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January 15, 2020

OUR TOP STORY

Boss said he was only trying to see if injured employee was fit to return to work

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INSIDE

Beware these bullying types

Dollar General settles bias claim

4 skills all good managers develop

Disability made her disruptive

Fitness-for-duty test turns into sticky, costly gender bias lawsuit

Worker said supervisor targeted her because of her gender

“So exactly what does this test have to do with me doing my job?” Gretchen Peerless asked.

“You’re testing me on stuff that I never even do at work. Like, why are you asking me to walk backwards through the warehouse? That’s just weird.

“What does that have to do anything?”

“Settle down now, Gretchen,” supervisor Jim Jackson said. “The walking test is for problem solving and agility.

“These tests will help me see if you’ve recovered from your injury and if it’s safe for you to get back to work,” Jim explained.

“But my doctor already said I’m OK to go back to work,” Gretchen replied. “He said my leg is better than ever.”

“And how come I’ve never seen any of the guys here taking these tests?”

What if I fail?

“You’re not here every day,” Jim said. “Some guys have taken this test.”

“And what happens if I fail?” she asked.

“Oh, you don’t want to fail,” Jim warned her, “because we’ll have to let you go if you

Please see Gender bias ... on Page 2

Sharpen Your Judgment

Worker on FMLA claims firm set him up for layoff

HR manager Lynn Rondo was reading the CEO’s email about the recent layoffs when company attorney Eric Bressler knocked on her door.

“Hi, Eric,” Lynn said, as he walked in. “Did you see this email about the layoffs?”

“That’s actually why I wanted to talk to you,” Eric replied. “One of the workers we let go, Tony Shepard, is suing us. He’s claiming after he took FMLA leave, we didn’t give him his old job back.”

‘Easier to get rid of’

“That’s not true!” Lynn said. “He returned to the same title and salary, and he even worked in the same department.”

“Tony’s saying that when he got back from leave, you didn’t give him a lot of his old duties, which

made him easier to get rid of,” Eric said.

Lynn sighed. “While Tony was on leave, we had to reassign his tasks. When he came back, we may not have given Tony all of his old duties, but he certainly always had work to do.”

“He’s saying we deliberately gave him less essential work, which then resulted in him getting laid off,” Eric said.

“It wasn’t on purpose,” Lynn said. “A few people took on some of his tasks when he left. It just made sense when he returned to not just disrupt everything ... again.”

Tony sued, claiming FMLA interference. The company fought to get the case dismissed.

Did it win?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

Make your decision, then please turn to Page 4 for the court’s ruling.

Gender bias ...

(continued from Page 1)

do. If you can't do the job, we have no duty to keep paying you."

"So I'd get fired for failing the test, even though I've proven I do the actual job," she said.

"That's BS.

"This is just an excuse to get me out of here so you can go ahead and hire one of your good old buddies," Gretchen said.

"You've always said you didn't think women can do this job," she added. "I guess this is proof."

"Oh, here we go again," Jim said, rolling his eyes.

"You passed over me for two years before you finally agreed to hire me here," Gretchen said.

"You were up against some very qualified and very experienced people," Jim told her.

"Not true. Some of the guys you've hired have less experience than me."

Still complaining?

"But you have the job now," Jim stressed. "So I don't see why you're still complaining like this.

"We have work to do here. I make my staffing decisions based on people's abilities and not whether they are male or female."

"My record here is spotless,"

Gretchen said.

"I do everything I'm asked to do – and then some!"

Sued for gender bias

The next day Jim told Gretchen she failed the return-to-work test and would be let go.

Shortly after, when Jim hired a man to replace Gretchen, she sued for gender bias.

She said the return-to-work test was a pretense for firing her and the real reason she was let go was because her boss didn't want a woman in her job.

The firm said it used the test many times and it was a reliable measure of a worker's ability to do the job.

Decision: The company lost when a court sent the case to trial, which often results in a hefty out-of-court settlement or a costly jury trial.

The judge said Gretchen presented enough evidence that a jury should decide what was true – and what wasn't.

The court said it was quite possible the test was being used selectively.

Key: It's essential that the administration of any fitness-for-duty test be based on the facts of a particular situation, and not on any stereotypes or assumptions a supervisor might harbor about the employee's condition.

