

The Use of Apology in Employment Cases

By David A. Hoffman¹

I. Introduction

The subject of apology has received increasing attention in recent months as the President of the United States has been called to task for his failure to offer a genuine apology in connection with the Monica Lewinsky affair. When he finally admitted that he had misled the American people about his “inappropriate” relationship with Ms. Lewinsky, President Clinton was criticized for offering only a grudging statement of regret. Because much of the President’s statement was devoted to an attack on Prosecutor Kenneth Starr, many said the President did not seem truly remorseful. Faced with criticism about his legal hair-splitting and unwillingness to shoulder the full blame for the morass in which he found himself, President Clinton expanded his statement of regret with a series of pronouncements that began to sound to the American public more like a real apology. And, in the meantime, the nation got a lesson in the art of apology.

What have we learned? Perhaps we now have a greater understanding of the elements of a real apology. In addition, the President’s crisis has drawn greater attention to the ways in which apologies might be important in other areas of our lives.

The purpose of this paper is to examine how the use of apology might be relevant to employment termination cases, with a focus on what is needed to make an apology effective and the legal consequences of apologizing. In many employment cases, an apology can play a major part in the settlement of a case. Almost invariably in such cases, the plaintiff believes that s/he is entitled to an apology because of misconduct of some kind by the employer.

Termination of employment is a stressful event, even when it is anticipated and/or warranted. When it is viewed as unwarranted and unfair -- possibly discriminatory and therefore illegal -- the disruption, embarrassment, and wounded self-esteem that result from employment termination produce anger that may stand in the way of settlement. Seeking revenge and vindication, the plaintiff may believe that no amount of money would suffice to make him or her whole, or that a settlement must be large enough to punish the employer. In either case, even where resolution of the dispute by settlement would serve the employee’s economic interests, the compromise involved in settlement is emotionally unappealing.

The emotional aspect of employment disputes is usually not a one-way street. On the employer’s side of the dispute, the individual(s) responsible for the termination

¹ Thanks to the following people for useful discussions on the subjects discussed in this article: Deborah Levi, Daniel Bowling, Carl Schneider, and Jonathan Cohen.

decision often feel defensive and angry about the allegations of discrimination or unfair treatment. The employer usually believes that termination was richly deserved and the idea of an apology may be anathema. In part because of these feelings, the employer is often willing to spend more to defeat the plaintiff's claim than it would take to settle it.

Successful resolution of employment termination cases therefore often means finding a way to overcome these emotional barriers to settlement. Apologies don't work in every case, and in some cases they may be necessary but not sufficient to resolve the case. In some cases an apology may not be appropriate at all. However, for the many cases in which an apology might be useful, it is worth considering how an apology can help the parties overcome the emotional barriers to settlement.

A useful starting point is to attempt a definition of apology as used here. The Oxford English Dictionary gives us two meanings:

- A justification, explanation or excuse of an incident or course of action.
- An explanation offered to a person affected by one's action that no offense was intended, coupled with the expression of regret for any that might have been given.

The first of these definitions is, in some ways, the opposite of what we ordinarily think of as an apology – i.e., a justification or excuse is intended to deflect blame rather than accept it. But even the second definition falls somewhat short of the everyday meaning because it includes an expression of regret without necessarily accepting any responsibility for the harm inflicted. It is the acceptance of responsibility – in a moral sense rather than simply a causal sense² – that writers on the subject have identified as central to an effective and complete apology.³

One useful way to think of apology may be to situate it on a spectrum of interactions that can occur after one person suffers harm for which another person may be responsible. The person who caused the harm can:

1. Deny the harm occurred.
2. Acknowledge the harm but without any expression of concern or regret.

² Thanks to physician Edward Marsh for helping to clarify this point with a moving account of an obstetrician telling the parents of a child he had just delivered that the infant suffered a severe but unavoidable birth-related injury for which the doctor was "responsible" (in the sense that he delivered the baby) but not culpable (i.e., his work in delivering the baby was done properly).

³ For an excellent discussion of different types of apology, see D. Levi, "The Role of Apology in Mediation," 72 *N.Y.U. Law Review* 1165 (1997).

