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October 16, 2020

OUR TOP STORY

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Management Minutes

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Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



INSIDE

Leading during this pandemic

Firm out \$104K for wage bias

Managing WFH expectations

Broken promise means big OT pay

Worker claims FMLA retaliation after boss puts her foot down

Worker had a creative excuse for everything

It wasn't my fault!" Max Carter said, throwing his hands up in the air.

"When I got here everything was already fairly well screwed up," he said. "But I think I can explain this."

"No doubt," replied Supervisor Diane Simpson, as she cleared herself a spot to sit in Max's cubicle.

Diane knew Max could come up with the best explanations: colorful, creative, memorable and ... mostly not believable.

For instance, he once said he'd missed a deadline because his "computer went into a coma." In another case, he lost his

temper in a meeting because everyone else in the room took "a mental vacation."

Diane had hoped Matt would return more focused after his recent FMLA leave.

But that was wishful thinking.

"OK, tell me what happened," she said.

It sounded good

"You remember when IT switched us to a paperless schedule?" Max said. "As if we'd all suddenly came down with an allergy to copy paper!"

"Anyway, everybody is still getting

Please see Retaliation ... on Page 2

Sharpen Your Judgment

Boss sued for age bias after selecting a 'good fit'

Shelly, I know you really want this promotion," Supervisor Charlie Hammond said. "But I plan to give it to Victor."

"Victor? He doesn't have anywhere near the experience I have," Shelly protested. "I don't think he has the qualifications you've listed in the job search description."

"Well maybe not all of the qualifications," Charlie acknowledged. "But he brings some things to the table that would be beneficial."

"And besides," Charlie added, "he'll be a good fit for the system we're putting in place."

"I have fit in here nicely for over 20 years," Shelly told him. "And I have performed most of the duties for this post for three years."

"You've had a good career here," Charlie said. "But you're really just not sufficiently suited for this promotion."

Half her experience

"You mean because I'm 59?" Shelly asked, her words trailing off.

Shelly hired an attorney and sued for age discrimination. She claimed she was illegally denied a promotion, which was given to a younger person with half her experience.

The employer said it selected a candidate who is a "good fit" and brings "beneficial" things to the job that Shelly couldn't.

Was the firm able to get the lawsuit dismissed?

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.

Retaliation ...

(continued from Page 1)

used to following changes online and I didn't find out about these problems until it was way too late."

As usual, it sounded good.

Diane didn't want to label Max a chronic excuse-maker, but it was time to hold him accountable.

Big improvement

"I think we need to discuss how to avoid this problem in the future," she said.

"There are a few good ways to double-check this from the start," she said.

"But if IT hadn't taken it upon themselves to change the process for us, we wouldn't be having this conversation," Max insisted.

"Things change," Diane said. "A paperless schedule is a big improvement. It allows everyone to follow what's going on."

Put him on a PIP

"We have talked about this not long ago in your performance review," she reminded him.

"So what I'll do next is create a performance improvement plan for you, and we can follow that. That will help you get back on track."

"Who's off track?" Max asked. "I can't control all these changing circumstances. You know this

wasn't my fault."

"Well, you seem to have a run on bad luck," Diane said.

"And you seem to have it in for me ever since I took FMLA leave," he said.

"Max, please, let's stop the blame game," Diane said. "You are the one on the hot seat, not me."

Came to a head

The performance improvement plan brought Max's situation to a head.

Max was let go for poor performance.

Max sued, claiming his termination was in retaliation for taking FMLA leave.

The firm asked the court to dismiss the case.

It maintained Max's work performance shortcomings were well documented and persistent.

Things just weren't getting any better.

Decision: The firm won when a

court tossed out the case.

The court said a jury was likely to find that Max's performance problems were legitimate.

And while the timing of Max's firing – soon after he returned from an FMLA leave – might raise some eyebrows, the court said timing does not create a "magical formula which results in a finding" of retaliation in this case.

Case: Martino v. Kraft Foods, Inc.

What you need to know:

The FMLA entitles eligible employees to unpaid, job-protected leave for specified family and medical reasons.

