

# Supervisors LEGAL UPDATE™



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April 1, 2020

## OUR TOP STORY

**He didn't get promoted, now he's just not getting the job done**

## ONLINE

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### Management Minutes

6-point checklist to document better



### Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



## INSIDE

**Staffers fearful of being honest?**

**Church fined \$50K for race bias**

**Recognition that works**

**Protecting those who complain**

## Lost out on promotion, then fired: Poor performer – or racial bias?

*Was supervisor just begging for lawsuit?*

“My apologies for that report being late,” Matt said into the phone. “I will square this away as soon as I get back in the office.”

Matt hung up and pulled up Fred from his frequently dialed contacts list.

“Fred, glad I caught you,” Matt said. “I just got off the phone with Accounting. They said you never delivered the purchase report today.”

“Oh, well, um,” Fred said. “Sorry Matt.”

“That report was your responsibility,” Matt said.

“I’ve just been really busy,” Fred told

him. “I should be able to get the report finished and ...”

Matt cut him off.

“This is not the first time you’ve done something like this to leave me hanging,” Matt said angrily. “I’m starting to see a pattern here.”

### Got shafted?

“A pattern, funny you should bring up patterns,” Fred said. “First I got shafted on the promotion because I’m black.

“Then you make me look bad to

*Please see **Racial bias ...** on Page 2*

## Sharpen Your Judgment

### Firm pays big for a single failure to accommodate

“Look, I need to take my break, like now!” Maria Quintana told her supervisor.

“You take your break on schedule, just like everyone else does,” Matt Long replied. “Besides, we are very busy right now.”

“But you don’t understand,” Maria said to him. “They always let me take a break when I need to. You see, I have this problem and ...”

Matt interrupted her. “This is the third time you’ve asked and the answer is still ‘No,’” he said to her.

“I can’t let you leave your register just because you ask,” he added. “We’re shorthanded as it is.

“I can’t just let everybody run off to the bathroom when the urge strikes them,” Matt said. “I know I’m the newest supervisor around here, but I can assure

you, you won’t take advantage of me just because I’m new here.”

### Prone to dehydration

Maria began to walk toward the bathroom anyway. But she didn’t make it in time, and embarrassed herself in front of her customers.

The employee hired an attorney and sued the firm for not accommodating her need to use the bathroom frequently, an accommodation the company had always granted in the past.

The firm said it had always given the employee freedom to use the bathroom because she was prone to dehydration and needed to drink water constantly. It said it simply had failed this one time to inform the new supervisor. Was the firm able to get the case dismissed?

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.*

# Racial bias ...

(continued from Page 1)

everyone in Accounting by blaming this whole thing on me.”

## Water under the bridge?

“But this was your responsibility,” Matt said. “And I recognize that you’re still upset that I got the promotion and you didn’t.

“But that’s water under the bridge. This is where we are now and it seems the more I try to rely on you the less reliable you’ve become.”

“I know what you’re doing, you’re just dumping more and more responsibilities on me so I can’t keep up,” Fred said.

“And what really gets me angry,” he added, “is that I was – and still am – more qualified than you for the promotion.

“And no one has yet to explain to me satisfactorily how you ended up being selected over me!”

## Performance never improved

“Fred, I cannot keep going round and round with you on this,” Matt said. “If there are any more lapses in your performance like this, any more failures, I’ll have no choice but to let you go.”

But Fred’s performance never improved.

First, he failed to turn in his weekly reports. He also failed to tell Matt about a vacation he had planned.

And after he failed to finish a crucial supplier research project on a critical company effort, Matt let him go.

“You and this company have been begging for a lawsuit,” Fred said to Matt when he learned he was being fired.

## Race bias and retaliation

Fred sued the firm for racial bias and retaliation.

He said racial bias was the only explanation for why someone less qualified was promoted over him.

And when he complained about that, the firm found a way to fire him.

The company said Fred wasn’t promoted because his experience was more as a functionary than as an executive, and that he was dismissed for insubordination and for failing to

complete his assignments.

**Decision:** The firm won when a judge dismissed the case against it.

The court said it was in no position to second-guess the firm’s rationale for not promoting the employee, and that it agreed with the employer’s position to dismiss the employee for failing to complete legitimate assignments.