3. Express concern or regret about the harm without any acknowledgment of responsibility for causing the harm.
4. Express concern or regret, acknowledge responsibility but not moral culpability – let us call this a “limited apology.”
5. Express regret, acknowledge responsibility and moral culpability – let us call this a “full apology.”
6. Give a full apology and offer to make amends.
7. Give a full apology, offer to make amends, and ask for forgiveness.

As this list and our everyday experience suggest, there are many ways, short of a full apology, to communicate concern to someone who has been harmed. And there may be reasons -- legal or psychological -- for stopping short of a full apology even where one might be warranted. The discussion that follows will focus on the utility of apology and the reasons why apologies -- both the fuller and the more limited varieties -- can be effective in resolving disputes. The discussion then examines the elements of an effective apology and situations in which an apology is not desirable. As a grounding and context for that discussion, however, I begin with several stories about apologies given and not given, effective and ineffective -- not all of them about employment termination per se, but hopefully useful nonetheless as part of a framework for discussion.

II. Stories

A. No Apology; No Settlement: Jones vs. Clinton.

Shortly after she filed her law suit against President Clinton, Paula Jones told the press that she would settle the case if the President apologized. He, of course, refused to do so, and thus ensued all of his difficulties with Mr. Starr, the federal grand jury, Monica Lewinsky et al. Why didn't the President apologize? Most Americans believe that he did something to Ms. Jones for which an apology would be appropriate. However, the President evidently feared that any admission of wrong-doing (which, after all, is an essential component of the apology she sought) would be just so much blood in the shark-infested waters of Washington politics. However, there are many examples one could cite of politicians who have admitted even more serious indiscretions than Paula Jones alleged, and who have survived.⁴

Imagine the country's reaction if the President had said, in a nationally televised statement, after the Paula Jones law suit was filed:

⁴ For example, Congressman Barney Frank was accused of sexual indiscretions with a young Congressional page, and has been repeatedly reelected.

My fellow Americans. I am deeply embarrassed to stand before you tonight and admit that I have a problem. I have come to realize that, at various times in the past, I have let my sexual urges get the better of me. I have resolved to deal with this problem and exercise appropriate restraint in the future. In the meantime, however, I owe a number of people an apology.

First, I want to apologize to Paula Jones -- I should have used better judgment, and I should not have made sexual overtures to you. That was wrong. I regret it, and I feel badly about all the publicity and other difficulties you have had to endure because of what I did.

Second, I owe my family an apology -- I know I have embarrassed them. I am particularly sorry about the hurt that I have caused Hillary -- she deserves better than this. I have a lot of work to do to try to repair the harm I have inflicted on Hillary and Chelsea by my thoughtless conduct.

Finally, I owe you the American people an apology -- those who voted for me and those who didn't. My conduct, and my original denials of Ms. Jones' claims, have cast a shadow not only on me but on the presidency as well. You had the right to expect me to uphold -- in my personal life as well as in my public life -- the highest values and aspirations. I have failed to do so, and I am sorry.

To all of you, I ask for your forgiveness and understanding. I am committing myself to do better, to refrain from inappropriate sexual conduct, and if I fail to live up to that commitment, I probably do not deserve to remain your President. Starting today, I will cooperate fully with those who are investigating these matters. I will be candid about what happened.

In the meantime, I want you to know how sorry I am about what I have done.

It is hard to imagine that the public would not have reacted favorably to such candor. The polls suggest that, even after Clinton was forced to make damaging admissions and apologize about his misconduct and lack of candor in the wake of the Monica Lewinsky scandal, he was viewed with approval by the public. In any event, we know that an apology would have settled the Paula Jones case, Clinton passed up that opportunity until well after the suit triggered events leading to an impeachment inquiry, and the rest is history.

B. Ambiguous, Ineffectual Apology: Brown v. Smith

Smith is the co-owner of a business that hired young Susan Brown as a receptionist, her first job. Smith had a drinking problem and he frequently invited others at work to join him in drinking on the job after lunch. Brown alleges that Smith got drunk one day, asked her to come into his office, closed the door, and sexually assaulted her. The claim that she filed with the state EEO agency alleges that, despite her protestations, he reached underneath her clothing, touched her genitalia and breasts, and offered her money if she would have sex with him. This incident caused her to quit her job with Smith's company, and she has had trouble holding down other work. She has sought treatment from psychologists, who concluded that she suffers from severe post-traumatic stress disorder. When the case went to mediation, Smith's lawyer began the mediation session by apologizing. He said that, although his client does not remember the incident because he was drunk, it is clear to Smith that something happened that should not have, that he was solely to blame for it, and that he was sorry -- not only for what he did but also for the severe impact his actions had on Brown.

