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July 15, 2020

OUR TOP STORY

Some key dos and don'ts for steering clear of bias claims

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7 questions to ask yourself before deciding whether to fire someone



INSIDE

Avoid biased interviewing

FedEx pays big for disability bias

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Time to get back to work: ADA

Accommodating the Sabbath leaves Supervisor in the hot seat

Employee says firms infringing on his religious rights

Supervisor Sally Dawkins watched Ronnie Wolf stack the last box, making sure the bar code was faced the proper way.

"How's the new shift?" she asked.

"Uh, OK," he said. "But it's been a while since I did this much lifting," he added, rubbing his hands.

"But it's going OK.

"Glad you're here," he added quickly. "I do need to talk to you about my schedule."

"Sure, what's up?" she asked.

"I need someone to swap with me so I don't work Saturday," he said.

"You guys have always been great about letting me work around the Sabbath," Ronnie told her.

"But this new shift has a lot of Saturdays and I can't get people to work for me.

"It seems kind of unfair," he said. "All of a sudden I'm getting hit with all these Saturdays on my schedule."

Why did it change?

"Times aren't what they used to be," Sally said.

"Ever since the new owners took

Please see Sabbath ... on Page 2

Sharpen Your Judgment

Same titles, same duties, but different pay

HR manager Lynn Rondo let out a groan as she saw employee June Howard walking through her door. She knew what this was about.

"Hi, June," Lynn said, forcing a smile. "What can I do for you?"

"I know my manager spoke to you about me wanting a raise," June started.

"Yes, he did," Lynn said. "I ..."

"You need to give it to me now," June interrupted. "Because I found out Mark and Kyle make way more than me, and I know it's just because they're men."

"Hold on a second," Lynn said. "You, Mark and Kyle aren't exactly similarly situated."

"We have the same title," June argued. "We

have all the same responsibilities."

"But Mark and Kyle have experience you don't," Lynn pointed out. "Not to mention, you picked the two men with the highest salaries in your department. You earn more than some of your other male colleagues."

Same duties, different pay

"I'm not buying it," June said. "No matter the experience Mark and Kyle have, I work harder than they do – my manager said so himself. This is clearly an illegal pay disparity."

June sued the company, claiming it violated the Equal Pay Act, and 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.

Sabbath ...

(continued from Page 1)

over, and all the layoffs started, everyone is being asked to make adjustments," she said.

"Re-working the schedules have saved money and jobs," she added. "But it has cut flexibility.

"Like working on Saturdays – it's tougher for you to find people to swap with because there are fewer people here.

"You're going to have to just work it every now and again."

Why now?

"That's what I'm having trouble understanding," Ronnie said.

"For years, it's been OK."

"We've worked with you because you're a good employee," Sally told him.

"You have a great track record. When we made these cuts we had to let a lot of good people

go. But we held on to you. That says a lot about how much we value you.

"You're a good influence on the other workers here."

"You seem to be avoiding the topic," Ronnie said. "I'm talking about a change in policy.

"My religion is important to me, but I can't do the same things here you let me do before.

"It's just not right," he said. "I'm

being left with no choice but to work on the Sabbath, and you're telling me it's just business."

"We've done all we can," Sally said. "We let you swap shifts, set your own schedules, more or less, and even transferred you to a more stable position so you wouldn't get laid off."

Back-breaking job

"You put me in a back-breaking job and made me work Saturdays," he replied. "If you're trying to make me quit, it's working. I have lined up another job."

"We've done all we can," Sally said.

After Ronnie left, he sued his former employer for religious bias. He claimed his supervisor was well aware that he needed Saturdays off, but stuck him with a shift that required him to work that day.

The firm said it changed the shift so he could keep his job with the company. Otherwise, he likely would've been laid off.

Decision: The company won when the court said it had a legitimate non-biased business reason for the employee's schedule change.

Key: The firm had long offered the employee an accommodation that was no longer reasonable as economic conditions changed at the company.

Case: *Ellington v. Murray Energy.*

What you need to know:

The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the business. But the practical application can change as circumstances change.

