

# Supervisors LEGAL UPDATE™



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November 16, 2020

## OUR TOP STORY

**If she made her fair share of mistakes, why can't she be demoted?**

## ONLINE

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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

**Unexpected legal issues firms face**

**Pay violation costs firm \$50K**

**COVID-19 impact on working moms**

**He kept bothering her, so she hauled off and hit him!**

## She claims her evaluation was biased: Best way to respond

*When is it OK for supervisor to change performance standards?*

**I** can't say that any of this surprises me," Wyatt mumbled to himself as he read over the daily error reports coming fresh off the printer.

"What did you say?" Maddie asked as she tried to see the paperwork, too.

"Your errors!" Wyatt said sharply. "I'm not surprised you made so many."

"Oh, you mean because I'm still kind of new to this job?" she asked.

"No, because you probably shouldn't be in the job in the first place," he replied.

"It wasn't my idea to take you on, and we both know the company promoted

you so it wouldn't look like only men get promoted around here. I think they like to call that *diversity*."

### High standards

"I know what they like to call it," Maddie said. "And I also know I'm more than qualified for this job."

"If you're qualified, what's the reason for all these errors?" he asked, raising his eyebrows.

"I'm aware of my mistakes, too," Maddie said. "In fact, I've been asking around

*Please see Best way ... on Page 2*

## Sharpen Your Judgment

### Addicted employee claims ADA rights violation

**O**K, I'll admit I lost my cool and called Bill a loser and a junky in front of the others," supervisor Mitch Hayes told his HR manager Carol Lumpkins.

"But you have to understand," Mitch continued, "Bill was impossible to manage. He showed up whenever. He was late every day and never finished any job."

Carol nodded.

"Well, he is suing us now, claiming you harassed him for going through the drug-rehab program we recommended and set up for him."

"He just wants revenge because he was fired for being late," Mitch said. "He can't blame me for that."

"It turns out he had relapses and was using

again," Carol said. "That's why he was getting difficult again. And we couldn't let him hide behind his drug use."

"Then what's the big deal?" Mitch asked.

### Kept riding him

"He claims his addiction was a disability, and that's why you kept riding him," Carol explained. "He says you harassed him."

In court, the company argued Bill was fired for poor performance, poor behavior, and chronic lateness and absenteeism.

It also claimed Bill was just looking for a reason to get back at his supervisor, and that Mitch's comments were stray remarks.

Did the company 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.

# Best way ...

(continued from Page 1)

about it.”

“From what people have told me, my error rate is on par with someone who is new to this job.”

“Maybe it is,” Wyatt said. “But I have higher standards than the others, and you are not meeting them.”

“I need to see your error rate cut in half over the next month. I expect high quality work from everyone.”

## Sent her back

A month later, Maddie was back in Wyatt’s office looking over the latest reports.

“When you took this promotion, you knew there was a probationary period for us to decide to keep you or send you back,” he said.

“I’ve made my decision. It’s time for you to go back to your old job.”

“Your pay will be adjusted down to reflect that change.”

## The numbers are the numbers

“You’re just picking on me because I’m a woman,” she said. “You as much as admitted that you didn’t want me in the first place.”

“I didn’t think you deserved this job and I still don’t,” Wyatt said.

“The numbers are the numbers and you did not hit your goals.”

“No, those are *your* numbers and *your* goals,” Maddie shot back.

“You set me up to fail, and I guess you think it worked, huh?”

## By the numbers

Maddie sued over her demotion, saying the supervisor had shown he was biased by his comments about diversity and by holding her to a higher standard than others were able to meet.

The company argued that even though the supervisor had made a stray remark about diversity, he had the authority to enforce workplace performance standards.

As long as the goal was clear, objective and measurable, it didn’t matter what the supervisor’s opinions were.

The firm also said Maddie was demoted during an acceptable probationary period.

**Decision:** The company lost when the court sent the case to trial.

The combination of the supervisor’s remarks and the higher standards he held for this particular employee were too much for the court to ignore.

**Key:** It’s always dangerous to hold different employees to different performance standards because it raises the question of “why.” Instead, stay neutral and use consistent standards.

Case: *Williams v. Alabama Dept. of Trans.*

### What you need to know:

Part of this case rests on what’s considered an “adverse action” by a supervisor. You’ll need solid documentation and good standards if you decide to take an adverse action, such as:

- demoting an employee – a move marked by a decrease in pay, responsibility, opportunity or authority
- terminating an employee for performance or behavior problems, or
- transferring an employee to a less-desirable position, location or shift.

