SupervisorsLegalUpdate.com

Supervisors LEGAL UPDATE™

A fast-read source of information to help managers understand and comply with federal and state employment laws

August 17, 2020

OUR TOP STORY

Is company on the hook for stray remarks made by a non-supervisor?

ONLINE

Check out this exclusive online content:

www.SupervisorsLegalUpdate.com

Management Minutes

6-point checklist to document better

Stay Legal!

7 questions to ask yourself before deciding whether to fire someone

INSIDE

‘Poor performer’ says she was harassed – gets fired anyway

Employee claims ageist remarks were proof of bias

“Well then, if this doesn’t just take the cake!” Kathy Walker exclaimed.

“My last supervisor got a big kick out of harassing me, and now you’re going to actually fire me.”

“I heard Bill used to ride you pretty hard,” said supervisor Ken Harley. “But technically, Bill was never really your supervisor, he was a roving quality control specialist. He interacted with lots of different employees.

“And you have to admit that the mistakes Bill flagged weren’t made up,” Ken told her. “They were real mistakes that could cause problems if they weren’t caught early on.”

Everyone makes mistakes

“That’s just hogwash,” Kathy shot back. “Everybody makes mistakes from time to time. But Bill had it in for me.

“I really have no idea what went on between you two,” Ken said. “So, why do you say that?”

“For starters, he would greet me in the morning as the ‘useless old lady,’” Kathy said. “And no matter what I said,

*Please see **Harassed …** on Page 2*

Sharpen Your Judgment

Poor performance review spurs age bias lawsuit

“I can’t believe this!” Henry grumbled as he plopped down into a chair with his arms crossed.

“What’s wrong?” asked HR director Lynn Plough.

“I just got a terrible performance review,” Henry said. “It’s ridiculous!”

“They’re only saying all this because they want me to retire,” he said.

Sleeping on the job

“What makes you think that?” Lynn asked. “We don’t have a mandatory retirement age here.”

“You all are well aware that I’m eligible for full Social Security at 66,” Henry said.

“And as tight as things have gotten for this company financially, I’d be one less paycheck they’d have to write.”

Out of the blue

“They’re nitpicking every small thing about my work,” Henry added. “And it all just seems to be coming out of the blue.”

“Looking back at your record, there have been some slipups lately,” Lynn told him. “I have a good working relationship with your supervisor. Let me talk to him.”

“What’s that supposed to mean?” Henry asked. “Are you two going to gang up on me now?” Henry hired an attorney and sued for age bias.

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.

Harassed ...

(continued from Page 1)

he wouldn't drop it.

"He'd just keep right on going down that road."

Everybody knew

"Did you complain to anyone?" Ken asked. "Did you tell someone?

"Everybody heard him say it," Kathy said.

"Why should I have to complain?

"He did it all the time."

"What other kinds of things did Bill say to you?" Ken asked.

"When he wasn't calling me a 'useless old lady,' he would refer to me as a 'troubled old lady,'" she recalled.

"Oh, and another of his favorites was 'damn woman.' Now I'm not clear on where exactly that expression came from, but he sure seemed to get a kick out of saying it."

'Nothing I can do'

"Kathy, I'm sorry your relationship with Bill was so strained," Ken told her. "But there's nothing I can do now.

"You've been written up for three quality mistakes in 30 days time, and that's grounds for dismissal here. It always has been. It's a hard-and-fast rule we apply to everyone – young, old, men, women, it doesn't matter. Three mistakes and you're out."

Age bias?

"Well, if that don't beat all," Kathy said. "I guess I should've known you weren't really going to do anything about this.

"This is just more proof that no one was going to listen to me anyway.

"Bill always told me I needed to retire, so now that you're firing me, I think I'll hire a good lawyer and sue you."

Kathy lived up to her threat and sued the firm for age discrimination.

She claimed her employer tolerated ageist remarks made by the quality control inspector, and that was clear evidence of bias.

The firm said Kathy was fired for poor performance. It said the mistakes that led to her firing were documented and the decision to dismiss her was made by a supervisor who was in no way involved in the discrimination allegations she made.

Decision: The firm won when a court dismissed the case. The court said "stray remarks" made by a "non-decision-maker" did not influence the firing process directly and, therefore, were completely irrelevant to the worker's discrimination claim.

Case: Hill v. Lockheed Martin Logistics, Inc.

What you need to know:

Negative ageist comments are hurtful to older people and must not be tolerated in the workplace.

