

# Supervisors

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May 1, 2020

### OUR TOP STORY

**Busy supervisor didn't get on the same page with HR, and pays a price**

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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

**Key insights on working remotely**

**Sex harassment by Harley dealer?**

**Senior center out \$2M for bias**

**Worker sues after job eliminated**

## Should she have gotten more help before being fired? Court weighs in

### Mixed messages lead to gender bias claim

**"I'm afraid I have some bad news for you,"** Supervisor Russ Gerber said as he closed his office door.

"I know," Vicky Stone said before Russ could even sit down in his chair.

"Know what?"

"Your news."

Russ was baffled. He looked puzzled.

"Good grief," Vicky said. "I'm the one getting fired here. So why are you the one looking so forlorn?"

"HR told me just a little bit ago that I'm getting canned," she said.

"I see," Russ nodded. "I guess I thought you'd be more upset."

"What, you think because I'm a woman I need to cry over this?" she said.

### Poor performance?

"People just don't usually take it so calmly when they find out they're being let go for poor performance," Russ said.

"Poor performance? HR said this was about the bottom line, that the company was facing layoffs."

Russ paused before speaking. "Look,

*Please see More help? ... on Page 2*

### Sharpen Your Judgment

## Worker out on 'medical leave' – and living it up!

**"Take a look at these pictures,"** Andrea said to HR director Matt Angers as she pointed at her computer screen.

Matt peered at the screen and said, "Is that Michael climbing a rock wall? Where'd these come from?"

"He posted them on Facebook," she answered. "A lot of people here have seen them. And they know he's on medical leave for his shoulder."

Matt rubbed his chin as he spoke: "Well, he did submit a doctor's note certifying he's eligible for the leave under the Family and Medical Leave Act."

"Does that look like someone with a bad shoulder?" Andrea exclaimed. "I'm saying he should be fired."

"It looks iffy, that's for sure," Matt said. "But let

me explain something. If he has a doctor's note, he's entitled to the leave."

### He's faking it

"But I put him in charge of two people who now have to do his work," she noted. "Now they're convinced he's faking it. How am I supposed to deal with that – let him get away with it?"

Andrea ended up firing Michael. He sued for violation of the FMLA, saying he had proper certification and couldn't be fired, no matter what he did on leave or what photos he posted.

The company said his actions hurt teamwork and morale, which justified the termination.

Did the company 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.*

## More help? ...

(continued from Page 1)

the company is having financial struggles,” he said.

“But,” he added quickly, “you’ve been having performance issues for some time.

“And that’s what I was going to talk to you about.”

“You’ve made it clear to me that you don’t think I can handle this job,” Vicky said.

“Or maybe I should put it this way: You don’t think a woman can handle the job.”

“C’mon now,” Russ said. “You’ve never been able to catch on to parts of this job.”

“Yes, I know that,” Vicky replied. “You told me that over and over when you did my most recent review.”

“Then tell me, why didn’t you try to make some changes before now?” Russ asked.

### Things aren’t clicking

“Maybe I would have if you would’ve given me a little more guidance,” Vicky said.

“But apparently you were too busy helping the guys around here,” she added, “because it sure looks like none of them are getting the axe!”

“Things just weren’t clicking with you,” Russ said. “In your case, more training wouldn’t have helped.

“And the fact remains,” he said, “that you haven’t been able to get up to speed on your performance.

“I talked about that with you in your review and now I have no choice but to let you go.”

### She knew the facts

The employee knew the facts, too. But she still felt as though she’d been discriminated against.

After all, the company usually put employees on an improvement plan, which didn’t happen in her case, so she didn’t feel as though she had gotten a fair shake.

Her suspicion was heightened because she was given two different reasons for her dismissal.

When she sued the firm for gender discrimination, the company acknowledged it gave two different reasons for her dismissal.

But it maintained that both reasons were accurate.

It tried to get the case dismissed.

**Decision:** The company lost when a judge sent the case to trial. A jury would have to decide if the differing explanations were a simple communication snafu, or suggestive of some other problem.

