How Not To Be A "Horrible Boss": A defense litigator's perspective

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The dark comedy "Horrible Bosses" opens nationwide this weekend. The film's trailer highlights Colin Farrell's character directing a subordinate to "trim the fat" by firing all "the fat people." The other two bosses – played by Jennifer Aniston and Kevin Spacey – are equally despicable.

This may make for good cinema, but employment defense attorneys rarely see such blatant expressions of bad intent. Most supervisors are well aware that it is illegal to discriminate against employees based on protected characteristics (which in some states include weight). Nonetheless, communication problems that occur every day make employment defense attorneys cringe.

Any action taken against an employee, along with supporting documentation may ultimately face review by a jury. Two sides of the communication coin often plague employers defending termination decisions: over-communication and under-communication. A skilled plaintiff's attorney can paint these just as distastefully as can the writers of "Horrible Bosses."

Of the two, over-communication is more obvious, but also harder to avoid. When supervisors make snide, sarcastic or disparaging remarks about an employee, they risk angering a jury. It is far too easy to e-mail comments one would never say in person, let alone want to explain under oath. When you consider that plaintiffs' attorneys can also obtain personal e-mail, text messages, and social media content, it is easy to see how the less one says about a problem employee, particularly in the heat of the moment, the better.

But over-communication is not always a knee-jerk reaction. It also occurs in reasoned deliberations of employment decisions and can happen, for instance, with employees' medical conditions. It is unlawful to terminate an individual based on an inaccurate perception that the individual has a medical condition that renders him or her unable to perform the job. When management or human resources personnel speculate as to what an individual may or may not be able to do now and in the future, they create evidence that may be used to demonstrate improper motive in a disability discrimination case.

Under-communication is a problem, too. No adverse decision should ever come as a surprise to an employee. While most employees are terminable at will, a jury will be persuaded by whether a decision seems fair. As a result, it's important to have a clear written record of the basis for any adverse decision – as well as a record that the concerns were shared with the employee to

give him or her a chance to correct the problem. (Obviously, there are exceptions to this guideline such as when an employee engages in behavior that warrants immediate termination.)

Under-communication often becomes a problem during a reduction in force. Supervisors select for termination individuals who are poor performers. When asked to explain the selection, supervisors cite abysmal performance, but written performance evaluations paint a far different picture. In litigation, a jury will decide whether poor performance was really just a pretext to hide some unlawful motive. Far better that a jury making that decision have before it several instances of documented poor performance. The same is true in retaliation cases, where a central issue is often whether the issues that led to the employee's termination existed before the employee's protected activity.

In "Horrible Bosses," subordinates plot to murder their bosses. (Workplace violence is another topic altogether!) While taking the stand at trial is a far less dramatic prospect, it is doubtless one few supervisors relish. Avoiding over- and under- communication may minimize the potential for litigation and will certainly make the experience less uncomfortable should litigation become unavoidable.