Smith's lawyer may have thought that admitting fault and expressing remorse on behalf of his client -- who was in the room looking chagrined -- would improve his client's bargaining position. And, it may have -- the case did ultimately proceed to settlement. However, it was apparent to everyone in the room that the client, not the lawyer, should have been making the apology. The lawyer's decision to make it conveyed an impression (whether rightly or wrongly) that Smith himself was not feeling contrite. Accordingly, the apology did not have the emotional impact it could have had, and probably made settlement more difficult than it would have been if the defendant had made a sincere apology himself.

C. Apologies That are Meaningful to One Party But Not to the Other: Treadwell v. ABC, Inc.

Arthur Treadwell was hired as an independent contractor to handle personnel placement for ABC, Inc. He filled an important position for ABC, but the candidate turned out, after a short stint on the job, to be a dud. ABC fired the candidate and then terminated its relationship with Treadwell alleging poor performance. He had failed, according to ABC, to do the most routine due diligence, and now the company was falling behind its competitors. ABC refused to make its final payment to Treadwell, who sued. ABC's counterclaim sought recovery of all the money it had paid Treadwell because he had delegated the work to an untrained subordinate. Negotiations led to an agreement that Treadwell would repay some but not all of the money he had been paid. ABC also insisted on a written apology from Treadwell in the settlement agreement. Treadwell provided it willingly; he was not emotionally invested in the defense of his actions. However, for the management of closely-held ABC, who felt ill-used by Treadwell, the apology was meaningful and enabled them to make their peace with the idea of settlement rather than judicial vindication.

D. Apologies Meaningful to Both Parties: Harrison v. Chen

A doctor and nurse had worked together in a sorely underfunded medical clinic for the homeless. One night, the nurse, bursting with frustration at the poor quality of equipment and lack of medications, left the job site in protest. She felt that offering medical treatment under those circumstances was unconscionable. The doctor felt that her walking off the job was equally unconscionable, and he fired her. The two parties entered mediation when the nurse claimed she had been wrongfully discharged; her action, she claimed, furthered public policy.

During the mediation, in which no lawyers participated, each party expressed appreciation for the other as a professional and as a principled person. The nurse took responsibility for leaving the doctor in the lurch. The doctor expressed sorrow at having fired the nurse, though he felt he had no other choice under the circumstances. After this communication, the doctor agreed, on behalf of the clinic, to pay the nurse's lost wages for a period of time, and she in turn donated much of the settlement to the local mediation center to express her satisfaction with the process. Each felt that the other had, in effect, apologized for the action s/he had taken -- apologies that were both moving and effective in resolving the dispute.

III. Discussion

A. Why Are Apologies Effective In Resolving Disputes?

1. Psychological Barriers to Settlement. As the above stories illustrate, and as our experience suggests, most disputes are fundamentally personal, even seemingly impersonal business disputes. The feelings aroused by disputes -- anger, betrayal, vulnerability -- make it difficult for the parties to negotiate rationally. Two of the well-documented psychological phenomena that disputing parties experience are cognitive dissonance and reactive devaluation.⁵

a. Cognitive dissonance. Cognitive dissonance (a phenomenon that lawyers sometimes describe as litigation hypnosis) occurs when a party is so firmly convinced that s/he is right that it becomes difficult, if not impossible, to understand, much less accept, information and conclusions inconsistent with the deeply held belief.⁶

⁵ For a useful discussion of these phenomena in the context of negotiation, see R. Mnookin and Lee Ross, "Introduction," in K. Arrow et als., eds. *Barriers to Conflict Resolution* (1995), and D. Golann, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* 200-01 (1996).

⁶ This feeling is captured in the following curse of folk legend: "May you be involved in a law suit in which you believe you are right."