Supervisors are prohibited from:

- Refusing to authorize FMLA leave for an eligible employee.
- Discouraging an employee from using FMLA leave.
- Manipulating an employee's hours to avoid responsibilities under the FMLA.
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions.

TEST YOUR KNOWLEDGE

Leading and engaging in the COVID pandemic

The pandemic has changed how good managers lead their employees. Engagement has never been more important, and good employees are in need of inspirational road maps.

Test your knowledge of leading in a pandemic by responding *True* or *False* to the following:

1. It's well established that many employees are stressed and frayed. Because of that, now's the time to give all that "corporate vision" stuff a break.
2. Group Zoom meetings are effective and productive, so managers should stop trying to "corner" employees in one-on-one sessions.
3. It's been shown time and again that meaningful and properly developed online engagement activities really can help to make employees feel more connected and be more productive.

ANSWERS

1. *False.* Most employees desire a meaningful vision to connect with. Steve Newhall, managing partner at consulting firm Korn Ferry, suggests it might be a good time to narrow down your larger corporate vision for the pandemic-forced, work-from-home situation. It'll help employees keep the vision in sight and focus on the highest priority tasks.
2. *False.* HR professionals and frontline managers can help employees feel connected with a cadence of meaningful one-on-one meetings, says Karin Hurt, founder of Let's Grow Leaders. And remember not to just jump into business. Ask how employees are handling all the change.
3. *True.* One idea is to offer one-on-one fitness and wellness classes for employees and their families to use together. Another is a virtual "dog park" where co-workers and their families can meet each other's pets.

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.

Baccarat of NYC pays \$100K for bias claims

What happened: A sales consultant at Baccarat, Inc., which operates a retail store in Manhattan that sells luxury crystal products, was subject to constant and virulent verbal harassment by two co-workers for close to three years, with the knowledge of a supervisor, to whom the sales consultant complained on several occasions. The harassment victim was forced to quit to escape the abuse, according to the EEOC.

Decision: Along with agreeing to pay \$100,000 to settle claims of race and disability bias, Baccarat agreed to implement an 800 hotline for employee complaints; train all employees, including management and human resources staff, on the requirements of Title VII and the ADA and their prohibition against harassment in the workplace; and institute specific one-on-one training for the manager who failed to report or stop the harassment.

Cite: EEOC v. Baccarat Inc.

Presbyterian Healthcare out \$150K for retaliation

What happened: An African American emergency medical technician at Presbyterian Healthcare Services' Lincoln County Medical Center, Ruidoso, NM, was subjected to race discrimination and then retaliated against for complaining about racial harassment by her white co-worker.

Decision: Along with paying \$150,000 and issuing a letter

of apology to the employee, Presbyterian is prohibited from discriminating against employees on the basis of race and from retaliating against employees in the future. The decree also requires Presbyterian to review and revise its EEO discrimination reporting and investigation policies, and it requires Lincoln County Medical Center to train all its employees on Title VII race and retaliation requirements.

Cite: EEOC v. Presbyterian Healthcare.

Firm pays \$104K for wage discrimination claim

What happened: Covenant Medical Center, Inc., doing business as Covenant HealthCare, a nonprofit health care system based in Saginaw, MI, violated federal law by paying a female business intelligence developer a lower salary than two males who held the same job and performed the same work.

The EEOC recommends that employers routinely assess their compensation policies to ensure that they compensate their employees lawfully.

Decision: Along with paying \$104,707, Covenant HealthCare agreed to increase the female employee's salary; revise its compensation policies to ensure compliance with the EPA and Title VII; train managers on compensation discrimination; and post a notice to inform employees of their rights under both federal statutes.

Cite: EEOC v. Covenant Healthcare.

STOP, LOOK, LISTEN ...

Managing expectations

Employees have varying work expectations – ranging from where and when they work to how and why they communicate.

Here are six areas that wise leaders should pay attention to.

Schedule options: If you haven't already developed a more long-term work-from-home (WFH) plan, you'll want to involve employees now. Key considerations include qualifications for working remotely, equipment needs and performance expectations.

