



UPSCALE UPCHARGES

You represent Upscale Dane Designs, Inc., wholly owned by the Dane family since its founding to create upscale displays for trade shows and the like. The Dane grandparents' knack for design and entrepreneurship were carried forward with the company's entry into web design, product labeling, packaging, and print and digital display. The design staff includes family members with those strong Dane design genes as well as other employees with top design credentials.

A few years ago, as Upscale was seeking to expand its digital offerings, the business suffered lost customers and revenues when half of its marketing team went to a competitor. (Hard to believe, but there were no non-competes and Upscale couldn't prove stolen trade secrets.) Upscale was forced to let some of its design staff go. There wasn't enough work for them to do.

Upscale CEO Owen Dane and the executive team decided to hire Jen Ganulin, an outside business/HR consultant to recommend how they might reorganize functions and which employees they could afford to use. After some internal assessment, Jen recommended cutting long time employees Chris Tomlin and Pat Heller. Chris soon found another job. Pat was distraught and angry, hired a lawyer and sued for age and disability discrimination.

Now in her mid-fifties, Pat had worked at Upscale for 25+ years. After various administrative roles, Pat took a basic graphic design course and began doing some simple print layout and elementary graphics work. However, as web, digital, video, and complex graphic and video editing software became more important, Pat's limitations became clear. She was encouraged to move into marketing and sales, apparently increasing her stress. About six months before being laid off, Pat had a mild heart attack and a stent procedure, and returned to work three months later. From Upscale's and Jen's perspective, she was not performing. Her sales were low. Customers complained about her inability to explain Upscale's newer product and service offerings.

At first, it seemed like this case was a "slam dunk" for summary judgment. Pat's performance issues were apparent. Unfortunately, discovery has unearthed very damaging material, including Jen's emails referring to Pat as a "dinosaur," with a wink emoji: "This is about as digital as our dinosaur will ever be." One supervisor sneered in a text: "Pat's still tired and still old, and not any smarter since that stent." Someone else commented: "They say anesthesia kills brain cells: Pat has a shiny stent and a lot of dead brain cells." On deposition, Pat testified that Jen and her friends were "out to get her," and "the boss probably put Jen up to it to protect his little niece's job."

Bottom line: this case won't disappear on summary judgment. Chances are nil with the assigned judge and would be awfully slim with any judge. Pat will make a sympathetic witness. And, on deposition, Jen sounded young, brash, smug, and snippy. Even if a jury understood Upscale's need to reduce staff, they will blame Jen for targeting Pat. It will still be the company's liability.

Beyond dashing hopes of early dismissal, you will have to tell your client that their exposure at trial is potentially enormous, up to as much as \$2.5 million (if future lost pay and punitive damages are awarded), plus at least \$150,000 in your fees, and the other side's attorney's fees on top. Your client's business can't handle this.

Based on informal conversations with Pat's attorney, you suspect they would consider settlement in the \$240,000 - \$300,000 range (about 2X-3X her \$80,000 salary plus attorney's fees). That's not going to make your client happy either.