In the context of employment termination, there are usually two sharply differing views of the factual circumstances that gave rise to the dispute, and discussion of those facts in a negotiation, mediation, or hearing seldom produces even modest changes in the parties' views of those facts. It is no surprise, of course, that our emotions influence our ability to process information, and therefore it is not surprising that an apology, which can defuse anger by acknowledging the harm that the other party experienced, often makes it possible for the recipient of the apology to better hear and understand the other party's point of view, thus paving the way to a possible settlement.

b. Reactive devaluation. Reactive devaluation occurs when an offer made by one party appears less attractive than it might otherwise appear because of the source of the proposal.⁷ For example, in the employment setting, an employee might come into a negotiation willing to accept a payment of, say, \$50,000 as a settlement of a termination dispute, but then reject that amount if it is offered, either (a) because the offer is made so readily that the employee believes more is available, or (b) because the employee wants the settlement to be punitive and the employer's willingness to make the offer suggests that the settlement would have no punitive impact.

2. Lack of trust. Another important barrier to effective negotiation and settlement is a lack of trust. Trust is necessary in any close relationship, and employment relationships are no exception. The involuntary termination of an individual's employment usually ends any feeling of trust between the parties, thus making negotiation difficult. This problem arises for two reasons. First, in cases where resolution of the case involves future performance (e.g., payments over time) or some on-going relationship (e.g., a consulting arrangement), each side may question whether the agreement will be faithfully performed. Second, even in cases where there will be no on-going relationship and no future performance (e.g., a cash settlement in exchange for a release), trust can be an important component in negotiation.

The reason for this is that negotiation is usually a multi-step process, in which there are not only multiple offers and counter-offers, but also a multitude of other moves and counter-moves in the negotiation. These may arise in discussions of the facts or the law, or even discussions involving the logistics of the negotiation itself. Each interaction in the negotiation gives the parties an opportunity to assess whether the other side will be competitive or cooperative. The success of the negotiation may depend on each party's perception that his or her willingness to be flexible (i.e., cooperative) is reciprocated. In these circumstances, an apology can be a signal of considerable importance.

⁷ This phenomenon is similar to the feeling that Groucho Marx described with his famous one-liner that he would never join a club that would have him as a member. See D. Golann, *supra*, 28.

Apologies arise in a variety of ways in the context of negotiating the resolution of an employment case. An apology can be one of the negotiated terms of the agreement, in which case a party's agreement to include either a written or spoken apology as part of the settlement may be seen as a cooperative move in the other party's direction (as, for example, in Treadwell v. ABC.) Or, an apology can arise spontaneously in the negotiation, without any request for a quid pro quo. In that case the apology may motivate a willingness on the part of the other party to apologize (as, for example, in Harrison v. Chen) or proceed further with the negotiations (as, for example, in Brown v. Smith). In each case, one of the important effects of the apology, or the willingness to provide one, is to restore a modicum of trust.

Why does apology have the effect of restoring trust? One of the components of trust is a sense of shared values and beliefs. In order to feel safe in our dealings with others, we must have some measure of confidence that their behavior is predictable, and that predictability is based, to some degree, on whether the principles that guide our conduct are similar. An apology is simultaneously an affirmation of human relationship and an affirmation of shared values and beliefs. In the apology, the wrongdoer says explicitly or implicitly "I know what I did was wrong." The message is two fold: (a) "I care about your feeling of being wronged," and (b) "We share an understanding of what is right and what is wrong." Both of these messages are effective in resolving disputes. The affirmation of human relationship tends to assuage the emotional injury, while the affirmation of shared values and beliefs may cause the recipient of the apology to feel less vulnerable to future harm from the defendant or more willing to negotiate productively with the defendant. Such an outcome may result from the acknowledgment of the employee's feelings arising from even a limited apology.

B. What Makes For An Effective Apology?

There is no universal recipe for an effective apology. As one writer on the subject has noted, "the success of an apology rests on the dynamics between the two parties . . . The apology is an interactive process in which a deal has to be struck that is emotionally satisfactory to both involved parties."⁸

Thus, one of the essential elements of a successful apology is sincerity, which must be felt by the recipient of the apology. It is impossible to prescribe all of the elements that contribute to that feeling, but the timing of the apology, the manner in which it is given (both affect and body language), and the choice of words contribute to the effect. An apology given either too soon or too late may be unhelpful. An averted glance or a monotone delivery may leave the recipient of the apology unmoved or

⁸ Aaron Lazare, "Go Ahead and Say You're Sorry," *Psychology Today* 40, 43 (Jan./Feb. 1995).

unconvinced. Some apologies may be more effective when given face to face, others in writing.

