

# Supervisors LEGAL UPDATE™



Get More  
Online

Check out our  
ready-to-use  
training  
materials today.

A fast-read source of information to help managers understand and comply with federal and state employment laws

April 15, 2020

## OUR TOP STORY

**Avoiding  
bias lawsuits  
when handling  
disciplinary cases**

## ONLINE

Check out this exclusive  
online content:

[www.SupervisorsLegalUpdate.com](http://www.SupervisorsLegalUpdate.com)

### Management Minutes

6-point checklist  
to document better



### Stay Legal!

7 questions to  
ask yourself  
before deciding whether  
to fire someone



## INSIDE

**Dealing with  
illegal harassment**

**Firm out \$33K for  
boss's retaliation**

**Job candidate  
no-show lately?**

**Older workers  
claims bad deal**

## ‘But they did it too!’ Female says demotion was based on gender

*Difficult employee claims supervisor was out to get her*

“Gabby you cannot just keep setting those things down right there,” Supervisor Ralph Beasley said.

“I’ve said that over and over and over.”

“Oh, don’t get your panties in a bunch,” Gabby laughed. “I only put them there for a few minutes and then I get them. It doesn’t hurt anything.”

“It’s a safety violation and you know it!” Ralph told her. “Those boxes can’t be left there, not even for a minute, not even for a few seconds.”

“So please get them and move them to where they belong or I’ll write you up.”

“You’re kidding me, right?” Gabby asked “Why would you threaten me with discipline for such a little thing when the guys around here do whatever they want?”

### Picking on a woman?

“Oh, it’s not a threat,” Ralph said calmly. “Now move this stuff!”

“Now hold on here,” Gabby said loudly. “If I were any of the guys you wouldn’t care a hoot where I put those boxes. You’re just picking on me because I’m a woman.”

“That has nothing to do with it,” Ralph

*Please see Demotion... on Page 2*

## Sharpen Your Judgment

### ADA violation? Worker suffers PTSD, gets fired

“I know this is not a good time to tell you this,” Supervisor Rachel Dunbar said into the phone.

“But you are being let go for a pattern of poor judgment, unsafe acts and behaviors, and an unwillingness to follow critical work instructions.”

Rich Davidson was stunned.

“But I haven’t even been released by my doctor yet to return to work,” Rich said.

“How can you even think about firing me when you know darn well I have PTSD from the accident I suffered – at your workplace no less!”

“While it’s true this particular accident wasn’t your fault,” Rachel said slowly, “you have been responsible for at least four other safety violations that resulted in accidents here this year.

“And the fact of the matter is, your doctor says you won’t be able to return to work for some time and we need to fill your position now.”

### Federal disability discrimination?

“Do I need to remind you that this is exactly why there is such a thing as federal disability discrimination?” Rich said, angrily.

“If you fire me, I guarantee I’m going to sue you.”

After he was dismissed, Rich lived up to his threat.

He hired a lawyer and sued his former employee for violating the Americans with Disabilities Act.

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.*

# Demotion ...

(continued from Page 1)

said. "The others have worked here a long time and I can always trust that they know what they're doing."

## Rules are rules

"But rules are rules, remember?" Gabby said. "So, if those rules apply to me, they apply to everyone."

"We'll talk about this later,"

Ralph said, walking away.

When Gabby arrived at work the next morning, she was met by Ralph who was holding a discipline notice with her name written on it in bold.

"You showed poor judgment in putting that stuff where you did yesterday," he told her as he handed her the note.

"And frankly, I've lost confidence in your ability to work safely."

## Who taught her?

"You know darn well why I set that stuff there and you know it's only for like 15 minutes," Gabby said. "And guess who taught me to do that? The same guys whose unsafe behavior you ignore?"

"Why do you have to be so difficult about this?" Ralph admonished her. "That's another problem I have with you."

"You won't take responsibility

for your own actions," he said. "You bring everyone else into it to help dodge responsibility."

## Was treatment fair?

"And one of the problems I have with you," Gabby countered, "is that I don't think you treat me the same way you treat the men."

"And this is proof," she said, waving the discipline slip.

Ralph stuck to his disciplinary actions by demoting Gabby and cutting her pay.

That's when Gabby sued for gender bias, claiming that Ralph was harsher with her than with her male co-workers.

The company asked the court to dismiss the lawsuit. It acknowledged it was not a normal practice to demote an employee in this instance.