Case: *Merritt v. Old Dominion Freight, Inc.*

What you need to know:

A fitness-for-duty exam can help determine whether an employee is physically or psychologically able to perform the job. The exam can be used to:

- make sure the employee is capable of meeting the physical requirements of the job
- make sure the employee doesn't pose a significant safety risk when doing the job, and
- test whether the employee's condition may prevent the employee from performing the job's essential functions. Because the exam may reveal information about an employee's disability, they are regulated by the ADA.

TEST YOUR KNOWLEDGE

Watch out for these workplace bullying types

Workplace bullies are productivity killers and potential legal threats to employers. One in three employees will experience bullying which leads to decreased productivity, increased absenteeism and high turnover.

To test your knowledge of bullying personalities respond *True* or *False* to the following:

1. The Attention Seeker is a bullying type that tends to look for areas of skilled workers' performance to complain about.
2. The Guru's work performance is generally good. The problem is The Gurus tends to see themselves as being superior to others.
3. The Screaming Mimi you can hear coming from a mile away. In fact, when they act up, fallout from the disruption they caused a few days ago will still be reverberating through your workplace days later.

ANSWERS

1. *False.* The Attention Seeker needs to be the center of the action at all times. They'll try to get on their superior's good side through consistent flattery and even come on as kind and helpful to their peers – especially the newer employees. However, if they don't get an abundance of attention, these bullies can quickly turn on others.
2. *True.* What The Guru offers in technical skill, however, they severely lack in emotional maturity. Gurus see themselves as being superior to their co-workers. As a result, they don't consider how their actions will affect others, aren't able to fathom the possibility that they can be wrong and don't accept responsibility for their own actions.
3. *True.* The Screaming Mimis are loud and obnoxious, and their abusive behavior is meant to berate and humiliate people. They thrive on the notion that others fear them.

Answers to the quiz:

Where other supervisors went wrong

News you can use to head off expensive lawsuits

This feature highlights violations of workplace laws. You can learn how other supervisors got off track, what the mistakes cost and how to avoid them.

TX oil field firms pay \$1.2M for racial bias

What happened: Nabors Corporate Services, Inc. and C&J Well Services, Inc., two Houston-based oilfield services companies, subjected black oilfield workers at their Pleasanton, TX, yard to a hostile environment that included the pervasive use of racial slurs. The EEOC also alleged that managers intentionally assigned black employees to lower paying jobs and fired workers in retaliation for reporting racial harassment. Another black employee was called a racial slur at a meeting in front of supervisors and was then fired for reporting his objection.

Decision: Along with agreeing to pay nine black employees and a white co-worker a total of \$1,225,000 to settle the lawsuit, the companies will provide training to all employees and managers on racial discrimination, harassment and retaliation.

Cite: EEOC v. Nabors Corporate Services, Inc., et al.

PA mushroom grower out \$200K for harassment

What happened: A female manager and two female employees at Bisconti Farms, Inc., Temple, PA, subjected eight female workers in various mushroom-harvesting positions to repeated sexual harassment in the form of unwanted sexual touching and comments. The EEOC also charged that Bisconti Farms retaliated against one of the workers who opposed the sexual harassment by disciplining her

and demoting or reassigning her to a different, lower-paying position.

Decision: Along with paying \$200,000 to settle the claim, the employer agreed to create and disseminate an anti-discrimination policy and complaint procedure, in Spanish and English, and will designate EEO officers to investigate and respond to complaints.

Cite: EEOC v. Bisconti Farms, Inc.

Dollar General pays \$70K for disability bias lawsuit

What happened: A frequent customer at the Dollar General store in Portal, GA, decided to apply for a sales job position. When she arrived to her scheduled interview, the store manager told her, "I didn't know it was you," and said that she could not work at Dollar General "with that arm." The woman's left arm had been injured in an automobile accident two years earlier. Under federal law, job applicants have the right to be considered for open positions based on the applicants' ability to do the job and not their disabilities.

Decision: Along with paying the woman \$70,000, Dollar General agreed to provide ADA training to management and employees in 19 stores, post its anti-discrimination and anti-retaliation policies in those stores, and report any allegations of disability discrimination made by employment applicants to the EEOC.

Cite: EEOC v. Dolgencorp, LLC.

STOP, LOOK, LISTEN ...

