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June 15, 2020

‘I want a raise!’ 3 ways to make sure a ‘no’ doesn’t backfire

Boss hit with violation of Equal Pay Act

Sophia got right to the point as soon as she walked into Ron’s office and closed the door: “I want a raise.”

Ron’s jaw dropped. “I think everyone who works for me wants a raise. Why would I give you one right now?”

“The short answer is that I deserve it, based on my production and performance,” she said.

“Well, those are good reasons, but getting a raise here can be a bit more complicated than that,” he countered. “But what’s this all about, really? Why now?”

“Because you just gave Sam a promotion that I should have gotten,” she responded. “Plus, I happen to know that most of the guys here are making more than I am, even though we do the same job and I’ve received top performance ratings.”

They’re talking

“How do you know they’re making more money?” Ron shot back.

“I’m not going to mention names, but some of them got to talking at our last social gathering and mentioned their salaries,” she revealed. “Do you want to

*Please see **Raise …** on Page 2*

Sharpen Your Judgment

Was it FMLA, or just a few days off to relax?

“Hey, Lynn,” said company attorney Eric Bressler. “Got a minute?”

HR manager Lynn Rondo looked up from her computer. “Sure, Eric. What’s up?”

Eric walked inside her office and shut the door. “So do you remember Susan Mayer?”

“Of course,” Lynn said. “She was let go not too long ago for performance issues.”

“Well, she’s suing us,” Eric said. “Susan’s saying she was FMLA-protected when she was fired.”

FMLA leave or sick time?

Lynn sighed. “FMLA-protected? That’s ridiculous. Susan certainly didn’t have an FMLA-approved condition.”

“She did request some time off right before she was fired, though?” Eric asked.

“Susan sent her manager an email, saying she needed some time off because she was stressed out,” Lynn replied. “She had a doctor’s note recommending that she take a few days. But a few days off to relax is different from FMLA leave.”

“Didn’t she ask for this the day before she was terminated, though?” Eric asked. “The timing looks terrible for us.”

“It’s not great,” Lynn agreed. “But we’ve been documenting her performance issues for a long time.”

When Susan sued for violation of the FMLA, 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.

Raise ...

(continued from Page 1)

deny that they're making more?"

"I really don't want to get into much detail about salaries," he said. "What I will say is that I have standards for determining pay."

"OK," she said. "Can you tell me what they are?"

"For starters, there's education and experience," he explained. "The guys who are making more have more education than you do and more experience in the industry."

"But I have more experience here than some of them," she noted.

"I said more experience in the industry, not just here," he said.

"When I took this job, you told me all that mattered was performance, that I and everyone else would be measured and rewarded on it.

"Now, when my performance is at the top, your story is that you're factoring in education and industry experience. That sounds to me like an excuse to pay a woman less."

Valid reasons

"It's not a story," he objected. "I'm giving you valid reasons why some people make more than others and get ahead faster than others. You doubt they're important factors for setting pay?"

"I doubt they're important factors here, for this job," she replied. "I'm a top producer, and I don't see how someone whose performance is at or below mine deserves more just because of some irrelevant education or experience."

He holds fast

Ron refused Sophia's request, citing her lesser education and limited experience.

She then sued the company for gender bias and a violation of the Equal Pay Act, saying men who did the same job at lower performance levels got more money.

The company said other valid factors, besides performance, influenced its decisions.

Decision: The company lost. The court's decision rested on the idea that just saying some factors are relevant doesn't prove they're relevant. And when those questionable factors result in clear differences in pay between men and women, the factors become even more questionable.

Key: The supervisor wasn't able to document the why of his decision process when confronted with evidence that the process resulted in male/female pay disparity.

Case: King v. Acosta Sales and Marketing Inc.

