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July 1, 2020

## OUR TOP STORY

**A stray remark comes back to haunt the boss**

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7 questions to ask yourself before deciding whether to fire someone



## INSIDE

**Return-to-work guidance**

**ACME pays \$60K for bias claim**

**Protect everyone when reopening**

**ADA: Did boss ignore her complaints?**

## A joke here, a wisecrack there – now Supervisor's on the hot seat

*Older worker didn't see humor in the 'joking'*

**L**ook at this!" Frank Hoffman exclaimed, holding up his brown paper lunch bag for all to see.

"It's written here as clear as day," he said. "Don't Touch: This bag contains Frank's Alzheimer meds."

"I'm guessing this is an attempt at humor by the usual jerks," he said.

"C'mon, Frank, give it a rest," Supervisor Carl Kowalski said. "They're always kidding around like this."

"I'm tired of being the butt of their jokes," Frank said. "I should not have to put up with this."

"OK, what do you want me to do this time?" Carl asked.

"You're young, you're smart, you're in charge," Frank said. "You figure it out."

Frank slammed the door.

### He's one of them?

The following day Carl met with Frank again, in Carl's office.

"You know, I actually think the guys really like you," Carl said. "They're treating you like one of them."

"So, that explains why I've already been

*Please see Wisecrack ... on Page 2*

## Sharpen Your Judgment

### Two workers, two different outcomes: Race bias?

**H**R manager Lynn Rondo was browsing travel sites, wondering if she'd ever get to go on vacation this year, when company attorney Eric Bressler strolled into her office.

"Hi, Lynn," Eric said as he sat down. "Sorry to barge in, but we've got a problem. Charles Miner is suing us for race discrimination."

That statement caught Lynn entirely off guard.

"What?" Lynn blurted out.

"Charles was fired because he forged a document," she said firmly. "That's a clear policy violation. It had nothing to do with his race."

"Charles mentioned his white colleague, Shawn Detweiler, did the same thing he did, yet Shawn wasn't fired for it," Eric told her.

"In fact, Shawn was eventually promoted in spite of his actions," Eric added.

### Thorough investigation

Lynn frowned. "I don't completely remember the circumstances around Shawn's incident," Lynn admitted. "But I do remember we thoroughly investigated Charles' conduct before we let him go."

"We did this by the book," Lynn added. "Charles violated our policy, we investigated and then terminated him due to our findings. How can anyone possibly call that race discrimination?"

"We should fight this, then," Eric concluded.

When Charles sued for race discrimination, the company fought to get the case dismissed.

Did it win?

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

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.

# Wisecrack ...

(continued from Page 1)

called ‘old man’ twice today, and it’s not even lunch time.

“And there was this: ‘It must be great being your age, because there’s no more peer pressure.’

That got a big laugh.”

## One of the guys?

“See, that’s what I’m saying,” Carl said. “It makes you one of the guys. They insult each other all the time.

“Why don’t you let them know you’re tired of their jokes?” Carl suggested.

“I’ve done that,” Frank said. “They just try harder.”

When Frank returned to his cubicle, his name placard, which was modeled after a CD case, was replaced by a worn LP album cover.

His name was scrawled in heavy black marker across the album.

“Very funny,” Frank said.

## Job eliminated

When Frank was called into HR a couple weeks later, and Carl was there waiting for him, he knew it couldn’t be good.

“Your job has been eliminated and we’re letting you go,” Carl said. “And besides, you have to admit you haven’t been a good fit here.”

“Is that another way of saying I’m too old?” Frank said.

“Your age has nothing to do with it,” Carl told him. “It’s strictly a business decision.”

“Strictly business,” Frank echoed. “You’ve confirmed my suspicions. This company has been discriminating against me all along.”

“You’re making a mountain out of a molehill,” Carl said. “And you know what? You don’t have a sense of humor.”

After he was let go, Frank sued the firm for age discrimination.

He claimed his co-workers made clear, derogatory remarks about his age, and that the company did nothing to stop or fix the situation.

The firm said it was all a big misunderstanding – on the employee’s part.

It said its employees were encouraged to joke around with each other, and that their humor had

many other targets and not just one employee. This employee couldn’t adapt to that.