Case: *Burrell v. Dr. Pepper/Seven UP Co.*

### What you need to know:

One of the toughest situations a supervisor will face is taking charge and remaining calm when another staffer feels “cheated” out of the job and behaves badly because of it.

The advice for dealing with it:

- Be aware of it, and of course don’t antagonize the other employee. But don’t apologize for being promoted over the person and don’t let the situation dictate your decisions.
- Warn the employee, outline a plan for change and document your warnings and plans.
- Take action when you must, or have your own supervisor make the decision for you.

## TEST YOUR KNOWLEDGE

### Is your staff afraid to be honest with you?

If you’ve ever felt the need to cajole an employee into being honest, there could be a larger problem at hand. It might be that members of your team are afraid to be totally honest with you. To test your knowledge of how to put them at ease, respond *True* or *False* to the following:

1. A downside of optimistic, “can-do” cultures is that they can create fear in employees that they need to constantly over-inflate and exaggerate results.
2. If your team constantly gets the message that negative opinions, are best left unsaid, a lot could go wrong right under your nose that would have otherwise been avoided if you’d just encouraged your team to speak up.
3. Just because everyone “knows” what’s going on, that doesn’t mean a supervisor needs to bring it up.

## ANSWERS

1. *True.* Some companies pride themselves on their optimistic, can-do cultures. So when someone offers up a more realistic perspective, they can be admonished for not being a team player and told to “get on board.” Managers should do their best to let their teams know that sometimes, bad stuff happens, and they should feel free to tell you.
2. *True.* Employees could be hiding real problems that could end up putting your entire department – and the company’s well-being – at risk. Even if the upper execs push a positive-only atmosphere, managers should be the front-line sounding board for employees.
3. *False.* It’s called “talking about the elephants in the room” or bringing up the uncomfortable thing on everyone’s mind. For a culture of openness to flourish, it’s always a good idea to address these obvious issues no one wants to talk about.

### 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.*

### Methodist Ministry fined \$50K for race retaliation

**What happened:** The General Board of Global Ministries of the United Methodist Church, Inc., doing business as Global Ministries, Atlanta, hired a communications specialist and program area liaison to write articles for the organization's website to bolster engagement and increase awareness about the organization's ministry efforts. After the new hire complained several times to human resources about race discrimination and retaliatory treatment for complaining about it, Global Ministries fired her.

**Decision:** Along with paying \$50,000, Global Ministries agreed to provide employment discrimination training to its employees and post its anti-retaliation policy as well as an anti-discrimination notice. In addition, the decree subjects Global Ministries to reporting and monitoring requirements.

**Cite:** EEOC v. General Board of Global Ministries of the United Methodist Church, Inc.

### NC strawberry nursery settles religious bias suit

**What happened:** Cottle Strawberry Nursery, Inc., a corporation based in Faison, NC, that has grown, packed, shipped, imported, and distributed fruits and vegetables for over 50 years, fired a longtime seasonal worker who refused to work seven days a week. The employee, a Seventh-day Adventist, asked to be released from work from sunset Fridays through sunset on Saturdays. The

company declined the request and fired the employee.

**Decision:** Along with paying the employee \$12,500, Cottle Strawberry agreed to develop a policy on religious accommodations and to provide periodic reports to the EEOC. Cottle Strawberry also will conduct annual training for all employees on the requirements of Title VII, its prohibition against religious discrimination in the workplace, and on the company's religious accommodation policy.

**Cite:** EEOC v. Cottle Strawberry.

### AZ restaurant pays \$65K to settle harassment case

**What happened:** The owner of Rainbow Tree LLC, d/b/a Persian Room Fine Dining, in Scottsdale, AZ, sexually harassed an employee and then retaliated against her when she rejected his advances and complained about his conduct. She was fired the same day she complained to her direct manager about the sexual harassment.

**Decision:** Along with paying \$65,000, Persian Room agreed to apologize to the employee and modify its policies to clearly and unambiguously bar sex discrimination, sexual harassment and retaliation. It will also train its line staff and management level officials annually on federal laws against discrimination. The consent decree also prohibits the owner involved from traveling alone with an employee.

**Cite:** EEOC v. Rainbow Tree LLC d/b/a Persian Room Fine Dining.

## STOP, LOOK, LISTEN ...

### Recognition that works

Recognizing employees for their good work is essential to good business. So, what's the best way to go about it?