Hiding behind "stray remarks" is no way to manage any sort of bias complaint, subtle or overt. Instead:

- Make bias mitigation a priority with a company-wide announcement.
- Offer voluntary diversity training programs. Experts say voluntary programs work because attendees tend to see themselves as pro-diversity. That can create a virtuous cycle, meaning the way we think about ourselves feeds directly into the way we act.

TEST YOUR KNOWLEDGE

COVID-19 brings changes, new responsibilities

It's tough to keep pace with all the changes, especially the new duties and responsibilities employers are now facing because of the pandemic.

To test your knowledge of some of the issues employers are now facing, respond *True* or *False* to the following:

1. If you require all employees to take a COVID-19 test as part of a return-to-work protocol, then their health insurance plan is required to pick up the costs.
2. It's always good to assume your disabled and/or at-risk employees will not want to return due to the threat of COVID-19, and automatically accommodate them.
3. As the pandemic continues and the availability of medical testing increases, it's perfectly legal to require all your employees to have antibody tests, as long as everyone has to do it.

ANSWERS

Answers to the quiz:

1. *False.* DOL and HHS say whether a COVID-19 test is covered by an employee's health insurance depends on the reason behind the test. If the test is taken for non-diagnostic purposes – the person is taking it because it's a requirement to return to work and not because they suspect they have the virus – private health insurance plans may not cover the cost of the test.

2. *False.* Don't assume a person needs an accommodation. The EEOC said recently the ADA does not require employers to act if an at-risk employee does not request an accommodation.

3. *False.* Employers can screen for COVID-19 symptoms, but you can't require an antibody test. It's a violation of the ADA to make an antibody test a requirement in order to return to work, since it is considered a medical exam and isn't "consistent with business necessity," says the EEOC.

Supervisors Legal Update (ISSN 1521-8066), issue date August 17, 2020, Vol. 22 No. 527, is published semi-monthly, (24 times a year) by Progressive Business Publications, 370 Technology Drive, Malvern, PA 19355; PHONE: 800-220-5000. FAX: 610-647-8089. Periodicals Postage Paid at West Chester, PA 19380. Postmaster: Send address changes to **Supervisors Legal Update,** 370 Technology Drive, Malvern, PA 19355.

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.

Firm pays $25K to settle disability bias lawsuit

What happened: Powerlink Facilities Management Services, a Michigan-based management and maintenance services company, violated federal law by failing to provide a reasonable accommodation to a deaf employee. The company uses training videos during its employee orientation.

Instead of providing the employee with an accommodation to participate in the orientation, Powerlink claimed she could not complete the process because its videos did not have closed-captioning for the hearing-impaired. The employee was unable to complete the orientation and start work for about two months.

Decision: Along with settling the claim for $25,000, the firm agreed to train workers on ADA rules and requirements, and report outcomes to the EEOC.

Cite: Powerlink Facilities Management Services v. EEOC.

Staffing firm out $568K for race bias, harassment

What happened: Personnel Staffing Group, LLC, doing business as Most Valuable Personnel (MVP), and MVP Workforce, LLC, discriminated against Black and female applicants and employees by refusing to send them on work assignments or by sending them for fewer work hours.

The EEOC's suit charges that the companies did so either on their own initiative or to honor the discriminatory requests of clients who did not want Black workers or sought only men.

Decision: Along with agreeing to pay $568,500, the firm also stipulated it would not engage in race or sex discrimination in their referrals in the future.

Cite: Personnel Staffing Group LLC v. EEOC.

Texas TV station pays $215K for age bias

What happened: CBS Stations Group of Texas, a division of New York-based CBS Corp., violated federal law when it refused to hire Tammy Dombeck Campbell for a full-time traffic reporter position at the Dallas/Fort Worth station because of her age. Campbell had worked for CBS 11 as a freelance traffic reporter.

As part of its candidate search, the station said "the ideal candidate" would have a strong knowledge of local traffic in the Dallas/Fort Worth area and that the "applicant must have at least five years professional broadcasting experience." The EEOC said that CBS 11 hired a 24-year-old applicant for the full time traffic reporter position. The younger applicant was a former NFL cheerleader.

Decision: Along with paying $215,000 to Ms. Campbell, the station committed to not engage in age discrimination. The company will also provide training on the ADEA, publish a notice of employee rights, and report to the EEOC on its compliance with the agreement.

Cite: EEOC v. CBS Stations Group of Texas.