But it said the supervisor had lost all confidence in the employee's ability to work safely and so stronger measures were warranted.

## What you need to know

Naturally you can and should enforce all safety rules as well as other standards. And when you must resort to discipline, doing it right the first time prevents others from turning the tables on you.

To stay out of hot water:

- Review files to learn how like offenses were handled in the past, and be sure to update those files with the paperwork from your current disciplinary action
- Follow the disciplinary guidelines based on the gravity of the offense, and
- Always be sure to check with HR to make sure you're on the right path and you have their OK and support.

**Decision:** The company lost when a jury awarded the employee \$55,000 for emotional distress and punitive damages.

The jury said there was evidence of "inconsistencies and contradictions" in the supervisor's records it was able to review.

**Key:** Equal treatment and clear documentation are key to supporting disciplinary actions.

Case: Based on *Lundien v. United Airlines*

## TEST YOUR KNOWLEDGE

### Keys to dealing with illegal harassment

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

To test your knowledge of illegal harassment, respond *True* or *False* to the following:

1. Harassment becomes unlawful the very moment an employee makes a complaint to you.
2. The EEOC recommends supervisors come down fast and hard on potential harassers because it really doesn't take much for an interaction between two employees to rise to the level of illegality
3. In most instances where illegal harassment occurs, the harasser is a person in a position of authority over the victim who is being harassed.

## ANSWERS

1. *False.* Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
2. *False.* Petty slights, annoyances, and isolated incidents (unless extremely serious) generally will not rise to the level of illegality, though they should be dealt with. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
3. *False.* The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee. The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

### 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.*

### **Hat World pays \$33K to settle retaliation claim**

**What happened:** A store manager for Hat World, Inc., an Indianapolis-based retailer of sports hats and fan gear, made written complaints to corporate human resources that she was being sexually harassed by her district manager at the Greenbrier Square “Lids” location. When the employee filed an official discrimination charge with the EEOC, she was dismissed.

**Decision:** In addition to paying \$33,000, Hat World agreed to adopt a written anti-discrimination policy that includes a procedure for the investigation of employee complaints. Hat World must also conduct annual training for employees and their supervisors on Title VII and its prohibition against retaliation and on the company’s anti-discrimination policy. The decree also requires Hat World to post a notice concerning the lawsuit and to provide the EEOC with periodic reports.

**Cite:** EEOC v. Hat World, Inc.

### **Staffing firm pays \$199K for sexual harassment**

**What happened:** Women employees at Real Time Staffing Services, Inc., Employment Solutions Management, Inc., and Employbridge LLC, all doing business under the brand name “Select Staffing” in Albuquerque, were forced to endure pervasive and unwelcome conduct based on sex. The women were subjected to sexual

comments about their bodies and were referred to as “prostitutes” and “dumb broads.” Some were subjected to unwelcome touching. The EEOC also said that the women reported the treatment to both the city of Albuquerque and Select Staffing, but that Select Staffing failed to remedy or prevent sexual harassment.

**Decision:** In addition to paying a \$199,500 settlement, Select Staffing agreed to refrain from engaging in employment practices that discriminate based on sex.

**Cite:** EEOC v. Real Time Staffing Services, Inc., et al.

### **Express Mart to pay \$25K for disability bias**

**What happened:** Home Service Oil Company, doing business as Express Mart, Barnhart, MO, which operates nine Express Mart convenience stores near St. Louis, violated federal disability discrimination law by failing to hire a job applicant with Tourette’s syndrome and neurofibromatosis for a part-time sales clerk position at its Cedar Hill, MO, store because of his medical conditions.

**Decision:** Along with paying the \$25,000 settlement, Express Mart will encourage job applicants with disabilities to apply for open positions and ensure that it has strong policies and procedures in place to prevent any future disability discrimination.

**Cite:** EEOC v. Home Service Oil Company.

## STOP, LOOK, LISTEN ...

### **3 reasons job candidates turn into ‘no-shows’**

Ever been stood up by a no-show candidate?

More than once?

No-show prospects are not only frustrating — they’re holding your company back and keeping you from taking yet another to-do off your list.

Why does this keep happening?

Here are some of the common factors across firms that seem to encounter no-shows more frequently and what you can do about it.