If you’re considering such a move, talk to HR to be sure you don’t run afoul of employment laws.

## TEST YOUR KNOWLEDGE

### Unexpected legal issues

There is no shortage of unexpected workplace legal issues cropping up related to the current state of politics – and health – in this country.

To test your knowledge of how to respond to some of these issues finding their way into work, respond *True* or *False* to the following:

1. You have a small group of off-duty employees who come into the workplace to peacefully protest, but they can cause quite a disruption. There’s little you can do because these types of demonstrations are protected under the National Labor Relations Act (NLRA).
2. Given all the misinformation circulating online, it’s perfectly legal to look up a candidate on social media sites before hiring them.
3. As more employees consider permanent work-from-home arrangements, there really are no legal downsides to being transparent about salaries.

## ANSWERS

1. *False.* Under the NLRA, employees do have the right to speak out against their working conditions. However, a demonstration like the one described is only considered protected activity if it doesn’t cause a large disruption. *True.* A candidate’s social media profile offers a glimpse into their personality, communication style and potential fit for your organization. This insight is tremendously valuable in a competitive market, and culture fit is one of the most important factors an organization can consider. *False.* It’s laudable that firms try to be more transparent about salary levels in their organization. However, one big downside is employees misinterpreting the reasons for salary disparities. If employees believe they’re underpaid, they can use their employer’s salary data in court.
2. *True.* A candidate’s social media profile offers a glimpse into their personality, communication style and potential fit for your organization. This insight is tremendously valuable in a competitive market, and culture fit is one of the most important factors an organization can consider.
3. *False.* It’s laudable that firms try to be more transparent about salary levels in their organization. However, one big downside is employees misinterpreting the reasons for salary disparities. If employees believe they’re underpaid, they can use their employer’s salary data in court.

### 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.*

### **San Diego grocer pays \$30K for pregnancy bias**

**What happened:** Ralphs Grocery Company, a national chain of retail grocery stores, was charged with subjecting a female courtesy clerk to discrimination based on pregnancy while she was employed at a store in the Point Loma area of San Diego. The EEOC said the store denied the employee's request for a schedule change as an accommodation for her pregnancy. As a result of the ongoing discrimination, the female clerk was forced to quit, the EEOC said.

**Decision:** Along with paying \$30K, Ralphs has agreed to review and revise its policies and procedures on discrimination and provide training to employees and managers on federal anti-discrimination laws, with an emphasis on pregnancy discrimination and handling employees' accommodation requests for pregnancy-related medical conditions.

**Cite:** EEOC v. Ralphs Grocery Co.

### **Firm pays \$50K to settle EEOC equal pay lawsuit**

**What happened:** Bryce Corporation, which manufactures flexible packaging products, failed to pay equal pay for equal work when it hired a male senior business analyst and paid him \$18,000 more than a female senior business analyst hired for the same position at its Memphis facility. The EEOC alleged that when the female learned of the pay disparity 10 months later, she requested equal pay, but Bryce refused to increase her pay to the male's level.

**Decision:** Along with agreeing to pay \$50,000, Bryce took actions to ensure in the future that employees receive equal pay for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions.

**Cite:** EEOC v. Bryce Corporation.

### **NC builder agrees to pay \$115K racial settlement**

**What happened:** Thompson Construction Group, Inc., a heavy industrial contractor based in Sumter, SC, violated federal law when it fired an African American employee because of his race. According to the EEOC's lawsuit, the employee worked as a pipefitter foreman in Semora, NC, when a white subordinate made abusive and racially derogatory comments to him and engaged in insubordinate behavior. Thompson declined to punish the white subordinate for his obvious racist behavior.

**Decision:** Along with agreeing to pay \$115,000, Thompson agreed to revise and distribute equal employment opportunity and affirmative action policies; provide annual Title VII training; and report regularly to the EEOC about employees discharged from its North Carolina worksites.

"Federal law requires employers to be responsible for preventing and remedying racial discrimination in the workplace," said Kara Haden, acting regional attorney for the EEOC's Charlotte Office.

**Cite:** EEOC v. Thompson Construction Group, Inc.

## STOP, LOOK, LISTEN ...

### **Women and the pandemic**

Little surprise that some have coined the coronavirus pandemic a "She-cession." Women are being disproportionately negatively impacted by the economic impacts of COVID-19.