- Accommodations can include flex scheduling, voluntary shift swaps, job reassignments and modifying some policies.
- Undue hardships often compromise workplace safety, cost too much, reduce productivity or efficiency, infringe on the rights of others or require others to make work adjustments that go beyond what's normally required of them.

TEST YOUR KNOWLEDGE

Avoiding those tricky, biased interview questions

You have a critical position you're trying to fill (aren't they all?) and you want to pick through your candidates carefully and really dig deep to find the best person possible. But be careful, because some "innocent enough" questions can get you in big trouble.

To test your knowledge of how to proceed with an interview and what's OK to ask, respond *True* or *False* to the following:

1. Of course you want to treat everyone fairly. But as far as most anti-discrimination laws go, the higher level of scrutiny begins once an individual is hired and on board.
2. One of the most common interview topics, and one of the most likely to lead to legal trouble, is discussing children and family obligations.
3. If the applicant brings up a topic, you are free to delve in and ask all about it.

ANSWERS

1. *False.* State and federal bias laws cover job applicants as completely and thoroughly as they cover actual employees. Avoid making employment decisions based on an applicant's race, religion, gender, disability, age and the many other protected categories and classes identified in equal-employment laws.
2. *True.* Avoid questions involving marital status and children or dependents. Such inquiries may be asked after an employment offer has been made and accepted if needed for insurance or other legitimate business purposes.
3. *False.* On the surface that seems safe enough, but don't go there. Always try to steer the conversation back to safer territory. For example, if the applicant asks about your health care benefits, and then mentions an illness they have, feel free to discuss the benefit, and NOT the person's illness.

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.

FedEx pays \$3.3M for disability bias claim

What happened: FedEx Ground Package System, Inc. denied deaf and hard-of-hearing package handlers reasonable accommodations and discriminated against deaf and hard-of-hearing applicants for the package handler position. Package handlers are responsible for loading, unloading, scanning and routing packages at the company's distribution facilities.

Decision: Along with paying \$3.3M to 229 individuals who may receive payment as part of the settlement, FedEx agreed to provide deaf and hard-of-hearing package handlers with access to live and video remote American Sign Language interpreting, captioned videos, and scanning equipment with non-audible cues such as vibration.

FedEx Ground will also take steps to protect the safety of deaf and hard-of-hearing package handlers.

Cite: EEOC v. FedEx Ground Package System, Inc.

CA senior living center out \$80K for retaliation

What happened: An African American caregiver working at the Auburn, CA facility of Brookdale Senior Living Communities, Inc., a nationwide senior care provider, overheard co-workers use a phrase with racial connotations offensive to the caregiver. Soon after the caregiver complained about the comments and alleged discrimination, Brookdale

suspended and ultimately fired her.

According to settlement documents approved in federal district court, Brookdale denies all allegations of wrongdoing.

Decision: Along with paying \$80,000, Brookdale agreed to train its personnel on compliance with federal anti-discrimination laws, with an emphasis on retaliation under Title VII.

Cite: EEOC v. Brookdale Senior Living Communities, Inc.

Albertson's grocery pays \$210K for discrimination

What happened: Albertson's, a national retail grocery chain, allowed a manager to harass Hispanic employees, particularly limited English-speaking employees, because they spoke Spanish, at an Albertson's store on Lake Murray Blvd. in La Mesa, CA.

Decision: In addition to providing \$210,000 to the affected employees, the two-year consent decree settling the suit, which remains under the court's jurisdiction during the decree's term, includes injunctive relief aimed at preventing workplace national origin discrimination in the future. Albertson's has agreed to review, and, if necessary, revise its policies and procedures on discrimination and provide training to employees and managers on federal anti-discrimination laws with an emphasis on language discrimination

Cite: EEOC v. Albertson's Companies, Inc.

STOP, LOOK, LISTEN ...

Push for paid sick leave keeps getting stronger

The push for federal paid sick leave legislation is getting stronger.

Presently, federal law doesn't require employers to offer paid sick leave, though 12 states and Washington, DC, have laws on the books. (Maine will join that list in 2021.)