**Decision:** The firm was unable to get the case dismissed and eventually settled out of court for an undisclosed sum.

**Key:** Even “innocent” joking that targets a specific protected area, like race, age, religion, gender etc., cannot be tolerated at work.

Case: Reid v. Google.

### What you need to know:

It happens all too often in the workplace, where one worker’s harmless joke is another’s ugly insult.

That means even casual remarks about age can land your firm in legal trouble.

To stay out of court:

- Help veteran employees remain valuable by giving them opportunities to be mentors to less-experienced colleagues.
- Be sure all employees know your procedures for filing a bias complaint.
- Work closely with your HR team to manage delicate situations like these.

## TEST YOUR KNOWLEDGE

### Key answers to common return-to-work questions

It’s a whole new world out there as HR pros take their first cautious steps in safely returning employees back to work.

To test your knowledge of how to proceed, respond *True* or *False* to the following:

1. As people are called back to work, employers should assume your disabled and at-risk employees will not want to return due to the threat of COVID-19, and automatically accommodate them.
2. In this pandemic, all bets are off. There’s just no way of assuring you can protect your company’s data or retrieve employer-issued electronic devices.
3. Most employers across the U.S. are on the verge of return-to-work, but that’s still very different from return-to-normal.

## ANSWERS

1. *False.* The EEOC recently stated that the ADA doesn’t require employers to act if an at-risk employee doesn’t request an accommodation. Don’t assume the person needs one – this is called benevolent discrimination.
2. *False.* There are steps to ensure this goes as smoothly as possible. Create a clear policy outlining which data is protected. Once the employee has been laid off, disable their company email accounts and any other digital platforms they have access to. Then send them a flat shipping box with a prepaid return label to return all devices.
3. *True.* It helps to remind yourself and your employees that returning to work will not be a “return to normal,” which will help people adjust their expectations. Think about what your new normal will look like and how it’ll impact business.

### Answers to the quiz:

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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.*

### **Well driller settles bias claim for \$650,000**

**What happened:** Horizontal Well Drillers LLC, of Purcell, OK, hired a rig hand before forcing him to undergo an unlawful medical exam and then fired him based on health information it obtained from the exam. The EEOC also alleged HWD rejected rig hand applicants who were older than 40 because of their age.

Such conduct violates the Americans with Disabilities Act, which restricts the use of medical exams in employment, and the Age Discrimination in Employment Act, which protects applicants and employees 40 and older from discrimination because of age.

**Decision:** Along with agreeing to pay \$650,000 to the fired rig hand and 484 other unsuccessful job applicants, the firm agreed to amend its hiring practices to conform with federal law.

**Cite:** EEOC v. Horizontal Well Drillers LLC.

### **Bias claims pile up against PA manufacturer**

**What happened:** Service Caster Corporation, headquartered in West Reading, PA, one of the largest caster and wheel companies in North America, subjected two assemblers and one assembly line supervisor to a hostile work environment because of their national origin, Puerto Rican, and religion, Pentecostal. Service Caster retaliated against the employees for their opposition to the

harassment, including by ultimately firing them, the EEOC said.

**Decision:** In addition to paying \$85,000 in monetary relief, the firm must disseminate to all employees, both in English and in Spanish, a detailed policy against discrimination, harassment and retaliation and let employees know they may contact the EEOC directly with any such complaints.

**Cite:** EEOC v. Service Caster Corp.

### **ACME Markets pays \$60K for disability bias claim**

**What happened:** ACME Markets, Inc., a supermarket chain that operates 164 stores in Pennsylvania and five other states, failed to provide a reasonable accommodation for the disability of a former employee at its Denver, PA, facility, according to an EEOC investigation of the employee's complaint.

**Decision:** Along with paying \$60,000 in monetary relief, ACME Markets agreed to revise its reasonable accommodation policies.

The supermarket chain will hire qualified external trainers to conduct bias training and post a notice regarding the settlement. ACME Markets will report to the EEOC on how it handles any future complaints of disability discrimination or denial of a reasonable accommodation.

The Americans with Disabilities Act (ADA) prohibits employment discrimination based on a disability or perceived disability.

