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## **Fear Of Firing**

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

COVER STORY

By Michael Orey

Would you have dared fire Hemant K. Mody?

In February, 2003, the longtime engineer had returned to work at a General Electric Co. (GE ) 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.

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<sup>1</sup> As seen on [businessweek.com](http://businessweek.com)

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 coveted 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 (IACI), the conglomerate that runs businesses such as Match.com and Ticketmaster.

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 harsh, reviews not only offer legal cover, but they're also critical for organizations intent on developing top talent. "There were definitely a lot of situations where a supervisor got fed up with somebody and wanted to terminate them, but there's no paperwork," says Sara Anderson, who worked in HR at Perry Ellis International (PERY ) and Kenneth Cole Productions Inc. (KCP ) in New York. Frequently, the work that the manager suddenly claims is intolerable is accompanied by years of performance evaluations that say "meets expectations." Says Anderson: "You look in the file, and there's nothing there to prove [poor performance], so it's like it didn't happen."

WHEN MODY SIGNED GE'S JOB application in 1998, the form said his employment was "at will" and "the Company may terminate my employment at any time for any reason."

Well, not exactly.

The notion that American workers are employed "at will"—meaning, as one lawyer put it, you can be fired if your manager doesn't like the color of your socks—took root in the laissez-faire atmosphere of the late 19th century, and as an official matter is still the law of the land in every state, save Montana. The popular conception of at-will employment is exemplified by the television show *The Apprentice*, which features Donald Trump pointing a finger at an underling and ousting him or her on the spot. That dramatic gesture makes great television, but it isn't something that happens very frequently anymore in the American workplace.

The rise of unions was the first development to put a check on summary dismissal. Collective-bargaining agreements outlined the specific kinds of infractions that could lead to termination, and set up procedures for discipline and review that a company must follow before a worker can be fired. But unions generally didn't deal with the problem of discrimination, and in some cases perpetuated it.

For most American workers now, their status as at-will employees has been transformed by a succession of laws growing out of the civil rights movement in the 1960s that bar employers from making decisions based on such things as race, religion, sex, age, and national origin. This is hardly controversial. Even the legal system's harshest critics find little

fault with rules aimed at assuring that personnel decisions are based on merit. And most freely acknowledge that it is much easier to fire people in the U.S. than it is in, say, most of Western Europe. Mass layoffs, in fact, are a recurring event on the American corporate scene. On Apr. 17, for example, Citigroup Inc. (C ) announced it will shed some 17,000 workers.

Yet even in these situations, RIFs (for "reduction in force") are carefully vetted by attorneys to assess the impact on employees who are in a legally protected category. And these days the majority of American workers fall into one or more such groups. Mody, for example, belonged to three because of who he was (age, race, and national origin) and two more because of things he had done (complained of discrimination and taken medical leave). That doesn't mean such people are immune from firing. But it does mean a company will have to show a legitimate, nondiscriminatory business reason for the termination, should the matter ever land in court.

As it happens, the judge in Mody's case tossed out his discrimination claims. But the retaliation allegation did go to the jury—a development that is increasingly blindsiding businesses. Plaintiffs are winning large sums not because a company discriminated against them, but because the company retaliated when they complained about the unproven mistreatment.

The rules surrounding retaliation may sound crazy, but they are one of the big reasons why the fear of firing is so prevalent. Retaliation suits are a hot growth area in employment law. In 2005 and 2006, retaliation claims represented 30% of all charges individuals filed with the Equal Employment Opportunity Commission, a required first step before most discrimination cases can go to federal court. That's up from about 20% just 10 years ago. "Even if there isn't a good discrimination claim, the employee has a second bite at the apple," notes Martin W. Aron of defense firm Edwards Angell Palmer & Dodge in Short Hills, N.J. Last year the U.S. Supreme Court increased the legal risk to business by ruling that improper retaliation can involve acts far short of firing or demoting someone. So even excluding an employee from meetings, relocating his or her office, or other intangible slights could lead to liability.

Of course, prohibitions against retaliation exist for a good reason. Without them, many workers would find it too risky to come forward with even legitimate complaints. Yet defense attorneys are deeply suspicious that some workers abuse the protection. Fearing their jobs may be in jeopardy, they may quickly contact HR with an allegation of discrimination or call a corporate hotline to report misconduct, thereby cloaking themselves in the protection of anti-retaliation law. "That's a

fairly common fact scenario," says Mike Delikat of Orrick Herrington & Sutcliffe in New York, a law firm that represents businesses. "The best defense is a good offense."

AFTER 1991, WHEN CONGRESS ALLOWED punitive damages and jury trials in job discrimination cases, litigation in the area exploded. In 2006, 14,353 employment cases were filed in federal court, up from 8,273 in 1990, though down from a peak of 20,955 in 2002. It should be noted that these statistics, which include both unlawful termination cases and other types of claims, dramatically understate the frequency with which companies deal with these issues. For every case that's filed in court, several more are quietly settled well beforehand.

Many of the lawsuits may seem ridiculous. IBM (IBM ) is currently defending a case filed by James C. Pacenza, a plant worker it dismissed for visiting an adult Internet chat room while on the job. In his lawsuit, Pacenza claims that his propensity to such behavior stems from post-traumatic stress disorder, which he suffers as a result of military service in Vietnam, and that IBM violated the Americans with Disabilities Act. He also alleges that two other employees who had sex on an IBM desk were "merely transferred," so he was treated with undue harshness. Pacenza's attorney, Michael D. Diederich Jr., says his client "didn't violate any of IBM's policies regarding computer usage."

Even when employers beat back silly suits, it often doesn't feel like much of a victory. That's because meritless cases can still tie up companies in burdensome and expensive proceedings for years. In October, 2002, Southview Hospital in Dayton fired Karen Stephens, a nurse who worked in a unit for premature babies and other at-risk newborns. Six other nurses had reported that Stephens was abusive to infants, according to court filings, spanking them when they were fussy, wagging their noses until they screamed in pain, pinching their noses shut to force-feed them, and calling them "son of a bitch." Stephens, who was 60 at the time, sued Kettering Adventist Healthcare Network, which operates Southview, denying "inappropriate" conduct and alleging that the real reason she was let go was age discrimination.

Only after a year and a half of legal dueling did a federal district judge in Dayton toss out Stephens' claims in April, 2005. But then she appealed, and it took another year—and an additional round of legal briefing—before the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal, noting that "Stephens has offered no evidence to indicate that she did not mistreat the infants," or that Kettering did not have a "legitimate, nondiscriminatory reason for discharging her." Kettering

declined to comment on the case. "I never lost a baby in 25 years," Stephens said in an interview.

The cost and distraction of lawsuits lead many employers to engage in contortional, and at times perverse, litigation avoidance. Defense attorney Cassilly offers the story of one of her clients, a hospital in the Southeast forced to reduce its ranks because of budget cuts. The head of one department elected to let go a female employee in favor of keeping a more junior male, whom he had spent a great deal of effort to recruit and whom he felt was more valuable. But the hospital overrode that choice and laid off the man out of concern that 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 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 (HEW ) 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 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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