The substance of the apology must include certain elements, either explicitly or implicitly. Most of the writing on the subject of apology suggests the following elements:

- Acknowledgment of the injured party's harm;
- Acknowledgment that the harm was caused by the person offering the apology;
- Regret by the person offering the apology; and
- Recognition that what the offeror did was wrong.

Additional elements, which may add to the force or effectiveness of an apology but may not be appropriate in every instance, are a desire to make amends in some manner and a request for forgiveness.⁹ Of course, some of the most moving and heart-felt apologies may involve little more than the words "I'm sorry." However, even in those situations, the surrounding circumstances, the context in which the apology is given, and the manner in which it is given may communicate all of the above elements: recognition of harm, acceptance of responsibility, and regret. As noted above, however, there may be situations in which such a full apology may not be warranted, or the risks of offering such an apology might outweigh the potential benefits.¹⁰

Whether the apology is elaborate or simple, eloquent or halting, full or limited, the apology involves an exchange. Psychologist Aaron Lazare has described apology as an exchange of "shame" and "power" between offender and offended. The offender gives up the power to harm and takes on the shame for the offense, while the offended exchanges the shame of his/her harm for the power to forgive. Thus, he contends, apologizing is not a sign of weakness and it is not shameful.¹¹

This conclusion is contrary, however, to a message that runs through the cultural landscape of the United States – i.e., that apologizing is undignified, "unmanly," and somehow degrading. (This seems to be, in part, what prevented President Clinton, from apologizing to Paula Jones.) On the contrary, according to Lazare, an apology "is a show

⁹ For a very useful discussion of the elements of an apology, see generally N. Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991).

¹⁰ It is worth distinguishing, however, an expression of sympathy -- e.g., "I am sorry that you were terminated from your job; I realize how difficult this transition must be" -- from an apology.

¹¹ Aaron Lazare, "Go Ahead and Say You're Sorry," *Psychology Today* 40, 43 (Jan./Feb. 1995).

of strength. It is an act of honesty because we admit we did wrong; an act of generosity, because it restores the self-concept of those we offended. . . . Finally, the apology is an act of courage because it exposes us to the emotional distress of shame and the risk of humiliation, rejection, and retaliation at the hands of the person we offended.”¹²

C. What Are The Legal Consequences Of An Apology?

Most lawyers recoil at the idea of recommending that their clients apologize. An apology might be construed as an admission and might be used to establish liability for wrongdoing. In a negotiation context, an apology might be viewed as a sign of legal vulnerability.

There are, however, relatively “safe” contexts in which an apology may be given.¹³ For example, statements made in the context of settlement negotiations are inadmissible under Rule 408 of the Federal Rules of Evidence and under the analogous evidentiary rules of most states. However, the protection available under such rules is limited because they exclude evidence only when it is offered for the purpose of establishing liability, and lawyers are often able to introduce the evidence for a different purpose.

More substantial protection is available in the setting of mediation. In the majority of states, there are “mediation privilege” statutes, which bar the introduction of statements made in a mediation from being admitted for any purpose.¹⁴ Confidentiality can also be protected by appropriate language in an agreement to mediate.

Even where counsel cannot be certain that an apology is completely “safe” (i.e., inadmissible), the benefits of an apology may outweigh the risks. For example, in a case where the liability of the defendant is clear, there is little to lose from apologizing, and there may even be something to gain, in the form of jury sympathy, if evidence of the apology is presented at trial. Even where liability is not clear, the value of an apology in bringing about a mutually advantageous settlement may warrant running the risk of the apology being admitted in evidence, since very few cases actually reach trial.