#### Do it every day

Put it on the calendar. Note names of people who you want to commend for something.

Mark it with a penny. One leader puts five pennies in his right pocket each morning. As he hands out compliments or praise, he moves a penny into his left pocket until they're all gone. Some days, he needs more pennies!

Another company president makes sure the first three things she says in the office each day are positive and/or complimentary. It sets the tone.

#### Honor employees

Employees need to feel their work means something. So recognize them first as a person and second as an employee. Highlight the good things they do outside work, too. Ask if you can announce and recognize their anniversaries, birthdays, special accomplishments and important events at work. Then talk about them at meetings or include a write-up about them in an in-house publication or company-wide email.

#### Create a plan

Help every employee develop a "vision" for personal success in the organization. Create a template they can use to document skills they've learned and ones they'd like to master. Use that to pick goals and to create a path they can follow to reach those goals.

#### Pay attention to them

Make the time every week to give undivided attention to details on each employee's work and personal lives. This gives leaders a chance to see how employees manage all of their demands, offer help when possible and uncover new ways to boost morale based on what employees care about most.

**SUPERVISORS SCENARIO**

# She complained about sexual harassment: Did supervisor do enough to protect her?

*Why 'I keep telling them to stop' doesn't cut it in court*

“Are we going to have this conversation again?” supervisor Wes Wheeling groaned.

Jessica glanced over her shoulder as she spoke: “Can we talk about this in your office? All the guys can hear us.”

“Good, let them,” Wes exclaimed. “Maybe they’ll get the message that I’m tired of hearing about how they sexually harass you all the time.”

“Look, Wes, I don’t like this any more than you do,” she said. “But what am I supposed to do when it goes on and on?”

“I keep telling them to stop,” he said. “So let me ask: What am I supposed to do? We’re understaffed as it is, and everything has to be done ‘yesterday.’ You want me to fire people?”

### Who’s the worst?

“Yes, if that’s what it takes,” she answered. “I mean it’s obvious nothing else seems to get through to those guys.”

“OK,” Wes said. “Tell me who the worst one is?”

“Well, a lot of them are pretty bad,” she explained. “But I guess Alex is the ...”

Wes held up his hand and shouted across the room: “Alex, you better leave her alone or you’re outta here.”

Then he turned to her and said, “There. Is that more like it?”

But Jessica wasn’t satisfied. She eventually quit and sued her employer for failing to stop sexual harassment.

The company fought the suit by arguing that the supervisor had taken strong steps to stop the harassment and that the employee had chosen to quit.

**Decision:** The company lost. A judge ruled that the supervisor’s repeated threats without action amounted to avoidance of the problem and was the cause of the employee’s decision to quit.

**Key:** When sexual harassment occurs, supervisors are expected to take concrete action that gets results – namely, an end to the harassment.

*Case: Gallagher v. Robinson WW, Inc.*

### What you need to know:

If you get a complaint of sexual harassment, consider that three initial steps are crucial:

- Inform HR or your boss of the complaint to get guidance on how other complaints of that type have been handled.
- As much as possible separate the person filing the complaint from the accused harasser while you’re investigating the complaint.
- Give the accused person a fair chance stating a defense; don’t assume there’s been wrongdoing.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

No, the company was unable to get the case dismissed and ultimately lost in a jury trial and was ordered to pay the former employee \$200,000 in damages.

The employer lost on appeal, as well.

The company argued there was no deliberate or intentional effort on its part to deny the worker an accommodation.

It said it had always accommodated the employee in the past, and in this one instance, the new supervisor was unaware of the accommodation.

“Once a reasonable accommodation has been granted, then the employer has a duty to provide that reasonable accommodation,” the appeals court wrote in its decision.

And while the employer said the failure to accommodate was “trivial” because it “constituted a single incident,” the court said the law does not require “a pattern of failure,” and that even a single failure can have a “tragic consequence.”

### One failure is one too many

This case is a good example of why it’s important to keep supervisors and managers in the loop when accommodations are granted to employees they might supervise.

There is no credit given for your efforts at past accommodations. It takes just one future failure to accommodate to violate the law and be held accountable.

*Case: A.M. v. Albertsons, LLC.*

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