managing the office of a busy architecture firm seemed to translate very well into the demands of Upscale Exhibits.

JB and his partner met and immediately liked Pat, who appeared highly organized and detail-oriented. Upscale Exhibits opened with Pat as a key team member. They can't count the number of meetings over Chinese take-out at Pat's kitchen table. Upscale Exhibits took off smoothly and experienced tremendous growth until three-and-a-half years ago, when the economic downturn impacted the business.

Pat's responsibilities as office manager were to make the office function smoothly, manage client billing accounts, coordinate with the accountant on payroll, and manage three administrative assistants.

In the initial years, Pat set up efficient processes for office operations. By the time Upscale Exhibits hit its peak five years ago, Pat could let the office run itself. Since Pat had a great command of the business strategy and knew many of the clients, JB and his partner offered Pat a promotion to account sales. Pat accepted with great enthusiasm and agreed to continue supervise office management. She started out with just two sales accounts. One of the administrative assistants was assigned the day-to-day administrative tasks, leaving Pat to focus on money matters, general office oversight, and the sales accounts.

At its peak, Upscale Exhibits had 22 full time or part time employees (not including the partners). The employee pool consisted of eight designers, ten sales people and four staff

positions, including Pat. When business started to decline, two sales people left for personal reasons, sparing the need to let anyone go. Upscale Exhibits was left with eight sales people. However, over two years ago, the business's continued decline prompted you and your partner to reassess. JB retained a business consultant to recommend changes in organization and business direction to help Upscale Exhibits get back on a growth track.

At JB's request, the consultant thoroughly reviewed all of the employees and recommended that terrifically talented Jen Johnson become part of a small management team. Jen was then 32 years old and had been with the company for two years. Jen would communicate the team's decisions to all employees. This would free up most of JB's and his partner's time for sales and design. The consultant selected Jen as the most computer/tech savvy and best able to take initiative and adapt to change.

It has been 2 years since the consultant's report issued and Jen moved to management. At the time, Pat was on a medical leave for arthroscopic heart surgery. After her return to work a month later, JB took Pat to lunch and explained the changes in office structure. While clearly unhappy, Pat said she did not have the energy to make a fuss. Since her return, JB did not see evidence of Pat's former energy level.

In the meanwhile, Upscale Exhibits' revenues continued to be abysmally low. At the peak, Upscale Exhibits' revenues were \$120,000 to \$130,000 per month. Last year's average was \$60,000 to \$70,000 per month and the year before was not much better. For a number of months, JB and his partner skipped pay checks to keep enough cash on hand for the business.

Fourteen months ago, JB and his partner decided that an office staff position would have to be eliminated. Jen was asked to evaluate each employee's strengths and weaknesses, and the aspects of the business they supported. Jen concluded that Pat, fifty-five years old, was the most expendable employee under low volume and revenue conditions. Although none of the other employees were nearly as "seasoned" as Pat -- indeed no others had been with Upscale Exhibits for more than three years -- Jen forcefully argued that they had greater strengths.

JB had to think long and hard about this because Pat had been with the company since the beginning. It was true that Pat could be prickly, a stickler for unimportant details, and less adept at the computer. However, she was a core member of the founding group. It is hard to imagine how Upscale Exhibits would have launched without her.

Despite loyalty to Pat, JB could not help but agree with Jen, especially in light of recent client comments. While JB has not shared this with anyone in the company, some of Pat's account clients had complained about the speed and quality of her follow up. They did not request a change but they did express disappointment.

Upscale Exhibits needed all of its other experienced sales people. The office management duties could be handled by Jen with Pat's assistant's help. Pat was the logical person to go. The business needed the savings of her \$50,000 salary plus \$15,000 in benefits.

Shortly before terminating Pat, JB attended a local small business CEO Round Table discussion. The take-away from the meeting was, "consult your lawyer before terminating any employee and make sure you get a release of claims in exchange for severance." However, to save costs, JB terminated Pat with a heavy heart but without consulting an attorney.