#### **You took too long**

Often the no-show occurs because the candidate got another job or thinks they’re about to and they simply do a poor job at tying up the loose ends of the job hunt. Had you moved a little faster, you could have been the company making the offer. The time it takes you to first reach out to express interest and then schedule them to come in is the time other employers have to seal the deal.

#### **You have some image issues**

“Not cool, Jared!” may be the entirety of the response you currently have when you see someone has written a poor review online about their work experience.

Maybe a “I’m surprised to hear that” when a candidate sheepishly admits they’ve heard “some things” at industry events?

But there exists significant correlation between poor employer reputation and first face-to-face interview no-shows. People do a much deeper dive between their first call with you and when they’re coming in for a formal, sit-down interview.

#### **You failed to sell them**

Often, the no-show occurs between the initial outreach and the first in-person interview. Speed not only helps with combating competitive offers, it also is one of the strongest genuine tools to help a candidate feel appreciated, valued, and wanted.

## SUPERVISORS SCENARIO

# Supervisor offers poor performer another chance: Then what's the problem?

*An older worker believes he's getting a bad deal, not a break*

Aubrey shook his head as he considered the offer.

"A move to a part-time job with no benefits?" he fumed. "I've given this company over 35 years of service, and I get treated like this?"

Michael, his supervisor, responded: "It's because of those 35 years that I'm giving you this choice, and not just letting you go. After all, it didn't come to this until after you made three major mistakes in customer orders.

"I'm sorry, but I have to think about the company and our customers, too."

"Hold on," Aubrey said. "I've trained and looked at the work of a lot of the new people you hired. Some of them have made as many mistakes as I have, and they're still here, without a demotion."

"You're overlooking something," Michael said. "Sometimes, they're not the perfect fit for the first job they try with us. So we might move them around a little, to see what works out."

"OK," Aubrey replied. "Then, I guess you can 'move me around a little' to see if

I can handle another full-time job with the same benefits I get now."

## Take it or leave it

"The only thing I have right now is the part-time position," Michael noted. "You interested or not?"

Aubrey refused and instead sued the company for age discrimination.

In court, he argued that he'd received tougher treatment than younger workers who made the same mistakes. The company said it expected more from an experienced worker, and that the older worker had been offered the only available position.

**Decision:** The company lost when a jury awarded the employee \$67,000 in damages for age discrimination.

**Key:** Supervisors are on slippery ice when they offer a better deal to younger employees than to older ones – especially when the circumstances appear to be almost identical, except for age.

*Case: Dougherty v. Sears Roebuck, Inc.*

## What you need to know:

Courts and the law generally recognize that because of business needs, you can't treat everyone the same all the time.

However, there are questions a judge or jury will ask if there are perceived signs of discrimination:

- Was the person in the protected position – because of age, for instance – denied choices offered to another younger worker?
- Did the supervisor go to the same lengths to help the older worker and use the same standards to pass judgment?

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes. The company won when a judge dismissed the employee's ADA lawsuit.

The employee argued the company fired him because of his PTSD, which was a result of an on-the-job injury.

Terminating someone due to a disability is a violation of the ADA, he claimed, saying he should've been given an accommodation.

But the court disagreed.

It said the company didn't need to accommodate the employee because he was no longer able to do his job. Since his PTSD prevented him from coming into work, he simply was no longer qualified for the position.

The court went on to say that the employee

was fired because of the multiple workplace accidents he'd caused due to "policy violations and poor judgment," not his PTSD.

Therefore, there was no ADA violation

## Disabled employees must be able to work

This case is a great reminder that while the ADA offers protections to disabled workers, it doesn't require companies to employ people who can't get the job done.

In this case, the worker's PTSD prevented him from coming into work. That, combined with his dismal safety record, proved to a court that the company was within its rights to get rid of him.

*Case: Sanchez v. City of San Antonio.*

EDITOR: RICH HENSON

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR:  
TOM D'AGOSTINO

PRODUCTION EDITOR:  
PATTI JACOBY

EDITORIAL DIRECTOR:  
CURT BROWN

**Subscriptions: 800-220-5000**

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal or other expert assistance is required, the services of a competent professional should be sought. — From a declaration of principles jointly adopted by a committee of the American Bar Association and a committee of publishers.

♻️ Printed on recycled paper.

Copyright © 2020 Progressive Business Publications. Please respect our copyright: Reproduction of this material is prohibited without prior permission. All rights reserved in all countries.