Thirty cities and localities, including San Francisco, Chicago and Philadelphia, also have paid sick leave.

Some states, including Kentucky, Arizona and Colorado, have introduced various emergency bills, while Massachusetts has urged employers to offer paid leave to those stricken with the virus.

What employers should do

Many firms are updating their sick leave policies to keep staff at home to prevent the pandemic from spreading. The Centers for Disease Control and Prevention (CDC) advises firms to "ensure your sick leave policies are flexible and consistent with public health guidance and employees are aware of these policies."

Here are some immediate steps employers can take:

Revise sick leave policies

First, ensure company paid sick leave policies are consistent with state and local laws. Then consider extending or expanding sick leave, "perhaps adjusting benefits plans for employees who exceed their sick-day allotment in order to support sick employees who must stay home," says law firm Littler Mendelson.

Employers may not be legally required to pay employees during this pandemic, yet choosing not to do so makes it more likely they'll return to work prematurely, potentially infecting other employees.

Add more flexibility

The CDC recommends firms be flexible enough to allow workers who have symptoms or have potentially been exposed to the virus, but can't work from home, to take time off from work.

SUPERVISORS SCENARIO

Employee needs extended medical leave; at what point can supervisor legally say ‘No’?

She needed her accommodation to go on indefinitely, but boss wasn't on board with that

“I gotta tell you we have the best group of employees anywhere,” Rachel Barnes said gleefully.

“Two more people just signed up to donate some of their time off to me so I can take medical leave when I need it.”

“That’s great,” Supervisor Bill Ross said. “Our people do have big hearts. Enjoy it while it lasts.”

“While it lasts?” Rachel said. “What do you mean by that?”

“Well, having people donate some of their time off for you to use so you can be out of the office when you’re sick is a great accommodation,” Bill said.

“But it’s not an arrangement that can just go on forever.”

“Who knows how long it can last,” Rachel said. “Two new people just signed on. There will be more.”

“What I mean is, after this, I’m pulling the plug on this arrangement,” Bill said.

“But I have an autoimmune disorder and I don’t ever know when I’ll be sick or for how long,” Rachel said. “I need the

extra leave so I can keep my job.”

“I’m not so sure,” Bill said. “The problem is, you’re out too much. You are the receptionist and I need you here greeting people. Physically being here is essential to your job.”

Essential job functions

Rachel sued the firm for violating her ADA rights by denying her access to an accommodation.

The firm argued the employee, by missing so much work, simply wasn’t able to perform the essential functions of her job, which included greeting people and answering phones.

Decision: The company won when the case was dismissed. The court ruled that providing the employee virtually unlimited medical leave wasn’t reasonable.

Key: Extended time off beyond FMLA may be denied in certain instances if it prevents a worker from performing essential job functions.

Case: Winston v. Ross.

What you need to know:

This case underscores the importance of position descriptions, and their accuracy. To ensure your PDs hold up under legal scrutiny:

- Check to be sure they are realistic – that they accurately describe the major duties and aren’t just “paperwork.”
- Periodically review the PDs with your employees, maybe during performance reviews, to catch and document any change.
- Sit down with HR to go over the PDs and get answers to any questions you might have.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed June’s case.

June’s attorney argued Mark, Kyle and June should all be paid equally because they had the same titles and job responsibilities. Not to mention, June received a review from her manager that said she was the hardest-working employee in the department.

But the court disagreed. It said while titles and responsibilities may be the same, Mark and Kyle had much more experience than June, and paying them more for that was not discriminatory or illegal.

The court said the suggestion that June “worked harder” didn’t prove the work they performed was equal.

There are legal reasons for treating the pay of two workers differently, such as education or experience.

Key questions

Some key questions to ask yourself to determine whether any disparity is fair and legal are:

- Are the two positions really exactly the same?
- Have the duties of the lower-paid employee changed or evolved since the person was hired?
- Is there a skill the higher-paid employee has that the lower-paid one doesn’t, or vice versa?

Cite: Spencer v. Virginia State University.

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