4 crucial skills all good managers should develop

From navigating employee schedules to planning off-site meetings, a manager's day is filled with a huge variety of tasks.

The most important task, though, is being mindful of how you interact with your employees. It's crucial for you to keep gaining and developing the skills you need to develop great employees.

Here are the key skills to work on:

Negotiating

Negotiating is a process of compromising. The key to negotiation is eliminating emotion. Remember that as a manager, you were once that employee on the other side of that table. Understand your employee's points and perspectives. Make sure you have carefully thought out counterpoints. Work together to come to an agreement that is fair and leaves everyone involved feeling heard.

Conflict resolution

The best approach to conflicts is to nip them in the bud when they first come to your attention. You don't want animosity coming to a boil in a big scene at the company Christmas party. Bring both parties together to figure out the root of the problem. Make sure both employees know that you are unbiased and working to create a strong work culture for everyone.

Giving feedback

Feedback is one of the most helpful things a manager can provide. Good feedback can foster trust and better performance. Being consistent in how feedback is delivered is crucial. It's important not to make an employee feel caught off guard with negative feedback. Ongoing feedback makes sure workers know where they stand.

Morale building

Make the workplace competitive and fun through contests and rewards. Even simple acts like an email of praise or a shout-out in a newsletter can make employees feel important. Every individual is different in how they like to be appreciated. It's your task to find what works for your employees and your team.

SUPERVISORS SCENARIO

She claims her illness made her ‘disruptive’ – so what’s a Supervisor to do about that?

Firing brings ADA lawsuit

“You are an absolute idiot,” Marge screamed from across the room. “And I am NOT going to that training.”

Everyone in the room froze. Supervisor Jill Henley took a step closer to Marge. “Please don’t speak to me like that,” Jill said calmly, but for all to hear.

Jill was well aware that Marge had an anxiety disorder. But that didn’t give her carte blanche to disrupt the workplace.

“I’m running out of options dealing with you,” Jill said. “So listen to me: I want you to go to this training and I don’t want any more outbursts like this.”

As Jill started to walk away, she could hear Marge mumbling about something.

Days later, during a phone call, Marge again screamed at Jill and then slammed down the phone.

The day after that, Marge had a run-in with a co-worker that included a very nasty exchange of words.

Since Jill had run out of suspensions to give Marge, the company let her go.

“You can’t fire me,” Marge yelled at Jill.

“I have a documented mental illness. I wish people could understand that. I wish I had a more understanding supervisor.”

ADA violation

Marge sued under the Americans with Disabilities Act, saying her firm didn’t do enough to accommodate her.

The company said the employee continually violated its code of conduct stressing respect for co-workers.

Decision: The company won when a judge dismissed the discrimination claim. The court said the law does not grant the employee an absolute right to go on tirades and berate her colleagues.

Any accommodation, the court said, would likely have required the firm to anticipate and tolerate emotional outbreaks in the future.

Key: Good bosses care about people. In cases like this it’s essential to consider the greater good for all employees, and not tolerate demeaning, disruptive behavior.

Case: Darcangelo v. Verizon Maryland, Inc.

What you need to know:

Employers are required by law to offer reasonable accommodations to disabled workers.

Typically, these accommodations are meant to level the playing field by helping a disabled person to:

- successfully complete the application process for a job
- perform the essential functions of a job, and
- enjoy the benefits and privileges of employment that are available to those without disabilities.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the company lost when a court said Tony’s FMLA violation claim could proceed.

The company argued that Tony had essentially the same job when he returned from leave. He had the same title and salary, and also continued to work in the department he had before he took FMLA leave.

But the court said Tony’s basic duties weren’t the same. Some of his key tasks had been reassigned to other employees – and splitting up his duties like that made Tony less essential to the organization, which made him more vulnerable to being laid off.

The company also argued it had given Tony plenty of work, trying to dispute his claim of being made “easier to get rid of.”

But the court said it didn’t matter the amount of work Tony received. The fact that he didn’t have his old duties may have contributed to the loss of his job later.

The company is now facing a costly jury trial or an out-of-court settlement.

FMLA: Returning workers

This case is a great reminder to employers that when a worker returns from FMLA leave, they must have the same or substantially similar duties. The employee can’t be given a different job – even with equal pay and benefits – just because it’s more convenient for the company.

Case: Kordistos v. Mt. Lebanon School District.

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