**Cite:** EEOC v. ACME Markets, Inc.

## STOP, LOOK, LISTEN ...

### **Protect your firm – and those returning to work**

Here's how to put employees' health first while still protecting your firm.

**CDC:** The Centers for Disease Control and Prevention (CDC) advises employers to implement heightened hygienic practices and workplace cleanings. The CDC also recommends employers replace in-person meetings with video or telephone conferences.

**ADA:** While the coronavirus is typically a temporary illness and not a "disability" under the ADA, employers need to use caution when making employee inquiries.

ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

**EEOC:** The agency has issued guidance for employers on the impact of the outbreak, reminding them of steps to be taken to avoid violating the ADA. It also includes a number of examples employers may find useful as they navigate the coming weeks and months. For example, employers can send employees home if they're experiencing virus-like symptoms.

**HIPAA:** The U.S. Department of Health and Human Services released a bulletin to clarify HIPAA's privacy rules during the coronavirus outbreak. The "basic requirements of HIPAA still apply even in a public health emergency," says Mintz Levin attorney Kristen Marotta. However, disclosures are allowed for treatment, for public health activities and to prevent a "serious and imminent threat," says the bulletin.

**FMLA:** Since employees can't use their 12 weeks of unpaid FMLA leave unless they have a serious health condition, an employee's fear of contracting the virus wouldn't qualify for FMLA. However, they're permitted to take the leave to care for a family member.

**SUPERVISORS SCENARIO**

# She couldn't hear well – and Supervisor pays the price for not listening to her concerns

## Keys to making accommodations for qualified employees

Maria Jones hung her coat on the rack, walked toward her workstation ... and then kept right on going.

Her co-workers had turned up the radio so loud – again – that Maria knew she wouldn't be able to focus.

"I can't even hear myself think," Maria told Supervisor Matt Milford when she caught up to him outside his office.

"I have a tough enough time hearing on a good day," said Maria, who has a hearing disorder. "Can you make them turn it down, please?"

"That's my most productive team you're complaining about," Matt said, shaking his head. "They like their music like that. It keeps them motivated and we get good results. What's to fix?"

"Maybe you should try to find another position someplace," he added.

"Your answer to this is I quit and get another job?" Maria asked.

"No, no," Matt said. "I mean maybe there is an opening somewhere else here in the building for you. You should check

with HR to see if there are any openings."

"But I've worked here six years," Maria responded. "I've only had problems since they started blasting the radio."

### A dead end

There were no openings anywhere for Maria to move into, and Matt didn't lend much of a hand helping her find one.

Matt let her go when she kept complaining about the loud music.

Maria sued under the Americans with Disabilities Act. She said her boss should've done a better job of helping to accommodate her.

The firm said the employee probably could've found another opening in the organization, but she wasn't persistent enough in finding herself a slot.

**Decision:** The firm lost when it agreed to settle the case out of court for \$100,000.

The employer couldn't show it made any effort to accommodate the worker.

*Case: EEOC v. St. John Health System.*

### What you need to know:

Accommodations are sometimes referred to as "productivity enhancers." It's important to try to make a reasonable effort to accommodate an employee with a disability. That includes:

- Ensuring equal opportunity in the application process.
- Adjusting the workplace so the employee can perform essential job functions in an acceptable manner.
- Making it possible for an employee with a disability to enjoy equal benefits and privileges of employment.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

No. The company lost when a court said Charles' case could go to trial.

The company argued that Charles was fired for just cause – he forged a document which violated company policy.

The incident was fairly and fully investigated and, as a result of the findings, he was fired.

But the court didn't quite see it that way.

The judge said the issue wasn't the investigation into Charles' conduct and the resulting termination, but the way in which the company handled similar conduct by Charles' white colleague, Shawn.

Shawn, even though he committed the same policy violation as Charles, wasn't fired. In fact,

Shawn's conduct hadn't harmed his career at all, as he eventually went on to be promoted.

Due to the different ways the company handled these employees' policy violations, the court concluded that race may have been the real reason for Charles' firing.

### Applying discipline evenly

This case is a great reminder of how important it is to apply the same standards when it comes to discipline.

The uneven discipline made it appear there was another factor at play behind Charles' termination.

*Cite: Spratt v. FCA US LLC.*

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