When JB met with Pat to inform her of her termination, JB explained Upscale Exhibits' dire financial straits. JB offered her 3 months' severance of \$15,000 if she agreed to sign a form release of claims. To JB's surprise, Pat declined. JB attributed her reaction to pride. JB did not think she would sue.

JB divided up Pat's duties among the other employees. Jen took most of the office management oversight and client billing. Pat's former payroll responsibilities were delegated to her assistant, then 40 years old. Pat's client accounts were borderline inactive and were not designated for anyone initially. Eventually they were scattered among the sales force, based upon who had answered the client phone call.

One month after Pat's termination JB received a charge form from the Equal Employment Opportunity Commission (EEOC) indicating that Pat had filed an age discrimination claim. JB felt angry and betrayed. He could not believe that Pat would do this after all that Upscale Exhibits did for her.

Upscale Exhibits' financial distress was so severe that JB resisted hiring a lawyer. He googled the EEOC, followed the recommendations on its website and complied with all of its investigation requests. To his surprise, the EEOC determined there was reasonable cause to believe that discrimination occurred and invited the parties to a conciliation, which finally occurred nearly a year after Pat's termination. The conciliation went nowhere because of Pat's outrageous (\$500,000) demand. This would have bankrupted the business, and JB viewed it as extortion.

Because JB knew that either the EEOC or Pat, but more likely Pat, might then file suit, he was not surprised to be served with federal complaint shortly after the failed conciliation. He had a difficult time being rational about the impending suit. It enrages him and he hates the idea of paying Pat a penny.

UPSCALE ACCUSATIONS COUNSELING EXERCISE

Client Information and Instructions

Your lawyer's secretary called you to set up an appointment to discuss the employment discrimination case initiated by Pat against Upscale Exhibits. You feel a sort of relief to schedule the appointment because, based on your initial interview with your attorney, you feel optimistic that you will either settle for the initial severance amount of \$15,000, or better, win with some special motion that your attorney mentioned in the interview. Your attorney told you that he/she has settled these types of cases for no more than three-months salary. In either case, you would be done with this nightmare in, at most, six-months time. This is good news. The business is improving and you will need to focus on its continued growth and innovation.

You make a mental note to tell your attorney about the new 26 year old sales person that you hired four months ago. You do not think that this will be an issue but you feel really paranoid to hire anyone under forty since this case began. The series of questioning that you endured in depositions, and subsequent phone calls from your attorney asking about different facts that Pat raised, have made you afraid of your own shadow. Specifically, most recently your attorney asked you about two expenditures that you and your partner made around the time of the downturn. One was the purchase of an \$80,000 computer and the second was the increase in salaries for most employees.

The computer system and custom software are state-of-the art technology that the company desperately needed to be competitive. Upscale Exhibits needed to appeal to a wider range of high-end customers with more sophisticated demands. The computer and software allowed Upscale Exhibits to create professional marketing materials and advanced display graphics in-house. You told your attorney that Pat did not know that you and your partner made personal loans to the company to cover it. The increases in salary were very minor, totaling \$10,000. However the company still needed savings from Pat's termination (\$50,000 salary and \$15,000 in benefits). The minor raises were intended to keep everyone motivated in the face of extra work.

You also were asked to clarify how Pat's job duties were distributed. Most of the office management duties went to 32 year old Jen because she was adapt at the computer, and understood the business including its vendor and billing relationships. Some of Pat's former duties were delegated to Pat's 40 year old former assistant. It is true that the accounts that Pat handled were handed over to younger folks as well but it was not pre-meditated. In fact, the accounts were initially handled by whoever picked up the client call and were eventually assigned to the best sales people because the accounts needed extra care. The two best sales persons were 39 and 40 years old at the time.

You cannot wait to find out when, exactly, this case will be over and the cloud that has been imposing on you and the business will be lifted.