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August 3, 2020

OUR TOP STORY

What to do when employee asks complaint be kept confidential

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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

When social posts cause unease

Lab pays \$10M age bias claim!

Ready to be an HR Business Partner?

Harassed worker gave as good as he got

She asked for complaint to be kept confidential – so boss did

Supervisor on the hot seat for not taking firm action on complaint

“This isn’t easy to talk about,” Jenny Singleton said. “And for right now at least, I’d like to keep this confidential.”

“There’s just no reason that everybody needs to know about this, OK?”

“I’ll do my best,” said Curt Boyer, a regional manager.

“But it’s hard to make any promises to you when you don’t even report directly to me, and I don’t know the full details of what you’re about to tell me,” he said.

“Well, it’s Tim,” Jenny said, “and I’m thinking you probably guessed it was going to be about him, right?”

“No, I haven’t guessed anything,” Curt said. “What’s up with Tim?”

“I don’t want to work under him any more,” she said. “I can’t put up with his vulgar remarks any longer.”

Most folks like him

Curt leaned forward.

“I’m surprised to hear that,” he said. “I’m told Tim is one of our best team leaders. He doesn’t report to me, either.”

“Most people say they really like working with him,” Curt said.

Please see Confidential ... on Page 2

Sharpen Your Judgment

Firm dragged into court after disciplining worker

“What you did earlier today just wasn’t right,” Cecily Miller said.

“I did what I had to do,” Supervisor Gary Carson replied. “It’s not something I wanted to do.”

“But half the staff has done what Phil did, and no one was ever disciplined for it,” Cecily said sharply.

“So, why Phil all of a sudden?”

“I had to put a stop to it,” Gary said.

“And so you picked Phil?”

“I told myself ‘no more warnings,’” Gary said. “The next time it happened I was going to put my foot down. I’m glad I finally did.”

“And it just so happens you picked the only black person on our team to do this to,” Cecily said.

“You did this because of his race,” she added. “I’m going to file a complaint about this.”

Profanity laced

Cecily filed a complaint accusing Gary of racial bias in his handling of Phil’s discipline. Her complaint was laced with profanities and threats.

After reviewing the document, the firm fired Cecily for inappropriate language and making harassing threats.

She sued for retaliation, saying she was fired for making a racial discrimination complaint.

The firm said she was let go because of the tone and manner of her complaint, and it asked the court to dismiss the lawsuit.

Was the firm successful?

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.

Confidential ...

(continued from Page 1)

“Most of his people are men,” Jenny said. “Maybe that has something to do with it. But if he treats the other women the way he treats me, I doubt they’d say they ‘enjoy’ working with him.”

“I honestly haven’t heard any complaints about him,” Curt said.

“Tell me more. What do you mean by ‘vulgar?’”

Crude as it gets

“By vulgar I mean crude, as crude as it gets,” she said.

“For example?” Curt asked.

“Some of the things are too embarrassing to even say out loud,” Jenny explained.

“I can’t bring myself to repeat all the awful things he’s said to me,” she said.

“But I think he does it to me because I’m the only Hispanic and he thinks he can get away with it. It needs to stop.”

“I understand,” Curt said. “And I will do everything I can to handle this properly.”

Hard to talk about

“I can understand why this makes you so uncomfortable to discuss with me face to face,” he added. “Would you be willing to put this complaint in writing and be more specific about what he said?”

“Sure, give me a little time to gather my thoughts, and I’ll do that,” Jenny told him.

Employee transferred

Jenny wrote a letter outlining Tim’s behavior in explicit detail. Shortly after she gave the letter to Curt, she was transferred to another area and given a substantial raise.

But as time passed and she noticed Tim was still in his same position, she felt betrayed.

“I thought you were going to do something about this?” Jenny said when she met with Curt again.

“And I thought you said you wanted me to keep this confidential,” he replied.

Jenny sued her employer for allowing a hostile work environment to persist.

The employer claimed it moved Jenny to another area, away from her harasser, and honored her request to keep the situation quiet.

Decision: The employer won when a court dismissed the lawsuit, and its ruling was also upheld on appeal. The court acknowledged that the legal issue was “by no means an easy one,” but it ruled the employee failed to show that her employer “acted unreasonably in honoring her request to keep the matter confidential, rather than taking immediate action to stop the unlawful harassment.”