What you need to know:

Disputes over gender equality can arise because of a range of issues – pay, benefits, opportunity, etc. To ensure your decisions on those issues don't appear suspect:

- Consider whether the decisions have a consistently negative impact on or give seemingly unfair advantage to one gender, male or female.
- Check to be sure your reasons and supporting documentation are based on measurable, relevant factors, and
- Work with HR and other supervisors to check that your approach is consistent with what's being done companywide and meets overall standards for fairness.

TEST YOUR KNOWLEDGE

Do you know how to handle key work changes?

The pandemic is changing the way we do work, and posing many challenging legal and management scenarios for fair-minded supervisors.

To test your knowledge of some key current workplace issues related to COVID-19, respond *True* or *False* to the following:

1. If an employee calls in sick right now, it's perfectly legal to ask them for more information about their medical condition to determine if it could be coronavirus.
2. To ensure people are being productive at home, using software to monitor keystrokes and other activity is always a good idea.
3. Once you get the all-clear from the government to reopen, it's OK to insist that all employees come back, even those who say they are genuinely fearful of catching COVID-19.

ANSWERS

Answers to the quiz:

1. *True.* During a pandemic, an employer is able to ask questions to determine whether the person might have the pandemic virus. You can specifically ask the employee if they're experiencing coronavirus symptoms, but you still must keep the info confidential.

2. *False.* It's crucial to be up-front with your employees, or it will cause distrust or even potential legal issues. You should also ask yourself why you feel the need to monitor your workers. If the purpose is to catch them in the act of not working and penalize them, it's probably a bad idea.

3. *True.* But proceed with caution. Fear isn't a legal reason for refusing to return to work. But there's an exception – diagnosed mental-health disability, such as severe anxiety. And if an employee is diagnosed with severe anxiety, the coronavirus could very likely exacerbate the disability.

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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.

Whataburger out $180K for retaliation violation

What happened: The general manager of a Whataburger location in Tallahassee repeatedly instructed her hiring manager to hire white, and not black, applicants for employment. When the manager complained, she was told that upper management wanted the teams to "reflect the customer base where we do business." The manager was then subjected to physical and verbal abuse, threats, a schedule change, and additional work assignments, which ultimately forced her to resign.

Such alleged conduct violates Title VII of the Civil Rights Act of 1964, which prohibits employers from retaliating against employees who report or oppose workplace race discrimination.

Decision: Along with agreeing to pay $180,000, Whataburger is required to adopt new human resources policies, conduct live and computer-based training, and maintain an anonymous hotline for complaints. Whataburger must also post a notice at its worksite about the lawsuit and report any new complaints of retaliation to the EEOC.

Cite: EEOC v. Whataburger Restaurants LLC.

Cleaning services firm out $315K for harassment

What happened: Four women who worked for HM Solutions, Inc., Greenville, SC, at various times between 2015 and 2017 were assigned to a client's battery recycling facility in Florence, SC, where they performed general housekeeping tasks and cleaned up lead and mercury contamination. The EEOC alleged that at various times during each woman's employment, the women were subjected to sexual harassment by an HM Solutions account manager and a shift supervisor, both male. The EEOC contends that some of the behavior was observed by other supervisors, who took no action to stop the sexual harassment.

Decision: Along with paying $315,000, HM Solutions is required to develop an auditing process to assist the corporation with identifying and addressing actual or potential incidents of sexual harassment and retaliation.

Cite: EEOC v. HR Solutions, Inc.

Spencer Gifts pays $90K for disability bias

What happened: An employee at a Spencer Gifts store in Hickory, NC, who suffered from Marfan Syndrome, asked to be allowed to use a cane or walker when she returned to work from knee surgery. Spencer refused to provide the employee with any accommodation that would allow her to return to work, and fired her when she exhausted her disability benefits.

Decision: Along with paying $90,000, Spencer will provide training to all managers on the prohibition of disability discrimination and requests for reasonable accommodations under the ADA.

Cite: EEOC v. Spencer Gifts, LLC.

STOP, LOOK, LISTEN ...