Here are two big reasons why.

#### **Parental leave policies**

One-third of those companies in the Fortune 500 offering paid parental leave offer twice as much leave to mothers as to fathers.

Generous, right? But the not-so-subtle message being sent: Women are the ones expected to sacrifice their jobs to take care of their families.

To help, you might offer paid leave based on whether an employee is a "primary" or "secondary" caregiver rather than an employee's gender.

That removes expectations and stereotypes and lets employees make decisions based on their families' best interests.

#### **Retirement savings gap**

Even before the pandemic, women's total median household savings were just a third of what men have socked away.

That's due to a whole host of things from wage inequities to the fact that women tend to take more time off of the workforce when they have children.

But COVID-19 is expected to make this situation even worse. Women have been unemployed or underemployed in disproportionate numbers during the pandemic. They were laid off in greater numbers and were more likely to have their hours reduced.

Women are more conservative in their investing than men, says Michelle Connell, CFA and owner of Portia Capital Management, LLC. Just 32% of women are willing to take average or above-average investment risk compared to 52% of men.

Open enrollment is fast approaching. Talk to your 401(k) provider about retirement-planning sessions that are geared specifically toward helping women with their savings goals.

**SUPERVISORS SCENARIO**

# He wouldn't stop harassing her, so she hit him – Should supervisor fire them both?

*Taking the right action quickly and effectively when sexual harassment occurs*

“What do you mean you’re firing both of us?” Rachel demanded.

“Scott’s outta here for harassing you, no doubt about that,” Supervisor Kevin Roth told her.

“But you sure didn’t do yourself any favors taking a swing and hitting him.”

Rachel flopped down hard onto the faded green wing chair in Kevin’s office. From there she could see straight through the large window that faced Production.

“I need this job,” she said, emphatically.

“What did you think was going to happen?” Kevin asked. “You’ve left me with no other choice.

“We have always had a strict, zero-tolerance policy for violence,” he said.

“But I had to stand up for myself,” she said. “I told you it was getting worse.”

“We looked at this every which way,” Kevin said. “It’s true Scott was out of line. But so were you.”

“Things should’ve never gotten this far,” Rachel protested. “I’ve been complaining about Scott since back in the summer,

but you guys didn’t do anything. You only decided to suspend him last week!”

## Pinching and grabbing

“We played this by the book and did everything required,” Kevin insisted.

“Maybe you did, but Scott didn’t,” she said. “He wasn’t back two days on the job and he picks up right where he left off, pinching and grabbing at me.

“I wouldn’t call that putting the fear of the Lord in him.”

After she was let go, Rachel sued for retaliation. She claimed she was fired for making a sexual harassment complaint.

**Decision:** The firm lost when a court ruled the case should go to trial.

The court said due to the persistent pattern of harassment, it would be reasonable for a jury to question why the supervisor deliberately left the employee in a position to have to defend herself, and then fired her when she finally did.

## What you need to know:

Retaliation is the most frequently alleged basis of discrimination and the most common discrimination finding.

It is unlawful to retaliate against job applicants or employees for:

- filing or being a witness in an EEO charge, complaint, investigation or lawsuit
- talking to a supervisor about discrimination, including harassment, and
- refusing to follow orders that would result in discrimination.

*Case: Watt v. Unifirst Corp.*

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

No, the company lost when a judge ruled the employee had been harassed and was entitled to back pay and cash damages.

The firing wasn’t the issue, the judge noted. The supervisor was well within his authority to let the employee go for poor performance, and the employee couldn’t offer drug use as a legal excuse, even if he was in rehab.

So where’d the supervisor go wrong?

A judge said employees who are going through rehab have to get some leeway from supervisors.

That leeway doesn’t mean a lowered standard. Employees in rehab can be held to the same standards as any other employee.

But riding an addicted employee in front of others crosses a line that’s there to give those employees a chance to recover and get their lives and their careers in order.

It would be the same as riding any disabled employee over his or her disability.

## Ridicule is no-go

Plain and simple, the law recognizes addiction as a disability, and forbids an employer from ridiculing a disability in the workplace.

That doesn’t mean addicted employees get special consideration. It means they get the same consideration as other employees.

*Case: Ezersky v. Rite-Way Forms, Inc.*

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