Closed spaces: Some companies that couldn't stretch out office space have added higher cubicle walls and plexiglass barriers in areas where employees interact, such as the break and conference rooms.

Digital collaboration: Researchers suggest you create communication guidelines. Give guidance on what should be done via email, on collaboration apps such as Slack and/or through video conference meetings. Another idea is to recommend when communication should move out of one channel and into another. For instance, video call colleagues if something isn't resolved after a certain number of email exchanges.

More support: Many companies have shifted some perks and benefits to make them appropriate for people working from home. For instance, if you offer yoga classes on-site, can you give employees access to online classes? Or if your Diversity and Inclusion groups meet regularly at lunchtime, can you arrange regular Zoom calls for them now?

More considerations: The coronavirus has forced HR professionals around the world to review and revise policies. Invite a cross section of employees to join forces to help do that.

Clarity: Management professor Nancy Rothbard, of Wharton School of Business at the University of Pennsylvania, offered this great insight: After time away, employees may come back to the job with an ability to pare down jobs to the most essential tasks – and that will help organizations run more efficiently.

SUPERVISORS SCENARIO

Boss’s promise that ‘this won’t take long’ ends with firm owing big back payments for OT

Seems simple enough: People must be paid for the hours they work

“Hang on please,” Supervisor Ann Shelton said. “I have a quick question I need to ask you.”

“I switched the phones over to the answering service so it will be quiet and we can talk for a bit.

“I promise this won’t take long.”

Ginny Morgan was looking forward to her sandwich and lemonade. She’d already punched out for her lunch hour.

Ginny glanced at her watch: 12:03.

“OK,” Ginny said. And the next thing she knew it was 12:29 – and Ann was just wrapping things up.

“Sorry that took this long,” Ann said as she walked Ginny toward the door.

“I was trying to get everything done quickly,” Ann said, “but I guess there was a lot more to go over than I first realized. Thanks for hanging in there.”

“No problem,” Ginny replied.

“I’ll try to talk faster next time,” Ann said with a smile.”

“Is that even possible?” Ginny joked.

“Well, sometimes I think it’s better to address things when they come up, instead of waiting,” Ann said.

Not very quick

The trouble with Ann’s approach was that her “quick” lunch meetings were far too frequent and NOT very quick.

In time, many employees couldn’t help but notice how much longer their work weeks had gotten, much longer than 40 hours in most cases, and there was no overtime paid.

The employees complained to the Department of Labor, which investigated.

Decision: The firm had to pay more than \$1 million in back overtime wages to a large number of employees.

The DOL found the workers hadn’t been paid for “lunch breaks” while attending meetings, doing paperwork and handling customer calls.

Key: Willful violations of wage and hour laws can result in criminal prosecution.

Case: DOL v. Compass Bank.

What you need to know:

Employees covered by the Fair Labor Standards Act (FLSA) must receive overtime for hours worked in excess of 40 in a workweek.

- Overtime is based on a 40-hour workweek.
- Rest periods usually of 20 minutes or less are customarily paid for as working time. These short periods must be counted as hours worked.
- An employee who stays at his/her desk during lunch and regularly answers the telephone and refers callers is considered to be working.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the employer lost when a court declined to dismiss the age bias case, which means the employer faces the difficult choice of offering an expensive settlement or facing a jury trial.

The employee documented that she was far more qualified than the younger person who was selected for the promotion, and she argued she was passed over simply because she was 59.

The employer said, even considering the employee’s 20-year record with the organization, she was not “sufficiently suited” for the post and lacked “certain capabilities.” The person selected was a “better fit.”

That’s where the court took the employer to task for not being specific.

“Justifying an adverse employment decision

by offering a content-less and nonspecific statement, such as that a candidate is not ‘sufficiently suited’ for the position, is not specific enough,” the judge wrote.

“The employer’s subjective reason for not selecting an applicant may serve as a legitimate reason but the employer must articulate a clear and reasonably specific basis for its subjective assessment.”

Be specific with criticism

Very few lawsuits make the case as clear as this does: when it comes to employee performance issues, it’s essential to be specific.

Case: Cunningham v. East Tallahatchie School District.

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