Case: *Torres v. Pisano (NYU)*.

What you need to know:

It pays to remember an employer can be held liable for the harassment perpetrated by one of its supervisors if:

- the supervisor was at a sufficiently high level in the company, or
- the supervisor used his actual or apparent authority to further the harassment, or
- the supervisor was aided in accomplishing the harassment by the existence of the agency relationship, or
- the employer provided no reasonable way to complain, or
- the employer knew of the harassment but unreasonably failed to stop it.

TEST YOUR KNOWLEDGE

Employee political posts causing workplace unease

Things can get very tricky when it comes to disciplining employees for personal social media posts.

Many states offer protections for employees engaging in certain online activities. However, when online opinions start to blur into offensive statements, employees can be subject to discipline. To see if you know when that applies, answer *True* or *False* to the following:

1. It’s OK to fire employees for posting online hate speech regarding a protected class of people.
2. It’s OK if employees make statements that would create a hostile work environment because they weren’t made at work.
3. Online threats are almost always just bluster made by people who, when face to face, would never carry out such actions. So threats made online are protected.

ANSWERS

1. *True*. Hate speech regarding any protected class is an example of behavior that crosses the line and managers should consider taking action to put a stop to. It includes derogatory statements made based on race, religion, ethnic origin, age, gender and all other protected classes.
2. *False*. A statement severe enough to have caused a hostile environment at work cannot be tolerated because the employee made the statement away from work. Hostile comments almost always involve a protected class of people or constitute a threat.
3. *False*. Both threats and implied threats should never be tolerated when made by employees online. There is no legal requirement that an employee’s misconduct must occur on the employer’s premises or while the employee is on duty to be considered work-related.

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.

Jet Propulsion Laboratory pays huge age bias claim

What happened: The Jet Propulsion Laboratory (JPL), Pasadena, CA, systemically laid off employees over the age of 40 in favor of retaining younger employees. The EEOC also alleged that older employees were passed over for rehire in favor of less qualified, younger employees.

Decision: Along with agreeing to pay \$10 million to settle the claim, JPL agreed to retain an EEO monitor, a diversity director and a layoff coordinator to monitor compliance with the ADEA and to take no further action that has a disparate impact on employees in the protected age group. JPL will also review and, if necessary, revise policies and procedures against all discrimination under the ADEA. Further, JPL agreed to provide training to all employees on age discrimination and report to the EEOC on recruitment, hiring, layoffs, terminations and complaints about age discrimination, along with the monitoring of such complaints to prevent retaliation.

Cite: EEOC v. Jet Propulsion Laboratory.

Trendy NYC eatery pays \$32K for sex harassment

What happened: The former district manager of GRK Fresh Greek, a small chain of New York City restaurants, touched women in vulgar, personal and sexual ways. He also talked about wanting them to lose weight or wear tighter clothing and

discussed his and their sex lives, the EEOC said. When female employees complained to other managers nothing was done. The EEOC said that some employees felt compelled to resign.

Decision: Along with agreeing to pay \$32,000, GRK will never to rehire the harassing manager; to provide extensive training to two managers assuming responsibility for preventing and remedying harassment; and will train all employees and managers on all areas of discrimination.

Cite: EEOC vs. GRK Fresh Greek.

Real estate firm pays \$11K for retaliation

What happened: A maintenance worker for George W. Morosani and Associates, LLC, a commercial real estate company in Asheville, NC, complained to a managing member of the company about his supervisor's use of language the employee believed to be racially discriminatory. Within several days of the complaint, the company fired the maintenance helper in retaliation for his complaint.

Decision: Along with paying \$11,000, the firm agreed to adopt an anti-discrimination policy and provide training for all managers, supervisors and employees on Title VII and its prohibition against retaliation in the workplace. The company will also provide periodic reports to the EEOC on employee complaints regarding discrimination.

Cite: EEOC vs. George W. Morosani and Associates, LLC.

STOP, LOOK, LISTEN ...

Are you prepared to be an HR Business Partner?

In most small and mid-sized organizations, HR pros need to be generalists. You have responsibility for employee relations and HR tasks like policy investigations.