STOP, LOOK, LISTEN ...

EEOC offers updated return-to-work guidance

Here's a heads-up: New return-to-work guidance from the EEOC specifically addresses the following employees:

Over 65

The ADEA prohibits employment discrimination against individuals age 40 and older. But employers cannot involuntarily exclude an employee from returning to the workplace because they're 65 or older, even if they're doing it to protect the employee.

However, unlike the ADA, the ADEA doesn't require reasonable accommodations for older workers due to their age. But employers can voluntarily provide flexibility to workers age 65 and older, even if it results in younger workers ages 40-64 being treated less favorably.

Pregnant employees

Even if motivated by concern for well-being and safety, employers aren't permitted to single out workers for involuntary leave, layoff or furlough because they're pregnant or nursing.

However, pregnancy-related medical conditions may be considered disabilities under the ADA, even though pregnancy itself isn't. If an employee who's scheduled to return to work requests an accommodation for a pregnancy-related condition, firms need to consider it under the normal ADA rules.

Employees with children

Treating female employees differently – offering remote work, modifying schedules, etc. – based on their assumed childcare responsibilities is discriminatory, says the EEOC. In other words, female employees can't be given more favorable treatment than male employees.

While the circumstances created by the coronavirus crisis make this even more complicated than usual, it's critical for firms to make sure managers know how to recognize and avoid disparate treatment of workers.

SUPERVISORS SCENARIO

Worker with disability wanted a shot at advancing – did supervisor hold him back?

Schedule changes kept worker stuck on probation

"Jimmy, I need you to work in Shipping and Receiving for the next few weeks," Supervisor Dave Bristol said

"But you're moving me again?" Jimmy asked. "That'll be three different jobs I've had here already. At this rate, I'll never get off probationary status."

"Gotta do what I gotta do," Dave told him. "Sorry, nothing personal."

"You know as well as I that I have to stay in one job for 90 days to get past my probationary status and start working my way up here," Jimmy said.

"And every time I get close to 90 days, you move me, and the clock starts all over again."

"What do you want me to tell ya?" Dave shrugged. "I'm filling the holes where we need help, OK?"

"This all seems a little fishy to me," Jimmy said. "Everything was going fine until I told you I was on anxiety meds. Ever since then, you've treated me like you want me to quit."

"This new assignment will give me a chance to see how you handle stress," Dave said. "It's a busy place. and I want to be sure you don't just up and quit on me."

Another move

A few weeks later Dave again moved Jimmy to a new assignment, and Jimmy sued the firm under the Americans with Disabilities Act.

He claimed his supervisor was trying to make him quit by making it impossible for him to advance because of his medical condition.

Decision: The employer lost when a judge sent the case to trial.

The court said the employer failed to present a convincing reason why it moved the worker so frequently, denying him of a fair shot at advancement.

The judge said a reasonable jury could conclude that the employer wrongly considered the worker's admitted disability in its decision-making, which is illegal under the ADA.

Case: Gallups v. Alexander City, AL.

What you need to know:

A good employment lawyer will tell you the Americans with Disabilities Act can be tricky to follow. So your HR office is the perfect place to go to get your questions answered.

It helps to know that employees protected by ADA include those who:

- Have a physical or mental impairment that limits their ability to do their jobs
- Have a history of physical or mental impairment, or
- Are regarded by your organization as having a physical or mental impairment, whether they actually do or not.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a court dismissed Henry's case.

Henry's lawyer argued that there was a link between his poor performance review and his age. The negative review was meant to encourage Henry to retire, his attorney said.

Henry's attorney also said that the HR director's comment that she had a "good working relationship" with Henry's supervisor was just another way of insinuating management was circling the wagons and showing Henry the door.

But the court disagreed.

It said the company provided legitimate reasons for the poor review through documented issues in Henry's work.

There was simply no evidence of any illegal or malicious pretext behind the company's decision to hold these deficiencies against him, the court said.

Documentation saves the day

Here's yet another reminder of the importance of documentation in protecting against legal trouble. This case could've been more complicated if the company wasn't able to prove Henry's lackluster performance.

Performance reviews are often areas of contention when it comes to adverse actions, especially when dealing with any protected class.

Case: Annenberg v. Clark County Schools.

EDITOR: RICH HENSON

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR: TOM D'AGOSTINO

PRODUCTION EDITOR: JEN ERB

EDITORIAL DIRECTOR: CURT BROWN

Subscriptions: 800-220-5000