Coronavirus and the ADA

As employees return to work during the COVID-19 crisis, employers must consider whether there are reasonable accommodations that would eliminate or reduce risk.

Employers need to make certain it is safe for high-risk employees to return to the workplace AND perform their essential job functions.

The EEOC changed earlier guidance to clarify that the ADA does not allow employers to exclude employees from work locations simply because they have an underlying medical condition.

Also, employers must consider accommodations that don't require the worker to be onsite, such as telework, leave, or a job change/reassignment to a location where it may be safer for the employee to work.

Effective accommodations

Identifying effective accommodation depends, among other things, on an employee's job duties and the design of the workspace.

Examples of potential accommodations provided by the EEOC's new guidance include:

- Additional or enhanced protective gowns, masks, gloves or other gear beyond what the employer may generally provide.
- Additional or enhanced protective measures, for example, erecting a barrier between an employee with a disability and co-workers/the public or increasing the space between an employee with a disability and others.
- Elimination or substitution of particular job duties not considered "essential" functions of a particular position.
- Temporary modification of work schedules to decrease contact with coworkers and/or the public when on duty or commuting).
- Moving the employee (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

SUPERVISORS SCENARIO

Denied light-duty job, he quits and sues: Did Supervisor do enough to accommodate him?

Are both parties obligated to participate in accommodation discussion?

"So you're saying Fred just up and quit?" HR manager Myles Anthony asked.

"That's right," Meghan said. "After I told him we couldn't give him a light-duty job to accommodate his leg injury, he just walked out."

"Did you offer any other sort of compromise to help him out?" Myles asked her.

"That's the thing," Meghan said while shaking her head. "He never gave me a chance. He just left without saying anything at all."

"You're sure that's how it went?" Myles asked.

"Yes, I'm sure," Meghan confirmed. "Why? Is that important?"

"It is now," Myles sighed. "Fred is suing us for violating the Americans with Disabilities Act by failing to provide a reasonable accommodation for his disability."

"You mean, I was obligated to dream up a light-duty job for him, even though we've been cutting staff?" Meghan asked.

"Not necessarily," Myles answered. "But you were obligated to explore and consider all options."

Employee walked out?

Fred sued, claiming his supervisor didn't consider the accommodation request.

The company countered by saying the original request was unreasonable and the employee never gave the supervisor a chance to offer a compromise.

Decision: The company won when a judge dismissed the lawsuit. The employee was right that the supervisor turned down the first request for an accommodation – a revised schedule – and offered no other accommodation.

But the court found the employee couldn't claim a denial of accommodation when it was the employee who refused to consider any other alternatives to his original request.

Case: EEOC v. Kohl's Department Stores, Inc.

What you need to know:

Providing an accommodation for a disabled employee often is a multi-step, collaborative process:

- If an employee proposes what he or she believes is an ideal accommodation, then
- The supervisor considers the proposal and either grants it, provides counter proposals or asks the employee for other proposals, and
- The employee and the supervisor try to reach a reasonable accommodation.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed Susan's case.

Susan's attorney argued that since Susan was fired the day after asking for a few days off, the company clearly discriminated against her because of her request. The attorney said Susan was FMLA-protected, and the company disregarded that.

But the court disagreed. It said the company had been having issues with Susan for a long time, and had documented all of her shortcomings. Not only that, but the court decided her request for a few days off didn't trigger FMLA protections.

Susan's doctor said nothing about her having an FMLA condition or needing extended time off – the doctor merely recommended a few days to relax.

Therefore, Susan's firing was for a legitimate reason, and she wasn't protected under the FMLA.

Document, document, document

While it never looks good to terminate an employee right after they request any type of leave, in this instance, the company did everything right to protect itself.

Susan's performance issues were well-documented, and the company realized her request for time off didn't trigger its FMLA responsibilities.

Cite: Gardiner v. City of Philadelphia.

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