**Key:** If you typically put struggling workers on improvement plans, it’s best to offer that chance to all struggling employees, so you don’t appear biased in any way.

*Case: Turco v. Fidelity Information Services.*

### What you need to know:

When it comes to terminations, beware these typical trouble spots:

- Touch base with HR and other managers to be sure you’re in agreement about the timing and necessity of the termination.
- Document whether you’ve given the employee the necessary tools for success, tools you’d offer everyone.
- At the point of termination, your goal is to simply let the person go. You are past the stage of helping the person improve, or offering help. And you’re past the stage of having to explain all the reasons. That should have been done and documented well before.

## TEST YOUR KNOWLEDGE

### Key things to know when people work remotely

Remote work was thrust upon most businesses and organizations that are fortunate enough to still be in operation during this pandemic.

And most supervisors are new to their roles in managing remote employees.

To test your knowledge of the best remote-work practices, answer *True* or *False* to the following:

1. It’s a fact that the majority of employees are frustrated with trying to work from home due to tech shortcomings and distractions.
2. It’s important to keep really close tabs on employees’ hours at homes, not so much for payroll and record-keeping but because most will try to quit early each day.
3. Managing remote workers properly can lead to significant gains in both employee engagement and morale.

## ANSWERS

1. *False.* According to a Harris poll published on Glassdoor, 3 in 5 U.S. employees (60%) said they are confident they can efficiently do their job remotely, if they are required to work from home indefinitely. Another 50% said they believe they would be equally or more productive working from home as opposed to their normal work location.
2. *False.* In a Flexjobs survey involving 5,500 professionals, 66% said their productivity improved when not in an office, 76% said there are fewer distractions outside of offices, and 51% reported working 12 extra hours a week.
3. *True.* Kevin Green, the former HR Director of Britain’s Royal Mail service, says managers who foster a culture of openness and are responsive to employee needs will develop employees that perform better and deliver better results.

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.*

### **Senior Living pays \$2M to settle disability bias**

**What happened:** Prestige Care, Inc., of Vancouver, WA, had policies requiring employees to perform 100% of job duties without restriction, accommodation, or engaging in the interactive process. The EEOC further charged that Prestige and its affiliates discharged employees with disabilities pursuant to inflexible leave policies.

**Decision:** Along with settling the claim for \$2M, Prestige agreed to retain an external EEO monitor to review and revise its policies and procedures regarding ADA compliance and to ensure that Prestige engages in the interactive process and provides reasonable accommodations. The firm also agreed to provide training and to designate coordinators to handle disability accommodation requests.

**Cite:** EEOC v. Prestige Care, Inc. et al.

### **Indiana coffee vendor pays \$22K for racial bias**

**What happened:** Coffel Vending Co., Mishawaka, IN, discriminated against a black applicant in filling vending service representative positions. Federal law requires that applicants must be evaluated for jobs based on their qualifications with no disadvantage because of their race.

**Decision:** Along with settling the claim for \$22,000, the firm agreed to train hiring personnel on Title VII prohibition of race-based hiring and how to create an

inclusive and diverse workplace. Coffel must also issue an apology letter to the rejected applicant. Also, the EEOC will monitor the company's compliance for the next four years.

**Cite:** EEOC v. Coffel Vending Co.

### **EEOC sues Harley dealer for sex harassment**

**What happened:** Chicago Harley Davidson, Glenview, IL, violated federal law by fostering a sexually hostile work environment for a female business manager and then firing her for complaining about it.

According to the EEOC, the business manager was subjected to constant harassment from other managers and co-workers, including repeated comments about her body; requests to wear more revealing clothing; sexual comments; unwelcome sexual propositions; and receiving sexual images and videos. When the business manager complained to the company, she was summarily dismissed.

Such alleged conduct violates Title VII, which prohibits employers from creating a sexually hostile work environment and prohibits retaliation against employees who complain about harassment.

**Decision:** The EEOC filed the lawsuit, which is still being litigated, after the parties were unable to reach an agreement by using the agency's conciliation process."