In short, HR generalists are responsible for fostering and maintaining the employee experience and managing talent processes from recruiting to staffing to separation.

And you make sure all regular performance management and training activities are on schedule and in line with what your organization needs.

Enter the HRBP

But a recent study by Cornell University finds HR is evolving to include a more strategic role – the Human Resources Business Partner.

So, what competencies should HR pros be looking to develop or improve to handle the HRBP role?

According to Cornell researchers, the most important are business acumen, data and analytics, and a skill they call a "talent translation."

Clearly, as HR's strategic role expands, HR pros need to understand organizations' specific business drivers and how organizational strategy relates to human capital strategy.

No surprise there, and it's equally obvious that HR pros are increasingly expected to identify and leverage data to make effective human capital decisions.

But beyond those familiar requirements, researchers identified a growing need for HR pros who are able to understand and anticipate business needs and translate that into a workforce with the skills for today's jobs and ready to take on the work that'll be required down the road.

In short, match the person to the job, and match the job to the organizational need.

So, HR pros already wear multiple hats.

And now you can add "talent translator" to the collection.

SUPERVISORS SCENARIO

Boss felt harassed worker gave as good as he got – so was it still illegal harassment?

Complainer told some pretty offensive ‘jokes’ himself

“There were these four brothers riding on a camel,” Jack was starting to say, “and the first one looks up and ...”

Jamaal Udeen couldn’t bear another of Jack’s off-color attempts at ethnic humor. So he simply turned and walked away with Jack still in mid-sentence.

“Hey, get back here, you infidel,” Jack cracked as Jamaal headed to see his supervisor.

“Jack just won’t give me a break,” Jamaal complained. “He downloads Muslim cartoons and emails them to everyone.

“And he won’t stop the camel jokes.”

“I’m surprised you’re back here complaining,” his supervisor told him. “You’ve learned to give it to Jack as good as he does to you.”

“Yes, I took your suggestion to fight fire with fire, but it hasn’t helped,” Jamaal said. “Please talk with him.”

The supervisor did have a talk with Jack, but a few days later, he was back at it.

“How many Islamic virgins does it take to change a light bulb?” he cracked

as Jamaal walked past him, not even bothering to look up.

“Jack is still his old self,” Jamaal told his boss, again.

Not a big deal

“How about we try not to make such a big deal out of it,” his supervisor told him. “I think things worked better when you dished it right back at him.”

“If you’re not going to do something, I will,” Jamaal said. And he did.

He sued the firm for ethnic bias, saying it didn’t do enough to stop Jack’s slurs.

The firm said Jamaal could give as good as he got – and had even used offensive language himself.

Decision: A jury awarded the employee \$250,000 for ethnic harassment. The jury said the firm didn’t take the required steps to prevent, and end, bias behavior.

Key: It’s important to act quickly and decisively when an employee complains about illegal behavior.

Case: Kamal v. Continental Airlines, Inc.

What you need to know:

When co-workers make a sport of harassing one another, a good boss must step in. Remember to:

- Talk to enough employees to get a good sense of what’s been going on, not just one side.
- Make it clear how, when and what consequences will occur if things aren’t corrected.
- Never heap on insult by brushing off the complaints. Instead, alert your HR team immediately after someone complains to you. These things rarely just work themselves out.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed the case.

The employee’s attorney argued that her complaint against Gary for racist behavior was a protected activity under Title VII of the Civil Rights Act, so she couldn’t be disciplined for it, even if it included profanity.

Terminating her shortly afterwards showed that the company retaliated, her attorney argued.

But the court disagreed.

It found that Cecily’s complaint failed to provide any reasonable basis for the supervisor’s alleged racist motives. That meant her write-up wasn’t protected speech.

The company was fully justified in terminating

her due to the violation of company policy, the court said.

Taking adverse actions

Even though the company won, this serves as a reminder to be cautious about the timing of any adverse employment action.

Termination directly following a complaint can result in a complicated misunderstanding. Be sure to document your reasons for the decision.

Even if the employer’s reason for discipline is legitimate, the risk of a lawsuit increases dramatically when a disciplinary event occurs in close proximity to a complaint being filed.

Case: Gibson v. Concrete Equipment Co.

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