Moreover, an apology in the context of mediation or a settlement negotiation is not necessarily inconsistent with the language used in many settlement agreements denying wrongdoing. The parties seeking a negotiated resolution of a litigation matter

¹² *Id.*

¹³ For an excellent discussion of the legal consequences of apologizing, see J. Cohen, “Advising Clients to Apologize” (unpublished paper 1998), and P. Rehm & D. Beatty, “Legal Consequences of Apologizing,” 1996 *Journal of Dispute Resolution* 115.

¹⁴ See Nancy Rogers & Craig McEwen, Mediation: Law, Policy, Practice § 9:01 (2d ed. 1994).

usually recognize that the settlement agreement is intended as a formal embodiment of certain rights and obligations and may have to be filed with a court.

D. Circumstances in Which Apology May Be Inappropriate

Not every situation is appropriate for apology. For example, in the employment context, the parties might want a judicial resolution of a disputed legal issue, because of the impact of that issue on other cases or the parties' dealings with each other (e.g., a dispute about whether a height requirement for a job is discriminatory or job-related). Or, even where no precedent or issue of principle is at stake, the parties may have a good faith disagreement about what happened which they desire a third party (i.e., judge, jury, or arbitrator) to resolve. Under those circumstances, no settlement is desired and neither party is seeking an expression of regret or responsibility.

An apology might also be inappropriate because it was premature and therefore could not be given with sincerity. An apology that is not heart-felt can be worse than no apology at all.

In determining whether an apology is appropriate, one must also consider the cultural context and the psychological make-up of the people involved. For example, the Japanese are widely considered to be more comfortable with apologies than Americans. In some cultures giving an apology means an unacceptable loss of face.¹⁵ Likewise,

¹⁵ The following account of a barking dog on an Indian reservation provides an example: A family in a rural Native American village was upset because the incessant barking of their neighbor's dog was keeping them awake. Their neighbor did not ordinarily leave the dog out, but recently the dog had been out every night. The family's complaints to their neighbor produced no response, no change. At their wit's end, they went to the village's chief, a respected elder of the community, and asked for his assistance. He visited the neighbor the next morning. The neighbor was on his front porch, and the chief stepped up onto the porch and sat down. The two men talked about the weather and the crops, but no one said anything about the dog. The morning wore on, and soon the chief left. But he came back the next morning, and the scene was repeated. The chief joined the neighbor on the porch and they talked about one thing and another, but nothing about the dog. This continued each day that week – an unusual number of visits from the chief, who ordinarily would be far too busy for so much casual conversation. At the end of the week, the family noticed that the barking had stopped – their neighbor was keeping the dog in at night. After a week of being able to sleep through the night, they visited the village chief and thanked him profusely for solving their problem. He accepted their thanks but said nothing about how he had accomplished the task. For purposes of this inquiry into apology, one of the lessons is that not asking for an apology is sometimes the most prudent and effective course for dispute resolution. The neighbor was not able to acknowledge the problem, much less apologize for creating it, when confronted about it by the family. The chief knew that, because of the culture of the village or the character of the neighbor, he would have to accomplish his task by indirection, because a direct request might have undermined the order of

some people may be so ill-equipped psychologically to admit a mistake that asking for an apology, or suggesting that an apology might be appropriate, would be counterproductive.

IV. Conclusion

Although apologies are not appropriate in every case, in many circumstances an apology can be useful in overcoming psychological obstacles to the settlement of disputes. Employment termination cases often involve intense emotion, and therefore an apology may be particularly useful in that setting. In the context of negotiating the resolution of such disputes, an apology can help overcome the lack of trust created by the termination and counteract other psychological barriers to successful negotiation. Certain elements are common in successful apologies: admitting wrongdoing, accepting responsibility for the harm done, as well as regret for having done it. Apologies must also be sincere in order to be effective. When these principles are applied in the resolution of employment termination cases, an apology may produce a feeling of empowered for each side -- for the offeror because giving an apology is an act of courage, and for the recipient because his or her self-image is restored to some degree by the apology. This exchange is not enough, by itself, to settle most cases, but it can be an important step in many cases to settlement.

* * * * *

[David A. Hoffman is a mediator, arbitrator, and attorney at the Boston Law Collaborative, LLC. He can be reached at DHoffman@BostonLawCollaborative.com.]

the community in a manner even more profound than the discourtesy of leaving a barking dog out all night.