**Cite:** EEOC v. DP Fox Ventures, LLC.

## STOP, LOOK, LISTEN ...

### **Remote work is a morale and engagement builder**

It's becoming increasingly clear that many people will be working from home for a significant period of time.

It's also likely many managers will be leading a completely remote team for the first time.

And no one had the time to prepare.

### **Operate differently**

This will call for managers to operate very differently.

Great managers understand their people and can pick up on changes by observing both individual and team behavior.

However, both of these become more challenging as people work from home or remotely.

### **Clarify what matters**

In times of crisis and change, people look to their managers and leaders to provide clarity, support, guidance and direction.

Good leaders will step forward and recognize the importance of their role. They will start by reinforcing why the work the team does is important.

### **Set expectations**

Set clear expectations about this new way of working, including your expectations of people's availability and accountability as well as how often team and one-to-one conversations will take place.

It pays to do the scene-setting with the whole team so they all hear it together at the same time.

### **Be friendly**

Foster friendships amongst the people who work for you. Apart from the formal calls and meetings, encourage people to have informal calls so they stay connected.

We know people feel more engaged and passionate about their work if they have confidants and supporters at work. This will atrophy if it's not encouraged.

## SUPERVISORS SCENARIO

# What was the real reason Supervisor wanted employee to take on new role?

## Job eliminated soon after employee took over

“This feels like you’re just setting me up,” Randy Davis said.

“Setting you up?” Supervisor Rachel Morris echoed.

Randy started coughing as he always did when he got stressed. Rachel watched as his shoulders lurched up and down.

Finally, he managed to speak.

“Yeah, you put me in that new position because you knew you were going to eliminate it anyway.”

“That’s not true,” she said.

“I’m sure you figured I’d be out sick again for a while and you didn’t want to have to deal with me.”

Randy coughed some more.

“So you thought you’d just put me in a job and make that position disappear, and me with it,” he said.

“I moved you into this slot as an opportunity for you,” Rachel said. “I felt it was a good fit and you’d do well.”

“Before you got sick,” she added, “you’d seemed to like filling in for this slot. That’s why I moved you.”

“This position was neglected and I liked improving on it, but that’s not the point,” Randy said.

“Now you’ve eliminated it, and me too. It was all a plan to not have to deal with me or my illness.”

### Set up, or not?

Randy sued the firm for firing him illegally under the Americans with Disabilities Act. He said he was deliberately moved to a spot that was eliminated so they could get rid of him.

The company said it had legitimate reasons to eliminate the position.

**Decision:** The firm won when a court dismissed the case. The judge said the evidence showed the supervisor had moved the employee to the new slot because he had shown an interest in the position. What’s more, he did the job well.

**Key:** Be sure your decisions to eliminate positions are based on sound, and legal, business needs.

*Case: Schaller v. Donelson Air Conditioning, Co.*

### What you need to know:

You can’t think of everything, but when you’re shuffling positions it helps to try.

To protect yourself from accusations of ADA violations:

- Don’t feel pressured to move someone to an easier position because you think they can’t handle the work they have. Just doing so can make it seem you view the person as disabled.
- Similarly, be cautious about piling too much work onto someone because you think they can handle everything. Check with HR as you shuffle assignments.

## Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won.

The employee had argued he couldn’t be fired for taking and supposedly abusing his FMLA leave, since the leave was certified by a healthcare provider.

The judge in the case ruled the firing wasn’t for taking the leave, or even for abusing it. Rather, it was for his actions while on leave – actions publicizing he was physically able to do work that others in the company had to handle in his absence.

The supervisor showed that those actions indicated a lack of judgment in how they affected the attitudes of other workers and ultimately their ability to work with and take direction from the employee.

All of that, the supervisor said, warranted termination, and the judge agreed.

### What to do?

What to do when you suspect an employee is abusing FMLA leave? Employers must be careful about acting on suspicions, but the law allows the employer to request recertification (though not more often than once every six months) by a medical provider and supply the provider with evidence that casts doubt on the certification.

Note: The law mandates that any such contact must be through HR or upper management and not by a direct supervisor.

*Case: Jones v. Gulf Coast Health Care of Delaware LLC.*

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