

UPSCALE ACCUSATIONS INITIAL INTERVIEW INTERVIEW EXERCISE

Instructions for the Attorney

You are a fourth year associate at Spatz & Weller, a medium-sized firm in downtown Cincinnati. You work in the firm's labor and employment group and have generally been the associate "second chairing" a partner on large litigation cases. You were delighted to receive a call from one of the partners in the corporate transactions department, referring you this matter from his client, Upscale Exhibits.

Upscale Exhibits is a small business specializing in design for historical and artistic displays and exhibits found most often in museums, trade shows or large building lobbies. Upscale Exhibits worked with Spatz & Weller's corporate transaction department to create its original partnership documents twelve years ago. Recently, one of Upscale Exhibits' co-owners, JB Clark, called his Spatz & Weller corporate lawyer and said that the company has been sued for age discrimination by a former employee whom he terminated a year prior. The attorney referred the matter to you.

Your administrative assistant has set up your initial interview with JB Clark. Prepare for the interview. Remember, the point is NOT to give advice at this time, but rather to establish a relationship with Clark, learn whether you would work well together or not, and learn what you can about the matter at hand. Based upon your experience in labor and employment law, you know that with age discrimination cases the devil is in the details. You want to be able to give wise counsel in the future (though not in the interview).

Assume that just prior to the interview you had a chance to review the complaint and that the only claim against Upscale Exhibits is age discrimination. You know that a law suit alleging employment discrimination must have been preceded by an Equal Employment Opportunity Commission (EEOC) action. You make a note to ask Clark about the details of those proceedings.

Within the context of the initial interview, you should be prepared to explain confidentiality in the lawyer-client relationship and your fee. The law firm generally bills on an hourly basis. Your normal rate has been \$175 per hour, though it has been discounted at times when you were working with a partner. As associates become more senior, their rates are often raised. Within the last month or so, it has been suggested that your rate should be adjusted to \$200 per hour in appropriate matters. For an extended litigation, you have the discretion to request a retainer, against which your fees would be billed.

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Instructions for Client - Upscale Exhibits Co-Owner

Twelve years ago, you and your 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. The two of you had been college friends, and had drifted into similar businesses before starting Upscale Exhibits. You had worked primarily in store fixtures and layout. He was a graphic and interior designer. You have always been the main salesman and business mind. Your partner is the “artiste.”

While developing Upscale Exhibits’ initial business plan, you 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. You and your partner felt that the person should have prior experience managing an office to deal more effectively with demanding clientele especially in handling billing accounts.

Your 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. Your 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.

You and your partner met and immediately liked Pat, who appeared highly organized and detail-oriented. Upscale Exhibits opened with Pat as a key team member. You 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. Many clients began to cut back and some smaller players dropped off altogether.

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 and focus more on increased demand for client billing and payroll oversight. Since Pat had a great command of the business strategy and knew many of the clients, you and your 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. You retained a business consultant to recommend changes in organization and business direction to help Upscale Exhibits get back on a growth track. Among other things, the consultant recommended "professionalizing and formalizing positions and information flow."

At your 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 most of your and your 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, you 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, you 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, you and your partner skipped paychecks to keep enough cash on hand for the business.

Fourteen months ago, you and your 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.

You 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, you could not help but agree with Jen, especially in light of recent client comments. While you have 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. Jen could handle the office management duties with Pat's assistant's help. Pat was the logical person to go. Saving \$50,000 salary and \$15,000 in benefits was essential for the business's survival.

Shortly before terminating Pat, you 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, you terminated Pat with a heavy heart but without consulting an attorney.

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

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

Upscale Exhibits' financial distress was so severe that you resisted hiring a lawyer. You googled the EEOC, followed the recommendations on its website and complied with all of its investigation requests. To your 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 your business and you viewed it as extortion.

Because you knew that either the EEOC or Pat, but more likely Pat, might then file suit, you were not surprised to be served with a federal complaint shortly after the failed conciliation. You have a difficult time being rational about the impending suit. It enrages you! You hate the idea of paying Pat a penny.

You called the attorney at Spatz & Weller who drafted Upscale Exhibits' partnership documents and explained that a former employee had sued the company for age discrimination. That lawyer referred you to another lawyer in the firm's labor and employment department. Your initial interview with the lawyer is about to begin.

Role Play "Acting" instructions:

Assume that the lawyer has reviewed the complaint and that the only claim against Upscale Exhibits is age discrimination.

When you play this role, you should be defensive, a bit self-righteous, adamant about the need for this decision, and all of your other judgments. Blame the decline in the business on everything but your judgment. In fact, the economy is most of the problem. Blame the decision to let Pat go on the consultant and on Jen, to whom you delegated the responsibility. Make it seem as if you had no other choice.

Emphasize your own stress. Assume you have three children, two of them younger but one in his senior year of high school. This older child has been accepted at a prestigious and very expensive college beginning next fall. Your spouse stopped working outside the home four years ago when business was good and your third child was born.

In adopting a persona/personality for this exercise, imagine yourself to be either:

- Someone reticent with information – reserved, perhaps shy (yet feeling stress). You might even be embarrassed at current circumstances. In other words, you will not volunteer information or telegraph your state of mind. Yours would be the clenched jaw, little slips about what you might be feeling, but nothing obvious unless the lawyer explores it. Your lawyer will have to work to get you to communicate what you are thinking and what is bothering you.

OR

- A “real talker” providing a great deal of information very quickly, perhaps even more details than in the fact pattern, but not in perfect sequence or logical order. Do not be calm. Be agitated. Talk about the fact that you are stressed. Be loud in asserting that there is nothing wrong with having terminated Pat, and that her claim against the company has no basis. At the same time, you can talk about feeling guilty. Play this one a bit “over the top.” Your lawyer’s job will be to clam you down, get the sequence and the facts straight, elicit careful details, make you feel that he/she understands your dilemma.